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— Police Powers—

Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton

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1. “Ruse” Traffic Stop for the Purpose of Conducting Search Incident to Arrest (Two Months Prior to Arrest) is Charter Compliant

Facts: The Applicant was charged with conspiracy, possession of the proceeds of crime and criminal organization offences as a result of Project O’River, a lengthy and detailed investigation into illegal gambling online and in the City of Toronto. The target of the investigation was an alleged criminal organization known as Platinum SB (Sports Betting), which operated a betting website. It maintained accounting records of wins, losses,

commissions, and accounts payable, had a network of betting agents, or “bookies” and collected commissions from middle management “super agents.” The Applicant was alleged to have been a “collector” for the top level of the Platinum SB organization. The investigation into the activities of Platinum SB employed a variety of techniques, including the use of undercover operatives, the covert execution of search warrants, the use of wiretaps, and physical surveillance. In his alleged role as a “collector,” the Applicant was observed meeting with known and unknown parties for brief periods of time to conduct an exchange of packages, and on one occasion, cash. Continued surveillance of the Applicant indicated that he appeared to be taking on collection duties previously carried out by another individual under surveillance. Project O’River was to conclude with a final takedown at Platinum SB’s 2013 Super Bowl Party.

During the fall of 2012, the lead investigator met with the Crown to determine whether a general warrant could be obtained to authorize a “ruse” traffic stop of the Applicant in order to search his vehicle for evidence, and was advised that a general warrant could not be obtained for such a search, as the accused would not become aware of his full jeopardy and thereby compromise the continuing investigation. A couple of weeks later, the lead investigator determined that there were reasonable and probable grounds to arrest the Applicant for possession of proceeds of crime and related offences. Instead of obtaining a general warrant, the police decided to search the Applicant incident to a *de facto* arrest, two months prior to the date of the intended physical arrest of the Applicant on takedown day.

A plan was developed to detain the Applicant along Highway 401 the day after his weekly collection duties. The object of the search was to obtain evidence relevant to the investigation, including cash, cell phones, computers, contact information and accounting records. However, in order to protect the on-going investigation, the Applicant was not to be advised of the real reason he was being detained. Instead, uniformed officers were to stop the vehicle if they observed any *Highway Traffic Act* offences, or in the alternative, to advise the Applicant that they wanted to check his driver’s licence. Under either scenario, after conducting a licence check, the officers were to advise the Applicant that they wanted to search his car for contraband, because the licence check revealed that the Applicant was associated with the Hells Angels motorcycle gang. This plan was modeled on the reasons for decision in *R. v. Dibble*, 2011 ONSC 399, 2010 CarswellOnt 10412, in which the accused was told his vehicle was being searched for a radar detection device when the true purpose of the search was to obtain evidence of narcotics.

In *Dibble*, the detention of the accused and the search of the vehicle were found to be lawful, but the failure to inform the target of the real reasons for arrest resulted in breaches of the right to be informed as to the reason for arrest under s. 10(a) of the *Charter*. Each officer involved in the ruse was provided with a copy of the reasons for decision in *Dibble*, and instructed to ensure compliance with the Applicant’s rights under s. 10(b) of the *Charter*, including allowing the Applicant to contact counsel of choice at the roadside, with a cell phone provided for this purpose. The officers were also told not to question the Applicant at all, and to caution him against making any statements. Finally, the officers were told that if the Applicant resisted the search, they were to caution him that he would be arrested for obstruct police, but that if he simply put up his windows and drove away, the officers were not to pursue him.

The Applicant’s vehicle was observed travelling on the 401 at a high speed, eventually exiting the highway from the middle lane of traffic. When the Applicant entered the highway again, approximately ten minutes later, police conducted a traffic stop. As per the plan, the officers informed the Applicant that he was being detained due to erratic driving and his affiliation with the Hells Angels and that they were going to search his car for contraband and/or weapons. When the Applicant insisted that the police would require a warrant, he was cautioned that he could submit to the search, or he would be arrested for obstructing police.

The Applicant was then handcuffed and placed in the cruiser, where he was permitted to consult with counsel, but not with an understanding of the real reasons for the detention or arrest. After discovering a duffle bag of cash in

the trunk of the vehicle, the Applicant was cautioned that he was now under investigation for possession of the proceeds of crime and given a second opportunity to consult with counsel which he exercised. Officers seized cash, cell phones and a computer, and the Applicant was released from the scene. Two months later, the Applicant was physically arrested with others on takedown day.

At trial, the Applicant conceded that investigators had reasonable and probable grounds to arrest him for gaming-related offences, but argued that as the Applicant was not arrested for another two months, the roadside detention of the Applicant and search of his vehicle were unlawful, and sought the exclusion of the evidence obtained under s. 24(2).

Held: Application dismissed.

The trial judge held that the Applicant was not arbitrarily detained, as police had reasonable and probable grounds to arrest him for gaming-related offences and were entitled to detain him for investigative purposes. The failure to inform the detainee of the true reason for the detention did not transform a lawful detention into an arbitrary detention. In *Dibble*, and more recently in *R. v. Grant*, 2015 ONSC 1646, 2015 CarswellOnt 3329, courts have endorsed the use of a ruse traffic stop to obtain relevant evidence, while taking steps to protect an on-going investigation. In both *Dibble* and *Grant*, the failure to inform the detainee as to the true purpose of the detention and search did not result in breaches of ss. 9 and 8 of the *Charter*, though it did result in findings that s. 10(a) was breached.

The search of the vehicle was a lawful search incident to arrest. The Applicant's detention on the roadside was a *de facto* arrest; it was not necessary for the officers to have uttered the phrase: "you are under arrest," nor was it necessary for the accused to have been detained in custody following the arrest: *R. v. Latimer*, [1997] 1 S.C.R. 217, 1997 CarswellSask 2. As reasonable and probable grounds existed for the arrest, the search of the vehicle was valid: *R. v. Caslake*, [1998] 1 S.C.R. 51, 1998 CarswellMan 1; *R. v. Debot* (1986), 17 O.A.C. 141, 1986 CarswellOnt 135 (C.A.); affirmed [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111, at para. 35.

As in *Dibble* and *Grant*, the courts in this case found that the calculated ruse traffic stop did result in a breach of the Applicant's *Charter*-protected rights under ss. 10(a) and (b). The failure to inform the appellant as to the true reason for his detention resulted in a breach of the Applicant's informational rights under s. 10(a) and a breach of the Applicant's right to retain and instruct counsel of choice under s. 10(b). The mere fact that the Applicant was put in contact with counsel did not constitute a meaningful exercise of his right to counsel. There cannot be any meaningful communication between an accused and his counsel where both are misled as to the true nature of the accused's jeopardy. Misinformation provided to counsel necessarily taints the legal advice provided: *R. v. McGuffie*, 2016 ONCA 365, 2016 CarswellOnt 7507. Notwithstanding the *procedural* steps taken to facilitate the Applicant's exercise of his right to counsel, the failure to inform the Applicant or his lawyer of the true reason for his detention, arrest and search *necessarily* resulted in a substantive violation of s. 10(a) and (b).

At the conclusion of the balancing exercise mandated in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, the trial judge refused to exclude the evidence under s. 24(2). The trial judge concluded that the seriousness of the breach of the Applicant's rights was significantly mitigated by aspects of the police conduct in this case, including the steps taken to comply with the Applicant's right to counsel, the specific directions not to question the Applicant, and the need to protect the integrity of the on-going investigation. As such, the trial judge held that the breach was not particularly serious. The *Charter*-offending conduct in this case had little to no impact on the *Charter*-protected interests of the Applicant as he was not questioned, or asked to make any incriminating statements. Having regard to the truth -seeking function of the trial, and balancing all factors, this is a case in which the *exclusion* of the evidence would bring the administration of justice into disrepute.

Commentary: The Alberta Court of Appeal recently upheld the use of a general warrant to conduct a similar ruse

as used in this case: *R. v. Whipple*, 2016 ABCA 232, 2016 CarswellAlta 1458. That said, this case has several troubling features. The police were advised by the Crown that the reason why a general warrant could not be obtained was because the target of the technique would not be informed of the reason for his detention, arrest, and search in violation of s. 10(a) and/or 10(b) of the *Charter*. That is, because the technique was not lawful. Further, the police knew from their reliance on *Dibble* that, without a general warrant, their strategic plan unavoidably would result in a s. 10(a) violation. Notwithstanding this, the police then set about to intentionally ensure that such conduct took place. Indeed, the inevitable s. 10(a) breach was understood in advance as a *necessary* part of their investigative plan. Although police took extraordinary steps to facilitate the right to counsel (as compared to an ordinary case), continuing with the ruse belied a fundamental misapprehension of the purpose behind s. 10(a) of the *Charter*. Finally, there was absolutely no urgency to the *de facto* arrest of the Applicant. Rather, it was a strategic mid-investigation decision designed to benefit the investigation at the intended cost of breaching the Applicant's rights. Failing to exclude the evidence, where the officers had explicit knowledge of the *Charter*-infringing conduct, and intended its result, arguably brought the administration of justice into disrepute in a serious manner.

R. v. Bielli, 2016 ONSC 6866, 2016 CarswellOnt 17568 (Ont. S.C.J.)

2. Warrantless Arrest at Residence Not a Violation of Section 9

Facts: Police received a 9-1-1 call about an assault in progress and arrived to find a distraught female who said her ex-boyfriend assaulted her. The woman told police that he was inside a rooming house and was in possession of drugs and in breach of his curfew. Three officers attended at the rooming house. A man in the lobby of the rooming house told police there was a black man in unit 202, dealing drugs. One of the officers testified that he heard a woman's voice inside unit 202, then knocked on the door and asked that it be opened. The woman answered that she needed to get dressed. She attempted to open the door, but it jammed on fabric lying on the floor. The officer pushed on the door to open it.

While entering, the officer observed a woman and a Caucasian male, and asked if they resided in the unit. Both indicated that they did not, and did not know who did. The officer then asked if anyone else was in the unit, and both indicated there was no one else.

The officer testified at trial that he suspected that the situation in unit 202 was an "apartment takeover" wherein the lawful resident of a dwelling is forcibly removed so that the property may be used to carry out illegal activity, which gave rise to concern for the well-being of the lawful resident of unit 202. The officer observed a closed door within the unit and opened it, revealing a very small bathroom. The appellant was inside, sitting on the toilet. The officer ordered the appellant to stand up and pull up his pants, then placed his hand on the appellant and guided him out of the bathroom. As the appellant exited the bathroom, the officer observed a cellophane bag containing what was later determined to be 38 grams of crack cocaine floating in the toilet. The appellant was arrested for possession for the purpose of trafficking.

At trial, the appellant sought the exclusion of the crack cocaine, alleging breaches of his rights under ss. 9, 8, 10(a) and 10(b) of the *Charter*. Citing *R. v. Edwards*, [1996] 1 S.C.R. 128, 1996 CarswellOnt 1916, the trial judge held that the appellant had no reasonable expectation of privacy in the apartment and no standing to assert a s. 8 *Charter* breach. The trial judge further found that while it would have been preferable for police to obtain a warrant to search unit 202, the brief investigative detention as the appellant was directed out of the bathroom was "for a mere instant in a fluid situation" but that if he was wrong, he would not exclude the evidence under s. 24(2). The appellant was convicted, and appealed.

Held: Appeal dismissed.

The Court of Appeal held that there was no reason to interfere with the trial judge's conclusion that the appellant lacked standing to advance a claim under s. 8 of the *Charter*. Although the reasons for judgment do not refer to each of the *Edwards* factors individually, the Court held that the trial judge was aware of the governing principles and that it was open to the trial judge, based on his credibility findings, to conclude that the appellant's subjective expectation of privacy was not objectively reasonable. These evidentiary findings were entitled to deference on appeal: *R. v. Gagnon*, 2006 SCC 17, 2006 CarswellQue 3559.

Generally, police require a warrant to arrest an individual inside a dwelling house: *R. v. Feeney*, [1997] 2 S.C.R. 13, 1997 CarswellBC 1015. In this case, the officer entered into the apartment, with the consent of one of its occupants, for the ostensible purpose of investigating various criminal acts, not for the purpose of effecting the arrest of the appellant. On being informed by the two occupants that they did not reside in the apartment and did not know who did, the officer continued his entry based on concerns for the safety and security of the true owner. In the circumstances, the Court of Appeal held that *Feeney* warrant was not required.

Further, the Court of Appeal held that while holding his back to the appellant, the officer's direction to exit the bathroom did not amount to a detention. Not every interaction between a person and the police constitutes a detention within the meaning of the *Charter*, even where that interaction occurs in the course of an investigation: *R. v. Mann*, 2004 SCC 52, 2004 CarswellMan 303. While the appellant may have been momentarily under the control of the officer as he was guided out of the bathroom, he was not subject to the type of physical or psychological constraint that amounts to a detention: *R. v. Suberu*, 2009 SCC 33, 2009 CarswellOnt 4106. Even if the direction to exit the bathroom did amount to a detention, it was certainly not arbitrary: given that the officer was undertaking an investigation of an alleged assault, the information available to him, including that a man matching his description was selling drugs in unit 202, and the concern that the situation amounted to an "apartment takeover", the initial investigative detention of the appellant was reasonable.

Commentary: This decision represents a clear "high-water mark" for the Crown regarding the concept of a reasonable expectation of privacy as set out in *R. v. Edwards*, [1996] 1 S.C.R. 128, 1996 CarswellOnt 1916. The appellant was in a private dwelling, in respect of which evidence was led at trial that he paid rent. The assault-complainant stated he would be there. The door was locked. The consent to enter offered by the other occupant of the apartment, whose authority to authorize police entry was at best dubious, did not extinguish the appellant's *Charter* rights. Yet, the trial judge held that the appellant did not have a reasonable expectation of privacy and the Court of Appeal refused to intervene based on a determination that the trial judge's decision was entitled to "deference".

R. v. Reid, 2016 ONCA 944, 2016 CarswellOnt 19657 (Ont. C.A.)

3. Authorization to Intercept Private Communications Upheld as Valid

Facts: Police were investigating the stabbing death of a man outside a nightclub in Ottawa's Byward Market district. The prime suspect was Ahmed Hafizi. The police sought a Part VI authorization to intercept the communications of Ahmed Hafizi, and three other named persons, two of Ahmed's friend, and his father, the respondent on appeal. The affidavit set out the grounds to believe Ahmed inflicted the fatal wound and that his two friends assisted him during and after the stabbing. The affidavit went on to state that the respondent "had knowledge of the actions of his son." In support, the affidavit detailed how two men resembling Ahmed's friends attended at the respondent's pizza shop the day after the stabbing. The affidavit also detailed two instances in which the respondent was observed driving his vehicle in a manner officers believed was designed to detect surveillance (*i.e.*, making u-turns and driving aggressively). The affidavit went on to describe how, when police attended to interview Ahmed, having followed him to the respondent's pizza shop, the respondent told police that Ahmed was at home, and provided them with a telephone number. Ahmed was observed exiting the pizza shop approximately an hour after this interaction. Finally, the affidavit included information from an informant, who had

"third hand" information that the respondent was heard saying it was better the victim was killed, rather than his son.

As a result of the interception of the respondent's communications, police formed the belief that the respondent was travelling to Toronto for the purpose of obtaining drugs. On his return to Ottawa, police stopped the vehicle he was travelling in, arresting the driver and the respondent for trafficking. A search incident to arrest revealed a quantity of cash and heroin in the trunk.

At trial, the respondent sought a declaration that the wiretap authorization constituted a breach of his rights under s. 8 of the *Charter* and an order excluding the evidence under s. 24(2). The trial judge granted the application and the respondent was acquitted. The Crown appealed, alleging that the trial judge failed to conduct the contextual analysis of the grounds in support of the wiretap authorization and substituting his own views for that of the issuing justice, and erred in his analysis under s. 24(2) by imputing improper intentions to the affiant of the Information to Obtain in the absence of any *viva voce* evidence from the officer.

Held: Appeal allowed, new trial ordered.

A *Garofoli* application is not a *de novo* hearing of the *ex parte* application for a warrant to search: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119 at p. 1452 [S.C.R.]; *R. v. Sadikov*, 2014 ONCA 72, 2014 CarswellOnt 752. On a *Garofoli* application, the test a reviewing judge must apply is whether, in light of the record amplified on review, the Information to Obtain contained sufficient reliable evidence that might reasonably be believed, on the basis of which the authorizing justice *could* have concluded that the conditions precedent for the authorization had been met: *R. v. Nero*, 2016 ONCA 160, 2016 CarswellOnt 2699. See also: *R. v. Hall*, 2016 ONCA 13, 2016 CarswellOnt 53, at paras. 47-48.

The threshold for naming a person in an affidavit as a "known person" in an authorization under Part IV of the *Criminal Code* is not onerous. Investigators must know the person's identity and have reasonable grounds to believe that the interception of that person's private communications may assist in the investigation of an offence: *R. v. Beauchamp*, 2015 ONCA 260, 2015 CarswellOnt 5412, at para. 105.

Here, the trial judge erred in law in adopting a piecemeal approach to the affidavit, considering only that evidence which directly suggested the respondent had knowledge of his son's involvement in the offence, instead of considering that evidence in the context of the entire affidavit, which disclosed other evidence in support of the authorization. (See *Beauchamp*, *supra*, at paras. 85-89; *R. v. Nero*, 2016 ONCA 160, 2016 CarswellOnt 2699, at para. 68; *R. v. Spackman*, 2012 ONCA 905, 2012 CarswellOnt 16420, at para. 223.) Adopting the correct approach to the review of the affidavit, it is clear that the "may assist" standard to include the respondent as a Principal Known Person was clearly met.

Commentary: This brief judgment contains a helpful and succinct summary of the relevant principles regarding the standard of review on a *Garofoli* application.

R. v. Hafizi, 2016 ONCA 933, 2016 CarswellOnt 19469 (Ont. C.A.)

4. "Overholding" of Accused Results in Exclusion of Breath Test Results

Facts: Around 3:00 a.m., ambulance attendants noticed the accused driving inappropriately. They were concerned that he might be impaired, and radioed dispatch. They then followed the accused's vehicle. They saw it speed up and slow down erratically, and cross over the centre line into oncoming traffic on more than one occasion. At a stop light, the accused appeared to fall asleep. His car moved forward only after another driver honked at it. Ultimately, the accused's vehicle crossed from the passing lane into the curb lane, mounted the

sidewalk, and smashed into multiple light standards.

One of the ambulance attendants walked the accused away from the vehicle as the police arrived. The accused walked unsteadily. The attendant and a police officer smelled alcohol on his breath. The accused was arrested for impaired operation and given his rights to counsel. He did not wish to contact a lawyer. After the police made the breath test demand, they took the accused to a police station, arriving at 3:40 a.m. He gave breath samples about an hour later. A toxicologist later testified at the accused's trial that the breath test results meant that at 2:40 to 2:50 a.m., the accused's blood alcohol concentration was in the range of 140 to 180 milligrams of alcohol in 100 millilitres of blood, and that his ability to operate a motor vehicle would have been impaired by alcohol. The accused also was charged with "over 80".

The officer in charge of the station decided to hold the accused in custody there to prevent accidental harm and to prevent him from driving after being taken home by taxi. That officer did not personally observe the accused. He relied on the breath test results, information about the accused's physical and mental condition, the fact that there had been a serious single vehicle accident, the fact that the accused had been falling asleep behind the wheel, and the arresting officers' opinions that the accused was too intoxicated to be released. The accused was released seven hours after the breath tests.

At trial, the accused argued that the police arbitrarily detained him contrary to s. 9 of the *Charter* by unreasonably overholding him after he provided breath samples. He sought a stay of proceedings under s. 24(1).

Held: Accused acquitted of "over 80", but convicted of impaired operation.

The trial judge found that the police failed to consider any possible alternatives to continued detention that could ensure the accused's safety. Further, the officer in charge of the station did not personally assess the accused before deciding to detain him, or at any time after that. He conducted an initial perfunctory hearsay assessment of the accused's condition for release, and then relied on another officer to check the accused every four hours. The trial judge found that the officer in charge essentially ignored the accused. There was an arbitrary detention and a violation of s. 9.

However, the trial judge concluded that a stay of proceedings was not an appropriate remedy for the *Charter* breach. Full answer and defence was not affected by the violation, nor would irreparable prejudice to the integrity of the judicial system be caused if the prosecution were continued. Instead, the trial judge decided that he could consider exclusion of the breath test results as a remedy. He found that the "obtained in a manner" requirement of s. 24(2) was met because the overholding was part of the same chain of events or course of conduct as the breath sample investigation, given the temporal connection between them and the reasons for the overholding.

Turning to the *Grant* factors, the trial judge found that they militated toward exclusion. The breach was serious, and in addition the police failed to take the breath samples as soon as practicable, demonstrating a bewildering inattention to the length of a citizen's detention. Because exclusion of the breath test results would not affect the impaired operation charge given the other overwhelming evidence, society's interest in adjudication on the merits was not affected. The trial judge excluded the breath test results, and acquitted the accused on the "over 80" charge.

After finding the accused guilty of impaired operation, the trial judge said that he would treat the overhold of several hours as a credit of pre-trial detention of six hours against the sentence to be imposed for that offence.

Commentary: The issue of police overholding of arrestees charged with drinking and driving offences continues to arise. This decision is somewhat odd, because it does not seem that the defence sought exclusion of the breath test results under s. 24(2) as a remedy for the overholding, nor is it clear that counsel made submissions

on that issue. The remedy sought by the defence was a stay of proceedings under s. 24(1). The trial judge, however, relied on the Court of Appeal's decision in *R. v. Pino*, 2016 ONCA 389, 2016 CarswellOnt 8004, where that court identified the considerations that should guide a court's approach to the "obtained in a manner" requirement of s. 24(2), to ground his conclusion that he could consider exclusion of the breath test results under that provision.

R. v. Rahman, 2016 ONCJ 718, 2016 CarswellOnt 19451 (Ont. C.J.)

5. Offer of Contact with Duty Counsel Not Violative of Charter where Counsel of Choice Unavailable

Facts: The accused was stopped on a highway early on a Sunday morning after a police officer watched him driving erratically at a high rate of speed. He was arrested for dangerous driving. The officer read the accused his rights to counsel. When asked if he wanted to call a lawyer "now", the accused said, "I can, ya I do." The officer asked the accused if he had his own lawyer. The accused replied, "I have my own lawyer". He said that he had counsel's card in his wallet.

During this exchange, the officer noticed an odour of alcohol on the accused's breath. As a result, he administered the roadside screening device. The accused registered a "fail". The accused was arrested for "over 80", and again advised of his rights to counsel. The accused said that he had his own lawyer. The officer read the breath demand. The accused replied, "I know but I'm going to call my lawyer first".

The officer took the accused to a police station. On arrival, the officer told the accused that he was also under arrest for fail to stop, and gave him his rights to counsel a third time, in relation to that charge. When asked if he wanted to call a lawyer, the accused said, "I told you, I gave you my lawyer".

The officer called the lawyer's cell phone number and left a message at 1:50 a.m. At 1:51 a.m. the officer called the office phone number for the lawyer and left a message. At 2:22 a.m. the officer told the accused that the lawyer had not called back, and asked if the accused wished to speak to duty counsel. The accused said that he did. At 2:23 a.m. the officer left a message for duty counsel, who called back at 2:35 a.m. The accused spoke with duty counsel.

The accused was taken to the breath technician, who went over his rights to counsel. The accused said that he understood. The accused gave breath samples that produced blood alcohol concentration readings of 150 and 140 milligrams of alcohol in 100 millilitres of blood.

The accused's lawyer never called back to the station.

At trial, the accused argued that his *Charter* s. 10(b) right to counsel had been breached because the police advised him that his options were counsel of choice or duty counsel; they failed to facilitate his access to counsel of choice; and when counsel of choice did not respond, they diverted him to duty counsel rather than giving him the opportunity to contact another private lawyer. He sought the exclusion of the breath test results under s. 24(2).

Held: Application dismissed.

The trial judge concluded that the police officer did not breach the accused's right to counsel. The trial judge found that the officer read the accused his rights to counsel from a card several times, and that this included reference to contacting "any lawyer you wish". The trial judge acknowledged that the officer repeatedly followed up by asking the accused, "Do you want to speak to your lawyer or duty counsel", and that this had the potential to mislead a detainee to believe that he or she had only those two options. The trial judge commented that any practice of asking that question should stop. However, he found that the accused was not misled by the officer's question. The accused was focused on contacting his own lawyer. He repeatedly told the police that he wanted to

contact his lawyer, whom he identified and whom the police tried to reach. Moreover, the accused testified on the application that he knew that if he could not reach his lawyer, he could call another private lawyer.

The trial judge also found that the police officer diligently performed his duty to facilitate the accused's access to counsel of choice, and did not foist duty counsel on the accused. The officer left a message on the lawyer's cell phone, and waited half an hour for a call back. That was a reasonable period to wait at that time on a Sunday morning. The accused asked no further questions about accessing private counsel. He agreed to speak to duty counsel, and expressed no dissatisfaction after doing so. The accused did not act diligently if his desire was to speak to another private lawyer.

Commentary: This decision exemplifies the obligation on a detainee that arises once the police have carried out their informational and implementational duties, to be reasonably diligent in exercising the right to counsel. This is particularly important in drinking and driving cases, where the police must be conscious of the statutory timeline for the taking of a breath sample. Absent some indication from a detainee that he or she wishes to contact another private lawyer when counsel of choice is not available after a reasonable time, the police are unlikely to be faulted if they offer the accused an opportunity to speak with duty counsel and the accused does so without expressing dissatisfaction.

R. v. Thompson, 2016 ONCJ 711, 2016 CarswellOnt 19453 (Ont. C.J.)

6. No Exclusion of Evidence Obtained Prior to Charter Breach

Facts: A police officer with a tactical canine unit was parked in an unmarked cruiser when a vehicle driven by the accused missed a turn, and hit a fence and the step of a house. The accused got out of the driver's side of the vehicle, barefoot and dishevelled. She was staggering. A male got out of the passenger side of the vehicle.

The officer went and spoke to the accused. He asked if she needed EMS. She said, "No. I fucked my car". The officer smelled alcohol on her breath and noticed that her eyes were glassy and red. He arrested her for impaired driving and dangerous driving, cautioned her, and gave her rights to counsel. When he asked if she understood, she said, "No". When asked if she wanted to call a lawyer, she said, "Whatever. I can't afford a lawyer."

The officer called for assistance. A second officer arrived. The arresting officer told the second officer that he had arrested the accused and for which offences, and that she had been read her *Charter* rights.

As the second officer escorted the accused to his cruiser, she screamed at her passenger, "Mom's going to kill me for driving bombed." The second officer took her to the police station. He too noticed indicia of impairment, including a smell of alcohol from her, unsteadiness on her feet, and watery, bloodshot eyes.

At trial, no evidence was adduced as to the wording of the *Charter* rights the arresting officer read to the accused. No evidence was adduced that once at the station, the accused was given a reasonable opportunity to contact counsel, or that she formally waived her right to counsel.

At trial, the accused contended that her *Charter* s. 10(b) right to counsel had been violated. She sought the exclusion under s. 24(2) of all evidence of indicia of impairment and any inculpatory statements she made. In the alternative, she sought a stay of proceedings or exclusion of evidence under s. 24(1).

Held: Application allowed in part, and exclusion of accused's statement to her passenger granted.

The trial judge found that there was a blatant violation of s. 10(b) in three respects. First, there was no evidence as to the wording of the *Charter* rights read to the accused. Second, after the accused replied to the arresting officer that she did not understand what he read to her about her rights to counsel and that she could not afford a

lawyer, the officer made no effort to explain the informational component of s. 10(b). Third, there was no evidence that after she was taken to the police station, the accused was ever given a reasonable opportunity to contact counsel, or that she formally waived her right to counsel.

On the issue of exclusion under s. 24(2), the trial judge noted that but for one inculpatory statement, all indicia of impairment by alcohol observed by the arresting officer, as well as the accused's first utterance, preceded her arrest and the s. 10(b) violation. The trial judge accepted that that evidence, although obtained prior to the *Charter* violation, had a temporal link to the breach. He concluded, however, that that standing alone was insufficient to make exclusion of the evidence under s. 24(2) available as a remedy for the s. 10(b) violation.

The trial judge viewed differently the accused's inculpatory statement about driving while "bombed". That utterance was made after the s. 10(b) violation and while the accused was being escorted to a cruiser by the second officer. There was a causal connection between that utterance and the s. 10(b) breach. Because the accused did not understand her right to counsel, she was at risk of incriminating herself, and did incriminate herself by blurting out a statement to her passenger that the police heard. Applying the *Grant* analysis, the *Charter* violation was serious, as was the impact of the violation on the accused's ability to appreciate the risk of incriminating herself. Even though a trial on the merits was in the public interest, admission of the utterance would bring the administration of justice into disrepute.

With respect to s. 24(1), the trial judge found that there was no evidence of egregious police misconduct that would merit a stay of proceedings, nor was the evidence obtained in violation of ss. 7 or 11(d) of the *Charter* so as to impact on the fairness of the trial.

Commentary: The trial judge distinguished the decision of the Court of Appeal for Ontario in *R. v. Pino*, 2016 ONCA 389, 2016 CarswellOnt 8004, on the "obtained in a manner" requirement of s. 24(2). In *Pino*, the appellate court held that drugs found in the accused's vehicle should have been excluded under s. 24(2) in circumstances where the accused was subsequently misinformed about her s. 10(b) rights and held incommunicado for several hours after her arrest. The trial judge noted that *Pino* involved, additionally, a take-down of the vehicle by masked police officers, a search of the vehicle that was held to be unreasonable, and evidence at trial from police officers that the appellate court viewed as misleading. The trial judge interpreted the holding in *Pino* as a determination that the conduct of the police throughout the investigation and the multiple *Charter* breaches were sufficiently egregious to warrant exclusion of the drugs. The trial judge commented that the case before him was factually different from *Pino*, because there was no search and seizure connected to the s. 10(b) breach.

R. v. Smith, 2016 ABPC 302, 2016 CarswellAlta 2533 (Alta. Prov. Ct.)

7. Admissibility of Mr. Big Statements Upheld on Appeal

Facts: The accused Magoon was the common law partner of the accused Jordan. Jordan's six year old daughter died as a result of severe injuries, including abdominal and head injuries, sustained while she was with the couple for a week.

The two accused claimed that the injuries occurred when the child accidentally fell down the stairs. This account was contrary to the medical evidence.

The police conducted an eight month long "Mr. Big" undercover operation that targeted both accused. It began when the accused rented a residence that was actually a covert police location. Undercover police officer A rented the garage. A engaged Jordan in a purported delivery business. Magoon became friends with B, who was another undercover police officer posing as A's girlfriend. Eventually, A introduced Jordan to the criminal side of the business and his involvement in an organization that tolerated criminal activity. The head of the organization,

Mr. Big, was portrayed as having special contacts with the police and the ability to help those in the organization avoid criminal prosecution. The organization was described as valuing honesty, loyalty and respect. Both accused were offered meals, entertainment and gift cards, as well as friendship, by the organization. Jordan was paid wages and told that he would earn $20,000 for participation in an upcoming big job. The organization promised to help the accused obtain access to and custody of their children, who were then in foster care.

While Jordan was in Vancouver on a job with A, the police came to his home to arrest him for his daughter's murder. Magoon notified Jordan. Jordan was upset. He spoke with A. They planned to involve Mr. Big to help Jordan get rid of the problem.

Mr. Big met with Jordan and said that he could help only if Jordan told him the truth about what happened to the child. During the course of a four hour interview, Mr. Big pressed Jordan for information, and told him that he would be expelled from the organization if he was not honest. Jordan admitted some violence toward his daughter, which explained various, but not all of her injuries. Mr. Big told Jordan that his disclosures did not explain the child's head injuries.

Twice during the interview, Jordan called Magoon. She denied involvement in the deceased's head injuries, but made reference to burning the child's hand. Jordan then told Mr. Big that Magoon said she had burned the child, and added that it had been done with a lighter. Mr. Big encouraged Jordan to speak to Magoon about any involvement she may have had in the child's head injuries.

Unknown to Jordan, the meeting with Mr. Big was videotaped.

After Jordan returned from Vancouver, he and Magoon stayed in a hotel room. The police had the room under electronic surveillance. In conversation with Magoon, Jordan admitted to further assaults on and abuse of his daughter, including dragging her up and down the stairs by her ankles and throwing her up the stairs to the kitchen.

Magoon then met with Mr. Big, for over two hours. She told him that she knew Jordan's job and relationship with his friends was at stake. She said that she had burned the deceased's hand and insisted that it was done with a lighter, even after Mr. Big told her the burn was caused by a flat surface. She related Jordan's admissions to her about assaulting the child. Mr. Big pressed Magoon about the head injuries. He said that Jordan told him that she caused the head injuries, which she denied. He told her that either she or Jordan must be lying. He gave her one last chance to tell the truth. She then said that she had tripped the deceased, causing the child to fall and hit her head on the stairs. She admitted to shaking the child's head on the tile floor. She also admitted to intentionally burning the child.

Unknown to Magoon, the conversation with Mr. Big was recorded.

After Magoon's meeting with Mr. Big, both accused were arrested and charged with first degree murder.

In the interviews with both accused, Mr. Big impressed on them the importance of telling the truth, and noted that the organization would not accept liars. He confronted them with medical reports about the child's death, and asked them to explain her injuries.

At the trial before a judge without a jury, Magoon sought the exclusion of the admissions she made during the undercover operation. The trial judge applied *R. v. Hart*, 2014 SCC 52, 2014 CarswellNfld 215, and ruled Magoon's statements admissible.

The trial judge found that the accused were co-participants in the child's death. She convicted both accused of second degree murder. They appealed, on various grounds. Magoon contended on appeal that the trial judge

erred in admitting her Mr. Big statements.

Held: Admissibility of Magoon's Mr. Big statements upheld.

The appellate court found that the trial judge was alive to the concerns identified in *Hart*: that Mr. Big confessions may be unreliable; that evidence of the accused's participation in simulated crime during the operation sullies the accused's character and carries a risk of prejudice; and that Mr. Big operations run the risk of being abusive. The court agreed with the trial judge that there were sufficient markers of the reliability of Magoon's statements to overcome the prejudicial effect of the Mr. Big evidence.

Although no threats of violence were made to the accused and the use of violence was not promoted within the organization, the trial judge recognized that economic inducements and promises of help in getting the accuseds' children back from social services were made to them, which raised concerns about the reliability of their statements. She found, however, that there were markers of the reliability of the statements. In particular, the accused were the only adults who cared for the deceased in the timeframe when she sustained the injuries, and there was no possibility that her injuries were accidental. The appellate court noted that the case was very different from *Hart*, where the deaths could have been accidental. Further, some of the information the accused gave in their statements to Mr. Big were consistent with medical information of which they were not aware. Another significant marker of reliability was that there were times when Magoon resisted the pressure exerted by Mr. Big to explain the child's injuries. In particular, Magoon did not agree with some of Mr. Big's untrue suggestions about how the injuries were caused.

On the issue of the prejudicial effect of Magoon's statements, the appellate court noted that she was not personally involved in the criminal organization and did not commit any simulated crimes that might lead to concerns about her character being sullied, as occurred in Hart. The trial judge also observed, correctly, that concerns about moral and reasoning prejudice are reduced in a judge alone trial.

Commentary: This case is an example of the application of the framework set out in *Hart*, to a Mr. Big operation that was designed and carried out before the Supreme Court of Canada decision was released. This Mr. Big operation was considerably more benign than that carried out in *Hart*. That, combined with the presence of multiple indicia of reliability of the accused's Mr. Big statements, saved them from exclusion.

R. v. Magoon, 2016 ABCA 412, 2016 CarswellAlta 2435 (Alta. C.A.)

8. Failure to Give Second Call after Jeopardy Changes Leads to New Trial

Facts: The accused was involved in a road rage incident. He was driving a car when the driver of a van cut him off near a stop sign. The driver of the van got out and walked toward the appellant's car. The appellant initially backed up, but then drove forward and hit the man.

Following his arrest for dangerous driving causing bodily harm, the appellant spoke with duty counsel. After the call, the interviewing officer told him that he would also be charged with assault with a weapon, at which point he asked to call his own lawyer. Two names were provided. While the interviewing officer attempted to call the lawyers to no avail, the arresting officer told him that the appellant had already spoken to duty counsel. The interview then went ahead without a second right to counsel being facilitated. The appellant never spoke with his counsel of choice or any lawyer after being informed about the assault with a weapon charge.

The trial judge determined that his s. 10(b) rights had not been breached because his jeopardy had not occurred. As both the charges, dangerous driving causing bodily harm and assault with a weapon, arose out of the same set of circumstances and both carried the same maximum penalty, his jeopardy had not changed. Even if he was

wrong about this, the trial judge determined that he would not have excluded the evidence under s. 24(2) of the *Charter*.

The appellant was convicted of both counts. He appealed his convictions.

Held: The Court of Appeal disagreed. The appellant's jeopardy had clearly changed when he was told that he would also be charged with assault with a weapon. The assault with a weapon charge significantly increased the appellant's jeopardy in the sense that it is an offence with higher moral blameworthiness. Unlike dangerous driving, where the Crown only has to prove that the driving constitutes a marked departure from the norm, assault with a weapon requires proof that the accused acted intentionally to harm another, in this case the driver of the van. This higher level of intent had the potential to significantly increase the penalty received by the appellant should he be convicted of the assault with a weapon offence.

It would be speculative to assume that the appellant would have provided a statement regardless of whether he had received legal advice on the assault with a weapon charge. The appellant's s. 10(b) rights were breached.

As for s. 24(2), the trial judge's determination was owed no deference as he did not find a breach and did not consider all of the relevant factors from *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104. This was a serious breach as it deprived the appellant of access to counsel in the face of a serious increase in jeopardy. It had a serious impact on him as it deprived him of an opportunity to make a meaningful choice about whether to speak to the police in these circumstances. Moreover, the exclusion of the evidence would not have gutted the prosecution in the sense that it could have proceeded without the statement. While the court reinforced the fact that there is no absolute rule requiring exclusion of statements obtained in breach of the *Charter*, as a matter of practice, it recognized that courts generally exclude because admission would, on balance, bring the administration of justice into disrepute. The statement was excluded, convictions set aside and new trial ordered.

Commentary: This case highlights the need for police to remain vigilant about the s. 10(b) right whenever an accused's jeopardy changes. The courts will afford wide latitude when determining whether there has been a change in jeopardy. Multiple charges can arise out of single incidents. As this case demonstrates, some charges carry a heavier moral blameworthiness than others. Just because an individual has consulted with counsel in the face of an arrest arising from an incident, does not mean that the legal advice received is adequate to the task if another charge will be laid arising from the same delict.

R. v. Moore, 2016 ONCA 964, 2016 CarswellOnt 19828 (Ont. C.A.)

9. Police had Reasonable and Probable Grounds to Arrest Arising from a 9-1-1 Call

Facts: The police received a 9-1-1 call that two occupants of a motor vehicle were travelling in a certain area and that they had a firearm. The vehicle was described with some precision, right down to the licence plate number. The occupants were also described with some precision. The 9-1-1 caller was following the vehicle and giving the 9-1-1 operator updated information as to its whereabouts, including when it went into an underground garage. The caller also said that he and the other person in his car would be prepared to meet with the police. Their first names were provided.

Two officers in a single police vehicle went in search of the Dodge silver four-door that had been described. Shortly after, they saw a vehicle matching this description in the area where it had been seen by the 9-1-1 caller. One officer testified that he was able to match the entire licence plate to the information received by the caller, while the other officer said that he was only able to confirm the last three numbers on the plate.

The officers followed the vehicle and noted it was travelling 60 kph in a 40 kph zone. When a second police

vehicle arrived, the Dodge was pulled over and a high-risk takedown was executed, involving a gunpoint arrest of both vehicle occupants.

The passenger of the vehicle, later the appellant, exited the vehicle and lay face down on the ground. He matched the description given by the 9-1-1 caller. He was arrested for possession of a firearm and he was searched, including inside of his pockets. A small quantity of marijuana was located in his pocket and over one thousand dollars in cash. Police dogs were deployed but found no evidence of a firearm. Once at the police station, 25 grams of cocaine was found in the appellant's underwear.

The appellant raised various *Charter* infringements at trial. While he conceded that the police did not err in stopping the vehicle, and were entitled to investigate the occupants, including conducting a pat-down search, they did not have sufficient objective reasonable grounds to arrest. As such, searching his pockets incident to arrest was unlawful and all evidence should be excluded.

The trial judge dismissed the *Charter* motion, finding adequate grounds to conduct a lawful arrest. Mr. Carelse-Brown appealed from his convictions.

Held: The appeal was dismissed.

Gillese J.A. rejected the argument that the police only had sufficient grounds to stop the vehicle to conduct an investigative detention. Relying upon *R. v. Golub* (1997), 34 O.R. (3d) 743, 1997 CarswellOnt 2448 (C.A.); leave to appeal refused [1998] 1 S.C.R. ix (note), she emphasized that an officer acting on grounds that are evolving in a tense situation does not always have the luxury of judicial reflection. In determining whether there are sufficient grounds to arrest, the court must consider "the power exercised and the context within which it is exercised": *Golub*, at para. 18.

Even where information that is provided by a police dispatcher cannot be independently confirmed, the police are entitled to rely upon that information in making decisions about whether to arrest. In order for there to be a lawful arrest here, the arresting officer had to personally believe that he had reasonable and probable grounds to arrest and the grounds had to be objectively established in the circumstances: *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CarswellOnt 78, at p. 250 [S.C.R.]. The appellant conceded that the officer had subjective grounds to arrest. The sole question was whether a reasonable person, standing in the officer's shoes, would have believed that reasonable and probable grounds sufficient to arrest existed.

The court concluded that the trial judge was right to answer this question in the affirmative. Among other things, the 9-1-1 callers said that the men were armed with guns, they provided the location where the threats had taken place and were "obviously in some form of contact with the suspect vehicle". In addition, the callers provided their first names to the police dispatcher. The information provided to the dispatcher, including the vehicle's location and description, had been confirmed. The police had "every reason to believe" the information and that there were guns in the vehicle. The court concluded that "not only were they justified in acting on that information, they would have been derelict in their duty had they not acted on it." The arrest was lawful and the search incident to it was lawful.

The appeal was dismissed.

Commentary: This case shows the continued power of the *Golub* decision almost 20 years later. In *Golub*, Doherty J.A. made the observation that the "dynamics" in an arrest situation are wholly different than those that operate in the search warrant context. An officer's decision as to whether to arrest "must be made quickly in volatile and rapidly changing situations". As such, it is an error to apply the legal requirements attaching to a search warrant — such as the need to confirm and corroborate information — with the same exactitude when it

comes to assessing the grounds upon which an arrest may occur. As officers have to make their decisions based on the information available at the time, it will often be “less than exact or complete”. A justice considering whether to issue a search warrant sits in a very different position than an officer who is on the street, making a real time decision, often with public and officer safety aspects involved.

This decision demonstrates the continued importance of understanding the difference between the arrest and search warrant environments and the latitude sometimes extended to the police in potentially volatile arrest situations.

R. v. Carelse-Brown, 2016 ONCA 943, 2016 CarswellOnt 19894 (Ont. C.A.)

10. Man Acquitted Following Incorrect Understanding of Breach

Facts: The accused was subject to a Yukon bail order that prohibited him from having contact or communication with a named person “if [he is] under the influence of alcohol”. As well, he was subject to a Northwest Territorial Court probation order, precluding contact with the same person if he has “been drinking any alcohol at all within the previous 24 hours”.

A police officer attended at a home one night to ask the home occupant to move an RV trailer. The owner was the father of the person who Mr. Krizan was precluded from having contact with if under the influence of alcohol. While waiting for the RV to be moved, the officer could see into the residence through a window. He could see Mr. Krizan and the named person. The officer recognized Mr. Krizan from previous contact. He knew that Mr. Krizan was bound by various court orders.

The officer checked in at the police station and was informed that Mr. Krizan was on a release that precluded him from having contact with the daughter of the home owner. He was not informed about the fact that he was only precluded from having contact in circumstances involving alcohol.

The officer asked the home owner if he could enter the home to make the arrest. He was granted permission. At the time that he arrested Mr. Krizan, the officer had no basis upon which to believe that he had been drinking. Notwithstanding this fact, within seconds of the arrest, the officer could smell alcohol on the appellant’s breath. There were no other signs of alcohol consumption.

The trial judge concluded that while the arresting officer did not have an honest and well-founded belief that the accused had consumed alcohol before the arrest took place, “within seconds” of the arrest, he could smell alcohol on his breath. The trial judge concluded that the arrest was lawful on the basis that the accused was “about to contravene” the recognizance.

The accused appealed his convictions.

Held: The summary conviction appeal court overturned the convictions and entered acquittals. Justice Veale concluded that the police lawfully entered the residence without a warrant. The trial judge made a finding of fact that the officer disclosed his reasons for wishing to enter the residence. It was accepted at trial that the officer told the home owner that he wished to enter in order to arrest Mr. Krizan. Justice Veale deferred to this finding of fact. He also deferred to the finding that the home owner was well-aware of his constitutional rights. He knew full well that he could refuse the police entry to his home and, in fact, had done so in the past. His decision to allow the police entry on this occasion was a fully informed and constitutional consent. There was nothing wrong with the police entering.

The error was in the trial judge’s approach to the lawfulness of the arrest. The officer clearly misapprehended the term of the orders precluding contact only when alcohol was involved. While an officer can arrest an individual

who she or he believes is about to commit an offence, this is not what the officer did here. Rather, the officer arrested on a belief that the appellant was committing an offence. He was working on imperfect information in circumstances where he could have received accurate information had he taken the time to uncover it. There was nothing to suggest exigent circumstances.

As for the exclusion of the evidence, Veale J. did not defer to the trial judge's alternative position that if he had found a *Charter* breach he would not have excluded the evidence in any event. This was a serious *Charter* breach. The fact that it was committed in a private home aggravated the seriousness of the breach. The unlawful arrest had a serious impact on the appellant's *Charter* protected interests. He was apprehended in a home where there were no exigent circumstances and where there were no reasonable grounds. He was transported to the police detachment and detained for several hours. As noted, "The loss of 'a few hours of freedom' is no trivial matter."

Finally, the evidence of the odour of alcohol on the appellant's breath is not particularly reliable evidence as to his drinking. While exclusion would gut the prosecution, on balance, the *Grant* factors pointed toward exclusion. Acquittals were entered.

Commentary: This decision reminds us of a few things. First, the grounds for arrest and the basis upon which an arrest takes place will inform the review process. Where the police arrest on a belief that an offence is being committed, they cannot later suggest that the arrest is lawful because they had grounds to believe that an offence was about to be committed. What is in the officer's mind at the time of the arrest is what will control the analysis.

As well, this judgment seems to stand for the proposition that entering a private home to conduct an arrest will aggravate the seriousness of a s. 9 *Charter* breach, even where the accused does not enjoy a privacy interest in the home.

R. v. Krizan, 2016 YKSC 66, 2016 CarswellYukon 158 (Y.T. S.C.)

11. Unsigned Search Warrant Is Properly "Issued"

Facts: The police were conducting a drug importing investigation. They obtained two search warrants for what they believed would be a transaction on a particular date. The transaction did not occur and was rescheduled to take place at Mr. Chen's home on July 26, 2011. The day before the anticipated transaction, the police applied for a new warrant. A new Information to Obtain a search warrant and application for a sealing order were affirmed before a "judicial justice of the peace". The package of materials was left with the justice.

At 10:38 p.m., the police received a call advising that the applications had been approved and that the warrants, one for Mr. Chen's home and one for his co-accused, were ready for pick-up. An officer picked them up the next morning. Officers then attended at Mr. Chen's home with the warrant. He was provided with a copy prior to execution.

As it turns out, the warrant was not signed by the justice of the peace. While the justice had filled out the date and place of issuance on the search warrant, made a small adjustment to the description of his or her office (changing "Justice of the Peace" to "Judicial Justice . . . "), and printed the name of the justice underneath, the search warrant did not contain the justice's signature.

The trial judge concluded that the warrant was "valid" based on the totality of evidence, including that the officer had been contacted and told that the warrant could be picked up. Despite this fact, the trial judge concluded that pursuant to s. 29 of the *Criminal Code*, a person could not necessarily determine from the face of the warrant whether it had been properly authorized. As such, there was a s. 8 breach because Mr. Chen would not have

been in a position, after being provided with a copy of the warrant, to determine its validity. Despite the s. 8 breach, the evidence was not excluded under s. 24(2) of the *Charter*.

The appellant was convicted of possession for the purposes of trafficking of 28 kg of methamphetamine and one kg of cocaine. He appealed his convictions on the basis that the trial judge had erred in concluding that there was no s. 8 breach arising from the fact that the search warrant was not signed.

Held: The appeal was dismissed.

The trial judge did not err in finding no s. 8 breach arising from the failure to sign the warrant.

This was a drug investigation and the search warrant issued under s. 11(1) of the *Controlled Drugs and Substances Act* (*CDSA*). While the appellant argued that the warrant was facially defective, the court thought otherwise. Justice Newbury concluded that the issue is not whether the warrant was signed, but whether it was "issued". Section 11(1) of the *CDSA* requires that a justice of the peace "issue a warrant authorizing a peace officer" to search. Unlike s. 11(3) that refers to a justice endorsing a warrant, s. 11(1) merely references issuance of the warrant. The question on this appeal is what constitutes issuing a warrant. Does it need to be signed?

The court emphasized the *Oxford English Dictionary* meaning of "issue", being to "come out or be sent out". The *Canadian Oxford Dictionary* speaks to sending forth or putting into circulation. While a signature can provide proof that a warrant was issued, signing need not happen for issuance to occur. The requirement for a signature should not be read into s. 11(1) of the *CDSA* as a condition of a validly issued search warrant. In these circumstances, there were sufficient facts, combined with the presumption of regularity, to support the conclusion that the warrant was issued. The trial judge was correct in proceeding as if the warrant was validly issued and there was no s. 8 breach arising from the lack of signature.

As for the s. 29 *Criminal Code* issue, the trial judge was correct to find a breach of s. 8. An officer executing a search warrant must provide it when requested to do so. The purpose of s. 29 is to allow the occupant of a place to be searched knowing why the search is being carried out and to allow him or her the ability to assess his or her legal position and know that there is a "colour of authority for the search, making forcible resistance improper": *R. v. Cornell*, [2010] 2 S.C.R. 142, 2010 CarswellAlta 1472, at para. 43. A person who was shown this warrant would be confused about whether the warrant was properly authorized and this gives rise to a s. 8 breach.

As for s. 24(2), the Court of Appeal deferred to the trial judge's conclusion that the evidence should not be excluded. The failure of the police to notice the absence of the signature was nothing more than a lapse of attention. While the mistake was unfortunate, it was not serious.

Commentary: This is an interesting judgment. The interpretation of issuance, while well supported in its dictionary meaning, seems somewhat novel in the search warrant context. While there is a body of law that supports the proposition that a body of evidence can be relied upon to conclude that a warrant was properly issued, arising from the presumption of regularity, until now, this principle does not appear to have been applied to an unsigned warrant. From the Crown's perspective, it is a helpful stretch of the presumption of regularity doctrine in the face of an allegation of facial invalidity.

As for the s. 29 issue, it shows the importance of this *Criminal Code* provision. It is interesting in this case that the actual s. 8 breach is rooted in the fact that Mr. Chen might not have been able to ascertain the lawfulness of the warrant, an underlying purpose of the s. 29 requirement, yet the police were found to be executing a validly issued warrant.

R. v. Chen, 2016 BCCA 506, 2016 CarswellBC 3645 (B.C. C.A.)

12. Nine Hour Delay in Facilitating Access to Counsel Results in Exclusion of Cash, Drugs and Paraphernalia

Facts: A confidential informant advised police that the accused was involved in trafficking in cocaine. He advised that the accused carried out his activities from a white Ford F-150 pickup truck and provided police with the licence plate. The detective who received the information advised investigators that the source was reliable, but did not provide any further details with respect to the source, or the currency of the information. Subsequent police checks revealed that the F-150 was registered to woman named Trang Do. The registered address of Ms. Do was a property owned by both Ms. Do and the accused. Further searches revealed that Ms. Do and the accused were in a relationship and had children together. As a result of the informant's tip, police conducted surveillance of the accused at his registered address.

On day one, police observed an Asian man entering a white Mitsubishi Lancer, also registered to Ms. Do. After following the vehicle for a period of time, police determined the driver was not the accused.

On day two, an Asian man and woman were observed entering a blue Kia Spectra. This vehicle was also registered to Ms. Do. The Kia was followed for a period of time, but officers were not sure that the man in the Kia was in fact the accused. Later on that same day, a man entered the Kia and it was followed again. Police were again unable to identify the driver. Police observed two interactions they testified were consistent with drug-trafficking: the Kia would park, and a person would approach and enter the vehicle for a short period of time. The Kia was then followed to a third location, where it parked again. The surveillance team lost sight of the vehicle for approximately 30 seconds, and when surveillance resumed, a man was observed exiting the Kia and entering a nearby house. The Kia then returned to the accused's home.

On day three, the accused was identified entering the Kia. He was followed to a location where another brief interaction was observed. When the Kia parked again, police arrested the accused. The accused was cautioned, read his rights to counsel, and indicated he wished to speak to a lawyer.

At the time of his arrest, the accused was holding a cell phone. An officer seized the phone and reviewed the text messages. Two conversations were consistent with drug transactions. One of the conversations made reference to the location where the Kia was parked. The officer continued the text conversation, and saw a man approaching the Kia. When the officer identified himself to the man, he refused to speak to police.

A search of the Kia at the scene of the arrest did not reveal any evidence of drug-trafficking. The Kia was towed to the Edmonton Police Service impound lot for the purposes of searching the Kia with a drug-sniffing dog. Before the sniffer dog search could be conducted, police located two canisters containing 37 spitballs of cocaine magnetically attached to the underside of the front driver and passenger seats.

An application was made for a search warrant for the address of the accused, as well as an apartment. The application was completed and approved at 1:53 a.m., but took some time to execute. A quantity of GHB and paraphernalia associated with drug trafficking was located at the apartment, together with $30,000 in cash, and a taser. Both searches were completed at 4:30 a.m. at which point the accused was permitted to speak to counsel, approximately nine hours following his arrest and initial request to speak to counsel.

The accused was charged with possession of cocaine for the purposes of trafficking, possession of the proceeds of crime and possession of GHB. At trial, the accused brought an application to exclude the evidence obtained as a result of the investigation, citing breaches of his rights under ss. 9 and 8 of the *Charter*, arguing the police lacked reasonable and probable grounds to believe he had committed an offence, such that his arrest, and the subsequent search of his vehicle and cell phone incident to that arrest, were unlawful. The accused also alleged the nine hour delay in facilitating access to counsel constituted a breach of his rights under s. 10.

Held: Application allowed in part.

The arrest of the accused was lawful. The information provided by the confidential informant was weak, and deserving less weight as no details about the informant, his track record of reliability, or the currency of his information were available to the officers. However, police were able to confirm that a white Ford F-150 pickup truck was associated to the accused's address. While police were not able to confirm the identity of the accused as the driver of the Kia on day two of surveillance, his conduct the following day showed he was associated with the vehicle and engaged in similar activity. While none of these factors would, on their own, constitute reasonable and probable grounds to arrest, taken together, the officer's subjective belief was objectively reasonable: *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111, at p. 1166 [S.C.R.]; *R. v. Greffe*, [1990] 1 S.C.R. 755, 1990 CarswellAlta 42; *R. v. Truong*, [2014] A.J. No. 1519 (Q.B.); *R. v. O. (N.)*, 2009 ABCA 75, 2009 CarswellAlta 288; and *R. v. Lim*, 2015 ABQB 273, 2015 CarswellAlta 927.

Accordingly, the search of the applicant's vehicle at the scene of the accused's arrest, and its subsequent search at the police impound lot, were both valid searches incident to arrest. While *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202 had not yet been released at the time of the arrest of the accused, the cursory search of the cell phone was not unreasonable.

The nine-hour delay in facilitating access to counsel was held to be wholly unreasonable and unjustified. In the absence of any objectively reasonable purpose for failing to facilitate access to counsel, like legitimate officer safety concerns or exigent circumstances, the deliberate withholding of access to counsel constitutes an egregious breach of s. 10(b). In all the circumstances, the evidence obtained as a result of the execution of the searches of the apartment and the accused's residence must be excluded from evidence. In addition, if later convicted, the serious breach of the applicant's 10(b) rights may be considered relevant on sentencing: *R. v. Nasogaluak*, 2010 SCC 6, 2010 CarswellAlta 268.

Commentary: The reasons for decision in this case represent a good example of the sometimes difficult assessment of reasonable and probable grounds to effect an arrest. Here, the subjective belief of the officers conducting the investigation was that the activities observed were consistent with drug trafficking. Based on all of the circumstances, the court found their grounds to be objectively reasonable based on the knowledge and experience of the officers themselves. While the reasons provide little analysis under s. 24(2) as required in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, the deliberate and egregious nature of the officers' failure to facilitate access to counsel clearly brought the administration of justice into disrepute, thereby justifying the exclusion of the evidence located that was causally and/or temporarily connected to that breach.

R. v. Lam, 2016 ABQB 736, 2016 CarswellAlta 2606 (Alta. Q.B.)