JUSTICE INSTITUTE of BRITISH COLUMBIA

IN SERVICE: 10-8

A PEER READ PUBLICATION

"Through a number of meetings with both frontline and more senior officers, it became apparent to me that many police officers are not confident in their knowledge and understanding of the lawful authorities granted to them or the proper scope of their police powers."

The Honourable Michael H. Tulloch

Report of the Independent Street Checks Review at p. 161.

TRAINING TARGETED IN INDEPENDENT REVIEW

Once again, recommendations are being made for improved police training. This time in the area of street checks and Ontario's *Collection of Identifying Information in Certain Circumstances - Prohibition and Duties Regulation* Of course, however, street checks and police powers related to investigative detention and arrest are important to all police officers, whether they work in Vancouver or Halifax, Whitehorse or Toronto. In his comprehensive Report on the Independent Street Checks Review, The Honourable Michael H. Tulloch, a justice of the Ontario Court of Appeal, makes several training recommendations. These topics include:

- The legal framework under which requests for information may be made, including the meaning of articulable cause, reasonable suspicion and investigative detention;
- How to take proper notes of the reasons for the interaction;
- Rights of individuals under the *Charter* and the *Human Rights Code*;
- The initiation of interactions with members of the public;
- The right of an individual not to provide information to a police officer, the limitations on this right and how to ensure that this right is respected;
- The right of an individual to discontinue an interaction with a police officer, the limitations on this right and how to avoid unlawfully psychologically detaining an individual; and
- Bias awareness, including recognizing and avoiding implicit bias, as well as how to avoid bias and discrimination.

Many of these topics have long been the goal of this newsletter. Training is critical to police efficacy and promoting public trust. As Sir Robert Peel once said long ago, *"the ability of the police to perform their duties is dependent upon public approval of police existence, actions, behaviour and the ability of the police to secure and maintain public respect."* Training will not only improve public confidence in the police but your confidence if performing your duties in difficult and often demanding circumstances! Be smart and stay safe!

Highlights In This Issue

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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 2019

- ☑ **General Investigative Skills** @ New West Campus: March 18-22
- ☑ **Field Trainers** @ New West Campus: March 20-22
- ☑ **Advanced Tactical Surveillance** @ Victoria Campus: March 25-29
- ☑ **Intoximeter Training** @ New West Campus: April 1-5
- ☑ **Advanced Tactical Surveillance** @ New West Campus: April 8-12
- ☑ **Forensic DNA** @ New West Campus: April 15-18
- ☑ **Pistol Instructor** @ New West Campus: April 23-27.

Advanced Police Training Contact Information

advancedpolicetraining@jibc.ca

604-528-5761

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.

A budgeting guide for local government.
Robert L. Bland.
Washington, DC: ICMA Press, 2014.
HJ 9147 B55 2014

Autism spectrum disorders.
edited by Eric Hollander, Randi Hagerman, & Deborah Fein.
Washington, DC: American Psychiatric Association Publishing, 2018.
RC 553 A88 A88 2018

Beyond anger: a guide for men: how to free yourself from the grip of anger and get more out of life.
Thomas J. Harbin, PhD.
Boston, MA: Da Capo Lifelong 2018.
BF 575 A5 H345 2018

Cannabis in the workplace.
John R. Gilmore.
Toronto, ON: Thomson Reuters, 2018.
HV 5822 C3 G55 2018

Cannabis law.
by Bruce A. MacFarlane, Q.C. , Robert J. Frater, Q.C., & Croft Michaelson.
Toronto, ON: Thomson Reuters, 2018.
HV 5822 C3 M33 2018

Driver distraction: a sociotechnical systems approach.
Katie J. Parnell, Neville A. Stanton, & Katherine L. Plant.
Boca Raton,FL: Taylor & Francis, 2019.
TL 152.3 P36 2019

Engaging men and boys in violence prevention.
Michael Flood.
New York, NY: Palgrave Macmillan, 2019.
HM 1116 F56 2019

Essentials of Canadian aboriginal law.
Kerry Wilkins, B.A., M.A., LL.B., LL.M.
Toronto, ON: Thomson Reuters, 2018.
KE 7709 W55 2018

Grief counseling and grief therapy: a handbook for the mental health practitioner.
J. William Worden.
New York, NY: Springer Publishing Company, 2018.
RC 455.4 L67 W67 2018

Handbook of training evaluation and measurement methods.
Jack J. Phillips & Patricia Pulliam Phillips.
Abingdon, Oxon, New York, NY: Routledge, 2016.
HF 5549.5 T7 P43 2016

How to lie with charts.
Gerald Everett Jones.
Santa Monica, CA: LaPuerta, 2018.
HF 5718.22 J66 2018

Human resources guide to workplace investigations.
Janice Rubin & Christine M. Thomlinson.
Toronto, ON: Canada Law Book, 2018.
HF 5549.5 E43 R83 2018

Messing with the enemy: surviving in a social media world of hackers, terrorists, Russians, and fake news.
Clint Watts.
New York, NY: Harper, 2018.
HM 742 W399 2018

The jury under fire: myth, controversy, and reform.
Brian H. Bornstein & Edie Greene.
New York, NY: Oxford University Press, 2017.
KF 8972 B67 2017

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

TRANSMISSION DATA RECORDER ASSISTANCE ORDER AUTHORIZED SUBSCRIBER INFO

Re: Section 487.02 of the Criminal Code, 2019 NLCA 6

A police officer involved in a serious drug investigation swore an Information to Obtain (ITO) a Transmission Data Recorder (TDR) warrant under s. 492.2(1) of the *Criminal Code*. A TDR warrant authorizes the police to obtain transmission data when there is a reasonable suspicion, that ***"an offence has been or will be committed […] and that transmission data will assist in the investigation of the offence"***. A TDR captures the transmission data in "real time" so that suspected crime can be investigated as it is being committed or soon thereafter. In this case, the police were seeking information respecting unknown telephone communications with an identified mobile phone number. Since a TDR warrant would only capture the numerical digits of the as yet unknown telephone numbers which were communicating with the identified mobile phone number and not the names and addresses (subscriber information) associated with the unknown telephone numbers, the officer also swore an ITO to obtain an assistance order under s. 487.02. The assistance order required telecommunications service providers (TSPs) to give the police the subscriber information associated with the telephone numbers that were communicating with the identified mobile phone once those telephone numbers were captured.

Newfoundland & Labrador Provincial Court

Although the judge granted the TDR warrant, he refused to grant the assistance order because he concluded that he did not have jurisdiction to do so. In his view, it was outside the scope of s. 487.02 where the purpose of the assistance order was to require a TSP to provide subscriber information associated with the raw telephone numbers disclosed through the TDR.

BY THE BOOK:

s. 492.2 *Criminal Code*

Warrant for transmission data recorder

s. 492.2 (1) A justice or judge who is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed against this or any other Act of Parliament and that transmission data will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain the transmission data by means of a transmission data recorder.

Scope of warrant

(2) The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the transmission data recorder, including covertly.

Limitation

(3) No warrant shall be issued under this section for the purpose of obtaining tracking data. [...]

Newfoundland and Labrador Supreme Court

The Crown applied for *certiorari* to quash the provincial court judge's decision and *mandamus* to compel him (or another judge) to reconsider the application on a proper jurisdictional basis. The Supreme Court judge, however, denied the Crown's application. ***"The powers to police granted under s. 492.2 of the Code are limited to obtaining that which falls within the definition of 'transmission data',"*** said the Supreme Court judge. ***"Subscriber information is not transmission data."*** He refused to expand the interpretation of the definition "transmission data" to allow the police access to subscriber information through the use of an assistance order. In his view, any assistance order could only be used for the purpose of assisting in fulfilling the objective of obtaining transmission data as defined under s. 492.2, and not for the purpose of obtaining subscriber information. The Crown's application for certiorari and mandamus was dismissed.

Newfoundland & Labrador Court of Appeal

The Crown argued that the Supreme Court judge erred in finding the assistance order sought in this case was not reasonably required to give effect to the issued TDR warrant. In the Crown's opinion, an assistance order was available to require TSPs to provide the subscriber information associated with particular telephone numbers captured by the lawful use of a TDR under a s. 492.2 warrant. Subscriber information from TSPs is necessary ***"to give effect to"*** issued TDR warrants. Amicus curiae, appointed to oppose the Crown's position, submitted that interpreting transmission data to include subscriber information would broaden the scope of a s. 492.2 warrant and go beyond what Parliament intended.

Assistance Order & Subscriber Information

Justice Hoegg, speaking for the majority, concluded that the modern principle of statutory interpretation supported the ***"view that section 487.02 assistance orders for subscriber information are 'reasonably required to give effect to' section 492.2 TDR warrants and are therefore available to require [TSPs] to provide the subscriber information associated with lawfully captured telephone numbers pursuant to the lawful execution of a section 492.2 TDR warrant."*** In so interpreting the *Criminal Code* provisions, Justice Hoegg recognized that legislated police powers to investigate crime needed to be balanced against the privacy interests of individuals. She stated:

> In the result, it is my view that Parliament's purpose of providing police with the power to fight crime with real time information by enacting the 2014 amendments to the Code is realized by enabling police to obtain assistance orders to require [TSPs] to reveal the subscriber information associated with the lawfully captured telephone numbers through the use of a TDR warrant, so as to give meaning to the captured data and thereby give effect to the purpose of obtaining a TDR warrant.
>
> Finally, to the extent that the privacy rights of callers can be said to be affected by this interpretation, I say that Parliament has considered this point, and "rationally" determined, that its objective in enacting section 492.2 is substantially important to society's well-being and sufficiently important to warrant limiting, "proportionally" certain rights and freedoms. [reference omitted, paras. 60-61]

The majority ruled that the provincial court had jurisdiction to grant the assistance order requiring TSPs to reveal the subscriber information associated with telephone numbers lawfully captured under the lawful execution of a TDR warrant. The matter was remitted back to provincial court for a determination of whether an assistance order was appropriate on the specific facts of this case.

Another View

Justice Green, in dissent, disagreed with the majority that the phrase ***"to give effect to"*** in s. 487.02 relating to assistance orders authorized the obtaining of subscriber information as applied to the operation of a TDR warrant. In Justice Green's view, an interpretation that facilitated the police investigation to which the warrant related would enable information to be obtained that went beyond the scope of the information that was available under the warrant itself. He noted that an assistance order was not a stand-alone provision authorizing the obtaining of information. Rather, an assistance order is dependent upon another authorization, order or warrant and is designed to ***"assist"***. An assistance order cannot, by its

"[S]ection 487.02 assistance orders for subscriber information are 'reasonably required to give effect to' section 492.2 TDR warrants and are therefore available to require [TSPs] to provide the subscriber information associated with lawfully captured telephone numbers pursuant to the lawful execution of a section 492.2 TDR warrant."

operation, extend the authorization of the warrant. If information is not within the scope of the TDR warrant, then an assistance order cannot be used to obtain it. Otherwise, the reach of the TDR warrant would be extended beyond that which it authorized the police to collect.

"The logical result flowing from the statutory structural relationship of the assistance order to the TDR [warrant], together with the ordinary dictionary meaning of the key words in section 487.02 and their use in other contexts, points to the scope of the assistance order being limited to making the operationalization of the warrant effective'," said Justice Green. ***"It does not extend to providing assistance to the police investigation generally or to make it more meaningful or efficacious outside of the provision of the information allowed to be accessed by the underlying warrant."*** Justice Green would dismiss the Crown appeal and uphold the provincial court judge's refusal to issue an assistance order to provide customer name and address information in conjunction with the issuance of a TDR warrant.

Complete case available at www.canlii.org

PHOTOS NEED NOT BE AUTHENTICATED BY PHOTOGRAPHER

R. v. B.S., 2019 ONCA 72

Ontario's highest court has found that photographs do not need to be authenticated by the person taking them, but may be authenticated by a person appearing in them. In this case, the complainant of sexual offences against the accused was able to identify herself and the accused in photographs. She was also able to explain the interactions depicted in the photos, the locations where the photos were taken and provide a reasoned explanation for the approximate date range for the photos. She was also able to explain her belief that her sister was the likely photographer. As a result, the trial judge did not err in receiving the photos into evidence.

RECOGNITION EVIDENCE NOT INHERENTLY UNRELIABLE LIKE STRANGER EYEWITNESS TESTIMONY

R. v. Field, 2018 BCCA 253

A hotel clerk was robbed by two masked men armed with a firearm. Shortly after, two individuals attempted to car-jack a vehicle. Following the robbery, police investigators circulated an email containing still photos taken from inside the taxi of the individuals who were thought to have committed the offences. One of the emails was received by a probation officer who had dealt with the accused. She subsequently testified that she recognized the accused as one of the individuals in the photos. She had met with him about five times in the year the robbery took place.

The probation officer forwarded the photos to another probation officer who had also dealt with the accused. This second probation officer also identified the accused from the still photos. She first met with the accused in the year of the robbery and had subsequently met with him between five to 45 minutes on about five occasions. The accused was charged with robbery, wearing a mask to commit an indictable offence and the attempted theft of the vehicle.

British Columbia Provincial Court

Both the taxi driver and the victim of the car-jacking incident provided in-dock identification of the accused. The judge also admitted the identification evidence with respect to the probation officers. The first probation officer said she was ***"extremely certain"*** that she recognized the accused from the photos while the second probation officer was ***"very certain"*** of her identification. Both probation officers identified particular characteristics and details about the accused's face and its shape to explain why they were so certain of their identification.

> "Experience has shown that eyewitness evidence proffered by a stranger to the accused is the least reliable identification evidence. It has been described as 'inherently unreliable'."

The judge found the eyewitness identification by the two individuals who saw the perpetrator of the crime at the time of the offence fraught with frailty and dangerous to rely on. The judge described the best still photo of the individual in the taxi as ***"not excellent"***, but nevertheless concluded there were ***"striking similarities between the photo and [the accused]."*** However, he was reluctant to rely on his own assessment and, instead, concluded the two probation officers would be in a better position to make the assessment as they had dealt with the accused in the year when the offence occurred.

In the judge's view, the quality of the photos was not too poor to permit reliable identification. He admitted the recognition evidence of both probation officers. He held that ***"both witnesses have had the appropriate degree of familiarity with the accused due to the nature of their relationship and [their] contact with the accused to assist me."*** Their evidence satisfied him beyond a reasonable doubt that the person sitting in the taxi was the accused. That conclusion, together with other evidence, resulted in the accused's conviction for robbery and being masked with intent to commit an indictable offence. On the other hand, the judge was not satisfied that the identification in relation to the car-jacking was sufficient to establish guilt beyond a reasonable doubt and the accused was acquitted of that charge.

British Columbia Court of Appeal

The accused challenged, among other things, the admissibility of the recognition evidence because the trial judge failed to consider the quality of the photos and improperly considered the weight to be placed on the recognition evidence in light of this deficiency.

Identification Evidence

Justice Hunter, speaking for the Court of Appeal, first recognized that ***"it is well known that identification evidence can be unreliable."*** However, ***"the degree of reliability of identification evidence is a function of the particular circumstances in which it is tendered."*** The Appeal Court went on to explain different types of identification evidence:

> There are at least three distinct types of identification evidence that may be tendered, each with its own reliability characteristics:
>
> (i) **Eyewitness evidence by a stranger:** Experience has shown that eyewitness evidence proffered by a stranger to the accused is the least reliable identification evidence. It has been described as "inherently unreliable". In light of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection.
>
> (ii) **Identification by the trier of fact through photographic evidence:** On occasion, the trier of fact will have the benefit of photographic evidence taken at or sufficiently near the scene of the crime to have probative value in determining the identity of the perpetrator. As long as the photographic evidence is of sufficient clarity and quality to permit identification of the person shown in the photo, the evidence can be admitted and weighed with other evidence by the trier of fact.
>
> (iii) **Recognition evidence:** The Crown may also choose to tender opinion evidence from a person or persons who can identify the individual shown in a photo or video. This evidence is admissible if the witness had a prior acquaintance with the accused and is therefore in a better position than the trier of fact to conclude whether the individual in the photo is the accused. [emphasis added, references omitted, para. 23]

"While it is important to scrutinize carefully any form of identification evidence, recognition evidence does not carry with it the inherent unreliability of eyewitness testimony of a stranger."

Admissibility

When recognition evidence based on photographic or video evidence is tendered, a trial judge must conduct a voir dire to determine its admissibility. In doing so, the trial judge must determine ***"whether the recognition witnesses are in a better position than the trial judge as a result of their prior acquaintance with the accused to determine whether the person depicted in the photo or video is the accused. Provided the trial judge is satisfied that the image in the photo or video is capable of identification, issues as to the quality of the photographic or video evidence will go to the weight of the evidence. Once admitted, the [judge] will need to consider the recognition evidence along with the evidence as a whole to determine whether the Crown has established identification beyond a reasonable doubt. "***

In this case, the Appeal Court found the trial judge did not err in finding the recognition evidence admissible on the basis of the quality of the photos. "***The question for the trial judge was whether the prior acquaintance of the two probation officers with [the accused] was such that they were in a better position than the judge to assess whether the photos were that of [the accused],***" said Justice Hunter. ***"The trial judge considered the circumstances of the [probation officers'] interactions with [the accused] and, importantly, the time frame of those interactions, in concluding that their evidence would be helpful to him."***

Weight

The accused's submission that the trial judge treated the certainty of the probation officers identification evidence to negate concerns with the source of that identification, was rejected. ***"While it is important to scrutinize carefully any form of identification evidence, recognition evidence does not carry with it the inherent unreliability of eyewitness testimony of a stranger,"*** said Justice Hunter. Here, the judge properly considered the quality of the photos in relying on the recognition evidence of the probation officers who were well acquainted with the accused, particularly in the year the photos were taken. The trial judge did not err in weighing the recognition evidence.

The accused's appeal was dismissed.

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

GOOD FAITH FAVOURS ADMISSION OF DRUG EVIDENCE UNDER s. 24(2)

R. v. Wawrykiewicz, 2019 ONCA 21

Police were requested by hotel management to enter a hotel room occupied by the accused after complaints were made about excessive noise and the odour of marijuana reported near the room. The officers went to the room, knocked and identified themselves. They did not have a warrant. After there was no response, they opened the lock with a key. When the accused released the safety latch and stepped back, the police entered the room. In plain view in the hotel bathroom, the police observed evidence of drug possession. They then obtained a warrant and seized cocaine and crack cocaine in trafficking quantities. The police also executed a search warrant for the accused's car and seized more crack cocaine. The police also seized two cell phones incident to the accused's arrest and examined them after obtaining a search warrant. The phone searches led the police to obtain two drug related search warrants about two

months later at two addresses associated with the accused. During those searches, the police seized significant quantities of cocaine, heroin, marijuana, drug trafficking paraphernalia and drug proceeds.

Ontario Superior Court of Justice

The accused sought the exclusion of the cell phones and the other evidence seized. He argued that he was subject to an unreasonable search when the police unlawfully entered his hotel room. Since the information required for the subsequent search warrants came from the seized cell phones, those warranted searches resulted in s. 8 *Charter* breaches and that evidence should be excluded as well.

The judge agreed that the entry into the hotel room by the police was unlawful and therefore the unreasonable hotel room search tainted the subsequent searches. However, the judge ruled all of the evidence admissible under s. 24(2). In his view, the police officers were acting in good faith when they illegally entered the hotel room. As well, the circumstances (a party reveller smoking marihuana and causing a ruckus in a hotel room) lowered the accused's expectation of privacy, and the evidence seized was reliable and crucial to the prosecution of trafficking charges involving very serious quantities of drugs. The accused was convicted of all charges and sentenced to 10 years in prison less credit for pre-sentence custody and strict house arrest bail conditions.

Ontario Court of Appeal

The accused contended, in part, that the trial judge erred in admitting the evidence under s. 24(2). In his view, the trial judge incorrectly concluded that the absence of bad faith was the equivalent of good faith.

Good Faith

Here, the trial judge accepted the police officer's evidence that he was asked by the hotel manager to evict the occupants of the hotel room despite the manager not remembering doing so. And the trial judge was also entitled to accept the officer's evidence that he believed that the hotel manager's request gave him the lawful authority to enter the hotel room.

"Nor did the trial judge equate the absence of bad faith with good faith, or base his good faith findings solely on the subjective belief of the officers that they were acting lawfully," said the Court of Appeal. ***"It is clear that the trial judge considered the reasonableness of the officers' beliefs before making his good faith findings. He noted that there was a dearth of case law regarding the statutory authority to enter a hotel room before finding that [the officer] believed he was acting under the authority of [Ontario's Trespass to Property Act] and was attempting to comply with its requirements. He then assessed the reasonableness of the belief by other officers that the [accused] had implicitly invited them to enter the hotel room."***

The accused's appeal against his conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Additional facts taken from 2017 ONSC 569.

STATEMENT ADMITTED DESPITE SERIOUS s. 10(b) CHARTER BREACH

R. v. Storry, 2018 BCCA 483

The accused, who was on parole for murder, and another man were arrested following the violent attack of a man who lived in the same rooming house as the accused. The victim had been repeatedly struck with two bats and sustained serious injuries to his head and body, including two broken arms. On arrest, the accused was advised of his s. 10(b) right to counsel and he was cautioned about speaking to police. The accused advised the officer that he understood his rights and that he wished to speak to his wife who was a lawyer. On the way to the police station, the

accused repeatedly asked to speak to his wife. He maintained she was a lawyer and said that, if she could not act as his lawyer, she would help him find a criminal lawyer to assist him. The officer said he would help the accused speak with a lawyer but advised him that he could only speak with his wife if she was a practicing lawyer.

At the police station, the officer called the accused's wife. She confirmed that she had completed law school but she was not admitted as a member of any law society and therefore was not a practicing lawyer. The officer claimed he then arranged for, at the accused's request, contact with a lawyer from the Legal Aid phone line. The accused spoke with the lawyer by phone in a private interview room for about 30 minutes. At the end of the telephone conversation, the officer asked the accused if he had talked to a lawyer and if he had understood the lawyer's advice, to which the accused replied yes to both questions.

A detective interviewed the accused the following morning. At the beginning of the interview, the accused confirmed that he had spoken to a lawyer. The detective pointed out that the interview was being audio and video recorded, to which the accused replied, ***"Yeah the lawyer told me about this and he told me that I shouldn't have nothing to say about fuck all … because uh everything that's said … can be used against me in a court of law."*** The accused then volunteered his account of what had transpired, but later claimed that it was false because he figured his parole would be revoked no matter what. And he wanted to ensure that his co-accused remained out of custody to care for the accused's wife. The accused was jointly charged with attempted murder and aggravated assault.

British Columbia Supreme Court

There was no dispute that the accused's statement to the detective was a false account of the circumstances of the alleged offence. The Crown nevertheless wanted this false statement admitted for the purposes of cross-examining the accused if he testified. The accused, however, did not want his statement admitted. First, it was false and therefore unreliable. Second, he argued that his s. 10(b) right to counsel had been breached. Although he spoke with a lawyer and was told to remain silent, he claimed that he wanted to have his wife make arrangements for a specific criminal lawyer. He submitted he was prevented from doing so because the police did not permit him to speak with his wife. He said that he did not ask to speak to a legal aid lawyer but was handed the phone after being told by the arresting officer that he had to talk to a lawyer. He believed the police had arranged for the lawyer he spoke to.

The *voir dire* judge concluded that the police violated the accused's s. 10(b) rights. In the judge's view, the accused was entitled to request counsel through a person other than a lawyer. Here, there was no ***"reason to believe that the police investigation would be compromised if they had waited for [the accused] to arrange counsel through his wife."*** But the judge nevertheless admitted the statement under s. 24(2) because its admission would not bring the administration of justice into disrepute. Although the breach was serious, the accused did speak to a lawyer, understood the advice he received and never expressed any dissatisfaction with that advice.

While the Crown did not tender the accused's statement as part of its case, it was used at trial to cross-examination him. The accused was subsequently convicted of aggravated assault.

British Columbia Court of Appeal

The accused submitted, in part, that the *voir dire* judge erred by not excluding his false statement as evidence under s. 24(2). In his opinion, this error may have affected the trial verdict.

s. 24(2) Charter

The Court of Appeal first considered the s. 10(b) right and what it required the police to do:

> A detainee who chooses to exercise their right to counsel is entitled to be given a reasonable opportunity to contact counsel of their choice or to contact a third party in order to facilitate that contact, before he or she is questioned.
>
> However, the right to counsel is not absolute. The detainee also has an obligation to act reasonably in exercising their right to counsel.
>
> …
>
> The police are not required to monitor the quality of the advice given, but may assume that the detainee is satisfied with the exercised right to counsel and commence an investigative interview unless the detainee discloses that they are not satisfied with the advice they received.
>
> The purpose of the Legal Aid line is to provide detainees with immediate access to legal advice so that their interests against self-incrimination are protected and they are treated fairly in the criminal process. The ability of a detainee to obtain legal advice from duty counsel, as an alternative to speaking with counsel of choice, will mitigate the seriousness of a s. 10(b) breach where: (i) the detainee understands the advice; (ii) is silent with respect to any concerns about the adequacy of the advice; and (iii) the record is silent on whether there was any reasonable likelihood of contacting counsel of choice at the time. [references omitted, paras. 55-58]

Here, the trial judge found the breach of the accused's s. 10(b) right to be serious. However, he weighed each of the s. 24(2) admissibility factors and concluded the serious breach was mitigated by the accused's ability to obtain adequate legal advice from duty counsel, which he understood but chose to ignore. ***"I agree with the voir dire judge that [the accused's] evidence about what he might or might not have done, had he been given the opportunity to speak with counsel of choice, was entirely speculative,"*** said Justice Smith, writing the Appeal Court's opinion.

The accused's appeal was dismissed.

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

'SYSTEMIC' BREACHES AGGRAVATE SERIOUSNESS OF POLICE CONDUCT

R. v. Ippak, 2018 NUCA 3

The police received an anonymous tip that the accused was onboard an incoming plane from Montreal to Sanikiluaq, Nunavut, and that he was carrying "at least 10-15 mickeys of alcohol". Alcohol is prohibited in the dry community of Sanikiluaq, a small hamlet. Two police officers drove to the airport and approached the accused after he deplaned. They took him into a private room, advised him he was under investigation for transporting contraband liquor and gave him the standard police warning that he did not need to say anything to police. He was not, however, advised of his right to counsel under s. 10(b).

The accused said he was not carrying liquor and told police they could search his suitcase. An officer took the accused to retrieve his bag from the airplane baggage cart and they then went to a police vehicle outside. The officer took out a Consent To Search Form and explained it to the accused. The accused signed the form and his bag was searched. As soon as the officer opened the bag, he smelled a strong aroma of marihuana. The accused immediately asked for the search to stop, but he was then arrested for possessing marihuana. The accused was advised of his 10(b) right to counsel and a search of his bag revealed 3.7 lbs. of raw marihuana. He was charged with possessing marihuana for the purpose of trafficking.

Nunavut Court of Justice

The police acknowledged that the anonymous call provided insufficient grounds to obtain a search warrant or arrest the accused, since such tips were common and frequently inaccurate. As for why he didn't provide the accused with his s. 10(b) right to counsel, the officer stated, ***"it was just a routine – routine check at the airport."*** The officer also

"This police investigation was one in which these officers knowingly contravened the rights of the [accused], and that they do so regularly to other individuals – a fact which makes this conduct blatant and extremely serious."

testified that, even if the accused had not offered to have his bag searched, the police procedure in the circumstances would have been to request that the accused let the police search his bag. If individuals said "no" to signing the Consent To Search Form, then the police would take no further action. If consent was given, searches and sometimes seizures, took place. The evidence was that the police in Sanikiluaq frequently attended the airport to detain and ask individuals for permission to search their bags without reasonable and probable grounds for a search warrant or an arrest, and without instructing them of their right to counsel.

The Crown conceded that the police breached the accused's ss. 8, 9, and 10 *Charter* rights. However, the Crown argued that the breaches were not serious and the evidence seized was critical to the case and therefore should be admissible. The judge agreed, and the evidence was admitted. The accused was convicted of trafficking and sentenced to an 18-month conditional sentence.

Nunavut Court of Appeal

The accused argued that the trial judge erred in finding the evidence admissible. The Court of Appeal agreed, holding the proper factors under s. 24(2) were not considered in admitting the evidence. As such, a new analysis was conducted and the evidence was excluded.

Seriousness of Police Conduct

The *Charter* breaches were serious and included wilful disregard for the accused's rights. The police did not have reasonable grounds to arrest or search the accused without a warrant. Nor did the police even have a reasonable suspicion that the accused had done anything unlawful. ***"Not only were the various tips received by Sanikiluaq police relatively unreliable, but the anonymous and unconfirmed tip that lead to this investigation was not spurred by anything more than 'routine' police procedure because alcohol was viewed as 'one of the most important things to investigate in Nunavut',"*** said the majority. ***"That is, it was solely driven by the modus operandi of the RCMP in the small hamlet of Sanikiluaq."*** Not only did the officer testify that subjectively he did not believe the accused was carrying alcohol, objectively there was no reasonable grounds on the totality of the circumstances. ***"This police investigation was one in which these officers knowingly contravened the rights of the [accused], and that they do so regularly to other individuals – a fact which makes this conduct blatant and extremely serious,"*** said the majority. ***"On a more general level, the fact that police want to investigate an anonymous tip, does not automatically and legally mean the police can and should detain an individual. Nor does it give police a carte blanche on the manner in which they do so. Treating such detainees with civility, while knowingly breaching their rights, does not lessen the seriousness of the breaches or equate to good faith or fairness."***

Here, there was no legal uncertainly and the officer knew he did not have grounds to detain and search the accused. The police ***"set out to the airport to deliberately breach the Charter, as they knew they had no reasonable grounds for detention, arrest or a search."*** In sum, ***"the officers unconstitutionally detained, questioned and searched the [accused's] personal luggage, while at the same time failing to inform him of the right to retain and instruct counsel which in all likelihood, would have resulted in him being advised of the unlawful nature of the police conduct and affirmed that he need not offer or consent to any illegal search."*** Moreover, the breaches were systemic:

> Aggravating the seriousness of the breaches in this case, and weighing further in favour of exclusion, is that this matter was not the result

"Aggravating the seriousness of the breaches in this case, and weighing further in favour of exclusion, is that this matter was not the result of an isolated incident. The systemic and institutional nature of the approach used by the police in investigating anonymous tips in Sanikiluaq, 'is serious, and not lightly to be condoned'."

> of an isolated incident. The systemic and institutional nature of the approach used by the police in investigating anonymous tips in Sanikiluaq, "is serious, and not lightly to be condoned." That this occurs in a small community in Nunavut which may have its own particular problems with alcohol and drugs is largely, if not wholly, irrelevant in the face of blatant Charter breaches by those in law enforcement who are empowered and trained to follow proper investigative procedures and respect the Charter rights of those they detain. [para. 39]

Impact on the Accused

The unlawful detention and search impacted the accused's liberty and privacy interests, and the s. 10(b) breach impacted his right to make a meaningful and informed choice about whether to speak to police and consent to a search of his baggage:

> Although arguably the [accused's] detention in this matter was relatively brief and his expectation of privacy somewhat lowered in his checked baggage on a plane or at an airport…, however, being stopped and subjected to a search by police without justification impacts on an individual's "rightful expectation of liberty and privacy in a way that is much more than trivial. … A person in the [accused's] position has every expectation of being left alone" unless lawful grounds exist for detention and search. The breaches in this matter were therefore a significant intrusion into the [accused's] ss. 8 and 9 Charter-protected interests.
>
> The breach of the [accused's] s. 10(b) rights is also significant. The wilful decision not to inform or provide the [accused] with his right to counsel was not of a mere technical nature, nor was it a breach that was unlikely to have impacted the [accused's] understanding of his situation or his rights. Rather, the nature of the breach had a significant impact on the [accused's] right to receive meaningful legal advice about his right to silence and his right not to consent to a search of his baggage. … [The accused's] legal vulnerability in this matter was significant, so too was his need for legal assistance. The actions of the police officers were a significant intrusion on the [accused's] Charter-protected interests weighing in favour of exclusion. [paras. 46-47]

Society's Interest

The drugs seized from the accused's luggage were highly reliable evidence and essential to the Crown's case for the serious offence of trafficking. This favoured admission but did not outbalance the other factors. ***"To condone the serious nature of the Charter breaches in this matter which resulted in a significant intrusion on the [accused's] rights, would undermine society's confidence in the justice system and damage the long-term reputation of the administration of justice,"*** said the majority. ***"While the need for disassociation from police misconduct will not always trump the truth-seeking function of the criminal courts, the seriousness of the offence and the reliability of the impugned evidence do not outweigh the factors warranting exclusion in this matter."***

A Second Opinion

Justice Berger, writing his own decision, agreed that the evidence should have been excluded. He did, however, also consider Inuit law and culture in assessing the s. 24(2) factors. ***"Nunavut and Sanikiluaq are not Charter free zones,"*** he said. ***"The protections that are afforded to all Canadian citizens apply with full force and effect throughout the country."***

First, he found the police conduct to be serious:

"Nunavut and Sanikiluaq are not Charter free zones. The protections that are afforded to all Canadian citizens apply with full force and effect throughout the country."

> The actions of the police in the case at bar were the product of a systemic practice whereby individual members of the community were improperly detained when they arrived at the airport. Such practices, of course, have implications for the [accused], but also for the Inuit community at large. Police action on the facts of this case cannot be construed as equivalent to the interventions of elders with social authority within the Inuit community. It follows that the Canadian state actor, engaged in the enforcement of Canadian law cannot be said to be entitled to the same deference in the context of traditional Inuit maligait or tirigusuusiit.
>
> The investigative detention of the [accused] was both unjustifiable and arbitrary. [The officer] acknowledged from the outset and throughout his dealings with the [accused] that he "had no reasons to suspect anything.... It was just a routine call... I didn't even believe that he had anything on his person at that time." Moreover, he failed to inform [the accused] of his right to counsel. [paras. 95-96]

Second, Justice Berger concluded the impact of the police conduct on the Charter-protected interests of the accused, when considered along with Inuit law, was profound:

> While the Charter provides common protection for all Canadians, there may be space within the aboriginal law perspective to consider the socio-cultural impact on the [accused] by breaching his rights. My imperfect lens, focused as it is on the limited reading that I have done of the cited publications on aboriginal law, leads me to conclude that under Inuit law a wrongdoer such as the [accused] would face much lower jeopardy and would almost certainly be reintegrated into the community as long as he welcomed counselling from elders and changed his behaviour. Instead, the [accused] in this case whose recorded conviction will follow him for the rest of his life, was sentenced to a form of imprisonment (albeit in his own home). The breach of the [accused's] Charter-protected interests resulted in a significant differential negative effect on him flowing directly from the actions of officers of the State. The unlawful detention and search in this matter impacted the [accused's] liberty and privacy interests. The s 10(b) breach further infringed the [accused's] right to make a meaningful and informed choice about whether to speak to police and consent to a search of his baggage. Importantly, the recording of a conviction and the punishment that was imposed under Canadian law, operates directly in conflict with the objective of Inuit law to reintegrate the individual and preserve the community. [para. 99]

As for society's interest in adjudicating the matter on its merits, Justice Berger had this to say:

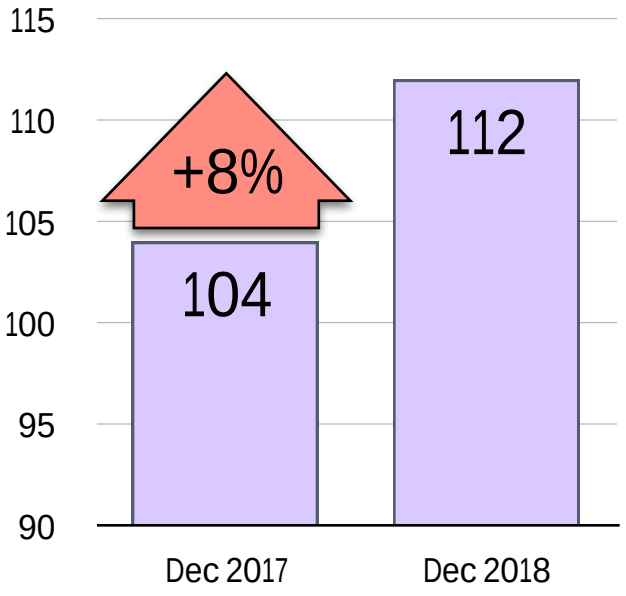
> Inuit law's approach to evidence of wrongdoing relies almost entirely on the cleansing power of the offender admitting his wrongdoing. Reintegration into the community is paramount. The admission of the marihuana – the physical evidence of crime – is not a matter of concern (apart from forfeiture) to the Inuit legal system.
>
> The [accused] was in breach of his community's admonition to ban alcohol and mood-altering drugs from Sanikiluaq. Both Canadian law and Inuit law recognize his transgression; they differ, however, in addressing it. Canadian society's preoccupation with adjudication (read: conviction and sentencing) does not accord with Inuit culture's principal focus on reintegration of the individual and preservation of the community.
>
> Yet when Canadian law is married to and reconciled with Inuit law and culture in the application of the Grant factors, both favour exclusion of the evidence. [paras. 102-104]

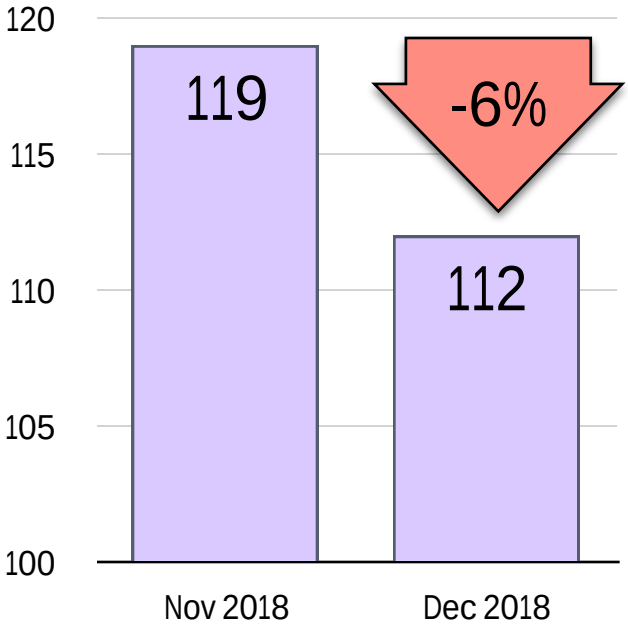
The accused's appeal was allowed, the evidence was excluded and an acquittal was entered.

Complete case available at www.canlii.org

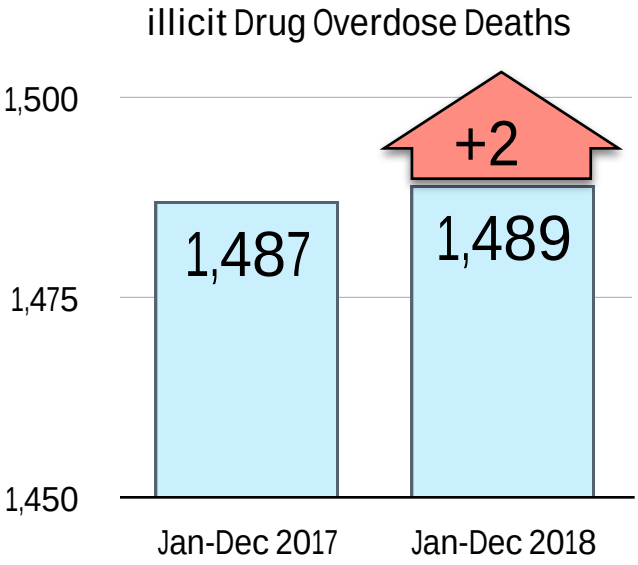
ILLICT DRUG OVERDOSE DEATHS IN 2018

The Office of BC's Chief Coroner has released statistics for illicit drug overdose deaths in the province from **January 1, 2008 to December 31, 2018**. In December there were 112 suspected drug overdose deaths. This represents a **+8%** increase over the number of deaths occurring in December 2017 but a **-6%** decrease over November 2018.





In 2018, there were a total of **1,489** suspected drug overdose deaths. This is an increase of two (2) deaths over the 2017 numbers (**1,487**).



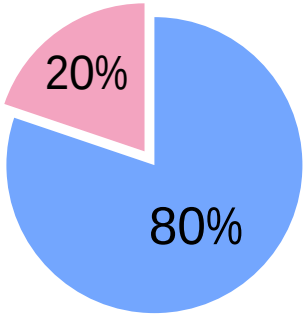
Overall, the 2018 statistics amount to about **4 people dying every day of the year.**

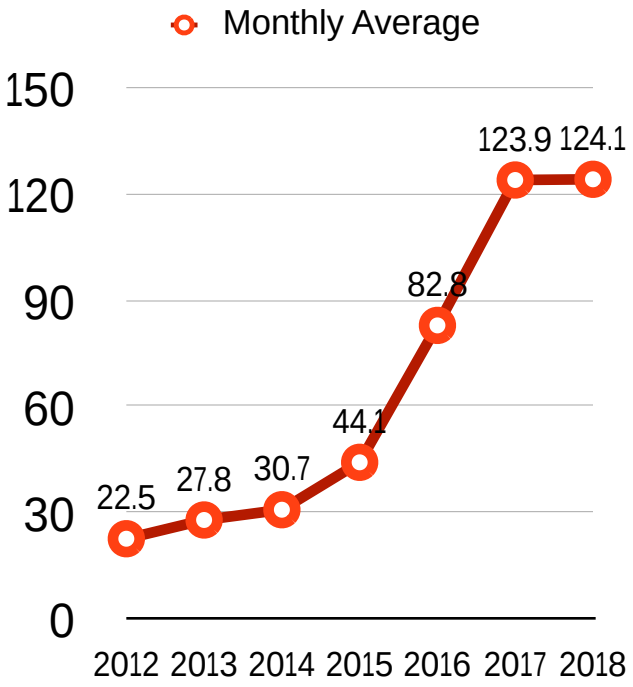
The **1,489** overdose deaths last year amounted to more than a **347%** increase over 2013. The report also attributed fentanyl laced drugs as accounting for the increase in deaths.

People aged 30-39 were the hardest hit in 2018 with **386** illicit drug overdose deaths followed by 50-59 year-olds at **337** deaths. People aged 40-49 years-old accounted for **332** deaths while those aged 19-29 had **293** deaths. Vancouver had the most deaths at **382** followed by Surrey (**210**), Victoria (**94**), Kelowna (**55**), Kamloops (**48**), Prince George (**46**), Burnaby (**43**) and Abbotsford (**40**).

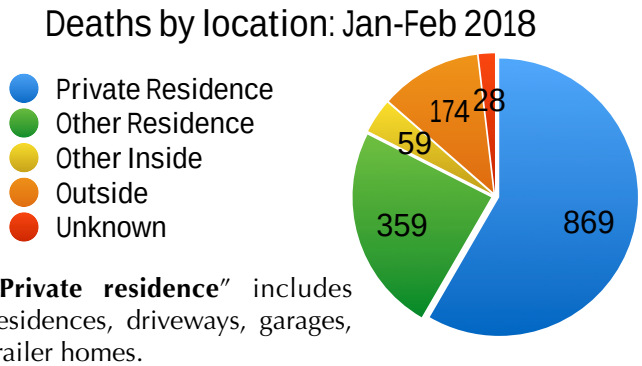
Deaths by gender

Males continue to die at almost a **4:1** ratio compared to females. In 2018, **1,194** males had died while there were **295** female deaths.





The 2018 data indicates that most illicit drug overdose deaths (**86.4%**) occurred inside while **11.7%** occurred outside. For **28** deaths, the location was unknown.



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

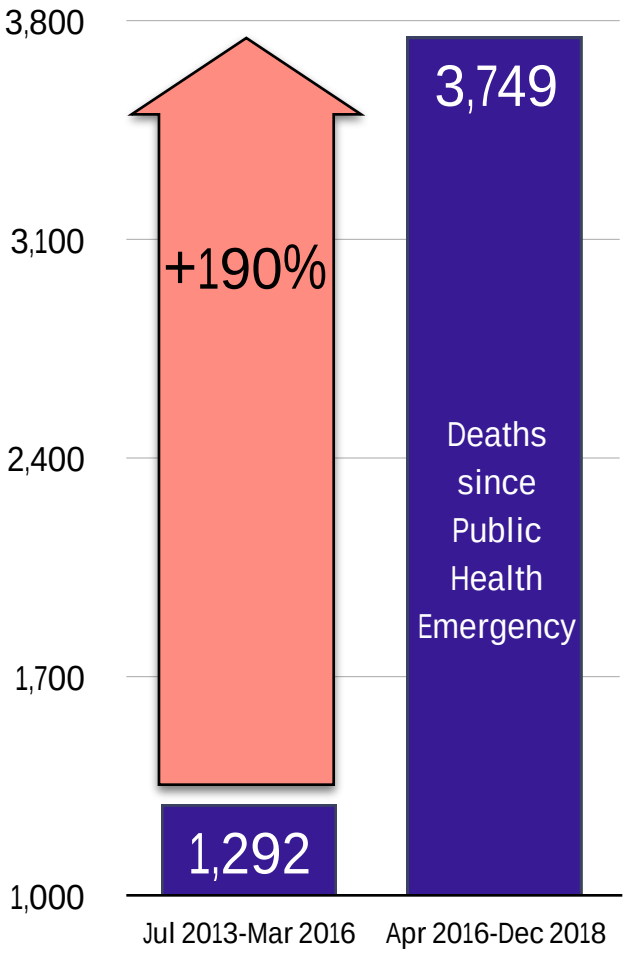
"**Other residence**" includes hotels, motels, rooming houses, shelters, etc.

"**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

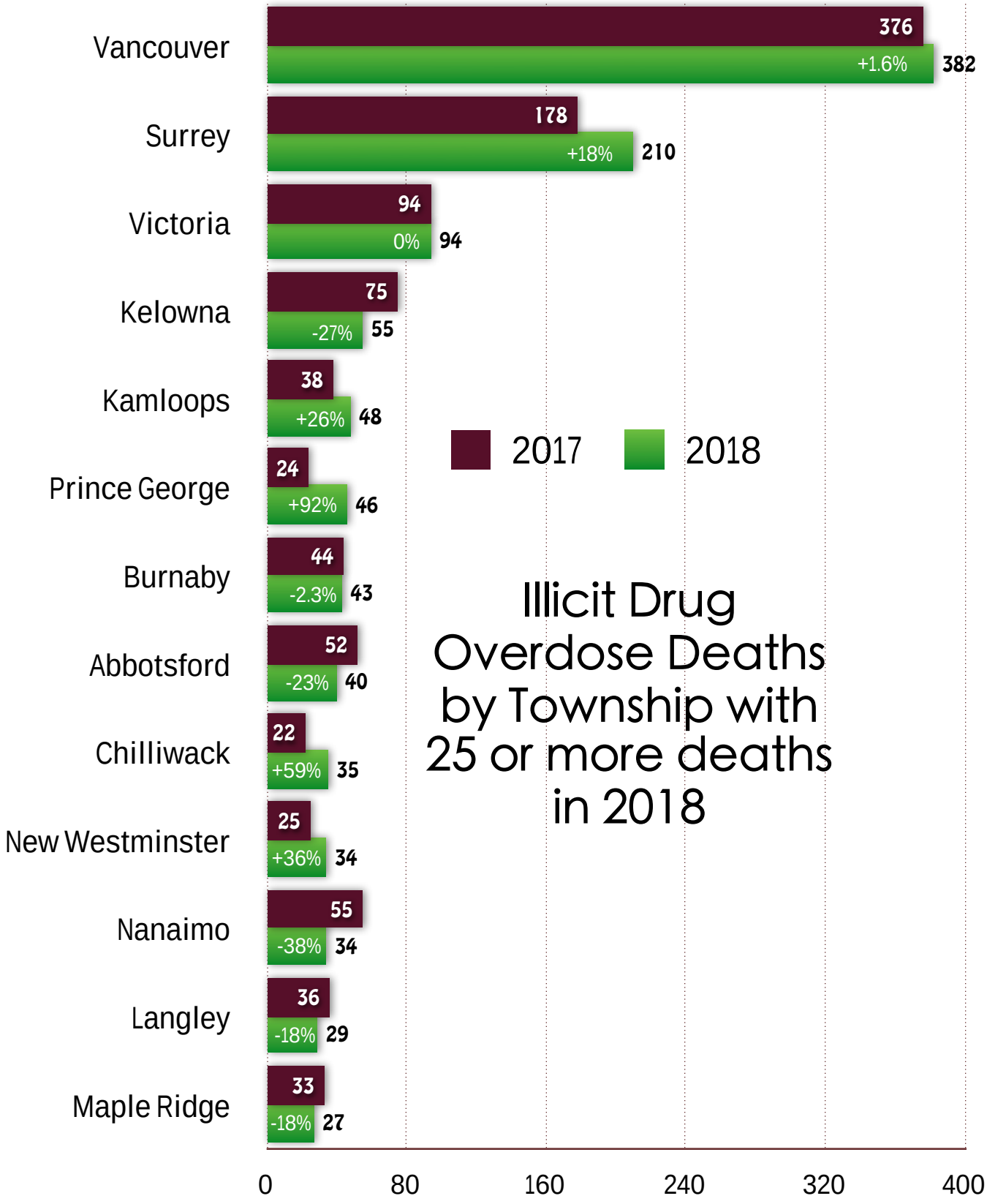
In April 2016, BC's provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths. The number of overdose deaths in the **33** months preceding the declaration (Jul 2013-Mar 2016) totaled **1,292**. The number of deaths in the **33** months following the declaration (Apr 2016-Dec 2018) totaled **3,749**. This is an increase of **190%**.



Source: Illicit Drug Overdose Deaths in BC - January 1, 2008 to December 31, 2018. Ministry of Public Safety and Solicitor General, Coroners Service. February 7, 2019.

TYPES OF DRUGS

The top five detected drugs relevant to illicit drug overdose deaths from 2016 - 2018 were fentanyl, which was detected in **78.6%** of deaths, cocaine (**49.2%**), methamphetamine/amphetamine (**30.9%**), ethyl alcohol (**26.2%**), and heroin (**20.3%**).


Vancouver
376
+1.6%
382
Surrey
178
+18%
210
Victoria
94
0%
94
Kelowna
75
-27%
55
Kamloops
38
+26%
48
Prince George
24
+92%
46
Burnaby
44
-2.3%
43
Abbotsford
52
-23%
40
Chilliwack
22
+59%
35
New Westminster
25
+36%
34
Nanaimo
55
-38%
34
Langley
36
-18%
29
Maple Ridge
33
-18%
27
2017
2018
Illicit Drug Overdose Deaths by Township with 25 or more deaths in 2018
0
80
160
240
320
400

Illicit Drug Overdose Deaths in BC, 2018

BRITISH COLUMBIA Coroners Service

112 Illicit drug overdose deaths in December 2018

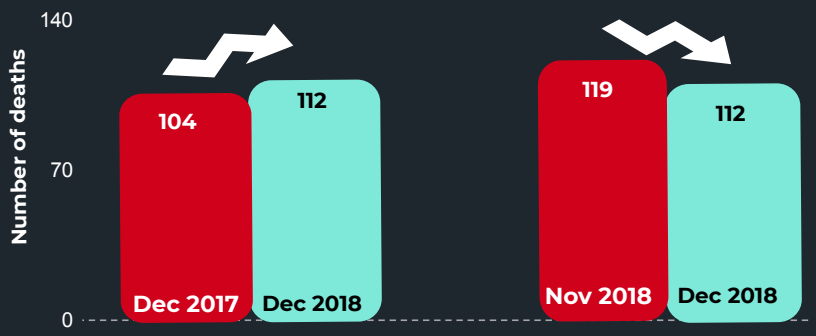
In 2018:

~ 4.1 illicit drug overdose deaths per DAY

more than 4.5 illicit drug overdose deaths for every motor vehicle accident death

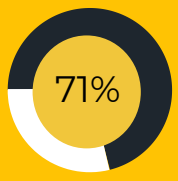
8% increase compared to Dec 2017

6% decrease compared to Nov 2018

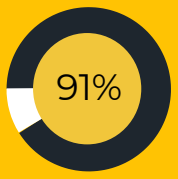


Illicit drug overdose deaths by age group and sex, 2018

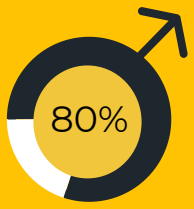
30 to 59 years old



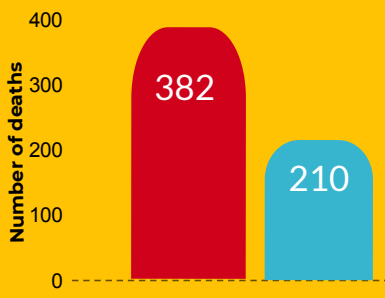
19 to 59 years old



Male



Number of illicit drug overdose deaths by city, 2018

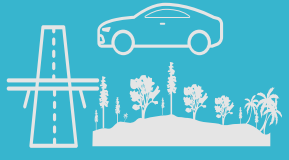


Vancouver, **Surrey** and **Victoria** had the highest number of illicit drug overdose deaths in 2018

Illicit drug overdose deaths by place of injury, 2018

58% at private residences

28% at other inside locations (e.g., other housing, hotel/motel, public buildings)



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

CI INFORMATION SUFFICIENTLY CONFIRMED: WARRANT VALID

R. v. Soltan, 2019 ONCA 8

Police received information from a confidential informer (CI) who personally knew the accused. The CI said that the accused was dealing a variety of drugs from a particular apartment unit where the CI said the accused lived. The CI provided details as to the types and quantities of drugs he had seen in the accused's apartment, and said that the accused was never out of drugs. The CI was immersed within the criminal subculture, had provided accurate and reliable information to the police before, and was motivated by an incentive they would receive upon the success of the investigation. A warrant was granted to search the accused's apartment and, as a result of the search, the police seized drugs and other items.

Ontario Court of Justice

Among other things, the accused submitted that the search warrant was invalid and thus his rights under s. 8 of the *Charter* had been breached. The judge concluded that the totality of the circumstances justified the issuance of the warrant. The information provided by the informer was sufficiently confirmed by the police and there was reliable evidence that might reasonably be believed. The warrant was valid and the accused was convicted of various offences, including possession for the purpose of trafficking a number of drugs.

Ontario Court of Appeal

The accused contended, in part, that there were insufficient grounds for the issuance of the search warrant. This argument, however was rejected.

> In this case, the information provided by the CI was specific and based on first-hand knowledge. The defence acknowledged that the information was compelling. The CI had provided credible and reliable information to the police in the past, and many of the details provided by the CI in this case were corroborated by the police investigation. The information provided by the CI met the Debot criteria and, together with all of the other information that was before the issuing justice, justified the issuance of a warrant. [para. 15]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Debot Criteria

"First, was the information predicting the commission of a criminal offence compelling? Second, where the information was based on a 'tip' originating from a source outside the police, was that source credible? Finally, was the information corroborated by the police investigation prior to making the decision to conduct the search?" - R. v. Debot, [1989] 2 SCR 1140.

SUFFICIENT GROUNDS TO WARRANT SEARCH OF APARTMENT: CONVICTION UPHELD

R. v. Lee, 2018 ONCA 1067

The police received information from three confidential informers (CIs) that the accused and his girlfriend were trafficking cocaine from the accused's car. The police conducted surveillance to corroborate these tips. In particular, the police orchestrated an undercover purchase of cocaine from the accused using specific bank notes, the serial numbers of which they recorded.

The police subsequently stopped the car that the accused was driving. His girlfriend was a passenger. A search of the accused at roadside located 4.3 grams of marijuana in his sock. At the

police station, a strip search of the accused yielded no evidence. A strip search of his girlfriend netted police an ounce of cocaine, which she had secreted in her vagina.

The police then obtained a warrant to search the accused's apartment. They discovered 700 grams of powder cocaine, 700 grams of crack cocaine, and $1,200 in Canadian currency, including the three bills used during the undercover purchase.

Ontario Superior Court of Justice

The accused brought applications under the *Charter* arguing several of his rights had been violated. The judge, however, found no breaches of the accused's rights. But he did find the strip search of the accused's girlfriend to be unreasonable. Nevertheless the drugs found on her were admitted as evidence. The accused was convicted of possessing cocaine for the purpose of trafficking and his girlfriend was also found guilty.

Ontario Court of Appeal

The accused contended, among other arguments, that the Information to Obtain (ITO) contained insufficient grounds to authorize the search of his apartment. He submitted that the warrant was granted because the issuing justice assumed that, since the accused was a drug dealer, the police were entitled to search his apartment. The accused also suggested any reference to the cocaine found secreted on his girlfriend's person following her illegal strip search ought to have been excised from the ITO. The Crown, on the other hand, argued that, even when reference to the drugs of the girlfriend's search was excised from the ITO, there was still a sufficient basis to authorize the warrant.

The Court of Appeal agreed with the Crown that, even with his girlfriend's strip search excised, there was a sufficient basis to obtain the warrant to search the apartment:

> "[T]he fact that the [accused] returned to his home after conducting three drug transactions and then went out again, differently attired, tied his drug trafficking activities to [the apartment]."

> On the night of the takedown, the [accused] and [his girlfriend] were observed in the [accused's] car in the Barrie area. The police observed three drug transactions. After the final transaction, the car was driven back to [the apartment building]. Using a key fob, the [accused] drove into the underground parking lot. He emerged hours later, having changed his clothes. After searching Ministry of Transportation databases, the police learned that [the apartment] was the [accused's] mailing address. The police subsequently confirmed with building management that the [accused] lived in Unit 1611.
>
> [The accused's lawyer] argues that there was no reasonable basis for the issuing justice to be satisfied that the cocaine discovered on [his girlfriend] originated from the apartment. However, the police were searching for more than just the cocaine. The ITO specified the following items: "Cocaine, Packaging, Currency including and not limited to Canadian $20 bills bearing [3 serial numbers], Debt List, Scales and Telecommunication Devices." In short, the police wished to search for evidence of the [accused's] drug trafficking activities.
>
> In our view, there was a sufficient basis to authorize this search, even though the ITO did not contain an opinion from the affiant about the typical behaviour of alleged drug dealers, in terms of where they keep their money, supplies, and tools of the trade. Significantly, the fact that the [accused] returned to his home after conducting three drug transactions and then went out again, differently attired, tied his drug trafficking activities to [the apartment].

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

"The appropriate standard of proof is one of reasonable probability, not proof beyond a reasonable doubt or a prima facie case. In applying that standard, the trial judge must assess the totality of the circumstances in a practical, non-technical and common-sense way, mindful of the knowledge, experience and training of the officer."

ARREST TO BE ASSESSED IN 'A PRACTICAL, NON-TECHNICAL & COMMON-SENSE WAY'

R. v. Penner, 2019 MBCA 8

A confidential informer (CI) told police that the accused and another man would be selling cocaine together in Winkler, Manitoba that evening. The CI was a drug user familiar with both men. The CI had given information to police 10 times previously in the prior year; one time resulting in arrests where drugs and drug monies were seized. Police conducted surveillance over the dinner hour on the men. While that was occurring, the CI advised police that the two men were presently selling cocaine. After witnessing the two men attend to three brief meetings believed to be drug deals, they were arrested. Drugs and drug monies were seized.

Manitoba Court of Queen's Bench

The lead investigator testified that, while not all of the CI's previous information could be confirmed, none of it was found unreliable or untrue and much of it was consistent with other sources of reliable information. The judge concluded the accused's arrest was lawful. Since the arrest rested on CI information, the judge considered the Debot factors:

- How compelling was the information?;
- Was the CI a credible source?; and
- Was the information sufficiently corroborated by police?

The judge concluded that there was an objective basis for the arrest because the information was ***"quite compelling"*** as it was detailed, recent and firsthand; the CI had ***"proven to be reliable"***; and the information was corroborated by observations of three interactions ***"consistent with the sale of drugs."***

The accused was convicted of possessing cocaine and marihuana for the purpose of trafficking and possessing proceeds of crime.

Manitoba Court of Appeal

The accused argued the trial judge erred in concluding that his warrantless arrest, and the resulting search of his vehicle, did not breach the *Charter*. In his view, the grounds for arrest were not objectively reasonable. Thus, the evidence ought to have been excluded and an acquittal entered.

Arrest

In upholding the legality of the arrest in this case, Justice Mainella, delivering the Appeal Court's opinion, stated:

> A lawful warrantless arrest pursuant to section 495(1)(a) of the Criminal Code has both a subjective and objective component. The officer who makes the decision to arrest must subjectively have reasonable and probable grounds on which to base the arrest and those grounds must be objectively justifiable to a reasonable person placed in the position of the officer. The appropriate standard of proof is one of reasonable probability, not proof beyond a reasonable doubt or a prima facie case. In applying that standard, the trial judge must assess the totality of the circumstances in a practical, non-technical and common-sense way, mindful of the knowledge, experience and training of the officer. [para. 4]

> "[T]he combination of reliable information that the accused would be trafficking on the same day he was observed likely doing just that is sufficient in law to amount to a reasonable belief that objectively justified the arrest."

The Court of Appeal then upheld the trial judge's finding that the arrest was lawful. ***"Under the Debot analysis, a weakness in one area may, to some extent, be compensated for by strengths in the other two,"*** said Justice Mainella. ***"In cases such as here, where a tip is compelling and comes from a proven reliable informant, corroboration of the information is of less concern."*** The trial judge did not err in determining whether there was an objective basis for the arrest in light of the totality of the circumstances. He was entitled to rely on the CI's information and what it meant in light of the extensive drug investigation experience of the lead investigator. ***"In our view, the combination of reliable information that the accused would be trafficking on the same day he was observed likely doing just that is sufficient in law to amount to a reasonable belief that objectively justified the arrest,"*** said Justice Mainella.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

DETENTION INVOLVES 'SIGNIFICANT PHYSICAL OR PSYCHOLOGICAL RESTRAINT'

R. v. Reid, 2019 ONCA 32

At 6:00 p.m. Toronto Anti-Violence Intervention Strategy (TAVIS) officers went to a Toronto Community Housing Corporation (TCHC) townhouse complex. The TCHC was concerned about trespassers on its properties and the landlord wrote to the Toronto Police Service asking that the police enforce Ontario's *Trespass to Property Act*. The townhouse complex was a large property, containing many different buildings, housing units, laneways, parking lots, and outdoor common areas.

At about 6:20 p.m., two officers encountered a few 10-year-old boys in a courtyard area around the centre of the complex. As police spoke to the boys, the accused (a 36-year-old man) and his acquaintance started walking toward the officers. Police spoke to the men.

The accused was asked a few questions: whether he lived at the TCHC property, his name, whether he had been in trouble in the past, and his purpose for being on the property. The accused provided his name and volunteered his date of birth and home address. He said that he did not live on the TCHC property, but that he had family in the "area". He also said that he had been arrested a long time ago and that he was at the property to produce music and help children to not go down the "same path" as he once had. An officer ran a record check on the accused's name over a portable radio to determine whether he was subject to any court-imposed conditions forbidding him from being on the TCHC property. As the check was being done, the accused's name, date of birth, and address was recorded on a 208 card. The accused's acquaintance was found to be in breach of a conditional sentence order and was arrested.

When information was received over the radio that the accused was the subject of a weapons prohibition order, the accused "bladed" his body. He moved one side of his body away from the police. He then tapped a rectangular object on his hip and ran. As police ran after him, they saw a firearm go flying through the air. The accused was tackled when he stopped to retrieve the firearm. He was searched incident o arrest and several baggies of marijuana were found on him. The firearm was loaded with 14 bullets in the magazine and had its serial number removed.

Ontario Superior Court of Justice

One officer testified that the entire encounter between the police and the accused, up to the point he ran, was five to seven minutes, "give or take a minute or two". The officer also thought he told the

accused that he would be "on his way" once the record check was complete. The accused did not testify.

The judge found the accused had failed to establish on a balance of probabilities that he was detained within the meaning of the *Charter*. The officer's questioning of the accused did not result from singling him out, but from the police speaking to both men at the same time. The police were entitled to ask the accused the questions they did as part of their legitimate community policing exercise and those questions did not create a detention. And, even if the accused was detained, the judge would have found it justified and not arbitrary.

Finally, even if the accused had been arbitrarily detained, the judge would not have excluded the evidence under s. 24(2). First, any violation would be a "low level" breach. Second, the impact on the accused's Charter-protected interests was "very limited" and there was a tenuous connection between his *Charter* interests and locating the firearm. Lastly, there was ***"the public's overwhelming interest in this metropolitan area to curtail gun crime and the seeming omnipresence of illegal firearms."*** The accused was convicted of numerous firearm-related offences, possessing marihuana and failing to comply with firearm prohibition and probation orders. He was sentenced to 11.5 years in prison less time served.

Ontario Court of Appeal

The accused argued, in part, that he was arbitrarily detained and that the evidence obtained by police ought to have been excluded under s. 24(2). In his view, he was psychologically detained from the moment the police first interacted with him. And, if he was not detained at that point, he was certainly detained by the time the officer made the radio transmission.

Detention

Justice Fairburn noted ***"there are two forms of detention: physical and psychological detention."*** Moreover, ***"if no detention occurred that ends the matter, because if there was no detention, there was no arbitrary detention,"*** said Justice Fairburn. ***"Accordingly, only where there is a detention does the court go on to assess whether it was arbitrary in nature."*** Here, the accused acknowledged that he was not physically detained. Rather, he claimed he was psychologically detained.

There are two types of psychological detention. One can arise from a legal requirement that an individual comply with a police demand or direction, such as a roadside stop. Another can arise where a reasonable person in the circumstances in which an accused finds themselves would have concluded that they had no choice but to stay with the officers and answer the questions posed. ***"In other words,"*** said Justice Fairburn, ***"whether a reasonable person would have concluded that the choice to walk away had been removed."***

The accused said that any reasonable person in the circumstances of this case would have understood that they had no choice but to cooperate with the police because of the following:

- He was the subject of a "focused investigation" in a highly intimidating environment.
- The police dealt with his acquaintance and himself separately, effectively taking "control" of them.
- He was a black man confronted by police in a public housing area which would have increased his feeling of being psychologically detained.
- He was effectively told that he could not leave until the record check came back and, only then, could he be "on his way".

"If no detention occurred that ends the matter, because if there was no detention, there was no arbitrary detention. Accordingly, only where there is a detention does the court go on to assess whether it was arbitrary in nature."

"The words 'detained' in s. 9 and 'detention' is s. 10 do not reflect the simple act of being slowed down, kept waiting, or even stopped by the state. To the contrary… the words refer to situations involving 'significant physical or psychological restraint'."

The Court of Appeal, however, concluded that the accused did not satisfy the onus of demonstrating on a balance of probabilities that he was psychologically detained. ***"The words 'detained' in s. 9 and 'detention' is s. 10 do not reflect the simple act of being slowed down, kept waiting, or even stopped by the state,"*** said Justice Fairburn. ***"To the contrary… the words refer to situations involving 'significant physical or psychological restraint'."*** She continued:

> The need for a detention to involve a significant physical or psychological restraint reflects a purposive approach to s. 9, one that strikes an important balance between ensuring that individuals are protected from unjustified state interference, while at the same time making sure that the societal interest in effective policing is not threatened. A failure to consider whether the police-citizen interaction involves a "significant deprivation of liberty" may result in both overshooting the very purpose of the Charter provision and undervaluing the public's interest in effective policing. The purpose of s. 9 is not to make individuals inviolate from state contact, but to ensure that, where the state actually detains an individual (within the legal meaning of that term), the detention can be justified upon appropriate grounds. [references omitted, para. 26]

Although the ***"minority status"*** of an individual is a relevant consideration in determining what a reasonable person in the individual's circumstances would have concluded, there are other individual factors to be taken into account, such as the person's physical stature, age and level of sophistication. In this case, the following factors militated against a finding of detention:

- The accused was a 36-year-old man of sufficient physical stature that it took a number of officers to arrest him.
- The accused interacted clearly and decisively with the police.
- The accused walked toward, not away from, a group of police officers who were interacting with children. The men walked at a very slow pace and appeared to be trying to discover what was being said between the police and children. By walking toward the officers, the accused and his friend were not signalling that they did not wish to have contact with the police.
- The police did not order the accused to approach them or tell him to stay where he was.
- The accused showed no sign of wanting to leave in the following few minutes. He was extremely cooperative throughout the police interaction with him. He was described as being "cool".
- The conversation between the police and the accused was pleasant. The accused was extremely polite and forthcoming.
- The accused volunteered information that he was not asked for, like his date of birth and home address.
- The accused was never touched by the police or directed by them.
- The accused never expressed a desire to leave or tried to walk away (until he ran from police).
- The accused was not surrounded by a group of officers in tactical adversarial positions.
- The accused was not asked incriminating questions. He was not instructed to keep his hands anywhere nor told to move anywhere.

"[The accused] was a grown man … and walked toward the police voluntarily," said Justice Fairburn. ***"He was cooperative throughout. He answered the questions he was asked and volunteered additional information. He showed no signs of wanting to leave until the police radio transmission was received."*** Furthermore, even though the officer agreed in cross-examination that

> "[W]hether the circumstances were in law a detention was a legal question for the court to determine, not for the officer to dictate to the court."

he had "detained" the accused, little weight could be placed on this testimony considering the officer's use of the term "detention". The officer stated, ***"I was talking to him. If that's 'detain', then, yes, then I was"***. ***"Clearly the officer was not using the legal definition of detention,"*** said the Appeal Court. ***"In any event, whether the circumstances were in law a detention was a legal question for the court to determine, not for the officer to dictate to the court."*** Nor did the fact that the officer said that if the accused had tried to leave, he would have stopped him from doing so render the encounter a detention. ***"The fact is … that until the [accused] ran from the police, the [accused] did not try to leave"*** said Justice Fairburn. ***"What might have happened had events unfolded differently does not inform the legal character of what did happen. … Charter rights are not breached by intention, but action."***

The Appeal Court also rejected the suggestion that a person with a loaded firearm in his pants would not voluntarily stay to speak with the police. Thus, as the argument goes, the accused must have felt psychologically detained. In rejecting this submission, Justice Fairburn stated:

> There are myriad reasons why people speak to the police. Some may feel a sense of moral or civic duty. Some may just want to interact with the police. Some may make a calculated, strategic choice to speak with the police, thinking that it may work to their benefit. There are endless possibilities, too many variables and too many unknowns. Whatever the reason, the fact that a person might come to regret having spoken to the police, does not turn a non-detention into a detention. [reference omitted, para. 46]

In the final analysis, the Court of Appeal concluded that the accused had not demonstrated that he was psychologically detained over the five to seven minutes that the police dealt with him.

Lawful Detention?

Although the Court of Appeal concluded there was no detention, if there had been one, it was lawful as an investigative detention based on reasonable grounds to suspect that the accused was trespassing on the TCHC property :

> [A] brief investigative detention could have been justified given the answers that he gave to certain questions. Reasonable grounds to suspect is a lower standard than reasonable grounds to believe. The former involves a standard of possibility and the latter a standard of probability. The inquiry into reasonable suspicion involves a consideration of all objectively apparent facts that the person may be involved in the activity under investigation. A common sense and practical approach must be taken.
>
> The facts in this case involve the following.
>
> The [accused] was in a high-crime neighbourhood that was experiencing problems arising from trespassers to the TCHC property. The police had been specifically requested to enforce the TPA. The officers had each described in their notes how they had seen the [two men] loitering. The trial judge found as a fact that the "descriptions provided by the officers in their evidence seem to fairly fall within the ambit of what can reasonably be described as loitering."
>
> Next, although the [accused] said that he had family in the "area", he did not say that his family lived at the TCHC complex. Nor did he say he was there to visit his family or with their permission. Instead, he gave a wholly different reason for being present on the property. That reason made reference to helping children and there were, in fact, children nearby. Those children had been communicating with the police and the trial judge found as a fact that the [men] had shown "excessive" interest in those communications.
>
> Despite the [accused's] suggestion that he was present on the TCHC property to help children, as things unfolded, he was found to be in the company of a person who was breaching a conditional sentence order and, when searched

> incident to arrest, found to be in possession of marijuana.
>
> In all of those circumstances, there was a sufficient constellation of facts to support the reasonable possibility that the [accused] was trespassing. If there had been a detention for the short period of time needed to run the CPIC check, in all of those circumstances, I agree with the trial judge that it would have been justified. [reference omitted, paras. 55-60]

s. 24(2) Charter

Finally, even if there was a *Charter* breach, the evidence would nonetheless be admissible. Any s. 9 Charter breach was ***"minor and fleeting in nature."*** The officers acted in good faith and there was no evidence to suggest that the police were engaged in a systemic misuse of their authority. And, contrary to the accused's suggestion, the trial judge did not place too much emphasis on the seriousness of the offence. ***"The pervasiveness of gun violence in Toronto has become ever-present and ever-concerning,"*** said Justice Fairburn. ***"The public has an obvious interest in curtailing that form of crime."*** The gun was real and reliable evidence and its admission would not bring the administration of justice into disrepute.

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

COURT SPLIT ON LEGALITY OF DNA PROFILE OBTAINED FROM 'ABANDONED' COFFEE CUP

R. v. D'Amico, 2019 QCCA 77

The accused was suspected of having committed sexual assaults on four women who were sex workers. The police followed the accused to collect abandoned DNA but were unsuccessful. They then deployed an undercover police officer to get his DNA. An undercover police officer set up a business meeting with the accused who operated a small Internet-related services company. During the first meeting, the officer met the accused at his home (where he also worked) on the pretext that she was interested in his business. She proposed a second meeting. The accused agreed and suggested that they meet in a café of his choosing.

The officer arrived at the café before the accused. When he arrived, the officer told him that she was going to buy herself a coffee. The accused told her that he wanted a coffee as well. They went to the counter, ordered their coffees and the accused paid for both. The cashier served them their coffee at their table. She gave the accused a blue cup and the officer a black cup. When the accused finished his coffee, the officer said that she would clear off the table to make some room. She got up and carried the cups over to the counter. Another undercover officer collected the cup the accused had used.

Police considered that the accused had "abandoned" his DNA at the café. The cup was sent to the laboratory and a DNA sample was obtained. The sample revealed a possible match with one sex assault case and it was also processed through the "crime scene index" of the "Local DNA Data Bank". Further comparisons were made and a second match with another case was established. Several months later police obtained a warrant to take bodily substances for forensic DNA analysis under s. 487.05 of the *Criminal Code*. This confirmed the previous findings and further analysis confirmed a match. The accused was subsequently charged with several offences including sexual assault and sexual assault causing bodily harm.

Court of Quebec

The accused argued the police illegally, through the undercover investigative tactic, compelled him to "abandon" his DNA. He suggested that the use of his DNA analysis to incriminate him breached his ss. 7 and 8 *Charter* rights. In his view, the result of the DNA analysis should have been excluded as evidence. The judge, however, did not agree. Collecting the coffee cup to obtain the accused's

DNA did not violate s. 8, nor did the method used to obtain it breach s. 7. The accused abandoned the coffee cup with his DNA on it and therefore did not have a reasonable expectation of privacy in it. There were no tricks on the part of the police and, even if he was tricked, it was not a dirty one such that the community would be shocked. And there was no infringement to the physical integrity of the accused. The accused was not in custody and was not even offered a coffee by the undercover agent. He decided to have one on his own. In addition, he was not compelled to discard the cup and he had no intention of keeping it. The DNA warrant was valid and the evidence was admissible. There was no need to consider s. 24(2). The accused was convicted.

Quebec Court of Appeal

The accused argued, among other things, that the trial judge erred in admitting into evidence the results of the analysis of his DNA. He contended that his s. 8 *Charter* rights were violated when the police took a DNA sample from the coffee cup. He submitted that he maintained an expectation of privacy in relation to his DNA found on it. He also suggested that the method used to obtain his DNA sample violated ss. 7 and 8. Thus, the warrant obtained was invalid and his DNA samples should have been excluded from evidence under s. 24(2) of the *Charter*.

In addition, the accused argued that DNA is inevitably left behind by citizens and that it is unreasonable to let the state collect it and store it forever in databases for possible future use. It was his position that the police circumvented the legislative regime on collecting and using DNA by using a Local DNA Data Bank. The Crown, on the other hand, relied exclusively on abandonment. It submitted that the behaviour of the accused was inconsistent with any privacy interest in the cup, an expectation he could not have in the circumstances. In the Crown's view, the DNA was "gathered, not seized". In any event, the Crown argued the evidence was admissible under s. 24(2).

All three appellate judges agreed the DNA evidence was admissible but for different reasons.

No Abandonment - A s. 8 Breach

Justice Vauclair found the police obtained the accused's DNA illegally, and therefore his s. 8 *Charter* rights had been violated. He concluded that the police are not authorized to actively gather "abandoned" DNA from citizens they suspect of being involved in criminal activity, and to keep the DNA samples indefinitely and use them as they see fit:

> I have no hesitation in concluding that the [accused] had a subjective privacy interest in his DNA, that he did not consent to the search or seizure, nor did he voluntarily "abandon" his DNA, that the police action was a warrantless search or seizure, and that the Crown did not rebut the presumption of unreasonableness. The active police operation to obtain the DNA of the [accused] infringed his constitutionally protected right. The retention of DNA constitutes a continuing infringement. [para. 167]

Justice Vauclair rejected the position that the accused abandoned his DNA and any privacy interest he had in it and thus the police were allowed to collect it and use it at will. The issue was not whether the coffee cup was abandoned but whether the accused's DNA information had been abandoned. In only looking at the coffee cup, the trial judge overlooked the true nature of the thing seized. ***"It is undisputed that when no reasonable privacy interest exists, no protection is afforded and, when one truly abandons something, no privacy interest may be claimed,"*** said Justice Vauclair. ***"True, the cup was abandoned. I have more difficulty finding that the 'information' present on the coffee cup, the drinker's DNA, was abandoned as well."***

Justice Vauclair found intention must be taken into account in determining whether abandonment is made out. ***"A reasonable person does not give any thought to whether or not he or she is abandoning DNA,"*** he said. ***"one simply cannot infer, from the being of a person, one's intention to abandon the privacy interest in one's DNA information."*** Here, the police deliberately afforded itself the opportunity to obtain the accused's DNA for which

"I would conclude that police cannot target a person and set that person up in a scenario to obtain his or her DNA. Doing so is the functional equivalent of collecting someone's DNA while they are in custody and this is not possible without a warrant."

it would otherwise need an appropriate warrant. ***"DNA samples do not come about through 'happenstance' because someone is continuously under police surveillance,"*** said Justice Vauclair. ***"There are no fundamental differences between constant surveillance of a detainee and constant surveillance of a citizen at liberty. Only the setting is different, the control exercised by the police is the same."***

In this case, Justice Vauclair found the police engineered the taking of the DNA sample and the absence of any "dirty trick" was not relevant to the breach analysis. He did not agree that the concept of "abandonment" routinely applied to a person's DNA given ***"the nature of DNA itself, its substantial informational content and the intrinsic high valued privacy expectation it bears."*** In his opinion, police operations that actively trick citizens into giving up their DNA are not reasonable and the accused could not be said to have abandoned his DNA:

> I would conclude that police cannot target a person and set that person up in a scenario to obtain his or her DNA. Doing so is the functional equivalent of collecting someone's DNA while they are in custody and this is not possible without a warrant. The practice of tricking members of the public into surrendering a DNA sample should be subject to prior authorization by a general warrant (487.01 Cr. C.). Once legally seized for its DNA potential and analyzed, the use of the DNA thereby obtained should be regulated so that sufficient safeguards are put into place to strike a balance between the competing interests of people's privacy and law enforcement. [para. 153]

Furthermore, Justice Vauclair was of the view that retaining the DNA samples of "suspects" in an unregulated data bank for further use or comparison also breached s. 8. Despite all of this, Justice Vauclair would admit the evidence under s. 24(2) anyways.

Abandonment - No s. 8 Breach

Justice Thibault disagreed with Justice Vauclair. In her view, the accused abandoned the cup and therefore had no reasonable expectation of privacy in his DNA found on it. In addressing the concept of abandonment, she stated:

> Abandonment is an issue of fact. All the circumstances must be examined to determine whether the person acted in relation to the subject matter in such a manner as to lead a reasonable observer to conclude that the person had waived their privacy interest. Was that item discarded permanently or not? Was it discarded in a public, semi-public, or private place? Was it discarded in a place accessible to the general public or to a more-or-less restricted group of people? Are there other valid reasons leading to the conclusion that the privacy interest was or was not waived? etc. [para. 310]

Justice Thibault noted there were two approaches in determining whether or not a person has a reasonable expectation of privacy in discarded DNA:

- **Approach #1:** ***"The first approach stresses and focuses solely on the nature of the subject matter collected – bodily substances – a subject matter that is highly personal with respect to which a person undoubtedly has a direct interest and enjoys a subjective expectation of privacy. Barring cases of consent to forensic DNA analysis, or where such analysis is authorized by statute or by the court, individuals are legally entitled to expect that this exclusive, intimate and confidential information will not be stolen from them. According to this approach, even where the subject matter, in this instance the cup, was seized in a public place and the***

"The second approach … supports the theory that the police may, during a police investigation into a person suspected of having committed a crime, freely collect items abandoned by the suspect in a public place to establish a DNA profile when the person is not in custody …"

police technique used was not itself intrusive, there is nothing to suggest that this person explictly or implicitly abandoned his bodily substances so that the highly personal informational content drawn from the forensic DNA analysis of his bodily substances could be identified. This person simply discarded the subject matter, in this case the cup, which he used to drink his coffee in the restaurant that owned it, and not his DNA." [para. 313]

- **Approach #2:** ***"The second approach … supports the theory that the police may, during a police investigation into a person suspected of having committed a crime, freely collect items abandoned by the suspect in a public place to establish a DNA profile when the person is not in custody …"*** This approach supports the view that when a person voluntarily abandons an item, they also abandon any confidential information found on it.

Justice Thibault rejected the first approach because the police would never be allowed ***"to collect an item discarded by a person to analyze its bodily substances and obtain a DNA profile because it is the item that is abandoned, not the DNA of the person who used it."*** In this case, ***"the police had sufficient information to justify the existence of reasonable grounds to collect the cup. Their investigation had revealed that the victims had provided a consistent description of the [accused] and a consistent description of the vehicle, that three of the victims had provided the same vehicle licence plate number, and that the [accused] had been arrested near the scene of one of the assaults, in the minutes following that assault, while he was at the wheel of the vehicle in which the offences were committed."***

Justice Thibault concluded that the trial judge correctly decided that the accused had abandoned the cup and that his privacy interest had not been violated when the DNA evidence was obtained. And, even if there was a *Charter* breach, she would not have excluded the evidence under s. 24(2).

No Abandonment - No s. 8 Breach

Justice Ruel agreed with Justice Thibault that the police did not breach s. 8 of the *Charter* but added comments concerning the accused's reasonable expectation of privacy and his view on abandonment.

He found that ***"the theory of abandonment is inconsistent with the protection of private informational data in a person's DNA."*** In his view, ***"it is simply impossible to imagine that individuals implicitly abandon any protection to their genetic data through the natural loss of bodily substances in public."*** He stated:

> I therefore believe, like Vauclair J.A., that, in principle, a person does not abandon the protection of his or her genetic data for use by the state or third parties, even for legitimate purposes, without explicit consent. [para. 358]

And further:

> In my opinion, individuals do not relinquish protection of their DNA data because they have disposed of an item that naturally contains

"[T]he theory of abandonment is inconsistent with the protection of private informational data in a person's DNA. … [I]t is simply impossible to imagine that individuals implicitly abandon any protection to their genetic data through the natural loss of bodily substances in public."

"In my opinion, individuals do not relinquish protection of their DNA data because they have disposed of an item that naturally contains DNA, such as a tissue or chewing gum or by spitting on the ground, or by leaving traces of DNA through natural biological processes such as hair loss or the elimination of human waste."

> DNA, such as a tissue or chewing gum or by spitting on the ground, or by leaving traces of DNA through natural biological processes such as hair loss or the elimination of human waste. [para. 363]

Justice Ruel then reframed the question from whether the accused abandoned his DNA to whether he had a reasonable expectation of privacy related to the forensic identification analysis of the DNA he left on the cup. He described it this way:

> [T]the public should widely be aware that individuals can be identified by comparing their DNA profile with DNA found on crime scenes.
>
> The technique itself is not intrusive from an informational perspective, as it is not intended to search a person's DNA data to extract highly personal information. Its purpose is much narrower and seeks to identify specific sequences of a person's DNA chain, so that a person's profile can be distinguished from other profiles with a very high probability.
>
> CODIS uses the STR analysis ("Short Tandem Repeats"), which are short DNA sequences of about 2 to 5 repeating "letters". These repetitions are specific to each individual and determine whether two DNA samples come from the same person. This comparison means examining the STR located at 13 positions along the chromosomes (called loci).
>
> After an STR analysis, an individual's DNA profile resembles a bar code forming a specific pattern of lines of varying length. Each DNA profile is unique and can be distinguished from every other profile in the various DNA data banks, in the same way that a bar code distinguishes a product among all the items sold in a grocery store.
>
> This analysis has a specific, limited purpose and does not reveal any medical, physical or mental characteristics of the person. ….
>
> In this case, it is true that the [accused] did not waive the general protection of his DNA data. However, he knew or should have known that leaving bodily substances in public could eventually allow law enforcement to collect and analyze his DNA for comparative purposes.
>
> Moreover, the DNA identification technique is not used to extract highly personal information, but to identify markers for comparison.
>
> As previously stated, the manner in which the bodily substances were obtained is important, and the police simply gave the [accused] the opportunity to leave a cup containing his saliva in public. This method is not on its own abusive or unreasonable.
>
> In conclusion on this point, I find that the police did not breach the [accused's] fundamental right when they conducted a limited and reasonable non-intrusive operation to obtain a sample, in a public place, for the sole purpose of comparing one DNA sample with another. [reference omitted, paras. 374-382]

Since the accused could not claim an expectation of privacy in relation to the analysis of the DNA found on the cup, the search of the local DNA data bank did not breach his rights. Justice Ruel found no breach of s. 8 in this case. Therefore, the evidence was admissible.

The accused's appeal was dismissed.

Complete case available at www.canlii.org

Editor's Note: The accused in this case was also a suspect in a murder investigation but was ruled out as a suspect as a result of a forensic DNA analysis.

USB SEARCH NOT RELATED TO REASON FOR ARREST: CHARTER BREACH PROVEN

R. v. Balendra, 2019 ONCA 68

Two police officers saw what they believed to be a stolen red Dodge Caravan based on a police database search. The vehicle swerved across the highway onto an exit ramp, an evasive manoeuvre police believed was made to avoid a pursuit. The police vehicle was positioned in front of the van and brought it to a stop on the shoulder of the exit ramp. A second police vehicle arrived and blocked in the van. The accused (driver) was arrested for possession of stolen property and careless driving. The passenger was also arrested for possession of stolen property. The passenger's wallet was searched at the roadside and an Ontario driver's licence in someone else's name but bearing a photograph of the passenger, as well as other ID was found. Police became suspicious about the driver's licence. Both men were taken into custody and the van was removed by a towing company and secured in a compound.

At the police station both men's identities were confirmed and it was learned the accused had a suspended driver's licence. A passport-sized photograph of the passenger had also been found in the accused's possession. This photograph was an identical likeness to that on the driver's licence found in the passenger's possession. The accused was also found in possession of a USB key (drive). The USB key was searched, about seven hours after the accused's arrest. Its contents were examined for 10-30 minutes. It was found to contain, among other things, multiple credit card numbers and what was believed to be a driver's licence template.

Based on the information obtained through the search of the USB key, the following day the officer decided to conduct a more thorough search of the van. The officer attended the impound lot where the van was being held and searched it without a warrant. He noticed a loose ceiling compartment, from which he extracted a concealed plastic bag containing a number of credit cards. The officer took the bag, along with some other items found in the vehicle, back to the police station.

Five days later the officer again accessed the USB key in order to look at the information contained on it, and printed off numerous pages containing approximately 2,500 credit card numbers, the Ontario driver's licence believed to have been used as a template and a photograph of an unidentified male. After printing the contents of the USB key, the officer decided to apply for a warrant to carry out a more probing search of it. The resulting search of the USB key by the e-crimes unit did not reveal any additional information beyond that which the officer had already obtained. Based on the information obtained through the searches, the accused was charged with eight fraud-related offences.

Ontario Superior Court of Justice

The officer testified that he searched the USB key as an incident to the accused's arrest. He said he believed the USB key could hold valuable information to assist in facilitating the creation of the driver's licence found on the passenger. Although the officer confirmed that the accused had been arrested only in relation to the stolen vehicle and careless driving, he did not search the USB key in relation to either of those offences, nor was there any indication that he might expect to find any information related to those offences. Rather, he said he was engaged in investigating a separate impersonation offence in relation to the accused and his passenger.

As for the van, the officer said he did not seek a search warrant because he understood that the vehicle was stolen and that the accused would not have had an expectation of privacy in a stolen vehicle. He also acknowledged that he wanted to perform the search of the van, in part, because of what he had found on the USB key, and that his intent was to further the personation investigation. As for the second warrantless search of the USB key, the officer felt that he was already in lawful possession of the information, having seen it on a prior occasion incident to the accused's arrest.

The accused sought the exclusion of the evidence on the basis that his s. 8 *Charter* rights had been infringed during the first search of the USB key, the search of the impounded van and second search of the USB key. The judge, however, disagreed. Although the judge found that a USB drive was quite capable of holding and revealing extensive personal information about a person in the same way as a computer, she held that the first search of the USB key was valid as an incident to arrest. The search of the van did not breach s. 8 because the accused had no reasonable expectation of privacy in it, and therefore no standing to advance a s. 8 claim. Finally, the second search of the USB key was not a new search, but rather an extension of the search conducted earlier as an incident to arrest, which was also reasonable. The evidence obtained through the searches was admissible and the accused was convicted of four fraud-related offences. He was sentenced to four years' imprisonment.

Ontario Court of Appeal

The accused argued, among other things, that the trial judge erred in relation to her analysis of each search. In his view, the evidence should have been excluded under s. 24(2) and an acquittal should have been entered.

The First USB search

The Court of Appeal found, as the trial judge did, that the accused did have a reasonable expectation of privacy in the contents of the USB key found in his pocket, although it did not find it necessary to define the level or intensity of that interest relative to other such devices with any further precision. As for whether the search fell within the scope of a valid search incident to arrest, the Court of Appeal found it did not. The search was not truly incidental to the offence for which the accused had been arrested (possessing stolen property and careless driving).

> Here, [the officer] candidly acknowledged in his evidence on the voir dire that he looked at the USB key because he thought that it could have evidence relating to the developing impersonation investigation, and not because he expected to find any evidence in relation to the careless driving or possession of stolen property charges that had been laid. The [accused] had not been charged with anything relating to credit card fraud or impersonation at that point.
>
> The test for determining whether a search is incidental to arrest has both a subjective and an objective component. While [the officer] subjectively believed his look at the USB key was incident to the [accused's] arrest, this belief was not objectively reasonable because the officer was not looking for information relating to the stolen van charge but rather to the investigation that was superseding it with respect to which no charges had yet been laid. Put another way, he was not (subjectively) aware that the initial arrest did not (objectively) authorize him to look at the USB key in order to find evidence of impersonation or fraud. [paras. 45-46]

Furthermore, in applying the scope of a search incident to arrest doctrine as it applies to

"The test for determining whether a search is incidental to arrest has both a subjective and an objective component. While [the officer] subjectively believed his look at the USB key was incident to the [accused's] arrest, this belief was not objectively reasonable because the officer was not looking for information relating to the stolen van charge but rather to the investigation that was superseding it with respect to which no charges had yet been laid. Put another way, he was not (subjectively) aware that the initial arrest did not (objectively) authorize him to look at the USB key in order to find evidence of impersonation or fraud."

cellphones, ***"there was no evidence that the investigation would be 'stymied or significantly hampered absent the ability to search' the USB key incident to arrest."*** Rather, both men had been arrested and were in police custody. The USB key and the van had also been seized and secured, and there was no risk of the USB key being accessed or otherwise tampered with remotely. "***In short, I find that the first search of the USB key was not objectively reasonable because it was not conducted to find evidence of the particular offences for which the [accused] had been arrested,"*** said Justice Harvison Young. ***"Had it been related to those offences, the search would still not be justified because the investigation would not have been stymied or significantly hampered absent the search incident to arrest."***

The Search of the van

The accused's argument that he had a reasonable expectation of privacy in the van because he had "care and control" of the van by virtue of driving it was rejected. The van had been registered as a stolen vehicle and the accused offered no contradictory evidence regarding his ownership of the van, or regarding any authorization given by the registered owner to operate the vehicle. There was no evidence to establish that the accused had any ability to regulate access to the van or any legitimate privacy interest with respect to it. As a result, s. 8 was not engaged by the van search. The credit cards found inside it were thus admissible.

The Second USB key search

The Court of Appeal found the trial judge erred in treating the second USB key search as a continuation of the first one. ***"The two searches were factually and temporally distinct,"*** said Justice Harvison Young. ***"As with the first search of the USB key, this second search was not reasonable as it was not truly incidental to the [accused's] arrest for possession of stolen property."*** Nor was there any exigency. The USB key had been seized and its contents could not have been remotely affected. In addition, there were ample grounds to obtain a search warrant based on what had been lawfully found on the accused and his passenger, and from the van.

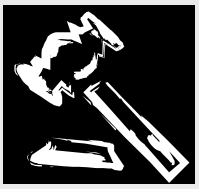
s. 24(2) Charter

Despite the unreasonable searches of the USB key, the evidence found on it was nevertheless admitted under s. 24(2). Although the USB search constituted a serious breach of the accused's s. 8 rights, the actual impact of the breach on him was minimal, given both the content of the information found on the USB key and the fact that a warrant was ultimately obtained which authorized its search. Moreover, the evidence was reliable and central to the Crown's case.

The accused's appeal was dismissed.

LEGALLY SPEAKING:

Search Incident To Arrest



In *Balendra*, Justice Harvison Young cited *R. v. Fearon*, 2014 SCC 77 in setting out "four conditions with which a search of a cellphone incident to arrest should comply in order to be lawful:

1. The arrest itself must be lawful;
2. The search must be "truly" incidental to arrest, and have a valid law enforcement purpose in
   (a) protecting the police, the accused or the public;
   (b) preserving evidence; or
   (c) discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;
3. The nature and extent of the search must be tailored to the purpose of the search; and
4. The police must take detailed notes of what they have examined on the device and how it was searched."

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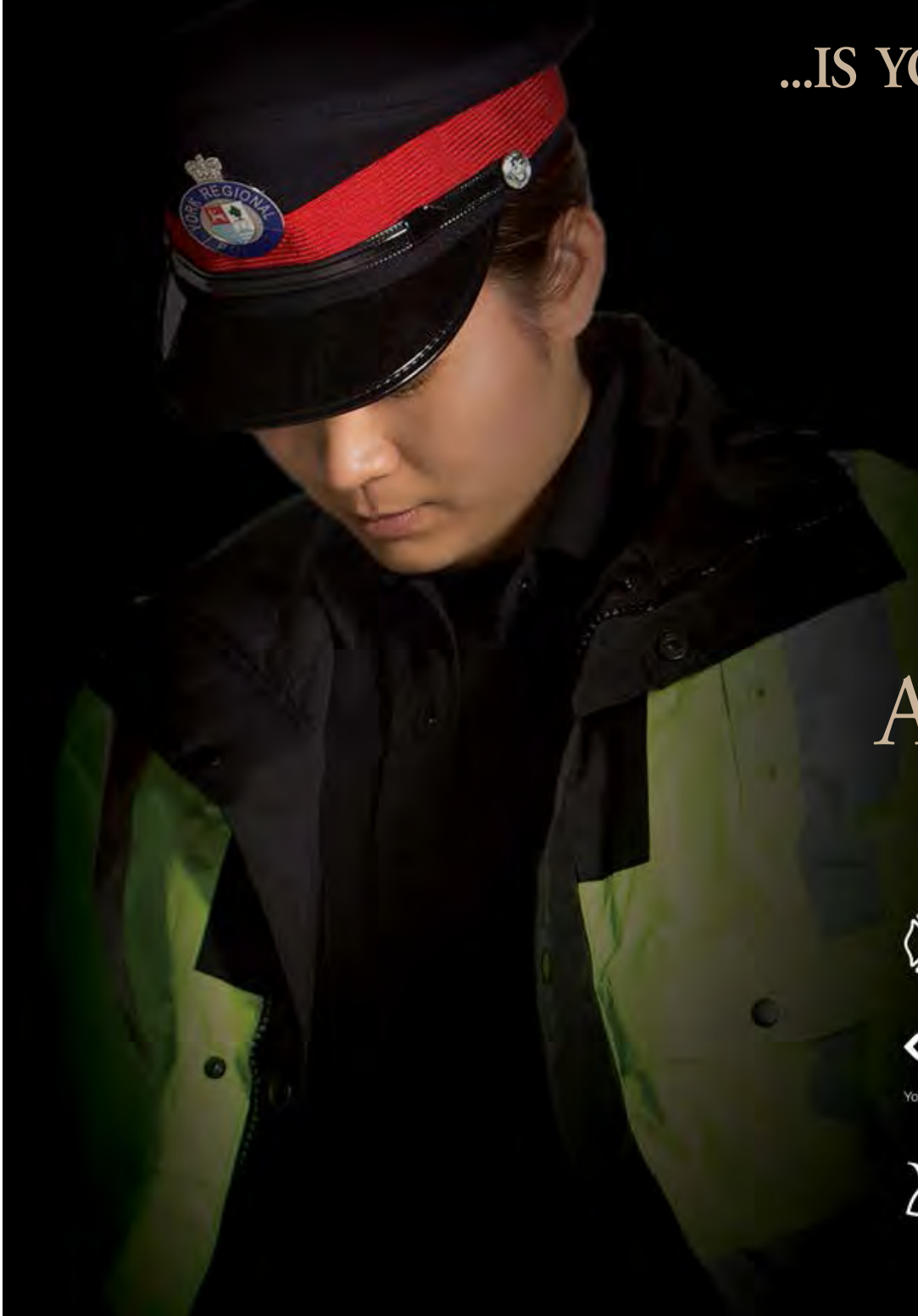

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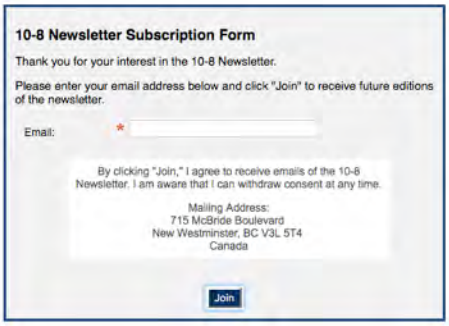

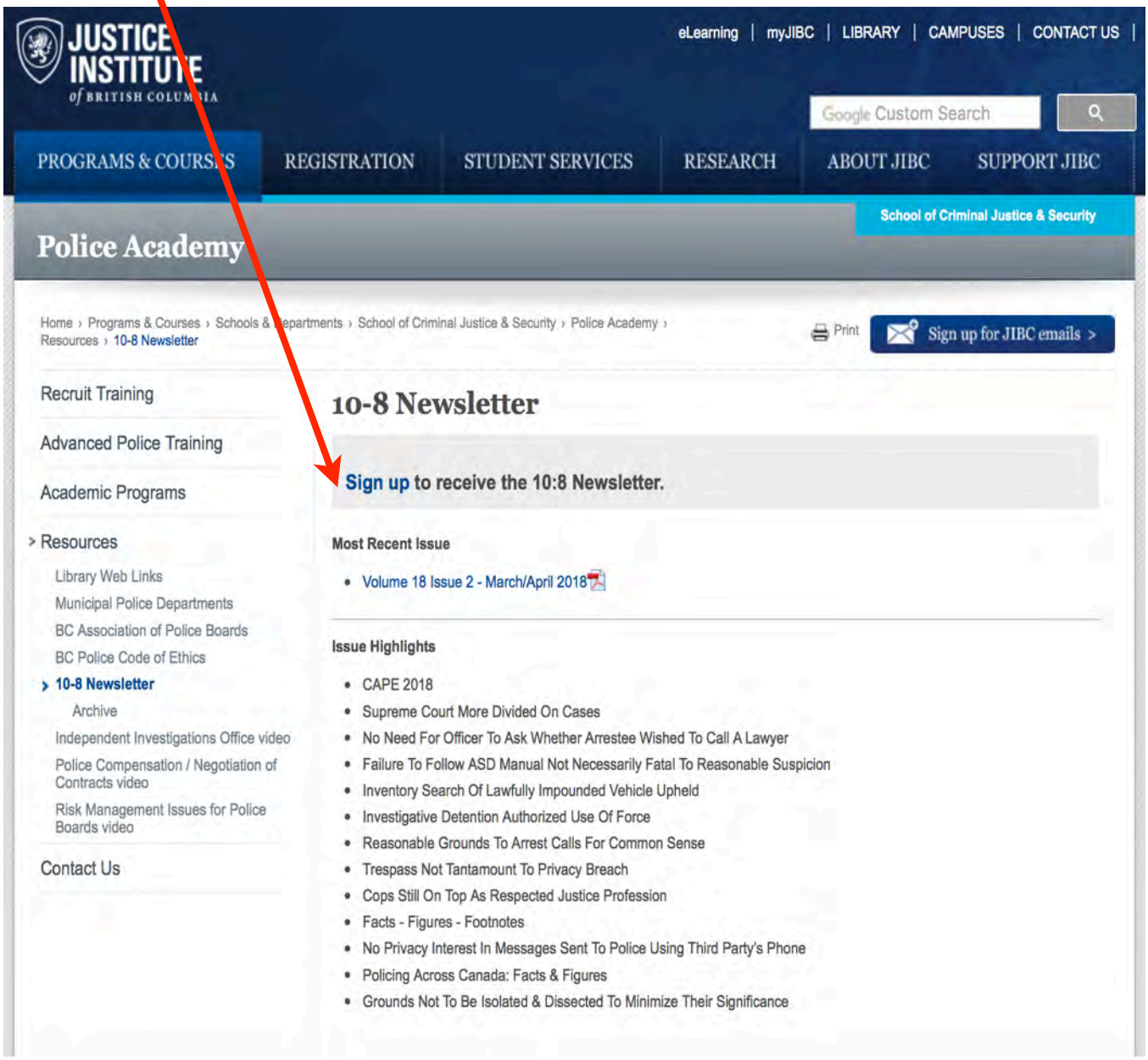

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