JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

BC OVERALL CRIME DOWN BUT HOMICIDES UP

B.C.'s Ministry of Public Safety and Solicitor General Policing and Security Branch released its provincial crime statistics for 2017. Highlights of this report include:

-4.1%

BC's crime rate dropped by **-4.1%** to 74.2 offences per 1,000 people.

The homicide rate increased by **+34%**. With **118** homicides in 2017, there were 30 more homicides than in 2016.


More on p. 34

-2.9%

The overall number of *Criminal Code* offences decreased by **-2.9%**.

The overall number of weapons offences increased by **+3.8%**.

+3.8%

HOMICIDE BY THE NUMBERS (2017)

City	Homicides	Population
Vancouver	19	658,354
Surrey	12	556,902
Abbotsford	9	145,184
Richmond	8	219,273
Kelowna	5	127,330
BC (Total)	118	4,817,160

BC'S TOP FIVE CRIMES (2017)

Crime	Number	Rate/1,000
Theft	120,610	25.0
Mischief	44,141	9.2
Disturbing the Peace	40,929	8.5
Assault	29,139	6.0
Breaking & Entering	26,529	5.5

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.

Advanced Police Training at the Justice Institute of BC

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

Upcoming Courses for Fall 2018

- ☑ **Patrol Tactics for Frontline Supervisors** @ New West Campus: November 5 – 9
- ☑ **Fundamentals of Police Instruction** @ New West Campus: November 5 – 9
- ☑ **Major Crimes Investigations** @ Victoria Campus: November 19 – 23
- ☑ **Investigative Interviewing** @ New West Campus: November 19 – 22
- ☑ **Field Trainers** @ New West Campus: November 28 – 30

Advanced Police Training Contact Information

advancedpolicetraining@jibc.ca

604-528-5761

To view other 2018 courses, go to http://bit.ly/plceadv

2019 Course Calendar here

JUSTICE INSTITUTE of BRITISH COLUMBIA | LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

The active reader: strategies for academic reading and writing.
Eric Henderson.
Don Mills, ON: Oxford University Press, 2018.
PE 1408 H462 2018

Applied empathy: the new language of leadership.
Michael Ventura.
New York, NY: Touchstone, 2018.
HD 57.7 V467 2018

Crime, media, and reality: examining mixed messages about crime and justice in popular media.
Venessa Garcia & Samantha G. Arkerson.
Lanham, MD: Rowman & Littlefield, 2018.
P 96 C74 G373 2018

Damaged: a first responder's experiences handling post-traumatic stress disorder.
James Meuer.
Bloomington, IN: WestBow Press, 2013.
RC 552 P67 M484 2013

Do less be more ban busy and make space for what matters.
Susan Pearse & Martina Sheehan.
Carlsbad, CA: Hay House, Inc., 2017.
BF 637 S4 P429 2017

Experiential learning: a practical guide for training, coaching and education.
Colin Beard and John P. Wilson.
London; New York, NY: Kogan Page, 2018.
LB 1027.23 B43 2018

Exploding data: reclaiming our cyber security in the digital age.
Michael Chertoff.
New York, NY: Atlantic Monthly Press, 2018.
KF 1263 C65 C44 2018

Fighting back: what an Olympic champion's story can teach us about recognizing and preventing child sexual abuse - and helping kids recover.
Kayla Harrison, Cynthia S. Kaplan & Blaise Aguirre.
New York, NY: The Guilford Press, 2018.
HV 6570 H365 2018

Handbook of psychopathy.
edited by Christopher J. Patrick.
New York, NY: The Guilford Press, 2018.
RC 555 H357 2018

Hyperfocus: how to be more productive in a world of distraction.
Chris Bailey.
Toronto, ON: Random House Canada, 2018.
BF 637 T5 B349 2018

Indigenous people and the criminal justice system : a practitioner's handbook.
Jonathan Rudin.
Toronto, ON: Emond, 2019.
KE 7709 R84 2019

Interpersonal conflict.
Joyce L. Hocker, William W. Wilmot.
New York, NY: McGraw-Hill Education, 2018.
HM 1121 W56 2018

Privacy in the workplace.
Éloïse Gratton & Lyndsay A. Wasser.
Toronto, ON: LexisNexis Canada, 2017.
HF 5549.5 E428 P75 2017

Security surveillance centers: design, implementation, and operation.
Anthony V. DiSalvatore, CPP, PSP, PCI, CFE, CLSD.
Boca Raton, FL: CRC Press, Taylor & Francis Group, 2017.
TK 7882 E2 D57 2017

LEGALLY SPEAKING:

Sentencing Drug Traffickers

"The categorisation of drug traffickers as street-level, mid-level or high-level dealers and the application of the corresponding sentence ranges are useful tools to help assess the moral culpability of an offender in arriving at a fit sentence. However, the determination of the appropriate category is not a scientific exercise; it involves the weighing of many factors. There is no bright line dividing mid-level traffickers from high-level traffickers, nor is any one factor determinative. The categories lie on a continuum and, depending on the particular circumstances, an offender could fall somewhere near the intersection of two categories." – Manitoba Court of Appeal Justice Pfuetzner in upholding an eight year sentence for an accused convicted of trafficking cocaine and possessing a firearm, R. v. Bisson, 2018 MBCA 92 at para. 6.

DRUG CALLS ADMISSIBLE AS HEARSAY EVIDENCE

R. v. Omar, 2018 ONCA 787

A police officer received a tip from a previously reliable confidential informer, that a black male with a big beard known as "J.J." sold crack cocaine. The tipster said that J.J. drove a black Jeep and provided its licence plate number. About a month later, the officer spotted the black Jeep in an area known for drug activity and prostitution. The driver, who matched the description of J.J., parked the Jeep some distance from a building and then went inside. A few minutes later, the driver returned to the Jeep and drove off.

The police began surveilling the Jeep and saw it go to another building where it again parked some distance from the entrance. The Jeep left a short time later. The police followed the Jeep to a motel located in a known drug area. The driver took a back way to the motel, which the police thought was consistent with the driver being surveillance conscious. Once again, the driver parked some distance from the motel. The driver went to a room, emerged a few minutes later and returned to his vehicle while talking on his cell phone.

At this point, the police decided to arrest the driver. They blocked in the Jeep and proceeded to effect the arrest. On arrest, the accused was found with a cell phone and $100 on his person. A search of the Jeep revealed three more cell phones, a knife and $1,175. At the police station, the accused was strip searched. The police found 20 grams of crack cocaine concealed in his underwear.

During the course of the arrest, at least two of the cell phones received calls. A police officer answered three calls on one of the cell phones and one call on another. In each instance, the call was brief. Language was used that indicated the caller was looking to purchase drugs. Two of the callers expressly referred to J.J. The police did not make any effort to locate and interview these four callers, even though three of the callers showed up on call display with either a name, or a name and telephone number. No efforts were made to obtain authorization to search the telephones to see if there was contact information in the phones that might match these callers. Further, the evidence from the police was that they had made efforts in the past to convince callers in such situations to be witnesses but they had never had any success in so doing. The accused was charged with possessing cocaine for the purpose of trafficking and possessing proceeds of crime.

Ontario Court of Justice

The accused asserted that the police violated his ss. 8 and 9 *Charter* rights when they arrested and searched him on the basis of the tip from the confidential informer. In his view, the seized evidence should

have been excluded under s. 24(2) of the *Charter*. As well, the accused submitted that the drug calls made to the cellular telephones seized after his arrest were not admissible as evidence under the principled exception to the hearsay rule.

The judge rejected the accused's *Charter* application and also admitted the evidence of the telephone calls. The judge found the tipster's information was compelling, the tipster had a measure of credibility and the information the tipster provided was corroborated by police surveillance of the accused's activities. As for the admissibility of the cell phone calls under the principled exception to the hearsay rule, the judge found both requirements for admissibility had been met:

- ☑ **Reliability requirement**: the evidence was reliable because of its connection to the information provided by the confidential informer and the observations made by the police of the accused's activities, all of which suggested drug dealing.

- ☑ **Necessity requirement**: the common sense reality that the callers would be unlikely, if located, to assist the police, coupled with the experience of the police officer in this case regarding the lack of cooperation of individuals in such circumstances.

The accused was convicted of possessing cocaine for the purpose of trafficking and possessing proceeds of crime. He was sentenced to 18 months imprisonment.

Ontario Court of Appeal

The accused argued that the police did not have sufficient grounds to arrest and search him, and that the "drug calls" could not be used as evidence as they did not satisfy the requirements for admissibility of evidence under the principled exception to the hearsay rule.

Reasonable Grounds

The Appeal Court found the trial judge properly considered the information provided by the confidential informer in upholding the lawfulness of the arrest and search. The cumulative effect of the compelling nature of the information, the credibility of the informer and police corroboration of the information met the standard of reasonable grounds:

> The information provided by the confidential informant was detailed, both with respect to the description of J.J. and also with respect to the black Jeep, including the licence plate number. The informant had provided reliable information to the police in the past. And the police surveillance of the [accused] did provide corroboration for the information that the confidential informant had provided. [para. 12]

As the Court of Appeal noted, ***"weaknesses in one area may, to some extent, be compensated by strengths in the other two."***

The "Drug Calls"

Drug calls can be admitted as evidence in a criminal trial under the principled exception to the hearsay rule provided they meet both the necessity requirement and the reliability requirement. Although there is no categorical rule concerning the admissibility of drug purchase calls, the number of calls is a significant factor in the admissibility analysis.

"Here there were four separate calls, all of them clearly revealing efforts by the callers to purchase drugs. It would 'defy belief' that all of these calls were erroneous or misunderstood."

In this case, the trial judge properly found both the necessity and reliability requirements had been satisfied.

Unlike a case involving a single telephone call suggesting that an accused was a drug dealer, this case involved a quantity of calls sufficient to establish reliability. ***"Here there were four separate calls, all of them clearly revealing efforts by the callers to purchase drugs,"*** said the Court of Appeal. ***"It would 'defy belief' that all of these calls were erroneous or misunderstood."*** Furthermore, the number of calls can also satisfy the necessity requirement because the Crown could not be expected, where there are numerous declarants (callers), to locate and convince most or all to testify at trial. As the Court of Appeal noted:

> The failure of the police to undertake any efforts to locate any of these callers risks undermining a conclusion that the threshold necessity requirement is made out. However, that risk is avoided by the particular circumstances of this case, notably, the number of calls received, that they were received in a short time frame (i.e. within minutes of each other), the specific contents of the calls clearly being to purchase drugs, and the unchallenged evidence of the police witness that prior efforts to enlist drug callers as witnesses had proved futile. [para. 19]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

OBJECTIVELY REASONABLE HONEST CONCERNS JUSTIFIED ENTRY ON 911 CALL

R. v. Serban, 2018 BCCA 382

Police received a 911 call made from a payphone about a possible break and enter in progress at the accused's residence. The caller claimed to be the homeowner and said that he had received a telephone call from his 80-year-old father who was alone in the residence. The 911 caller said his father was frightened because someone was attempting to break into the basement. The caller reported that his father's name was "Pavel Serban" and provided a telephone number for his father, but the caller hung up when he was asked to provide his own name. The 911 call-taker phoned the father's number but received no answer.

Four police officers, including one with a police dog, responded to the 911 call, which was dispatched as a "priority two call" (no confirmation of a life-or-death emergency but considered to merit an immediate response). While on their way to the call, the officers were advised that the residence had been the subject of two previous tips concerning a possible marijuana grow operation. This caused concern that the break-in could be a potential "grow rip" or a home invasion carrying with it a significant risk for violence. When they arrived, officers conducted a perimeter search of the house and located a basement access at the rear. Police could smell fresh marijuana, heard the sounds of fans and saw equipment inside a shed attached to the house consistent with a grow operation. But there was no sign of a break-in.

As the police examined the rear of the residence, the accused came out of a door located on the upper level. The officers walked up an exterior flight of stairs to meet the accused who identified himself as "Romeo Serban". He denied making the 911 call. When asked to produce identification, the accused re-entered the house in response and invited police inside. Once inside, the officers noticed the smell of fresh marijuana and saw a rifle resting on a cabinet. One of the officers, who had considerable experience in investigating marijuana grow operations, testified that the smell was very strong. He formed the view that a large amount of fresh marijuana was in the residence and arrested the accused for possessing it. The accused's wife, two young children and three elderly people who were Romanian and did not speak English were also in the house but they did not appear in

distress. Two of the elderly occupants were able to produce their Romanian passports to confirm their identity but the other elderly man could not. As a result, the police could not confirm whether or not this man was "Pavel Serban" – the person named in the 911 call.

Although the officers concluded that the 911 call was likely false, they decided to search the entire residence to ensure that no one was inside who may have broken in and no other occupant of the house was in distress. The police systematically went from room to room and checked anywhere a person might be hiding. No one else was found inside the home. The basement, however, housed a substantial marijuana grow operation with plants in various stages of growth. The accused was arrested for producing marijuana, and a search warrant was obtained and executed. The grow operation, which covered the entire basement floor, consisted of 9,738 marijuana plants.

British Columbia Supreme Court

All of the attending officers testified on a *voir dire*. One officer said he considered this to be a high-risk call and that a canine unit is usually summoned in such situations because it is safer for a dog to clear places and a dog can be used to track and apprehend an intruder. He also said that suspicions about whether a call might be false do not necessarily relieve the police of their obligation to investigate as if it were a legitimate complaint. Another officer said that grow rips sometimes involve violence if someone else is in the residence when the break-in occurs. The officers testified that although they believed there was a marijuana grow operation in the house, they conducted a relatively brief search of the residence because they continued to have unresolved safety concerns given the nature of the 911 call. And they all denied that the purpose of the search was to gather evidence.

The accused argued the police entered onto the property and conducted the search on the basis of ulterior motives, ie. to investigate a possible grow operation. He suggested the police ought to have concluded in very short order that the 911 call was false and therefore they acted unreasonably in carrying out any further search.

The judge found all three stages of the police intrusion - the perimeter search of the home's exterior, the entry into the residence and the clearance search - were reasonable under the *Charter*. The police evidence was unequivocal that they continued to have safety concerns given the nature of the 911 call. The judge concluded that the police were ***"entirely justified in treating the call as legitimate and requiring them to investigate."*** He accepted the evidence of the officers that information they received about the possibility that the residence was being used as a marijuana grow operation ***"heightened their concerns that the break-in could be a 'grow rip' which could increase the prospect of violence."*** In his view, the search of the accused's residence without a warrant was justified by the common law power of the police to conduct a warrantless search to protect life and safety in accordance with the principles set out in *R. v. Godoy*, [1999] 1 S.C.R. 311. There were no s. 8 *Charter* breaches and the accused was convicted of producing and possessing marihuana for the purpose of trafficking.

British Columbia Court of Appeal

The accused argued that the clearance search was not a justifiable use of police powers because it was neither necessary nor objectively reasonable. He asserted that any legitimate concern for the safety of the occupants had evaporated before the clearance search was conducted. In his view, the police concluded that the 911 call was false before the

"The police were aware of the potential that the break and enter in progress 911 call concerned a "grow rip". It bears repeating that "[a] 911 call is a distress call -- a cry for help" that obliges the police to "assume that the caller is in some distress and requires immediate assistance".

"Whether an unauthorized search is justified in the exercise of an established police duty is a fact-driven inquiry that will turn on the circumstances of the individual case."

clearance search was undertaken. Thus, the police must have had ulterior motives for the search, ie. to gather evidence in aid of an ongoing "grow op" investigation. He contended that the judge ought to have found that the clearance search breached his s. 8 rights and the evidence should have been excluded under s. 24(2).

Justice Fitch, authoring the unanimous Court of Appeal decision, disagreed with the accused. He first noted that ***"whether an unauthorized search is justified in the exercise of an established police duty is a fact-driven inquiry that will turn on the circumstances of the individual case."*** He continued:

> As is apparent, the [trial] judge found that the conduct of the police was motivated by a desire to fully investigate the circumstances of the 911 call, locate the subject of the call (Pavel Serban), and ensure the occupants of the residence were safe. In essence, the judge concluded that the concerns of the police were honestly held and objectively reasonable on the information known to them. He did not, as the [accused] asserts, conclude that the concerns raised by the 911 call had been alleviated at the time of the clearance search.
>
> In my view, there was a basis upon which the judge could reasonably come to the conclusion he did. The police were aware of the potential that the break and enter in progress 911 call concerned a "grow rip". It bears repeating that "[a] 911 call is a distress call -- a cry for help" that obliges the police to "assume that the caller is in some distress and requires immediate assistance". The information conveyed to the investigating officers understandably elevated their assessment of the risk for violence in the residence. On their initial entry at the invitation of the [accused], they saw a weapon in the home. They knew there were children in the home. The subject of the call had not been identified when the clearance search was conducted. They were unable, due to language difficulties, to communicate with the three elderly individuals in the residence. The police believed the residence was being used by the [accused] for the commission of a drug-related offence. They were, as a consequence, justified in treating with caution the insistence of the [accused] that all was well. [references omitted, paras. 26-27]

Justice Fitch did not accept the accused's submission that the police had viable options to ensure the safety of the occupants short of conducting the clearance search. The police could not simply ask the occupants of the residence whether any of them wanted the residence "cleared" by the police because there was a language barrier and police were unable to communicate with some of them. ***"Further, on all that was known to them, including the criminal activity they reasonably believed was occurring inside the premises, the police were justified in not deferring to the stated wishes of those who were present and able to communicate in English,"*** said Justice Fitch. ***"The [accused's] alternative submission that the occupants of the residence could have been taken outside and questioned without engaging in the clearance search would have done nothing to alleviate the officers' safety-based concerns about what might be taking place inside the residence."***

In this case, the circumstances that prompted the 911 call had not been addressed before the clearance search had been conducted. Nor did the police exaggerate safety-based concerns in an effort to justify a warrantless search conducted for the primary purpose of gathering evidence. The trial judge did not err in concluding that the police were justified in conducting a relatively brief clearance search of the residence to ensure that its occupants were safe. Since there was no s. 8 breach, there was no need to consider s. 24(2).

The accused's appeal was dismissed.

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

POLICING IS A TEAM SPORT: OFFICERS ENTITLED TO RELY ON INFORMATION OF OTHERS

R. v. Warsame, 2018 ABCA 329

The police received information from informers that drug trafficking was taking place from a particular house. The information reported that those involved would meet at a playground across the street for the actual exchange of drugs and money. The police set up surveillance and observed a number of brief interactions near the target house which they interpreted as being drug transactions. Some of those involved were known to have prior records related to drugs. A police officer, acting as an affiant, subsequently obtained a search warrant for the target residence. The affiant did not deal directly with the informants, but relied on information received from their "handlers" as well as information received from the surveillance officers. When the warrant was executed police found 684 grams of crack cocaine, 44 grams of soft cocaine, seven cell phones, a loaded Smith and Wesson .44 Magnum pistol, and $28,740.

Alberta Court of Queen's Bench

The only issue at trial was the sufficiency of the Information to Obtain (ITO) underlying the telewarrant. The accused argued that the ITO was insufficient to justify the warrant, raising a number of issues:

1. The ITO only contained a "boilerplate" statement about how the informants came to possess the information they provided;

2. There may have been innocent explanations for the interactions police interpreted as drug transactions;

3. The affiant did not deal directly with the informants or relied on information from the surveillance officers;

4. There was some uncertainty about who resided in the target residence; and

5. The information was incomplete and inconsistent in some respects.

The the judge concluded that the ITO provided adequate grounds for the police to obtain the warrant. The judge was satisfied that, after a thorough reading of the ITO, any justice of the peace reviewing the ITO would grant the warrant. Based on this ruling, the accused did not dispute that the Crown could prove all of the essential elements of the offence. The accused was convicted for possessing cocaine for the purposes of trafficking, possessing the proceeds of crime, and possessing a prohibited firearm and ammunition. He was sentenced to six years in prison.

Alberta Court of Appeal

The accused argued that the trial judge failed to provide sufficient reasons in dismissing his *Charter* application. The Crown, on the other hand, contended that no substantial wrong or miscarriage of justice occurred because the ITO contained overwhelming grounds supporting the issuance of the search warrant. The Court of Appeal addressed each one of the accused's submissions:

- ***"Information about the Informants.*** The [accused] argued that the Information to Obtain was deficient, because it only contained a "boilerplate" statement about how the informants came to possess the information they provided. It is stated that the information came from either (a) personal observation, (b) statements by the person being investigated, or (c) information that was overheard. The [accused] also argued that since the full criminal records of the informants were not disclosed, the issuing justice had no basis to assess their credibility.

  Relying on information received from informants creates a tension between protecting the informer privilege and the right

"Relying on information received from informants creates a tension between protecting the informer privilege and the right of the accused to make full answer and defence. The Crown, the police and the court have no ability to waive the informer privilege, which must be studiously protected. Being too precise about the source of the informants' information, or providing too much detail about their criminal records, might well expose their identity. The informant privilege can only be compromised when it is absolutely essential because innocence is at stake."

of the accused to make full answer and defence. The Crown, the police and the court have no ability to waive the informer privilege, which must be studiously protected. Being too precise about the source of the informants' information, or providing too much detail about their criminal records, might well expose their identity. The informant privilege can only be compromised when it is absolutely essential because innocence is at stake. The [accused] has not demonstrated that merely attempting to undermine the credibility of the informants, so as to undermine the foundation of the warrant, meets that test. Accordingly, any gaps in the information provided about the informants did not preclude the issuance of the warrant. [references omitted, paras. 8-9]

- ***"Ambivalent transactions.*** The surveillance officers observed a number of brief interactions near the target house which they interpreted as being drug transactions. Some of those involved were known to have prior records relating to drugs. The [accused] argued that there may have been innocent explanations for those interactions, but the mere possibility of innocent explanations does not preclude the officers from having reasonable grounds to believe that the transactions were criminal in nature. [reference omitted, para. 10]

- ***"Reliance on Secondary Information.*** The officer who swore the affidavit in support of the warrant did not deal directly with the informants, but relied on information received from their "handlers". Further, the affiant relied on information received from the surveillance officers. In order to preserve the informer privilege, it is common to have only a limited number of officers deal directly with the informants. Further, policing is a team sport, and one officer is entitled to rely on information received from other officers. [reference omitted, para. 11]

- ***"Uncertain Identity.*** One informant suggested that 'Tyler' was trafficking in drugs, while another suggested it was 'Mohammed', and there was arguably some inconsistency as to who actually resided in the target house. Inconsistencies in the evidence do not preclude the formation of reasonable grounds to believe an offence is occurring, as the test is not proof on a balance of probabilities. The warrant was focused on the particular premises, and it was not unreasonable to believe that more than one person, or at least one person, was trafficking drugs from that location. [reference omitted, para. 12]

- ***"Overall reliability.*** The [accused] argued that the information was in some respects incomplete, and in other respects contradictory. The historic reliability of the informants was not well established. Again, it was not necessary for the police to establish on a balance of probabilities that an offence was being committed from the target house. Corroboration of the informants is not essential. There was sufficient evidence on this record for the warrant to be issued. [reference omitted, para. 13]

"While the evidence was not perfect, it was sufficient to support the warrant," said the Court of Appeal. ***"The record before the authorizing judge***

confirmed that there were sufficient grounds for the warrant." The warrant was properly issued and there was no miscarriage of justice. The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's note: Additional information taken from *R. v. Warsame*, 2017 ABCA 239.

GIRLFRIEND's PLEA FOR ARRESTEE TO TALK DID NOT RENDER CONFESSION INVOLUNTARY

R. v. Lavallee, 2018 ABCA 328

Following a shooting where the victim was shot in the face twice with a .22 calibre rifle but survived, the accused was extensively interviewed by police over a two day period. During the interview, which was video recorded, the police used numerous tactics to elicit a confession. The police played recordings to the accused in which the victim's mother and the accused's sisters begged him to confess. The police hung pictures of the accused's daughter in the interview room and appealed to his moral obligation to be honest and do the right thing. Additionally, because the circumstances suggested that the crime was gang-related, the police talked to the accused about gangs and the gang code of conduct as a further way to try to elicit a confession.

On the second day of the interview, the police arranged a telephone call between the accused and another individual present at the shooting, a potential accomplice. This other individual had become a cooperative police witness under some form of police protection. During the telephone call, the individual told the accused that the ***"higher ups would obviously rather this all go away"***. He told the accused: ***"I want you to be able to go about having a regular life without having to look over your shoulders and you know, and to be able to breathe freely"***.

About 40 minutes after the telephone call ended, the police arranged for the accused's girlfriend to visit him in the interview room. The girlfriend told the accused that, if he knew anything, he had to tell police. She told him she had admitted to the police her role in an unrelated break and enter offence, and she then said, ***"We need to get this out of our lives so we can start over, right. We can't have a fresh start with the past haunting us. Okay. You know I love you. You know that's why I'm sitting here right now. I need you to do the right thing."*** Shortly after the girlfriend left the interview room, the accused confessed to the shooting, stating: ***"[Y]eah, I shot Donnie. I'm sorry for shooting Donnie. Right. I am."***

Alberta Court of Queen's Bench

The judge watched the video of the police interview and heard the testimony of the officers involved. The judge noted that the police were creative in their interviewing techniques, but that they acted respectfully and there was nothing in their behaviour to raise any kind of doubt as to the voluntariness of the accused's confession. Although the potential accomplice to the crime was an individual with a criminal record and a reputation for violence who was a member of a notorious gang, there was no evidence to suggest that the accused was the least bit intimidated or concerned about this individual or the gang they were involved with. After all, the accused himself had been a member of several gangs and was quite familiar with what they were capable of. And the accused seemed concerned that he would be seen as someone who might implicate others (a "rat") rather than appearing fearful or threatened.

The accused did not share other details of the shooting even after he admitted to shooting the victim. Such details, according to the judge, could have implicated others and the accused's refusal to share such details demonstrated that his will (to "not talk") remained steadfast. Furthermore, the accused's will was not overcome by anything other than his love for his girlfriend and her professed love for him, and her plea to him to tell the police

"The common law confessions rule 'requires proof beyond a reasonable doubt of the voluntariness of any statement obtained from an accused by a person in authority before it may be admitted in evidence'.As to whether a statement was made voluntarily, the inquiry focusses predominantly on the ability of the accused to make a meaningful choice whether to confess."

what he knew. Although the girlfriend was an agent of the state at the time of her attendance at the police interview, the judge found the type of pressure exerted by her was not precluded by the confessions rule. The accused's confession was voluntarily, it was admitted as evidence and he was convicted of attempted murder.

Alberta Court of Appeal

The accused contended that the trial judge erred, among other things, in finding that his confession was freely and voluntarily given. In his view, the judge misapplied and misinterpreted the test for voluntariness. He submitted that the potential accomplice's "scare call" during the interview should have raised a reasonable doubt as to the voluntariness of his confession.

Voluntariness

The Crown bears the burden of proving a confession is voluntary beyond a reasonable doubt. ***"The common law confessions rule 'requires proof beyond a reasonable doubt of the voluntariness of any statement obtained from an accused by a person in authority before it may be admitted in evidence',"*** said the Court of Appeal. ***"As to whether a statement was made voluntarily, the inquiry focusses predominantly on the ability of the accused to make a meaningful choice whether to confess."*** In assessing voluntariness, a contextual fact-based approach to the evidence is used. Since few suspects will spontaneously confess to a crime, the police will have to somehow convince the suspect that it is in his best interest to confess. It is only when an inducement, standing alone or in combination with other facts, is strong enough to raise a reasonable doubt as to whether the will of the accused has been overborne that attempts to convince a suspect to confess will be improper. ***"The most important consideration in such cases is to look for a quid pro quo offer, regardless of whether it comes in the form of a threat or promise (ibid). It is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement,"*** said the Court of Appeal.

In this case, the trial judge was alive to and specifically considered the accused's concern as to the possibility of a threat from the potential accomplice's telephone call. In the trial judge's view, there was ***"nothing to suggest that [the accused] was the least bit intimidated or concerned about [the potential accomplice] or the...gang, except that he did not want to be seen as a rat."*** The trial judge suggested the only thing that may have overcome the accused's will (in terms of providing the impetus for him to confess) was his love for his girlfriend and her professed love for him, and her plea to him to tell the police what he knew. However, while the girlfriend was an agent of the state when she attended the police interview, the type of pressure she exerted on the accused was insufficient to render his confession involuntary.

The Court of Appeal concluded that the trial judge did not misapprehend the test for voluntariness and correctly applied the beyond a reasonable doubt standard of proof in holding that the Crown had met its burden with respect to the admissibility of the accused's confession.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

INTERNATIONAL DAY FOR THE ELIMINATION OF VIOLENCE AGAINST WOMEN

November 25

REASONABLE SUSPICION ADDRESSES POSSIBILITY, NOT PROBABILITY, OF UNCOVERING CRIMINALITY

R. v. Tummillo, 2018 MBCA 95

While towing a trailer with a boat on it, the accused drove his truck through a red light into an intersection on a well-travelled highway. As he entered the intersection, the accused collided with another vehicle. The passengers in the other vehicle included three children between 11 and 14 years of age. Each of the children sustained serious injuries including intracranial haemorrhages, fractures, lacerations, concussions, abrasions and embedded glass.

When the investigating officer arrived at the scene of the collision, fire crew and ambulance paramedics were already there. One of the fire crew members told the officer that the accused had run the red light, smelled of alcohol and was believed to be intoxicated. As a result, after speaking with and observing the accused, the officer placed the accused in his cruiser car, demanded a breath sample and transported him to the local detachment.

At the detachment, the accused spoke to a lawyer. He subsequently gave two breath samples with readings of 140 mg% and 120 mg%. Since the samples were taken more than two hours after the driving occurred, an expert established that, at the time of driving, the accused's blood alcohol concentration was between 152 mg% and 184 mg%. The accused also gave a video statement. He said that the light was green when he entered the intersection, that he had a witness but did not take down that person's name and that he did not think that his blood alcohol level was over 80 mg% at the time he was driving.

Manitoba Court of Queen's Bench

The accused argued, in part, that comments he made to the officer at the scene of the collision and at the police station, as well as the certificate of analysis of his breath samples, should have been excluded from evidence. In his view, the police breached his ss.7, 8 and 9 *Charter* rights. He said he sustained a significant ankle injury as well as neck strain and light-headedness from the collision and did not receive the necessary medical treatment as required by s. 7. The judge concluded that the accused's s. 7 *Charter* right had not been violated because he did not mention that there was anything wrong to either the officer or the breath technician on the day of the collision. The judge also dismissed the accused's s. 9 claim that the officer did not have reasonable grounds to suspect that he had been involved in any criminal activity when he was detained at the scene of the collision. Finally, the judge ruled that the officer had reasonable grounds to make the breath demand, thereby rejecting the accused's asertion that his s. 8 right had been infringed. The accused was convicted on three counts of causing bodily harm while operating a motor vehicle with a blood alcohol concentration over 80 mg%.

Manitoba Court of Appeal

The accused again argued, among other grounds, that the trial judge erred in failing to find a s. 7 *Charter* breach regarding the lack of medical assistance provided to him. He also contended he was arbitrarily detained under s. 9 and the officer breached his s. 8 right by making a breath demand during the course of his detention absent reasonable grounds to believe that he had committed an offence.

"All that was required was that the officer have a reasonable suspicion that the accused committed the offence. A reasonable suspicion is something more than a mere suspicion and something less than a belief based on reasonable and probable grounds. Otherwise stated, the reasonable suspicion standard addresses the 'possibility of uncovering criminality and not a probability of doing so'."

s. 7 – Failure to Provide Medical Attention

Justice Cameron, speaking for the Court of Appeal, found the trial judge did not err in finding no s. 7 breach. The accused did not mention that he was injured to police nor did he request medical attention. Nor did the officer or the breath technician notice anything remarkable about the accused's emotional condition or observe any physical injuries.

As for the accused's assertion that the nature of the accident should have prompted the police to question him as to whether he required medical assistance, the Court of Appeal rejected this notion finding there was no factual foundation to this argument:

> [The accused] was able to walk to the police cruiser car after the accident and able to walk from the cruiser car to the police detachment. He was responsive to police questions and able to understand their statements to him. He understood his rights. He did not mention any discomfort. [para. 65]

s. 9: Arbitrary Detention?

Justice Cameron found the trial judge properly considered the constellation of circumstances in finding there was sufficient evidence for the officer to reasonably suspect that the accused had been impaired by the consumption of alcohol at the time of the collision. These circumstances included:

- There had been a collision with three damaged vehicles;
- The accused was standing at the driver's side of a badly damaged truck;
- The accused admitted the truck was his; and
- The information from the fire crew member that the accused was alleged to have gone through a red light, smelled of alcohol and was believed to be impaired.

"All that was required was that the officer have a reasonable suspicion that the accused committed the offence," said Justice Cameron. ***"A reasonable suspicion is something more than a mere suspicion and something less than a belief based on reasonable and probable grounds. Otherwise stated, the reasonable suspicion standard addresses the 'possibility of uncovering criminality and not a probability of doing so'."***

s. 8: Unreasonable Breath Demand?

The Court of Appeal also concluded that the trial judge properly found that the officer had reasonable grounds to believe that the accused had committed the offence of driving while his ability to do so was impaired by alcohol within the preceding three hours. In addition to the evidence relied upon in determining that the accused was not arbitrarily detained, the officer made observations that the accused had a lumbering gait as he walked to the cruiser car, that he smelled of alcohol and that he needed to hold on to the cruiser car for support. The officer not only had a subjective belief that the accused had committed the offence but his belief was objectively reasonable.

The officer was not required to take steps to discern whether there were causes other than impairment that would explain the observations he made of the accused. ***"It is trite law that an officer is not required to consider all of the alternative explanations for the observed conduct relied on to form reasonable grounds to make a breath demand,"*** said Justice Cameron.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

SHARE IT. DON'T WEAR IT.

IT'S TIME TO SPEAK UP ABOUT MENTAL HEALTH.

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

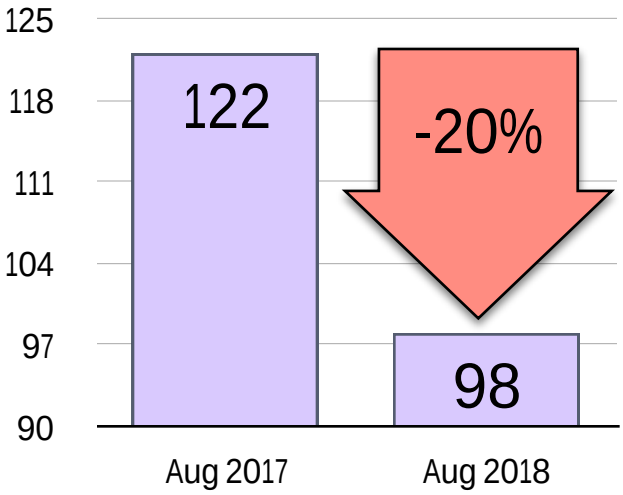
BCFirstRespondersMentalHealth.com

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

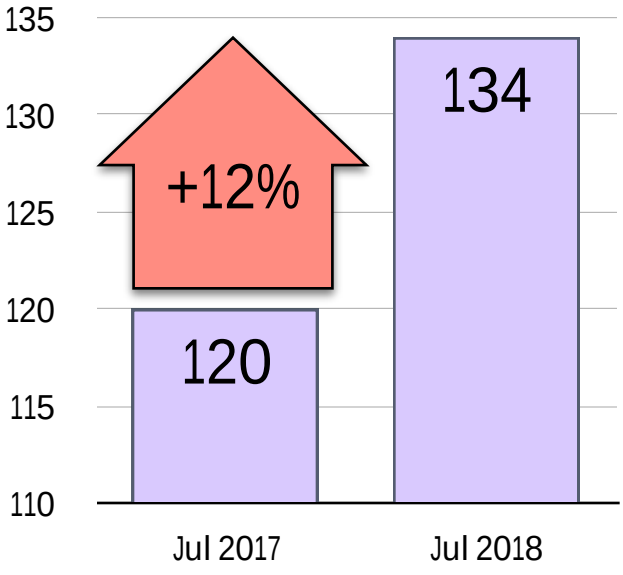
www.BCFirstRespondersMentalHealth.com

ILLICT DRUG OVERDOSE DEATHS IN 2018

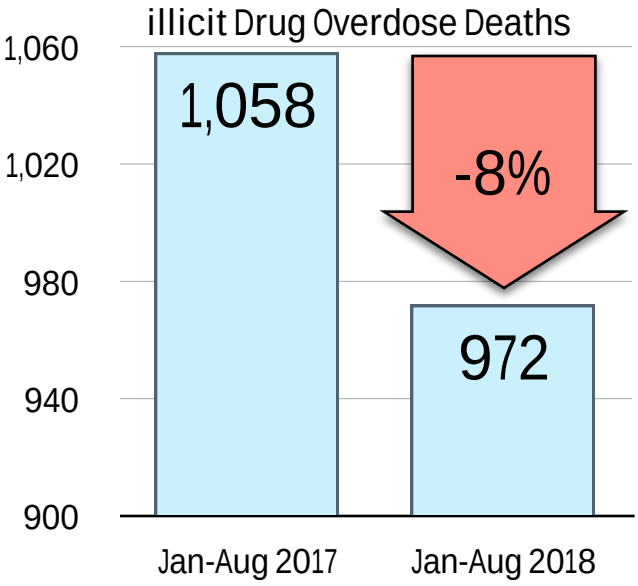
The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2008 to August 31, 2018**. In August there were 98 suspected drug overdose deaths. This represents a -**20%** decrease over the number of deaths occurring in August 2017 and a -**27%** decrease over July 2018. The August 2018 statistics amount to about **3 people dying every day of the month.**



In July 2018 there were 134 suspected drug overdose deaths. This represents an **12%** increase over the number of deaths occurring in July 2017.



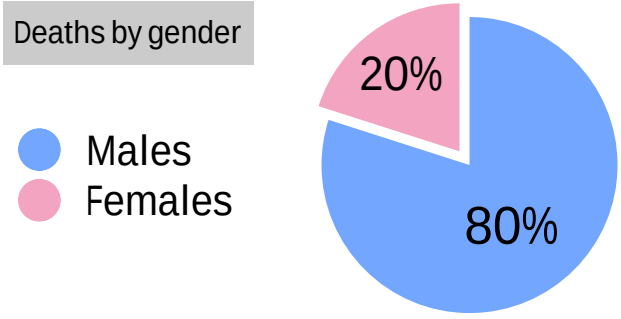
There were a total of **972** illicit drug overdose deaths from January through August 2018. This is 86 fewer deaths than last year's total at this time.

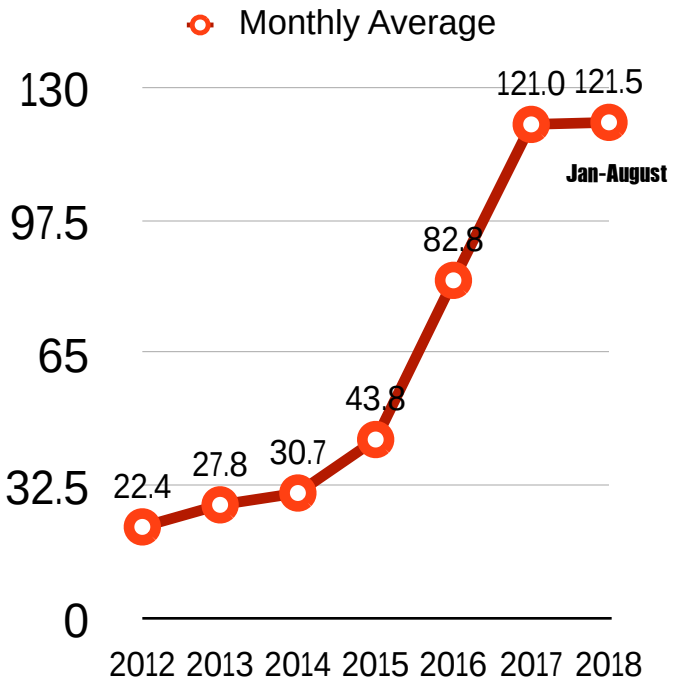


The **1,452** overdose deaths last year (2017) amounted to more than a **336%** over 2013. Moreover, the report attributes fentanyl laced drugs as accounting for the increase in deaths.

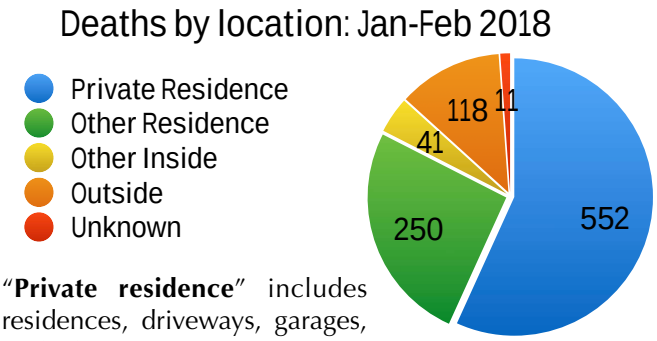
People aged 30-39 were the hardest hit so far in 2018 with **264** illicit drug overdose deaths followed by 50-59 year-olds at **228** deaths. People aged 40-49 years-old had **205** deaths while those aged 19-29 had **180** deaths. Vancouver had the most deaths at **256** followed by Surrey (**131**), Victoria (**64**), Kelowna (**40**), Prince George (**29**), Kamloops (**25**) and Nanaimo (**25**).

Males continue to die at almost a **4:1** ratio compared to females. From January to August 2018, **777** males have died while there were **195** female deaths.





The 2018 data indicates that most illicit drug overdose deaths (**86.7%**) occurred inside while **12.1%** occurred outside. For 11 deaths, the location was unknown.



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

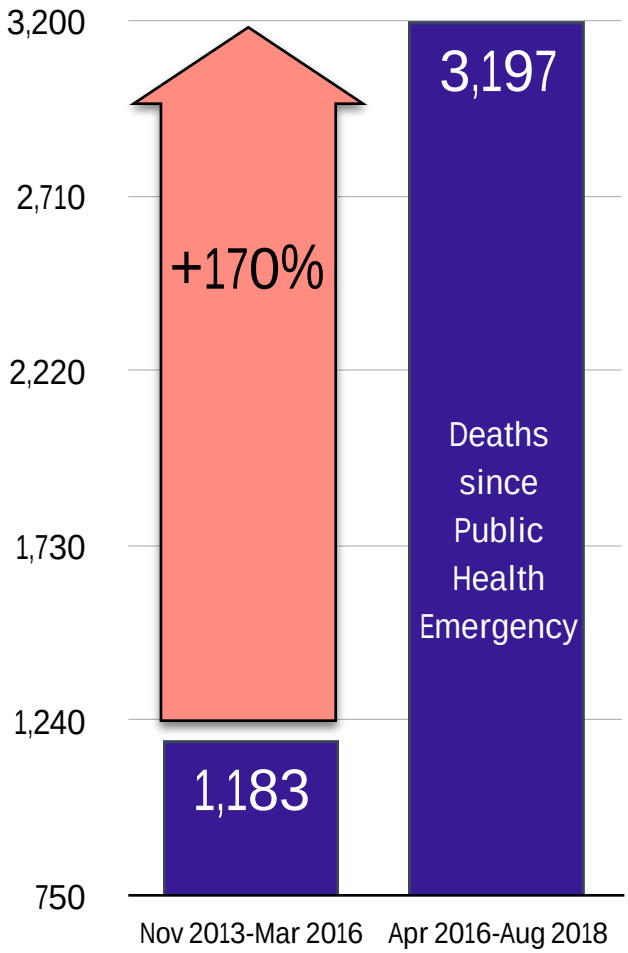
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

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

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

DEATHS SINCE PUBLIC HEALTH EMERGENCY

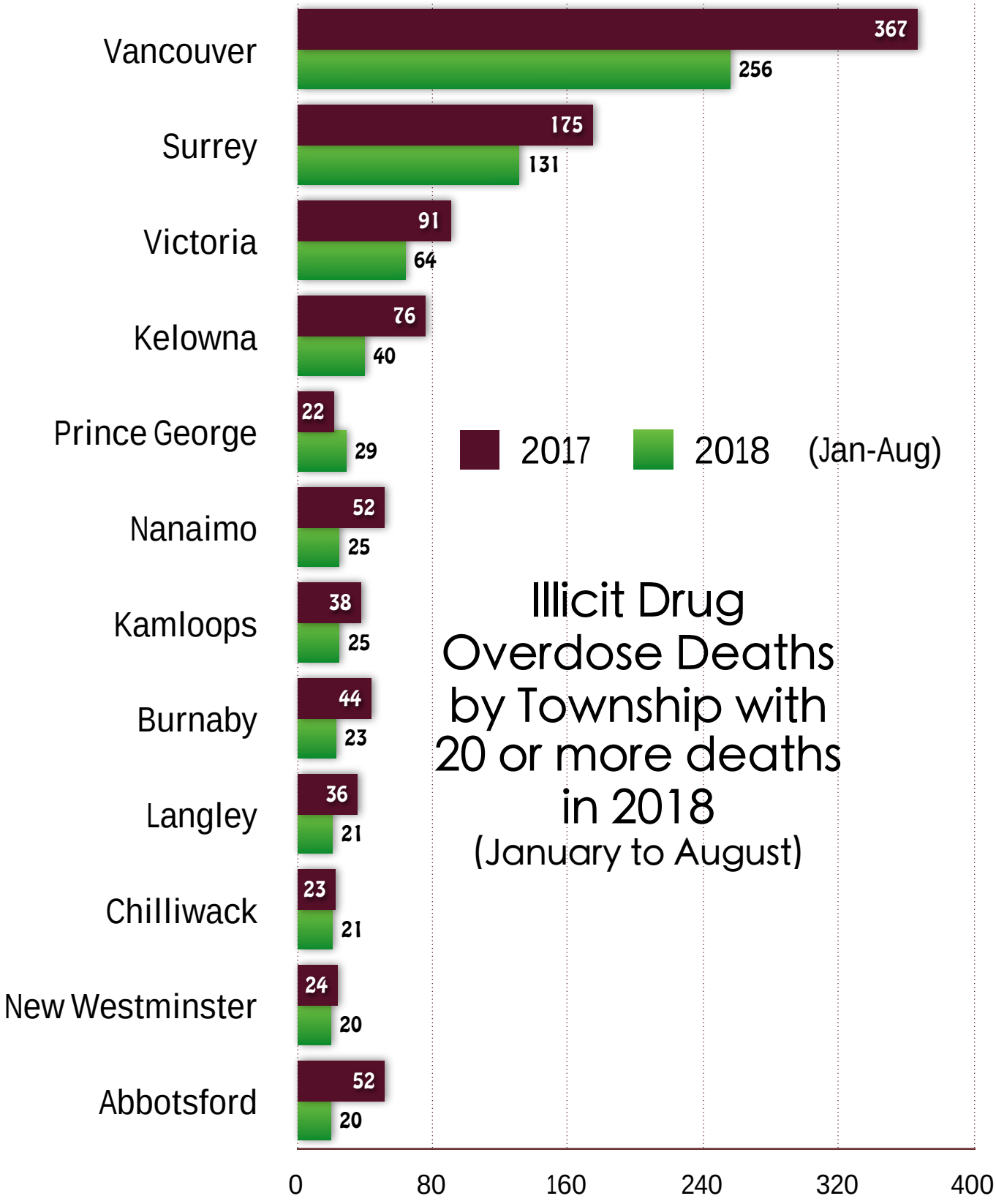
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the 29 months preceding the declaration (Nov 2013-Mar 2016) totaled **1,183**. The number of deaths in the 29 months following the declaration (Apr 2016-Aug 2018) totaled **3,197**. This is an increase of **170%**.



Source: -Illicit Drug Overdose Deaths in BC - January 1, 2008 to August 31, 2018. Ministry of Public Safety and Solicitor General, Coroners Service. September 27, 2018.

TYPES OF DRUGS

The top four detected drugs relevant to illicit drug overdose deaths from 2016 - 2018 were fentanyl, which was detected in **75.6%** of deaths, cocaine (**48.4%**), methamphetamine/amphetamine (**31.2%**), ethyl alcohol (**25.8%**), and heroin (**23.3%**).


Vancouver
367
256
Surrey
175
131
Victoria
91
64
Kelowna
76
40
Prince George
22
29
Nanaimo
52
25
Kamloops
38
25
Burnaby
44
23
Langley
36
21
Chilliwack
23
21
New Westminster
24
20
Abbotsford
52
20
2017
2018 (Jan-Aug)
Illicit Drug Overdose Deaths by Township with 20 or more deaths in 2018
(January to August)
0
80
160
240
320
400

Illicit Drug Overdose Deaths in BC, Jan-Aug 2018

BRITISH COLUMBIA Coroners Service

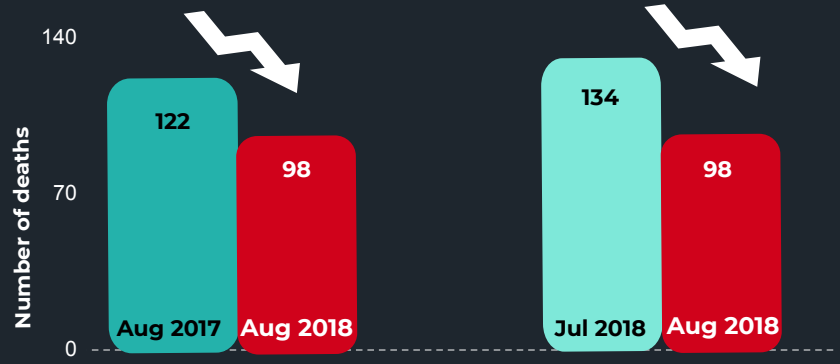
98 **Illicit drug overdose deaths in August 2018**

20% decrease compared to August 2017

27% decrease compared to July 2018

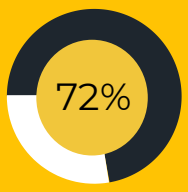
~ **3.2**

illicit drug overdose deaths per DAY in August 2018

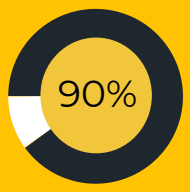


Illicit drug overdose deaths by age group and sex, 2018

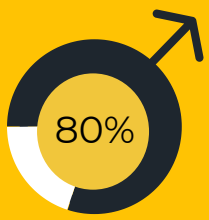
30 to 59 years old



19 to 59 years old



Male



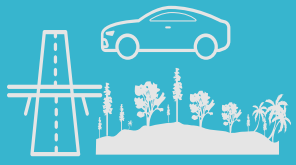
Number of illicit drug overdose deaths by city, 2018

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

Illicit drug overdose deaths by place of injury, 2018

57% at private residences

30% at other inside locations (e.g., other housing, hotel/motel, public buildings)



12% at outdoor locations (e.g., parks, vehicles, streets)

"The reasonable suspicion standard engages the reasonable possibility, not probability, that a driver has alcohol in his or her body."

BC's TOP COURT EXPLAINS REASONABLE SUSPICION

Mackenzie v. British Columbia (Superintendent of Motor Vehicles), 2018 BCCA 354

In an appeal by BC's Superintendent of Motor Vehicles over the setting aside of an Immediate Roadside Prohibition (IRP), the BC Court of Appeal restated some well-established principles on the application of the reasonable suspicion standard required for a roadside breath test under s. 254(2) of the *Criminal Code*. Justice Fitch, delivering the decision for the Court of Appeal, described reasonable suspicion as follows:

> There is both a subjective and objective aspect to the reasonable suspicion standard.
>
> The demanding officer must subjectively entertain an honest suspicion that the detained driver has alcohol in his or her body. Credibility issues and the need to make factual findings as a consequence thereof will most commonly arise in resolving whether the officer subjectively entertained the requisite honest suspicion.
>
> Further, the suspicion must be based on objectively verifiable circumstances which, taken together and subjected to independent judicial scrutiny, establish that the suspicion subjectively entertained by the officer was reasonable. The inquiry is based on circumstances known to the police officer at the time and asks whether it was reasonable, based on the totality of those circumstances, for the officer to suspect that the driver had alcohol in his or her body. The objective component of the test may be framed in these terms: "[W]ould a reasonable person, standing in the shoes of the investigating police officer and aware of all of the objectively verifiable evidence, reasonably suspect the driver had alcohol in his or her body?"

The inquiry is "fact-based, flexible, and grounded in common sense and practical, everyday experience".

The reasonable suspicion standard engages the reasonable possibility, not probability, that a driver has alcohol in his or her body. Application of the standard means that in some cases a police officer will reasonably suspect that a driver has alcohol in his or her body based on circumstances that are subsequently determined to be attributable to an innocent explanation. For example, an officer might reasonably suspect that a driver has alcohol in his or her body based on the detection of a strong odour of liquor coming from the area of the vehicle in which the driver is seated. In such a case, the officer might reasonably attribute the odour to the driver. That the source of the odour might later be determined to be coming from liquor spilled on the floor boards underneath the driver's feet, and not attributable to the driver's consumption of alcohol, does not necessarily mean that the officer's suspicion was unreasonable.

While a police officer is obliged to take into account the totality of the circumstances, including exculpatory, neutral or equivocal information known to the police officer at the relevant time, the officer does not have an obligation to undertake an investigation to rule out possible innocent explanations for sensory observations or observed behaviour. … "[T]he reviewing court is not to consider whether the investigating officer's suspicion was accurate or whether other inferences could be drawn from the constellation of circumstances, or to consider whether the investigating officer could have taken further steps to confirm or dispel a prima facie reasonably held suspicion that alcohol was present in the driver's body". As applied to this case, there might, for instance, be an innocent explanation for the wobble of the [driver's] motorbike as it left the intersection and for what [the officer] said about the [driver's] difficulty in retrieving his driver's licence from his wallet (assuming that this latter observation was made before the ASD

"While a police officer is obliged to take into account the totality of the circumstances, including exculpatory, neutral or equivocal information known to the police officer at the relevant time, the officer does not have an obligation to undertake an investigation to rule out possible innocent explanations for sensory observations or observed behaviour."

demand). The existence of possible innocent explanations does not necessarily take these observations out of the mix. The officer is entitled to take these observations into account as part of the totality of the circumstances.

Importantly, the reasonable suspicion inquiry cannot logically take account of circumstances learned after the demand was made. If, for example, [the officer's] observation that the [driver] had difficulty extracting his driver's licence from his wallet was made after the ASD demand …, it is not a factor that could be taken into account in determining whether the officer's suspicion that the [driver] had alcohol in his body was reasonable at the time of the demand.

… While objectively discernible indicia of impairment may be sufficient to ground a valid ASD demand, such observations are not necessary to the making of a valid demand. A detaining officer who is found to have detected a strong odour of liquor on the mouth of a driver but no observable signs of impairment will, in all likelihood, have a reasonable suspicion that the driver has alcohol in his or her body.

… An officer may reasonably suspect that a driver has alcohol in his or her body based on mouth odour even if the driver refuses to respond when questioned as to when he or she consumed their last drink. Alternatively, an officer may reasonably suspect that a driver has alcohol in his or her body based on other indicia of impairment in the absence of a detectable odour of liquor on the driver's breath. [references omitted, paras. 34-42]

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

REQUIRING ID FROM PASSENGER & TAKING IT BACK TO POLICE CAR RESULTED IN DETENTION

R. v. Loewen, 2018 SKCA 69

Saskatchewan police stopped a vehicle for speeding in the early morning hours. The driver was asked for his licence and registration. The accused, a passenger in the vehicle, was also asked for identification. He produced a Saskatchewan Government Insurance (SGI) photo identification card. Police conducted CPIC checks on both occupants and learned the driver had an outstanding warrant for his arrest in Alberta and a criminal record, while the accused was a federal inmate on statutory release with conditions. Police called Corrections Canada's National Monitoring Centre (NMC) and determined that the accused was not be in the presence of known criminals. The NMC official told police that a warrant under Canada's *Corrections and Conditional Release Act* would be issued for the accused's apprehension and police were to take him into custody. The driver was subsequently issued a ticket for speeding while the accused was removed from the vehicle and arrested for breach of his release conditions. The driver then departed the scene.

Immediately upon his arrest and being advised of the reason for it, the accused told police that his "parole" had expired two days prior. The police took no steps to investigate this claim. Police told the accused that the NMC was issuing a warrant and the matter was no longer within police discretion. Police searched the accused and found his wallet (containing $1,615), two cellphones and some keys. The accused was advised of his right to counsel and transported to the police station. He again raised the concern that his "parole" had expired. The accused was again searched and a

bulge was felt in his groin area. When asked what it was, the accused said it was cocaine and MDMA. He subsequently removed two packages of drugs containing 28.3 grams of cocaine and 28.1 grams of methylone from his underwear. A further search was then conducted and the accused's clothing was removed and replaced one piece at a time. He was then arrested for possessing a controlled substance for the purpose of trafficking and was re-read the standard police warnings.

Although a faxed warrant was received from the NMC, the police subsequently received a call from them reporting that the accused's release term had been completed and the warrant for his apprehension was invalid. As it turned out, the warrant was invalid on its face in that it stated the accused was on statutory release ending two days earlier. Police advised the accused that he was not facing any charges for breaching his release conditions but that his subsequent arrest for possessing a controlled substance for the purpose of trafficking was still in effect. The accused was charged with possessing cocaine for the purpose of trafficking, possessing methylone for the purpose of trafficking and possessing proceeds of crime.

Saskatchewan Provincial Court

The officer testified that he did not request the accused's identification in relation to any traffic offence. Instead, the officer said he always requests identification from passengers when he conducts a traffic stop so it can be checked on the CPIC database. He does this ***"to find people who are either breaching court ordered conditions, wanted on warrants, outstanding criminals, that type of thing as part of [his] job"***. As for the arrest, the officers said it was based on the warrant issued by the NMC.

The judge ruled that the accused's rights under s. 9 had not been violated by the police asking him to provide his name and identification nor had his s. 8 rights been breached when the police used his name to run a search on CPIC. However, the judge found the accused had been arbitrarily detained when he was arrested before a warrant had been issued. The search incidental to his arrest was therefore unreasonable under s. 8 because the arrest itself was unlawful. Furthermore, the search of the accused's wallet was not justified because it was not proper as an incident to the arrest. As for the searches at the police station, the judge concluded they were reasonable because the accused had been taken into custody. Finally, there was no s. 10(b) *Charter* breach when the police asked the accused questions before he had an opportunity to speak with counsel. Despite the *Charter* infringements, the evidence of the drugs and cash were nonetheless admissible under s. 24(2). The accused was convicted of possessing methylone for the purpose of trafficking and possessing cocaine, but he was acquitted of possessing proceeds of crime since the judge was unconvinced that the cash represented the proceeds of drug sales. The accused was sentenced to 42 months in prison.

Saskatchewan Court of Appeal

The accused argued that he had been arbitrarily detained both when the officer took his identification and when he was arrested. Moreover, he contended that he was unreasonably searched immediately after his arrest and at the police station. In his view, these *Charter* violations warranted the exclusion of the evidence under s. 24(2).

The Court of Appeal agreed with the accused, finding he had experienced four violations of his *Charter* rights: (1) when he was detained while the police did the CPIC and local records checks and dealt with NMC; (2) when he was unlawfully arrested; (3) when he was searched at the roadside incidental to the unlawful arrest; and (4) when he was searched at the police station.

Detention on Receipt & Holding of ID

The Court of Appeal ruled that the accused was arbitrarily detained in violation of s. 9 of the *Charter* at the point when the officer asked him for his identification and took it back to the police vehicle. The test for detention was explained:

"Police reliance on erroneous information may be considered objectively reasonable 'unless, in the circumstances at play in the arrest situation, the police could reasonably have made inquiries which would have led to the discovery of the deficiencies or defects' in that information."

> The onus of establishing the existence of psychological detention is, of course, on the individual alleging the detention. The test involves an objective determination made in light of the circumstances as a whole and the court must be satisfied by the evidence that the conduct of the police or state officials effected a significant deprivation of liberty. [para. 28]
>
> The question … is whether [the accused] has established that a reasonable person in his circumstances would have concluded that he or she had been deprived of his or her liberty when [the officer] walked away with the identification. Any such deprivation must have been significant in order to trigger s. 9 of the Charter. [para. 41]

In cases where that had been no physical restraint, the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 outlined a number of factors for courts to consider in determining whether there has been a psychological detention:

- The **circumstances** giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- The nature of the police **conduct**, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- The particular **characteristics** or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

LEGALLY SPEAKING:

Arbitrary Detention

"Section 9 provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned". However, not every interaction between an individual and the police is a detention. Section 9 does not oblige the police to "abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime". Further, the police may engage in the preliminary questioning of bystanders without creating a detention within the meaning of s. 9.

Section 9 is engaged only by "significant physical or psychological restraint". Psychological detention arises where an individual has a legal obligation to comply with a restrictive police directive or where "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply". - Saskatchewan Court of Appeal Chief Justice Richards in *R. v. Loewen, 2018 SKCA 69* at paras. 25-26, references omitted.

Here, the Court of Appeal held the accused was psychologically detained:

> Taking all of the Grant factors into consideration, I conclude that [the accused] suffered a significant deprivation of his liberty when [the officer] took his identification back to the police car. An SGI identification card is not something that can be easily abandoned. A citizen in [the accused's] circumstances would have reasonably concluded he or she had no meaningful option but remain in the vehicle until the police returned with the identification.

PSYCHOLOGICAL DETENTION GRID - R. v. Loewen, 2018 SKCA 69

CIRCUMSTANCES THE OF ENCOUNTER	CONDUCT OF THE POLICE	CHARACTERISTICS OF THE INDIVIDUAL
• The police were not providing assistance at a crime or accident scene nor maintaining general public order. • The police did not ask the accused for identification for any *Traffic Safety Act* purpose or because he suspected a *Criminal Code* offence. • The officer was following his standard practice of asking all passengers for their identification in order to determine if they might somehow be caught up in the criminal justice system. • Under the circumstances, a reasonable person would feel they were the subject of meaningful investigatory attention. • The police took the accused's photo ID and if the accused was to walk away he would have to abandon his ID. A reasonable person would believe they could not simply walk away.	• The accused was not given the option of declining to provide identification. • This was, in substance, a demand by the officer for the accused to hand over his identification. • The officers kept the accused's identification in their possession for some time. It was apparent that police had possession of the accused's identification and he waited in the vehicle in which he was a passenger for some considerable time – likely about 30 minutes – while the police made their inquiries.	• The accused chose not to testify so the Court was deprived of any knowledge of his personal perspectives. • He was on release in connection with a three-year sentence for the offence of possessing drugs for the purpose of trafficking. • There was nothing known of his level of education or sophistication.

> Thus, by way of a bottom line on this part of the appeal, I conclude the trial judge erred by failing to find that [the accused] had been psychologically detained while [the officers] had his identification in their possession during the course of the CPIC and local records searches and during the course of their dealings with the NMC. Given that the police had no lawful authority to detain [the accused], it follows that this detention was arbitrary and hence a violation of s. 9 of the Charter. [references omitted, paras. 47-48]

The Arrest

Under ss. 137(2) or 137.1 of the *Corrections and Conditional Release Act* an offender can be arrested for breaking their release conditions (eg. by being in contact with a known criminal). Here, the trial judge found the accused's arrest was unlawful because, at the time he was taken into custody, no warrant of apprehension had yet been issued (s. 137(2)) by the NMC.

Nor did s. 137.1 apply because the arresting officers had not considered it as a basis for arresting the accused nor did they turn their minds to the question of whether the arrest was necessary. Rather, the officers simply effected the arrest on being advised that the accused was in breach of his release conditions and a warrant would be forthcoming. In any event, the circumstances of this case would not justify a warrantless arrest under s. 137.1. The police said they had no concerns about the accused's identity, were not concerned he was going to recommit the offence by associating with the driver of the vehicle and they had no reason to believe he would fail to report if released. Since the arrest was unlawful, the accused's s. 9 rights were violated.

Search on Arrest

Since the accused's arrest was unlawful, the pat-down search of the accused's person performed immediately and incidental to that unlawful arrest was unreasonable and breached s. 8 *Charter*.

Search at Police Station

Since the accused's arrest was unlawful, the search at the police station associated with it was unlawful as well. For a search to be validly undertaken pursuant to the common law power to search incidental to arrest, the arrest itself must be lawful. Although the police were in receipt of the warrant of apprehension from the NMC by the time the search was conducted at the police station, the warrant was invalid on its face and could therefore not have supported either an arrest or a search incidental to an arrest. Nor could the warrant, issued after the fact of an unlawful arrest, somehow retroactively rehabilitate the arrest and make it lawful.

Exclusion of Evidence

In this case, the Court of Appeal excluded the evidence under s. 24(2). Chief Justice Richards stated:

> By way of overview, aspects of the police conduct in issue here are troubling and raise very real concerns. The detention and the arrest were both conducted in violation of the Charter and they led directly to unconstitutional searches. Further, the impact of the Charter breaches on [the accused's] protected interests was significant. He was wholly deprived of his liberty for a time and his privacy interests were deeply affected. On the other hand, the cash and drugs are essential evidence in the prosecution of the offences with which [the accused] was charged.
>
> This case is arguably close to the line but, in my opinion, the balance ultimately tips in favour of excluding the evidence and hence in favour of reversing the decision of the trial judge. [paras. 90-91]

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

Complete case available at www.canlii.org

BY THE BOOK:

Corrections & Conditional Release Act

Arrest without warrant

137 (2) A peace officer who believes on reasonable grounds that a warrant is in force under this Part or under the authority of a provincial parole board for the apprehension of a person may arrest the person without warrant and remand the person in custody.

Arrest without warrant - breach of conditions

137.1 A peace officer may arrest without warrant an offender who has committed a breach of a condition of their parole, statutory release or unescorted temporary absence, or whom the peace officer finds committing such a breach, unless the peace officer

(a) believes on reasonable grounds that the public interest may be satisfied without arresting the person, having regard to all the circumstances including the need to

(i) establish the identity of the person, or

(ii) prevent the continuation or repetition of the breach; and

(b) does not believe on reasonable grounds that the person will fail to report to their parole supervisor in order to be dealt with according to law if the peace officer does not arrest the person.

NO DETENTION ARISING FROM DNA CANVASS

R. v. Van Wissen, 2018 MBCA 110

Following the brutal murder of a single mother, the police located male DNA on swabs taken from her vagina and gluteal cleft (the area between the buttocks). Police also found DNA on the bindings applied to her wrists. Having no suspects for the murder and anticipating that the DNA might identify the killer, the police canvassed men who knew or lived near the

"The police are permitted to ask questions during an investigation even if it turns out that they are making inquiries with someone involved in a crime and at risk of self-incrimination,"

deceased for information and DNA samples. The police received information that the accused's father lived near the deceased's home and that the accused had lived with him "off and on".

The police approached the accused at a park. He was with his then girlfriend and her young child. Police asked him if he would go with them to the police station to be interviewed about the death of the deceased. He agreed and went with the officers in their police car to the police station. He was briefly left alone in an interview room that locked automatically from the outside. When the officers returned, they spoke with the accused for about 46 minutes. They asked him a range of questions including whether he would provide a DNA sample. He did not appear to be intoxicated.

The accused agreed to provide a DNA sample. Before doing so, the officers reviewed and completed a DNA consent form by reading the form to him and writing in his responses. While reviewing the DNA consent form with the accused, he expressly declined to contact counsel. The officers subsequently obtained a DNA sample. The accused's DNA matched the DNA found on the deceased's body as well as the wrist bindings. He was charged with first degree murder

Manitoba Court of Queen's Bench

The accused contested the admissibility of the DNA evidence. He argued that the police breached his *Charter* rights under ss. 8, 9 and 10(b). In his view, the DNA evidence ought to have been excluded under s. 24(2). The accused testified that the officers intimidated him and told him he had to accompany them to the police station. He said they led him to the police car with one officer on each side and then to the interview room with one officer in front and one behind him. He felt that he could not leave the interview room. He also said that the DNA consent form was not provided to him until after the police took his DNA sample and that he did not believe the officers ever read the DNA consent form to him. He testified that he was intoxicated by drugs and alcohol throughout his dealings with police and, based on what the officers said to him, he did not understand that the DNA sample may be used in the deceased's murder investigation.

The judge found the accused's testimony was inconsistent with the other evidence and was not credible. The judge ruled the accused had not been physically or psychologically detained and therefore there was no s. 9 *Charter* breach. The judge stated, ***"In the circumstances presented here, I am not satisfied that any reasonable person in the accused's position would have felt obligated to***

DNA RESULTS

A DNA expert testified that the accused's DNA profile matched the DNA found on the swabs and estimated the probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile as follows:

- Interior vaginal swab and gluteal cleft swab—1 in 510 billion;
- Wrist bindings, shorter end of the knot on the left side—1 in 47 billion;
- Wrist bindings, longer end of the knot on the left side—1 in 450 million; and
- Wrist bindings, loose ends between the knots—1 in 1.6 billion.

"In order to be valid, a waiver of section 8 rights must be both informed and voluntary."

go with the police." Moreover, even though the accused was not detained, he had been provided with his s. 10(b) right to counsel and there was no s. 10(b) *Charter* breach. The accused provided his voluntary, informed consent to give a sample of his DNA and therefore there was no s. 8 infringement. Finally, even if there were breaches of the accused's *Charter* rights, the admission of the DNA evidence would not bring the administration of justice into disrepute under s. 24(2). The accused was convicted of first degree murder.

Manitoba Court of Appeal

The accused again submitted, among other things, that the trial judge erred in concluding that his rights under ss. 8, 9, or 10(b) were not breached.

Arbitrary Detention

The accused asserted that he had been psychologically detained and the trial judge erred in applying an objective, as opposed to a subjective, test. The Court of Appeal, however, disagreed that the trial judge erred as suggested.

Physical Detention?

As for whether the accused was physically detained or not, the Appeal Court held:

> In this case, the trial judge found that the accused willingly attended the PSB. I am not persuaded that he erred in applying the legal principles to the facts when he made this finding. Even though the police car was locked, there was evidence that the accused was neither a suspect nor obligated to attend. Additionally, there was no evidence that the accused, at any time, indicated to the police that he wished to leave even though he was in a locked interview room.
>
> These circumstances do not, in my view, constitute a physical detention. [paras. 40-41]

Psychological Detention?

In applying *R. v. Grant*, 2009 SCC 32 with respect to psychological detention and rejecting its occurrence in the facts of this case, Justice Lemaistre for the Court of Appeal stated:

> The [Supreme Court of Canada] makes it clear that the inquiry is an objective one in which "the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police". Therefore, in my view, the trial judge correctly articulated the legal principles regarding the test for psychological detention and did not misdirect himself in their application. [reference omitted, para. 24]

For an interaction to constitute a psychological detention, two requirements are needed:

1. There must be a restrictive request or demand by the police to the member of the public; and
2. Where there is no legal obligation to comply with that request or demand, the state conduct is examined in the context of the surrounding legal and factual situation and how that conduct would be perceived by a reasonable person in the situation as it developed.

Here, the accused had not been psychologically detained based on the nature of the contact with the police which involved pointed questions and was accusatory and confrontational. ***"The police are permitted to ask questions during an investigation even if it turns out that they are making inquiries with someone involved in a crime and at risk of self-incrimination,"*** said Justice Lemaistre.

The police did not have physical contact with the accused, were polite to him, did not raise their voices to him or threaten him subtly or otherwise. The police questioning was not coercive, the accused was sober throughout his dealings with the

"Section 8 of the Charter protects against unreasonable search or seizure. The act of taking a DNA sample from the accused without a warrant in this case would be an unauthorized search or seizure absent the accused's consent. The accused's consent to provide a DNA sample, if valid, constitutes a waiver of his section 8 rights."

police officers and he was well spoken and intelligent. As the Appeal Court noted:

> The evidence established the following facts. The police officers were in the midst of a broad canvas of males associated with or living near the deceased. The accused was not a suspect, rather he was 1 of 38 individuals whom the police sought to interview and obtain a DNA sample from. Although the accused was left alone in a locked interview room, he was told he could knock if he needed anything. During the ensuing police interview, the questions were initially generic and then became more pointed and specific.
>
> In light of the trial judge's conclusion that the accused was willing to attend the [police station], the interaction between the accused and the police officers was polite and friendly and there was no restrictive request or demand during the course of the interview, in my view, an overall view of the situation does not demonstrate that a reasonable person would have concluded that he or she was being deprived of his or her liberty by the state.
>
> Moreover, while the questioning became more pointed and culminated with a direct inquiry as to whether the accused was responsible for the murder and whether he would consent to providing samples of his DNA, focussed suspicion, in and of itself, does not turn the encounter into a detention. What is important is the nature of the police interaction with the accused based on the suspicion.
>
> In my view, there is nothing unique about the accused's personal characteristics that would lead a reasonable person to conclude that, in the circumstances, he had no choice about whether to comply with the police officers.
>
> The trial judge's conclusions that there was no restrictive request or demand made by the police requiring the accused to accompany them and that a reasonable person in the accused's circumstances would not conclude that he had been deprived of the liberty of choice were, in my view, correct based on the facts as found. [references omitted, paras. 47-51]

Right to Counsel

Since the accused had not been detained, he was not entitled to rights under s. 10(b) of the *Charter*. ***"Section 10(b) imposes a duty on a police officer when detaining or arresting an accused to inform him or her that he or she has the right to counsel,"*** said Justice Lemaistre. ***"Where there is no detention, the accused is not entitled to section 10(b) rights."***

Unreasonable Search or Seizure

The accused argued that he did not properly waive his s. 8 *Charter* rights because he was tricked and misled by the police. The Crown, on the other hand, contended that the accused gave his express, voluntary and informed consent to the taking of his blood sample by the police and therefore waived his rights under s. 8.

In describing s. 8 and consent, the Court of Appeal first stated:

> Section 8 of the Charter protects against unreasonable search or seizure. The act of taking a DNA sample from the accused without a warrant in this case would be an unauthorized search or seizure absent the accused's consent. The accused's consent to provide a DNA sample, if valid, constitutes a waiver of his section 8 rights.
>
> In order to be valid, a waiver of section 8 rights must be both informed and voluntary. [reference omitted, paras. 59-60]

In concluding that the trial judge correctly found the accused had the required general understanding of his jeopardy and an appreciation

of the consequences of deciding for or against exercising his s. 8 rights, Justice Lemaistre stated:

> In my view, the evidence supports the conclusion that the accused possessed the requisite informational foundation to relinquish his right to be free from an unreasonable seizure under section 8 of the Charter. He was told the DNA being collected would be compared against other DNA found at the crime scene. He was also told the DNA was being collected regarding the murder of the deceased and could be used as evidence in court. The date and location of the murder was on the DNA consent form. The accused was found to be intelligent and sober. [para. 68]

Thus, the accused provided informed and voluntary consent to provide a sample of his DNA

Admissibility of the DNA Evidence

Like the trial judge, the Court of Appeal found that even if their were *Charter* breaches the admission of the DNA evidence would not have brought the administration of justice into disrepute.

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

Complete case available at www.manitobacourts.mb.ca

POLICE NEED NOT ARTICULATE SPECIFIC OFFENCE AT TIME OF ARREST

R. v S. 2018 MBCA 106

A person called 911 reporting that he saw a young male on a bandstand stage in a public area, playing with a knife that had a 12-inch blade. The young male was cutting up hay bales with the knife and flipping it about. He was not brandishing it or threatening anyone. The caller stated that there were four other people on the stage but the young male did not appear to be interacting with them. The caller described the young male's location, appearance and clothing in detail, that he had a black backpack and a bicycle on the stage near him and that he had seen the same young male take air pellet handguns out of the same black backpack 48 hours earlier. No guns were seen, however, on the day the 911 call was made.

Two police officers responded to the 911 dispatch, which was designated as a high-priority call because the incident was in progress. The officers arrived on scene within 10 minutes of receiving the call and saw the 17-year-old accused. He matched the caller's description of the young male and was standing in the middle of the stage, close to a black backpack and a bicycle. No knife was in sight. An officer approached the accused and advised him the police were there because someone had called in to say that the accused had a large knife in his possession and he was seen with some firearms at an earlier date. The officer then advised the accused that he was under arrest for ***"weapons-related offences."***

The accused and the black backpack were searched. A folding pocket knife was located in his front right pant pocket and numerous knives, a collapsible baton, brass knuckles and two air pellet handguns were found in the black backpack.

ITEMS FOUND

As a consequence of the police search, the following items were located in the accused's possession:

Pocket

- Folding camo-coloured knife.

Knapsack

- 14-inch knife in a black sheath;
- Silver-coloured brass knuckles;
- Broken red and black folding knife;
- Three camo-folding knives;
- Black folding knife;
- 10-inch knife with a gut hook;
- Collapsible baton;
- Black CO2 BB gun with a CO2 cartridge and BBs;
- Black and silver BB pistol.

See R. v. S., 2018 MBQB 51

Manitoba Provincial Court

The officer testified that he believed he had reasonable grounds to arrest the accused because he clearly matched the description of the male given by the 911 caller and it was reported that he was in possession of a knife with a 12-inch blade. The officer stated that, in his experience, unless displayed for decorative purposes, the only use of such a knife was as a weapon, and that there had been mention of firearms being in a similar backpack on a previous date. He also said that the young male's actions on the stage had caused the witness enough concern to call the police.

The judge ruled that the accused's rights under ss. 8 or 9 of the *Charter* had not been breached when police searched his person and his backpack. In the judge's view, the warrantless search was both subjectively and objectively reasonable. Furthermore, even if she was wrong, the judge would have admitted the evidence under s. 24(2). The judge also concluded that the knife and other items in the backpack were weapons. The accused was convicted on two counts of carrying a concealed weapon and one count of unauthorized possession of a prohibited weapon. He was sentenced to 12 months probation and given a two-year weapons prohibition.

Manitoba Court of Queen's Bench

The accused challenged his conviction arguing that the trial judge erred in finding his ss. 8 and 9 *Charter* rights were not breached. The appeal judge concluded that although the officer did not have a precise offence in mind when he arrested the accused, he didn't need a specific offence in mind in order to have a subjective belief on reasonable grounds that an indictable offence had been committed. The officer understood that something not inherently a weapon could amount to one depending on the circumstances. Furthermore, based on the fact that police had received a very specific and detailed complaint from an identified witness and were able to corroborate much of the witness's information by their own observations, the judge held that there were objectively reasonable grounds to arrest. Finally, the appeal judge ruled that a peaceful object, or one with a dual purpose, could become a weapon as defined in s. 2 of the *Criminal Code*. Whether or not such an item was a weapon would depend on all of the circumstances.

BY THE BOOK:

Criminal Code

Arrest without warrant by peace officer

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

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

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

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

Manitoba Court of Appeal

The accused made a motion to further appeal his conviction. He submitted that the appeal judge erred by concluding that an officer does not need to have a specific offence in mind in order to have a subjective belief on reasonable grounds that an indictable offence has been committed. He argued that the police were required to articulate the precise offence for which they were arresting the accused since they were only entitled to arrest without warrant if they reasonably believed he was committing, or had committed, an indictable offence. Otherwise, he contended, there was no authority to arrest on reasonable grounds for a summary conviction offence. In this case, the officer only indicated that the accused was being arrested for a ***"weapons-related offence"*** and did

"[P]olice officers are not required to articulate a specific offence at the time they arrest a suspect. Rather, the authorities suggest that as long as the police officers articulate the substance of the offence that they have in mind to the suspect and those offences are hybrid or indictable offences, then the officers' arrest of the accused, without a warrant but on reasonable grounds, will be valid."

not specify a particular weapons offence. Since ***"weapons related offences"*** could include both dual and summary conviction only offences, an officer's powers differ depending on the specific offence. He also asserted that the officer did not objectively have reasonable grounds to arrest without a warrant. Thus, the evidence ought to have been excluded under s. 24(2) as a result of the *Charter* breaches. Finally, the accused argued that the trial judge erred in finding that the items he possessed were weapons within the meaning of s. 2 of the *Criminal Code*.

Justice Steel, hearing the accused's motion on behalf of the Court of Appeal, first noted that ***"when an accused challenges the validity of a warrantless arrest, the burden is on the Crown to show that the arrest was made in accordance with section 495(1) of the Code."*** In relying on this provision she stated:

> I agree that a police officer may arrest someone upon reasonable grounds only if the offence is an indictable offence. He or she cannot arrest on reasonable grounds for a summary conviction offence. However, it should be remembered that hybrid offences found in the Code are deemed to be indictable offences by virtue of section 34(1) of the Interpretation Act, RSC 1985, c I-21. …
>
> Case law interpreting this provision has concluded that, where an offence "may" be prosecuted by indictment or summary conviction, the Interpretation Act provision will apply and the offence must be deemed to be an indictable offence until the Crown otherwise elects. Thus, where an offence is a hybrid offence under the Code, the offence will be deemed, at the time of arrest, to be an indictable offence and the police officer may arrest on reasonable grounds.
>
> As well, the police officer does not need to identify or have a specific offence in mind at the time they arrest a suspect (as long as the possible offences that are being contemplated by the officers are hybrid or indictable offences). [references omitted, paras. 19-21]

Specific Offence Need Be Articulated?

As for the s. 29(2)(b) *Criminal Code* requirement that a person arrested be told of the reason for their arrest, the substance of the reason for the arrest is sufficient. The exact charge, chapter and verse is not required. Nor does s. 10(a) of the *Charter*, which requires a person detained or arrested be informed promptly of the reasons therefor, require the police to precisely identify the reason for arrest in the words of the *Criminal Code*. Justice Steel opined that ***"police officers are not required to articulate a specific offence at the time they arrest a suspect. Rather, the authorities suggest that as long as the police officers articulate the substance of the offence that they have in mind to the suspect and those offences are hybrid or indictable offences, then the officers' arrest of the accused, without a warrant but on reasonable grounds, will be valid."***

In this case, the police officer had a hybrid or indictable offence in mind when he arrested the accused for a ***"weapons related offence."*** The only weapons related offence under the *Criminal Code* that is purely a summary conviction offence is carrying a concealed weapon while attending a public meeting (s. 89(1)). All other weapon-related offences are either strictly indictable or a hybrid offence (deemed indictable). ***"There was, in this case, absolutely no evidence upon which it could be established or inferred that the [accused] was attending, or about to attend, a public meeting,"*** said Justice Steel. ***"[The officer] testified that he***

"Officers are not required to articulate a specific offence when arresting someone on reasonable grounds, as long as the substance of the offence is communicated to the accused and the offence contemplated by the officer falls into the category of a hybrid or indictable offence."

told the [accused] that the police had received a call about him playing on the stage with a large knife, and he was therefore being arrested for weapons-related offences. [The officer] made no mention of any concern or report regarding the [accused] attending any meeting with the knife, nor was he asked whether he had any such concerns or reports."

Justice Steel concluded that the circumstances, including the place and time the accused was in possession of the knife, its concealment, and the level of credible information available to police, constituted at least one, possibly more, criminal offences justifying an arrest for ***"weapons related offences"*** and the specific offence need not be told to the arrestee:

> Officers are not required to articulate a specific offence when arresting someone on reasonable grounds, as long as the substance of the offence is communicated to the accused and the offence contemplated by the officer falls into the category of a hybrid or indictable offence. [para. 45]

Reasonable Grounds?

Justice Steel concluded that the arresting officer possessed the requisite reasonable grounds to make the arrest. She agreed with both the trial judge and the appeal judge that the specific detailed information provided by the 911 caller, which was confirmed by the officer's observations, provided both subjective and objective grounds to believe an indictable offence had been committed:

> [The arresting officer's] testimony establishes that he subjectively believed that the yo[accused] in front of him was the person who the witness had seen playing with a 12-inch knife approximately 10 minutes earlier, and that he subjectively believed the knife to be a weapon, it having no other purpose on the streets of Winnipeg.
>
> There were also several pieces of evidence, taken together, which would lead a reasonable person, placed in the position of [the arresting officer], to conclude that there were reasonable grounds to arrest the [accused] for weapons-related offences. The witness who called 911 identified himself (i.e., this was not an anonymous tip), and gave specific, detailed information about a young male who was playing with a 12-inch knife. Based upon the fact that the witness made a 911 call to the police, it was clear that he had genuine concerns about this young male possessing or handling this large knife, despite describing him as "playing" with it. Within 10 minutes, almost all of the information provided by the witness was confirmed when the officers arrived—a young male, exactly matching the description given, was standing on the stage where the witness said he would be, near a bicycle and a black backpack, as reported. The only inconsistency was the absence of the 12-inch knife in the young male's hand. However, [the arresting officer] was aware that the witness had reported seeing the same young male, two days earlier in the same location, take air pellet handguns out of the same black backpack that was currently lying one to two feet away from the young male.
>
> Given that almost everything the witness reported in his 911 call was observed by [the arresting officer] to be accurate, there would be no reason for [the officer] or anyone else in his position to disbelieve the report that a young male had been playing with a 12-inch knife approximately 10 minutes earlier, or the witness's report that he had seen the same young male take other weapons (air pellet handguns) out of his black backpack a couple of days earlier. Based on all of this information, it is my view that it was objectively reasonable for [the officer] to believe that the young male

had been playing with a 12-inch knife, as reported, and to believe that the knife was probably inside the black backpack that was lying close to his feet. In all of the circumstances, [the officer] had no reason to doubt what the witness reported. Consequently, [the officer's] subjective belief was also objectively justified. [paras. 33-35]

Were the Knives Weapons?

Section 2 of the *Criminal Code* defines a "weapon" as meaning ***"any thing used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person ..."***. As to how this definition applied to a knife, Justice Steel stated:

> There are thus three ways in which a knife may be determined to be a weapon: (1) the knife is actually used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person; (2) the knife is designed to be used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person; or (3) the knife is intended to be used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person. [para. 38]

In this case, however, there was no evidence the accused actually used the knife as a weapon or that his knives were designed to be used as a weapon. ***"A knife is normally designed to be used for utilitarian, peaceful purposes and not as a weapon, notwithstanding the fact that it can, on occasion, be used effectively in fighting and notwithstanding that some types of knives have been recognised as having been 'designed to be used' as a weapon,"*** she said. Thus, the court needed to consider whether the knife was "intended for use" (a) in causing death or injury to any person or (b) for the purpose of threatening or intimidating any person. In doing so, a court will determine from the circumstances surrounding the possession of the items and whether there is evidence upon which a judge could infer that the accused intended to use the knives as weapons:

> The courts will consider all of the circumstances surrounding an accused's possession of a knife when attempting to determine whether or not he or she intended to use the knife as a weapon. Courts have relied upon many different circumstances to support the inference that the accused intended to use the knife as a weapon, including:
>
> - the type of knife and its usual or designed purpose;
> - what the accused was doing and where he or she was at the time he or she was seen or arrested;
> - where the knife was located;
> - whether the accused had other weapons with him or her; and
> - any explanations the accused offered for the knife's possession. [para. 41]

In upholding the accused' conviction, Justice Steel found the appeal judge recognized that the trial judge examined all the circumstances to determine the accused's intention and that the items seized were weapons:

"There are ... three ways in which a knife may be determined to be a weapon: (1) the knife is actually used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person; (2) the knife is designed to be used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person; or (3) the knife is intended to be used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person."

In this case, the trial judge considered the circumstances surrounding the [accused's] possession of the knives, as the law requires. She considered the number of knives and other items that could be weapons that were found concealed, the time of night, and the [accused's] presence in a public place with these items. Furthermore, the following evidence supports the trial judge's inference that the [accused] intended to use the knives as weapons:

- The [accused] was seen with a 12-inch "bowie" knife and was using it to cut up bales of hay on a bandstand stage, at night, in a public park in Winnipeg, where other people were present;
- The [accused] did not put the knife away when asked to do so by a friend;
- [The arresting officer] testified that a 12-inch "bowie" knife was not a hunting weapon, that the only use he could think of for it would be as a decoration on a wall, and that the only reason for someone to have this type of knife on the streets of Winnipeg would be to use it as a weapon;
- There were multiple knives in the [accused's] backpack, along with a prohibited weapon (brass knuckles), a collapsible baton, and two air pellet handguns with cartridges;
- The [accused] also had a small folding knife concealed in his pocket; and
- The [accused] offered no explanation at the trial for the possession and concealment of these items. [para. 43]

The accused's motion to appeal was dismissed as there was no arguable case of substance.

Complete case available at www.canlii.org

... continued from cover.

According to the report, with a **-3.1%** decrease in BC's violent crime rate this was the lowest violent crime rate since 1998.

BC CRIME RATE			
Crime Rate	2016	2017	% Change
Violent	11.4	11.0	-3.1%
Property	50.0	48.1	-3.6%
Other	15.9	15.0	-6.1%

The clearance rate, or number of offences cleared by police during the year as a percentage of the number of crimes reported to the police during that year, dropped by **-1.7%**.

BC CLEARANCE RATE			
Clearance Rate	2016	2017	% Change
Violent Crime	58.2%	57.1%	-2.0%
Property Crime	13.7%	13.4%	-1.8%
Other Crime	50.5%	50.2%	-0.5%

The **Crime Severity Index** (**CSI**) uses weights to assign higher values to more serous crimes and lower values to less serious high volume crimes based on actual sentences imposed by courts. A jurisdiction with a higher portion of more serious crimes will have a higher CSI value while a jurisdiction with a higher proportion of less serious crimes will have a lower CSI value.

BC saw a **+0.5%** jump in its Violent CSI, primary driven by an increase in homicides and sexual assaults. BC's 2017 Non-Violent CSI saw a **-6.6%** decrease over 2016 while BC's Youth CSI increased by **+2.0%** over the same time period.

CRIME SEVERITY INDEX (CSI)			
CSI	2016	2017	% Change
Violent CSI	75.1	75.5	0.5%
Non-Violent CSI	100.2	93.6	-6.6%
Youth CSI	36.7	37.4	2.0%
Overall CSI	93.7	88.9	-5.1%

Source: Ministry of Public Safety and Solicitor General Policing and Security Branch. September 2018.

UPCOMING EXTERNAL LEARNING OPPORTUNITIES

OSGOODE
OSGOODE HALL LAW SCHOOL
PROFESSIONAL DEVELOPMENT

16th National Symposium on Search and Seizure Law in Canada

December 6, 2018
In Person Click here.

12th National Symposium on Tech Crime and Electronic Evidence

January 25, 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.

12th National Symposium on Money Laundering and Financial Crimes

April 26, 2019
In Person or Webcast Click here.

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

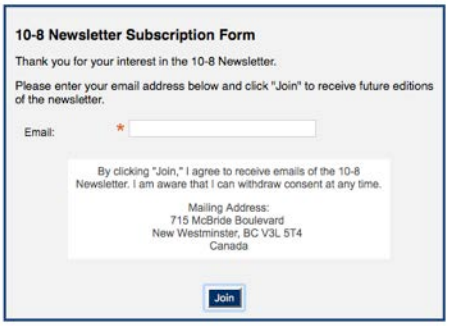
1-888-288-8036

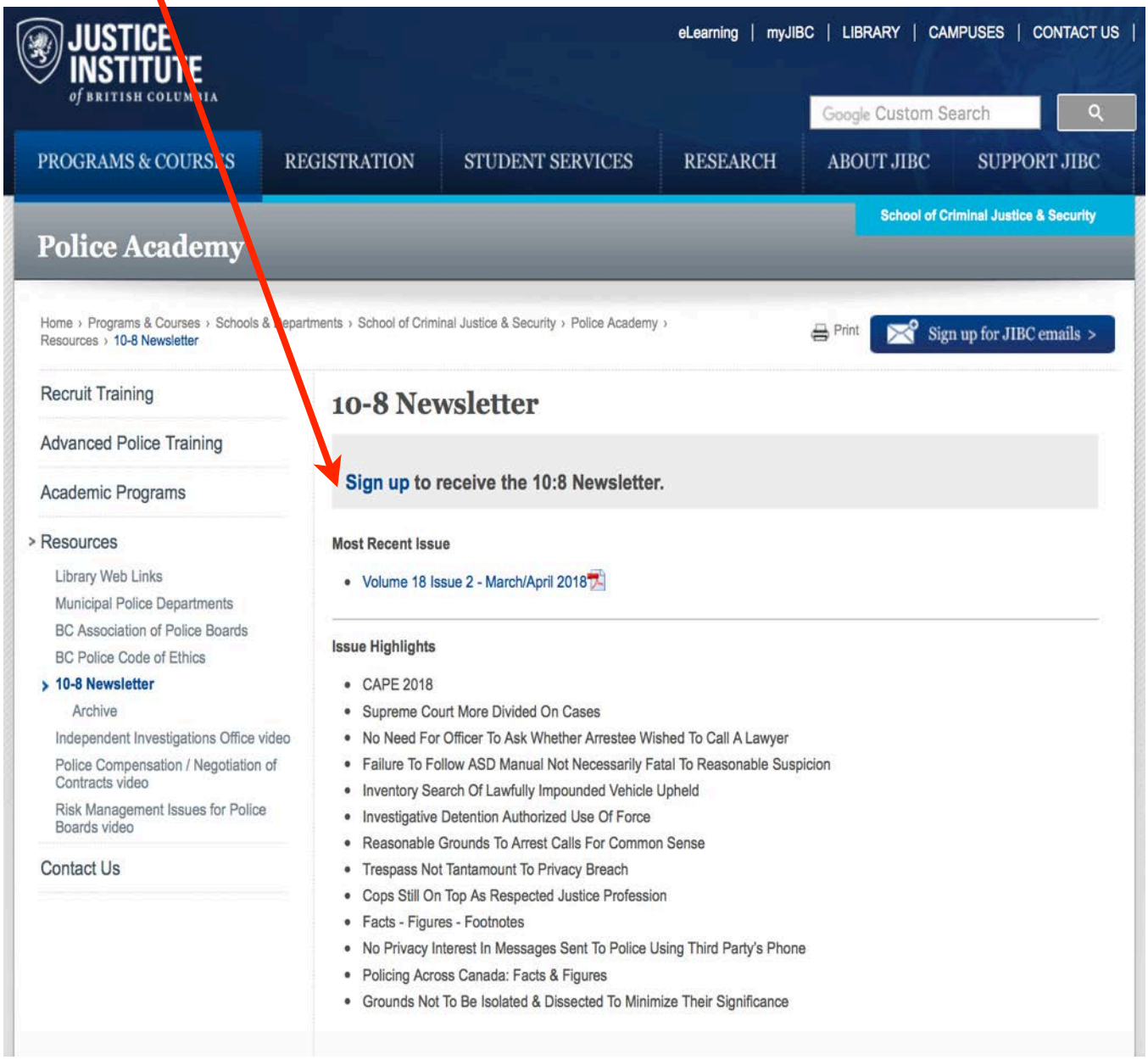
tema.ca

"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.





Be the one

on the front line
enforcing the law
keeping communities safe

BACHELOR OF LAW ENFORCEMENT STUDIES

BACHELOR OF EMERGENCY & SECURITY MANAGEMENT

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

JUSTICE INSTITUTE
of BRITISH COLUMBIA

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

November 8-December 13, 2018
Report Writing for Professional Investigators (INVE-1005)

November 19-December 21, 2018
Internet Open Source Investigations (INVE-1022)

January 16-February 13, 2019
Internet Open Source Investigations (INVE-1022)

UPCOMING COURSES IN NEW WESTMINSTER

November 19-21, 2018
Introduction to the Criminal Law (INVE-1001)

November 27-28, 2018
Introduction to Criminal Justice System (INVE-1000)

December 3-6, 2018
Conducting Internal Investigations (INVE-1011)

December 11, 2018
Tactical Communications (INVE-1012)

UPCOMING COURSES IN VICTORIA

November 5-9, 2018
Enhanced Investigative Interviewing (INVE-1004)

January 14-18, 2019
Enhanced Investigative Interviewing (INVE-1004)

February 11-15, 2019
Introduction to Investigative Skills and Processes (INVE-1003)

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