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Police Powers Newsletter
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— Police Powers—

Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton

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1. Arbitrary Traffic Stop Based on "Hunch" Violates Section 9; Search of Vehicle does Not Violate Section 8; Narcotics Excluded under Section 24(2)

Facts: On November 17, 2014, at approximately 11:00 p.m., the accused was driving north on Highway 5 in B.C. The road conditions were slippery, and there was some snow on the road. A member of the R.C.M.P., on patrol with a drug recognition dog, became interested in the vehicle because, according to the officer, it was travelling "just below" the posted speed limit. The officer ran the licence plate of the vehicle and learned that it had been linked to 24 recent police investigations, a majority of which involved drugs. The officer testified that he was also concerned about whether the vehicle was equipped with winter tires, and decided to pull the vehicle over to check.

The officer testified that when he approached the vehicle, it appeared the accused had just lit a cigarette. When the accused presented his driver's licence, the officer could feel the accused's hands shaking. There was a case of Red Bull on the front passenger seat, and some fast food wrappers in the back seat. The officer proceeded to check the tires, and the accused asked if he could get out of the vehicle. The accused continued to smoke his cigarette, and opened can of Red Bull. Both of these behaviors were described by the officer as "abnormal behavior." The accused advised that the vehicle was a rental and presented the officer with the rental agreement. The officer returned to his car, and the accused remained outside his own. He continued to smoke, then reached into the backseat to retrieve a sandwich, which he proceeded to eat. Given the temperature, and the fact that the accused was only wearing a long-sleeved shirt, the officer found the failure of the accused to get back into the vehicle to be suspicious. Subsequent checks revealed that the accused had a criminal record for forcible confinement and robbery. The rental agreement revealed that the vehicle was rented in Vancouver that day, and was to be returned in two days. The officer decided to conduct a drug investigation, and deployed the drug recognition dog, which detected narcotics inside the vehicle. A subsequent search revealed 1.2 kilograms of cocaine hidden in the wheel well.

At trial, the accused argued that he was arbitrarily detained in violation of s. 9 of the *Charter*, and sought the exclusion of the evidence under s. 24(2). The only evidence on the *voir dire* was that of the officer.

Held: Application allowed. Evidence excluded under s. 24(2).

The application judge found that the officer's evidence on the *voir dire* did not accord with the notes the officer made during the investigation. For instance, the officer testified that he stopped the vehicle on suspicion that the driver was impaired, a fact which was not recorded in his notes. The application judge found that the officer intentionally exaggerated many other facts relevant to the investigation to support the officer's grounds for the traffic stop, and that many of his answers to questions seemed contrived and self-serving. When scrutinized, the officer's articulated reasons for stopping the vehicle did not support a traffic-related stop. Instead, the judge found that the officer stopped and detained the vehicle based solely on the computer search linking it to 24 previous drug investigations. This was a stop based on a "hunch" that the vehicle was involved in the trafficking of narcotics and as such, constituted an arbitrary detention under s. 9 of the *Charter*.

However, the officer's subsequent search of the vehicle did not violate s. 8 of the *Charter*. While the initial detention of the accused was arbitrary, the factors relied on by the officer in forming the decision to embark on a drug investigation were reasonable. The officer's grounds to suspect that the accused was in possession of drugs must be viewed through the lens of an experienced and well-trained drug investigator. Indeed, this officer was at the time of the search one of the instructors of the RCMP Operation Pipeline Course. As well, he had been involved in many significant drug and drug-related seizures of evidence. The 24 recent drug investigations, the short term rental, the fact that the vehicle was travelling north on a known drug courier route late at night, the presence of Red Bull and food wrappers, and the accused's recent criminal convictions are sufficient to meet the reasonable suspicion test in *R. v. Chehil*, [2013] 3 S.C.R. 220, 2013 CarswellNS 693. Accordingly, the search of

the vehicle did not violate s. 8.

The arbitrary detention of the accused was serious. The attempted cover up by the officer in his evidence on the *voir dire* was egregious. This case is factually on all fours with the arbitrary detention of the accused in *R. v. Harrison*, [2009] 2 S.C.R. 494, 2009 CarswellOnt 4108. A person in the circumstances of the accused has the right to be left alone. To admit the evidence would bring the administration of justice into disrepute.

Commentary: This case constitutes an application of the well known standard for reasonable grounds to suspect an offence has been committed, as articulated in *R. v. Chehil*, 2013 SCC 49, 2013 CarswellNS 693 and *R. v. MacKenzie*, 2013 SCC 50, 2013 CarswellSask 655; however, the application judge appears to have distinguished this case from that of *R. v. Harrison*, *supra*, in that the additional information about the accused provided the requisite grounds to conduct a search of the vehicle. Despite the existence of reasonable grounds to search the vehicle, the officer's failure to fairly describe his grounds for stopping the accused was fatal to the admission of the evidence in this case.

R. v. Afzali, 2016 BCPC 305, 2016 CarswellBC 2821 (B.C. Prov. Ct.)

2. No Misconduct Hearing for Officer Alleged to have Failed to Make Full, Fair, and Frank Disclosure in ITO and in Evidence before Parliamentary Committee

Facts: The Ontario Provincial Police conducted an investigation into the alleged destruction or removal of documents relating to the cancellation of gas plants in Ontario by the Government of Ontario. Laura Miller, the Deputy Chief of Staff for the Premier agreed to give an interview with investigators, but subsequently cancelled. Ms. Miller indicated she would not make a statement or give an interview unless investigators provided written assurance that her statement would not be used against her in any proceedings. The police refused, and Ms. Miller never provided a statement.

In February 2014, the OPP prepared an information to obtain ("ITO") a search warrant to seize hard drives of 24 computers in the Premier's office, including the computer associated to Ms. Miller. The deponent of the ITO advised that Ms. Miller, among others, has "refused to provide a statement to police." The deponent later gave sworn evidence at the Standing Committee on Justice Policy of the Legislative Assembly of Ontario. At that time, he reiterated that Ms. Miller declined to make a statement to investigators and, in response to a question, stated that Ms. Miller had not provided a reason for not speaking with the OPP.

Ms. Miller subsequently filed a complaint with the Office of the Independent Review Director ("OIPRD") alleging that the OPP deliberately and falsely suggested that she refused to assist the investigation. Further to the *Police Services Act*, R.S.O. 1990, c. P.15, the Director of the OIPRD conducted an investigation, and found that the allegations of police misconduct were not substantiated. However, the Director ordered the Commissioner of the OPP to conduct a misconduct hearing with respect to two counts of neglect of duty for failing to disclose in the ITO and to the legislature the reasons why Ms. Miller declined to provide a statement to investigators. The Commissioner subsequently sought *certiorari* of the Director's decision in the Divisional Court.

Held: Application allowed. The Director of the OIPRD did not have jurisdiction to order the misconduct hearing as the allegations could not possibly constitute the offence charged.

It is well-settled that there is an obligation on a deponent to make full, frank and fair disclosure of all relevant information in an ITO. The reason why a person of interest declines to be interviewed in respect of an investigation is not relevant to the grounds to obtain a search warrant. Arguably, an explanation of the good faith efforts of the police to obtain information from persons of interest by means other than the authorization sought, while not technically necessary, would not be improper. However, there could be no relevance at all in any

reason, explanation, or excuse provided by anyone for a refusal to make a statement. Such information is completely irrelevant to whether there are reasonable and probable grounds that the seizure of the computers would provide evidence of an alleged offence. Indeed, had the deponent included Ms. Miller's reasons for failing to give a statement, it might be said to be an improper injection of innuendo and speculation that Ms. Miller was in the possession of incriminating information into the ITO.

There can be no neglect of duty unless there is first a duty. There is no duty to provide irrelevant information in an ITO. The failure of an officer to include information that was potentially incriminating is the opposite of misconduct. How much tangential or background information to include in an ITO is a matter of judgment for an officer to exercise.

To constitute neglect of duty, the impugned conduct must include an element of willfulness, or there must be a degree of neglect which would make the matter cross the line from a mere job performance issue to a matter of misconduct. Deliberately lying to the legislature might well constitute neglect of duty; however, the Director determined that the officer's testimony was not a deliberate lie.

In this case, more information could have been provided, but the answer given was truthful. Given the Director's finding, it is impossible to see how the same conduct can constitute neglect of duty. When asked by the legislature if Ms. Miller had provided an explanation, the officer could have revealed the conditions set out by Ms. Miller before she would agree to participate in the investigation. But that is not the same as the officer having a duty to do so.

Commentary: This case does not expressly refer to any case law, but constitutes a helpful explanation of the duty of full, frank and fair disclosure discussed in *R. v. Araujo*, 2000 SCC 65, 2000 CarswellBC 2440 and *R. v. Morelli*, 2010 SCC 8, 2010 CarswellSask 150.

Ontario Provincial Police Commissioner v. Independent Police Review Director, 2016 ONSC 6402, 2016 CarswellOnt 16380 (Ont. Div. Ct.)

3. Carelessness in Drafting ITO Results in the Exclusion of Cocaine

Facts: Based on the information gleaned from the three confidential informants, police obtained a warrant to search the accused's residence, specifically, his bedroom, and seized 6.5 ounces of cocaine. The first confidential informant advised, in the language of the information to obtain ("ITO"), that he had "either seen or heard" that the accused was a big dealer of cocaine at the high schools in Brandon, Manitoba. The informant advised that he had "either seen or heard" that the accused kept the cocaine in his bedroom, in a house located at 37 Aurora Crescent, where he resides with his parents. A second source advised that he had "either seen or heard" that the accused sells cocaine, lives at 37 Aurora Crescent with his parents, keeps the cocaine in his bedroom downstairs, and "reloads weekly." A third source advised that he had "either seen or heard" that the accused sells cocaine at high schools, keeps it in his bedroom at the home at his parents' house on Aurora Crescent, and has people who sell cocaine for him.

The ITO reported that the motivation for the first source was monetary, but that he had not received any compensation or promised any other special benefits for providing information to police, and would not be compensated unless contraband was discovered. The second source's motivation was civic duty and money, and understood that he would not be provided any compensation unless contraband was discovered. The third source was the only source who had a proven track record of supplying reliable information to police, leading to the seizure of contraband and resulting in the laying of criminal charges.

The ITO reported that the accused had provided his address as 37 Aurora Crescent six months prior to the

application to search, and a police database check revealed numerous entries reflecting the accused's involvement in the drug subculture of Brandon.

The accused argued that the ITO failed to disclose reasonable and probable grounds to believe that narcotics would be located thus breaching his s. 8 rights, and sought the exclusion of the evidence under s. 24(2) of the *Charter*.

Held: Application allowed.

Where an affiant relies on information provided by informants, the reliability of the information must be assessed in accordance with the test set out in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111. The authorizing justice must consider three factors in weighing evidence from confidential informants in assessing whether there are reasonable and probable grounds to issue a search warrant: first, whether the information is compelling; second, whether the source is credible; and, third, whether police are able to corroborate information provided. Weakness in one may be made up in other areas. It is a "totality of circumstances" test (see also: *R. v. Pilkington*, 2013 MBQB 79, 2012 CarswellMan 794 at para. 57; *R. v. Hosie* (1996), 107 C.C.C. (3d) 385, 1996 CarswellOnt 2016 (C.A.) at p. 392 [C.C.C.]; *R. v. Campbell*, 2003 MBCA 76, 2003 CarswellMan 267 at para. 22; *R. v. Beauregard* (1999), 136 C.C.C. (3d) 80, 1999 CarswellQue 1009, 1999 CarswellQue 4724 (C.A.) at p. 83 [C.C.C.]).

The information provided by the informants was not compelling. The ITO failed to disclose whether the source of knowledge for each of the three informants was first-hand knowledge or hearsay. Instead, the ITO used the same ambiguous description for each informant, that they had "either seen or heard" the information reported to police. In addition, the information provided was lacking in detail. Further, two of the three informants had yet to demonstrate a proven track record of providing reliable information to police, who did little to corroborate the information provided. For instance, police did not conduct any surveillance of the accused. In the result, the warrant had to be set aside as the ITO did not supply reasonable grounds to believe evidence would be located in the accused's house. The search of the accused's residence was a breach of the accused's rights under s. 8 of the *Charter*.

Either due to the lack of information as to the informant's source of knowledge, or in an overzealous attempt to protect the identity of the informants, there was insufficient information given to the justice of the peace. The conduct of the police, while not necessarily deliberate, was careless to a significant degree, and displayed a reckless disregard for the accused's *Charter*-protected rights. The impact of the breach was not trivial. Following the guidance of the courts in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104; *R. v. Dhillon*, 2010 ONCA 582, 2010 CarswellOnt 6645; and *R. v. Sharpe*, [1997] B.C.J. No. 1468, 1997 CarswellBC 1356 (S.C.), significant harm is caused to the long-term administration of justice where police obtain a warrant solely because of significant carelessness in preparing an ITO. In all the circumstances, the court must distance itself from such conduct and exclude the evidence obtained.

Commentary: In this case, the application judge applied the well-known factors for the review of an authorization to search, based on information obtained from confidential informants set out in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119; and *R. v. Araujo*, 2000 SCC 65, 2000 CarswellBC 2440. It demonstrates that while great care must be taken in ensuring that the identity of a confidential informant is protected, an ITO must provide sufficient information as to the source of knowledge of a tip from an informant, in order to constitute a "compelling" tip. One rumor cannot corroborate another rumor. In addition, there must be information demonstrating the "credibility" of the source. Finally, depending on the strength of the first two factors, there must be independent corroboration of material aspects of the tips. In this case, the information was found to be "not compelling," "not credible," and "not corroborated," the very opposite of what *Debot* mandates.

R. v. Bickerton, 2016 MBQB 201, 2016 CarswellMan 455 (Man. Q.B.)

4. Compelling, Credible, Corroborated Information from Confidential Informants Sufficient for Authorization to Issue

Facts: The accused was charged with possession and trafficking of cocaine and marihuana, and possession of ecstasy following a search of his home. Police received information from two informers, A and B. A's information was provided on two dates just prior to the execution of a search warrant on the home and outbuilding owned by the accused. Source A identified the accused by name and nickname, and reported that he had cocaine and marihuana in garages at the rear of his property. A described the quantity as "a large amount" and its quality as "good." Source A also indicated that the accused had a security system which enabled him to monitor the property and arrange deals from his cell phone.

Source B also identified the accused by name and nickname, and advised that he had cocaine and weed stored in a shed behind his home. Source B said that the house next door was owned by a relative of the accused who permitted him to store the drugs there. Both sources told police that the accused was associating with certain named individuals. Previous informer information provided by B revealed that B had told his handlers in the past that drugs seized during a particular search belonged to the accused.

Police took steps to independently corroborate the information provided by both sources and were able to determine that the accused had provided the same home address indicated by the sources and on a prior date had been found to be in the possession of marihuana at that location. Police also visited the premises identified by the sources and confirmed their descriptions of the property (which were generally accurate).

At trial, the accused argued that the information to obtain the search warrant did not disclose reasonable and probable grounds to believe that a search would result in the seizure of evidence relevant to an offence. The trial judge agreed, finding that Source A and B were not sufficiently reliable. He went on to exclude the evidence under s. 24(2). The accused was acquitted and the Crown appealed.

Held: Appeal allowed.

An application judge conducting a review of the sufficiency of the information contained in an information to obtain ("ITO") a search warrant that is based on tips from confidential informers must consider the totality of circumstances: *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111; *R. v. Burke*, 2011 NBCA 51, 2011 CarswellNB 262. A majority of the Newfoundland and Labrador Court of Appeal found that the trial judge erred in his evaluation of the sufficiency of the grounds set out in the ITO, finding errors in the trial judge's assessment of the credibility and reliability of the two informants. The trial judge erred in failing to adopt a functional approach to the reliability of the informants, and instead placed undue emphasis on inconsequential deficiencies in the ITO. These errors included giving too much weight to inconsequential differences in information provided by sources A and B, what police were unable to corroborate instead of what they were able to corroborate, and, that the ITO contained some irrelevant and extraneous information. In separate, concurring reasons, Rowe J.A. found that the trial judge erred in substituting his own view of the grounds contained in the ITO for that of the issuing justice, contrary to *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119.

Commentary: This case provides a conservative but helpful summary of the legal principles relevant to the review of authorizations to search from the standard of reasonable grounds set out in *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CarswellOnt 78, through the principles for assessing information obtained from confidential informants in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111, to the standard of review in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119.

R. v. Parsley, 2016 NLCA 51, 2016 CarswellNfld 382 (N.L. C.A.)

5. Trial Judge Considers Police Officers' Experience in Assessing whether Reasonable and Probable Grounds

Facts: A confidential informant told a police officer that a man named "J.J." sold crack cocaine in the community, and that s/he had purchased an identified amount of that drug from J.J. at a specified time and place. The informant provided a description of J.J., and said that he drove a black Jeep with a particular licence plate.

About a month later, the officer was on general patrol at an apartment building that was known to be a "high crime area" for prostitution and drugs. He noticed the black Jeep with the licence plate described by the informant. It was parked well away from the apartment building's door. He saw a man who matched the description of J.J. get out of the Jeep and go into the apartment building. The man returned about 15 minutes later, and left the area in the Jeep.

Other police officers followed the Jeep to a nearby housing complex. It left that location a few minutes later. Police officers then followed it to a motel, located in a known drug area in another community. The driver parked the Jeep well away from the motel entrance. The same man got out of the vehicle. He was next seen on the second floor balcony of the motel that connected all rooms. A few minutes later, the man returned to the Jeep. He was talking on a cell phone. The police arrested him for drug trafficking. The police seized cash and a cell phone from him, and cash, crack cocaine and three cell phones from the Jeep.

At trial, the accused sought the exclusion of the evidence on the basis that the police violated s. 8 of the *Charter*. The officers testified on the motion that they arrested the accused because they believed that he was delivering cocaine to customers. That belief was based on the information from the informant, who investigators had used in the past and who had been proven reliable. It also was based on the accused's visits to three separate locations for very short periods of time, one of which involved a drive between two communities; the fact that he was not seen carrying anything that would provide an innocent explanation for his actions; the fact that he was talking on his cell phone while walking back to his vehicle, which suggested that he was arranging another delivery and so would have drugs in his possession; and the fact that he parked away from the building entrance on two of the occasions, which the officers testified drug dealers do to prevent customers from identifying their vehicles.

Held: Application dismissed. The police acted lawfully and did not breach the *Charter*.

The trial judge concluded that the officers had an honest belief that the accused was trafficking cocaine, and that that subjective belief was supported by objective facts. In assessing whether the officers had reasonable grounds to arrest and search, the trial judge considered the information from the informant. He found that it met the test articulated in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111. It was compelling. It was detailed and personal. It included a nickname and a description of the individual, as well as the vehicle he used. The trial judge also found that the officers' observations of the accused, informed by their experience, constituted important corroboration of the informant. They witnessed a pattern of behaviour consistent with the actions of a drug trafficker.

The trial judge found that the officers' experience, which informed their conclusions, was relevant to his determination of whether the objective component of the reasonableness test was met.

Commentary: The trial judge considered the requirement that an officer's subjective belief that a person committed an offence be supported by objective facts. He observed that that requirement should not be diluted by a reviewing judge so as to threaten individual freedom, but neither should it be elevated to the test applied to evidence presented at trial. He framed the standard necessary to satisfy the objective component of reasonable

and probable grounds as enough to justify police interference with individual liberty, but not a *prima facie* case or proof beyond a reasonable doubt.

R. v. Omar, 2016 ONCJ 633, 2016 CarswellOnt 16616 (Ont. C.J.)

6. Accused's Testimony before Jury Defeats his Appellate Attack on Section 24(2) Ruling

Facts: The police apprehended the accused within a few blocks of the house where a shooting occurred. When the police stopped him, the accused was with his cousin. The accused was holding a sweatshirt hoodie wrapped around a loaded handgun that had its safety off. The accused was arrested. The police seized a cell phone from him.

The police obtained advice from the Crown's office that a search warrant was not necessary to view text messages on the cell phone. Days after the accused's arrest, the police examined the phone. They found text messages that indicated the shooting was planned and the victim was the target.

At trial, the accused sought the exclusion of the text messages on the basis that the contents of the cell phone were obtained in breach of s. 8 of the *Charter*. The trial judge found that the search of the cell phone was not incident to arrest, and that the police should have obtained a search warrant. However, he ruled the text messages admissible. He found that the police search of the cell phone was not wilful bad conduct, in large measure because the police obtained advice from the Crown that a search warrant was not necessary, and that the truth-seeking function of the criminal trial process would be better served by admission of the real evidence.

Although the victim could not identify his shooter, additional circumstantial evidence adduced at the jury trial pointed to the accused. The accused testified and denied being involved in the shooting. He said that he was holding onto the hoodie for his cousin, and had no knowledge of the gun inside. He said that the cell phone, which was in a fictitious name, was not his. He did not know about it or used it.

The accused was convicted of aggravated assault and firearms offences. He appealed, and argued that the text messages should have been excluded from evidence.

Held: Appeal dismissed.

The Court of Appeal reiterated that where a trial judge has considered the proper factors, an appellate court will accord considerable deference to his or her decision on a s. 24(2) analysis. The Court commented that if the trial judge made any error at all, it inured to the benefit of the accused, who disclaimed any ownership, knowledge, or operation of the cell phone when he testified before the jury. At best for the accused, this would have pointed to a lessened expectation of privacy in the contents of the cell phone. In addition, the Court noted that at the time of the accused's arrest, the state of the law about whether a search warrant was necessary to search a lawfully seized cell phone was unclear. Even though the advice obtained by the police may well have been wrong, there was no basis to interfere with the trial judge's finding that there was no wilfully bad conduct by the police.

Commentary: This decision illustrates that while an accused may successfully assert standing to challenge the search of an item because it was seized from him on arrest, if he later denies ownership, knowledge and/or use of the item, he does so at his peril. The Alberta Court of Appeal relied on the accused's testimony before the jury that he had no interest in the phone, as a basis to dismiss his appellate challenge to the admission of the evidence obtained from it. In effect, the Court used evidence that was not before the trial judge on the *voir dire* to rebuff the accused's attack on the trial judge's s. 24(2) ruling.

R. v. Mangatal, 2016 ABCA 335, 2016 CarswellAlta 2092 (Alta. C.A.)

7. Information from Anonymous Informant Provides Grounds for Arrest

Facts: A drug investigator received information from an anonymous informant that the accused would be travelling from Ottawa to North Bay that day to sell drugs. The information included the make, model, colour and licence plate number of the car in which the accused would be travelling.

The drug investigator, along with other officers, set up surveillance on the highway. In due course, they saw the car and stopped it. The accused was in the passenger seat. His uncle was behind the wheel of the car.

The accused was known to the police as a person involved in the illegal drug trade.

The police arrested the accused and read him his rights. They searched him and the vehicle. In the trunk of the car, they found baggies of marihuana, baggies of cocaine, some methamphetamine pills, a phone book with a debt list, and a piece of paper with the accused's name, email address and passwords.

At trial, the accused sought the exclusion of the seized items on the basis that the police breached ss. 8 and 9 of the *Charter*. He argued that they lacked reasonable and probable grounds to arrest him, and so the warrantless search was unreasonable.

Held: Application dismissed.

The trial judge concluded that the police had reasonable and probable grounds for the arrest. The drug investigator's subjective reasonable grounds to arrest the accused for possession for the purpose of trafficking were objectively justified. The trial judge found that the test set out in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111, concerning police reliance on confidential information was met. The information provided by the anonymous informant was reasonably compelling. It provided detail, including about the vehicle in which the accused would be travelling. It went beyond what was publicly known or readily available. The source of the information was credible, because although the drug investigator did not know the anonymous informant, he knew the informant by voice. That person had provided information to the drug investigator on about 20 occasions in the past. Although the information previously provided did not result in investigations or arrests, that was because the information was "too close". The officer feared that acting on it would identify the informant. The officer had been able to corroborate information provided by the anonymous informant in the past. The information given on this occasion was corroborated in that the vehicle described was located on the route the anonymous informant identified, and the accused was in the vehicle. Further, the accused was known to the police as having prior involvement in illegal drugs.

The trial judge also found that the search was truly incidental to arrest. Its purpose was to discover illegal drugs on the accused's person or within his control.

Commentary: This case is an example of the application of *R. v. Debot* to a search based on confidential information obtained from an informant whose identity is *not* known to the police. In the absence of a history of police contact with the anonymous informant, it likely would have been difficult for the Crown to meet the *Debot* test. Because the drug investigator in this case had dealt with the anonymous informer before and had been able to corroborate information he or she previously provided, the test was satisfied even though little was known about the anonymous informant.

R. v. Hansen, 2016 ONSC 6789, 2016 CarswellOnt 17054 (Ont. S.C.J.)

8. Denial of Opportunity to Consult Counsel No Excuse for Refusal of Approved Screening Device Demand

Facts: A police officer went to the scene of a single motor vehicle accident. The accused was standing near the vehicle. His wife was present, but further away. She gave inconsistent answers to the officer's question about who was driving. The accused denied that he was driving, but admitted to drinking. The officer made the approved screening device demand of him. The accused said that he was not the driver and that he was not going to blow. The officer cautioned him about the consequences of that response, but the accused again refused to provide a breath sample.

The officer put the accused in the rear of the police cruiser. The accused started to make a telephone call on his cell phone and said that he was calling his lawyer. The officer took the cell phone away and handcuffed the accused. After a second officer arrived, the arresting officer again made an approved screening device demand. The accused refused, yelling that he was not the driver.

The accused was arrested for refusing to provide a breath sample.

The accused was convicted at trial. He appealed, arguing that he did not make an unequivocal refusal, because he believed that he did not have to provide a roadside breath sample until he had spoken to counsel.

Held: Appeal dismissed.

The summary conviction appeal judge noted that the trial judge found that the accused had a settled intention not to comply with the approved screening device demand until after he had spoken to his lawyer. A request to speak to a lawyer before providing a roadside breath sample is not in law a reasonable excuse for non-compliance with an approved screening device demand. The summary conviction appeal judge rejected the submission that there is an obligation on the police to explain to an individual that a desire to speak to a lawyer first is not a reasonable excuse to refuse to provide a roadside breath sample. He also commented that the law is clear that requesting an approved screening device breath sample without giving the individual an opportunity to speak with counsel does not create a *Charter* s. 10 breach.

Commentary: This case emphasizes the distinction between an approved screening device demand, and a breathalyzer demand. The latter engages a detainee's s. 10 *Charter* rights, while the former does not.

R. v. Pociurko, 2016 ONSC 6691, 2016 CarswellOnt 16637 (Ont. S.C.J.)

9. What are the Police Obligations under Section 10(B) to Facilitate a Detainee's Access to Multiple Counsel of Choice?

Facts: The accused was charged with operating a motor vehicle while impaired and "over 80." The defence brought a *Charter* application arguing, among other things, that the accused's rights to counsel were violated during the course of the police investigation.

The relevant circumstances were as follows: the accused was arrested at the roadside and advised of her rights to counsel. In response, the accused stated that she wished to speak with a particular lawyer. Upon arriving at the station, the police called counsel of choice and left a message asking him to call the station. The officer also called duty counsel. Duty counsel called back first and the accused was placed on the phone. Afterward, the accused maintained that she did not get to speak with counsel of choice and that she still wanted to do so. The officer told the accused that she could wait a reasonable amount of time for counsel to call back — and they waited another 10 minutes without success. At that point, the accused asked to speak with another lawyer. The officer called this person and left messages at various numbers. Again, no one called back and, around 20 minutes after this second set of calls, the officer began the accused's breath tests. Shortly after the first breath test, the accused's second counsel of choice called back and the accused was permitted to speak with her.

Held: The Court held that the police violated the accused's s. 10(b) rights because they failed to make reasonable efforts to contact the accused's counsel of choice and also failed to wait a reasonable amount of time for counsel to call back. In the Court's view, the case turned upon whether the accused was diligent in the exercise of her rights and, if so, whether the police made reasonable efforts to facilitate access to counsel of choice. On the first issue, the Court held that the accused was in fact diligent; she expressed a desire to speak with counsel of choice and was entitled to insist upon speaking with one or two individuals before participating in the police investigation. On the second issue, the police waited very little time for counsel of choice to call back — 48 minutes for the accused's first counsel of choice and somewhere between 11 and 18 minutes for the accused's second counsel of choice. The Court concluded that "18 minutes is not long enough to wait for counsel to call back", and the police should have treated the accused's request to speak with the second counsel just as seriously as they treated her first (i.e., they should have waited around the same amount of time). As a result, her s. 10(b) rights were violated and the evidence obtained prior to the accused speaking with counsel was excluded under s. 24(2).

Commentary: This case touches upon an area of the law that has generated a considerable split of authority among lower courts — namely, the scope of an accused's s. 10(b) rights when (1) the accused initially expresses a preference for counsel of choice; (2) the police call both counsel of choice and duty counsel; and (3) duty counsel calls back first. As the Court recognized, the law generally provides that, in such circumstances, the accused has an obligation to continue exercising his or her rights diligently but, so long as the accused continues to do so, the police have a continuing obligation to make all reasonable efforts to facilitate access to counsel of choice. See *R. v. Willier*, [2010] 2 S.C.R. 429, 2010 CarswellAlta 1974; *R. v. McCrimmon*, [2010] 2 S.C.R. 402, 2010 CarswellBC 2665; *R. v. Manninen*, [1987] 1 S.C.R. 1233, 1987 CarswellOnt 99.

The problem is that, while these general principles are not in dispute, their application to any given set of facts often leads to conflicting decisions — with courts disagreeing on what qualifies as reasonable diligence by the accused and reasonable efforts at facilitating the right to counsel of choice by the police. See, e.g., *R. v. Traicheff*, 2010 ONCA 851, 2010 CarswellOnt 9501; *R. v. Littleford*, [2001] O.J. No. 2437, 2001 CarswellOnt 2258 (C.A.); *R. v. Vernon*, 2015 ONSC 3943, 2015 CarswellOnt 12030. In the present case, for example, the Court believed that the efforts made by police in contacting one counsel could not assist them in showing the reasonableness of their actions vis-à-vis another. In other words, so long as the accused remained diligent in asking to speak with different counsel — one after another — the police had to make full efforts to facilitate contact with each one (waiting the same amount of time regardless of the total delay).

The approach creates a considerable burden for police — particularly in the drinking and driving context where police officers are tasked with taking an accused's breath tests "as soon as practicable" in order to rely on the statutory presumption of identity while, at the same time, waiting a sufficiently long period of time for counsel of choice to call back. In light of this burden and the practical reality that accused persons cannot be permitted to delay a police investigation indefinitely, another court might very well have reached a differed result — focusing on the totality of the police efforts rather than the waiting period associated with each individual counsel of choice.

R. v. Duong, 2016 ONCJ 602, 2016 CarswellOnt 16136 (Ont. C.J.)

10. Does Facilitating Rights to Counsel in the Face of an Ambiguous Request for Legal Advice Inject Unreasonble Delay into a Drinking and Driving Investigation?

Facts: The accused was charged with operating a motor vehicle "over 80." The Crown's case depended upon the presumption of identity set out in s. 258(1)(c) of the *Criminal Code* and showing that the accused's breath tests were taken "as soon as practicable." On this issue, a question arose as a result of a 26-minute period of delay that followed the accused's arrival at the police station while the police made efforts to facilitate the accused's rights to counsel. The accused was arrested at the roadside and advised of his rights. The officer asked, "Do you want to call a lawyer now?" The accused responded, "I don't have one." Faced with this ambiguous statement, the

officer decided to facilitate a call with duty counsel upon arriving at the station. The defence argued that the delay caused by the call was unreasonable as the accused never invoked his right to counsel.

Held: The Court held that the accused's breath tests were taken as soon as practicable and allowed the Crown to rely upon the presumption of identity. To begin, the Court noted that the tests do not have to occur "as soon as possible." Rather, the police need only act reasonably and take the accused's breath tests within a reasonably prompt period of time. See *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489, 2006 CarswellOnt 1759 (C.A.) at paras. 12-13; *R. v. Singh*, 2014 ONCA 293, 2014 CarswellOnt 4953 at paras. 14-15. The inquiry also requires consideration of the entire chain of events, rather than discrete periods of time. In applying these principles, the Court found that the police had acted reasonably. Both breath samples were collected within 80 minutes of the accused's operation of his vehicle and the evidence showed that the police acted with reasonable haste throughout their interactions with the accused. The decision to place the accused on the phone with duty counsel did not alter the analysis. The accused had not waived his rights to counsel but, rather, simply said, "I don't have one" and the police were justified in interpreting this comment as a request to speak with duty counsel.

Commentary: The decision serves as yet another example of the tricky situation that officers find themselves in when seeking to facilitate access to counsel while, at the same time, investigating a drinking and driving offence in a reasonably prompt manner. The law provides that — after the police inform a suspect of his or her rights to counsel — the accused must invoke those rights before any police duty to facilitate access to counsel comes into play. See *R. v. Owens*, 2015 ONCA 652, 2015 CarswellOnt 14602.

The problem is that it is not always clear whether an accused is invoking his or her rights. For example, in the present case, the suspect said that he did not have a lawyer — not that he wanted to speak with one. Likewise, in the recent case of *R. v. Owens*, the accused was asked if he wanted to speak with counsel and he replied, "No, not right now." When faced with a similarly ambiguous request for counsel, an officer might believe that he or she ought to err on the side of caution and provide access to legal advice. Unfortunately, at least in the drinking and driving context, such action can be perceived as injecting unreasonable delay into the investigation. Although the Court in this case was not convinced by the argument, others have looked upon it more favourably. See, e.g., *R. v. MacCoubrey*, 2015 ONSC 3339, 2015 CarswellOnt 8112. Until this area of the law is clarified, an officer might consider seeking clarification when faced with an ambiguous request for counsel and confirm whether the accused is, in fact, invoking his or her rights.

R. v. Grewal, 2016 ONCJ 631, 2016 CarswellOnt 16612 (Ont. C.J.)

11. Is a Promise Not to "Press Charges" if the Accused Comes Clean Sufficient to Render an Admission of Guilt Involuntarily?

Facts: The case concerned an allegation of theft made by two women with whom the accused worked. The Crown's key piece of evidence was the accused's statement to police admitting that he stole the women's belongings. The statement came about from an odd set of circumstances, however. The accused's conversation with police took place on the steps of the police station and other individuals were present — including the two victims of the alleged offence. During the conversation, a police officer (not the lead investigator) advised the accused that he need not say anything but then proceeded to ask him questions. The accused twice declined to give his side of the story. However, at the same time, one of the victims lectured the accused for what she believed that he had done and demanded that he return the stolen items. The victim then stated that she would not "press charges" if he did so. At that point, the officer interjected and once again asked the accused if he had stolen the items in question. This time, the accused admitted that he committed the theft and promised to recover the belongings.

Held: The question became whether the accused's admission was voluntary and admissible against him at trial.

The Court held that it was not even though the accused did not take the stand and testify that he felt compelled to make a statement in the face of the victim's promise not to "press charges."

In so deciding, the Court noted that, for a statement to a person of authority to be admissible, it must have been made voluntarily — meaning that it was the product of an operating mind and not the result of "fear of prejudice or hope of advantage." See *R. v. Oickle*, 2000 SCC 38, 2000 CarswellNS 257 at para. 47. The voluntariness inquiry is a contextual one that focuses not only upon the existence of any threats, promises, or inducements in exchange for an admission of guilt but also the circumstances surrounding any such *quid pro quo* that might speak to the strength at which it influenced the accused's decision to provide a statement.

In the present case, there was sufficient evidence to conclude that the statement was involuntary notwithstanding the accused's refusal to take the stand. The accused had twice refused to answer the officer's questions when she asked what had happened. It was only after the victim's offer not to "press charges" that the police were able to obtain an admission. It was reasonable to infer that the accused's statement was the result of an impermissible *quid pro quo* that overcame the accused's free will and rendered his statement involuntary as a matter of law.

Commentary: This was an unusual case. Allowing the victims to be present and lecture an accused during a police interview is not a sound investigative practice. It is worse to allow those victims to offer the accused an explicit promise in exchange for incriminating information. Such promises are bound to place the voluntariness of any resulting statement in doubt — regardless whether the officer actually agreed with the victim's proposal and would go along with the victim's offer to avoid charges if the accused came clean. If such circumstances presented themselves in the future, the police would be wise to advise both the accused and victim that it is the police's decision whether to lay charges and make clear to an accused that they are not complicit in the victim's offer. There is no *quid pro quo* for providing an admission of guilt.

R. v. Brazeau, 2016 YKTC 54, 2016 CarswellYukon 127 (Y.T. Terr. Ct.)

12. Does a Lawful Investigative Detention Include Patting Down and Placing a Suspect in the Back of a Police Cruiser while the Police Continue their Investigation?

Facts: The police were on the lookout for a car driven by a suspected parole violator. Based upon a "vague hunch" that the officer had found the car, he stopped a vehicle and pulled over the accused. (As it turned out, there was considerable information available to the officer at the time that would have indicated that he had the wrong person.) After being pulled over, the accused provided his name and date of birth at the roadside but he did not have any identification on him. So, the officer conducted a pat-down search and placed the accused in the back of his cruiser in order to complete his investigation. In carrying out the pat-down search, the officer located 18 separate packages of cocaine. The accused was charged with possession for the purposes of trafficking. At trial, he sought to exclude the drugs on the ground that they were seized in violation of his *Charter* rights.

Held: The Court held that placing the accused in the rear of the cruiser violated s. 9 of the *Charter* and that the pat-down search violated s. 8. It excluded the impugned evidence.

On the legality of the detention, the Court stated that the "crux of the assessment centers on the question of whether the detention [was] reasonably necessary given the totality of the circumstances presented to the individual officer." See *R. v. Aucoin*, [2012] 3 S.C.R. 408, 2012 CarswellNS 847 at para. 39. As for the pat-down search, the Court noted that the searching officer must believe "on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search." See *R. v. MacDonald*, 2014 SCC 3, 2014 CarswellNS 16 at para. 41. The Court also noted that if the detention in the cruiser was unlawful, then so too was the pat-down search — as it was done as a prelude to the detention. See *R. v. McGuffie*, 2016 ONCA 365, 2016 CarswellOnt 7507 at paras. 56-57.

Applying these principles, the Court found that placing the accused in the rear of the cruiser was unreasonable. Had the officer made reasonable inquiries, he would have learned that the car he had just pulled over did not fit the description of the one driven by the alleged violator. This meant that, in the Court's view, the officer "immediately decided to detain and search rather than investigate." And, so, "while his initial stopping of the vehicle was appropriate as an investigative detention, the subsequent detention in the police vehicle was not reasonably necessary in these circumstances." A simple computer search from the officer's vehicle would have eliminated the necessity of a further detention and search.

Commentary: The Court's judgment provides a helpful review of some of the important legal principles that arise frequently in the context of investigative detentions at the roadside. In particular, officers must remember that there is a clear line between an investigative detention and an arrest. Although the grounds needed to conduct a lawful investigative detention are lower than those needed for an arrest, so too ought to be the infringement placed upon an individual's liberty interest. A brief detention to question a suspect or conduct a limited investigation is permitted; a full scale pat-down, handcuffing, and placement in the back of a cruiser is not.

The distinction helps illustrate how the investigating officer ran afoul of the accused's *Charter* rights here. The officer was permitted to pull over the accused's car and conduct a non-intrusive investigation to determine if he was, in fact, the suspected parole violator that the officer was after. This conduct is permitted under *Mann* and had the officer left the accused alone in his car, the officer would have done nothing wrong. However, the officer could not go further and carry out a *de facto* arrest by placing the accused in his cruiser for an indeterminate period of time while he completed his investigation. At that point, the officer was using his permissible powers to detain for a much more expansive purpose — and one for which they were not intended.

R. v. Primeau, 2016 SKPC 134, 2016 CarswellSask 663 (Sask. Prov. Ct.)