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— Police Powers—

Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton

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1. — Failure to Communicate Misunderstanding of Right to Counsel Results in Admission of Evidence

Facts: The appellant was driving on Highway #39 from North Portal to Regina, Saskatchewan. There was a substantial stretch of the highway that was under construction. The appellant had driven through the same construction zone a few hours previous to the events giving rise to his conviction on his way to North Portal to pick up his landed immigrant papers.

The appellant’s driving was uneventful, until he passed two semi-trailers in the construction zone. The second semi-trailer was in the process of slowing down as it approached a highway flagging station. Immediately after passing the semi-trailer, the appellant noticed a flag person approximately six meters in front of him, but could not stop in time. The appellant struck the flag person and killed her. After the collision occurred, the appellant called

911 for assistance.

When the RCMP arrived at the scene of the accident, the appellant was distraught, but able to produce his driver's license and answer questions without difficulty. The RCMP member on the scene, Cst. Buttle, did not detect any signs of impairment, but placed the appellant under arrest and provided him with his s. 10(b) right to counsel and police caution, which the appellant indicated he understood. When asked if he wished to call a lawyer, the appellant declined.

Cst. Buttle transported the appellant to the RCMP detachment and commenced a video-recorded interview. The appellant appeared calm and collected. At the start, Cst. Buttle confirmed that the appellant had been given his right to counsel, and asked him again if he wanted to speak to a lawyer. The appellant indicated that he didn't know a lawyer, and he could not afford one, "so I think I need legal aid." Cst. Buttle asked if the appellant wanted to speak to "legal aid," and the appellant indicated "that's fine as I don't mind going without." Cst. Buttle advised the appellant to let him know if he changed his mind, and reminded the appellant that anything he said during the interview could be used as evidence. The appellant indicated he understood and proceeded with the interview. At the end of the interview, Cst. Buttle identified the potential penalties the appellant faced. At this point, the appellant expressed an interest in legal aid, and Cst. Buttle arranged for a call to duty counsel. Following the call, the appellant refused to make any other statements.

At trial, the appellant applied to exclude his video-recorded statement to police on the basis that his s. 10(b) *Charter* rights had been breached. The appellant argued that Cst. Buttle ought to have recognized that the appellant was distraught, and did not understand his right to counsel. As evidence, the appellant relied on his subsequent request to speak to legal aid and the decision not to make any further statements after having consulted with duty counsel. The trial judge dismissed the application to exclude the evidence and convicted the appellant of dangerous driving causing death. The appellant appealed.

Held: Appeal dismissed.

The police do not have an obligation to respond to a detainee's misunderstanding of his right to counsel, or how to implement it, if that misunderstanding is not communicated to police, or there are no other indicators suggestive of a lack of comprehension: *R. v. Sinclair*, 2010 SCC 35, 2010 CarswellBC 2664, at para. 55. The requisite indicators of a misunderstanding, when viewed objectively, must signal confusion or misunderstanding: *R. v. Evans*, [1991] 1 S.C.R. 869, 1991 CarswellBC 417, at p. 891 [S.C.R.]; *R. v. Bartle*, [1994] 3 S.C.R. 173, 1994 CarswellOnt 100, at pp. 192-194 [S.C.R.].

The issue on appeal is the same as the issue at trial: whether there was something in the circumstances that should have altered Cst. Buttle that the appellant did not understand his right to counsel. Both at the scene of the accident and at the RCMP detachment, the appellant indicated that he did not wish to speak to a lawyer. The trial judge concluded that the exchange at the start of the interview indicated that the appellant *did* understand the information provided by Cst. Buttle, because he expressed that he could not afford a lawyer and would need legal aid. The fact that the appellant wanted to speak to legal aid after learning of the potential penalties he faced does not compel the conclusion that he did not understand his rights at the start of the interview.

Commentary: This case represents a straightforward application of the well-known principles in *R. v. Evans*, [1991] 1 S.C.R. 869, 1991 CarswellBC 417; *R. v. Bartle*, [1994] 3 S.C.R. 173, 1994 CarswellOnt 100; and *R. v. Sinclair*, 2010 SCC 35, 2010 CarswellBC 2664. While reasonable people might disagree as to whether the RCMP officer's offer in this case for the appellant to speak to "legal aid" rather than a "legal aid lawyer" was sufficient, this case presents an important reminder of the necessity of a detainee communicating any misunderstanding or confusion before a s. 10(b) *Charter* breach will be made out.

R. v. Dunford, 2017 SKCA 1, 2017 CarswellSask 4 (Sask. C.A.)

2. — Receipt and Review of Telecommunications Obtained in Foreign Jurisdiction in Real Time does Not Constitute an "Intercept"

Facts: In January 2008, the United States and Canada were cooperating on parallel investigations of

cross-border illicit drug importation and trafficking from the U.S. into Canada. The Drug Enforcement Agency ("DEA") used a civilian agent to communicate with a number of targets, one of whom resided in Canada. The agent informed the DEA that the Canadian target ("the appellant"), among others, communicated with him via Blackberry.

In May 2008, the DEA arranged for the agent to distribute encrypted Blackberry devices to the targets of the investigation. One of these phones was delivered to the appellant at an address in Langley, B.C. Each of the devices had its own "@goosebomb.com" email address, which was stored on the DEA server. Each device was configured to only send and receive emails, and could not be operated as telephone. Between June 23, 2008 and February 25, 2009, the DEA obtained a series of judicial authorizations to intercept the targets' communications to and from the devices. The intercepted emails were forwarded directly to the DEA server where they were stored.

On July 15, 2008, the DEA began forwarding the appellant's intercepted emails to an archived address set up by the Combined Forces Special Enforcement Unit (the "CFSEU") of the RCMP. The electronic transmission of the messages occurred within seconds of their real-time receipt by the DEA server.

During the time period of the interception, the appellant used his Blackberry to communicate with his co-accused, one Christopher Mehan, also resident in Canada. Mehan was not a target of the DEA investigation, and did not have one of the encrypted devices. However, emails between the appellant and Mehan were captured by the interception of the communications to and from the appellant's device. They in turn were transmitted to the CFSEU by the DEA.

The DEA's interception of the appellant and Mehan's emails led the CBSA to seize two shipments of cocaine being imported to Canada from the United States in December, 2008. The DEA investigation was scheduled to end on February 22, 2009, however, the CFSEU investigation was still on-going. The DEA agreed to loan the CFSEU the DEA server until the completion of the Canadian investigation. On February 20, 2009, relying in part on the communications transmitted by the DEA, the CFSEU obtained a Part VI authorization to intercept the email communications of the appellant from the "@goosebomb.com" email address. At the time, the CFSEU was investigating an extortion in Canada related to one of the cocaine seizures in December 2008. The emails intercepted under the Part VI authorization also implicated Mehan, who was using a personal email address. On April 21, 2009, the CFSEU obtained another Part VI authorization to intercept emails to and from Mehan's email address.

At trial, the appellant and Mehan applied for a *voir dire* to cross-examine the Canadian and American authorities with respect to the scope of their investigation and to assess the seriousness of alleged breaches of s. 8 of the *Charter* with respect to the admissibility of the emails intercepted by the DEA. The appellants argued that the interception in this case amounted to an "intercept" of private communications based on *R. v. Telus Communications Co.*, 2013 SCC 16, 2013 CarswellOnt 3216, and as such, could only be received and reviewed by the CFSEU pursuant to a Part VI authorization. The trial judge held that the appellants failed to meet the test in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193, 1996 CarswellBC 1611 (C.A.), in that the appellants failed to demonstrate that a *voir dire* would assist the court in determining the issues at trial. The trial judge held that acceding to the request for a *voir dire* would effectively apply the *Charter* extraterritorially to a criminal investigation in a foreign state. The court held that cooperation with foreign law enforcement agencies was of no relevance to any alleged *Charter* breach, and that the principles in *United States of America v. Wakeling*, 2014 SCC 72, 2014 CarswellBC 3341 applied.

Most of the intercepted emails admitted into evidence at trial had been intercepted by the DEA pursuant to wiretap conversations obtained under U.S. law. Those that were intercepted in Canada by the CFSEU's Part VI authorization were obtained after the conspiracy ended and were primarily relied upon to identify the appellants. The appellants were convicted and appealed, alleging errors both with the trial judge's application of *Vukelich*, and *Telus*.

Held: Appeal dismissed.

The British Columbia Court of Appeal held that there is no absolute right to a *voir dire* where a *Charter* right is alleged to have been violated: *R. v. Bains*, 2010 BCCA 178, 2010 CarswellBC 841 (C.A.), at para. 69. The single

issue at trial was whether the process by which the CFSEU received and reviewed the appellants' communications constituted an "intercept," as defined by s. 183 of the *Criminal Code*, of communications that were acquired from a "communication process" in Canada.

It was common ground that the *Charter* did not apply to actions of foreign law enforcement agencies, so long as they were not acting as agents of the Canadian agencies, and the manner in which they obtained the evidence would not render the trial unfair: *R. v. Harrer*, [1995] 3 S.C.R. 562, 1995 CarswellBC 651, at paras. 11-12; *R. v. Hape*, 2007 SCC 26, 2007 CarswellOnt 3563, at para. 113. Nor did the *Charter* govern the actions of foreign law enforcement agencies on an information basis: *R. v. Terry*, [1996] 2 S.C.R. 207, 1996 CarswellBC 2299, at para. 19.

Based on the undisputed facts and the jurisprudence, the trial judge did not err in finding that there was no evidentiary or legal basis that required him to embark on a *voir dire* to determine the admissibility of the intercepted communications.

Commentary: The *Vukelich* rule which permits a reviewing court to decline any form of evidentiary *voir dire* into an alleged *Charter* violation seems to be a uniquely British Columbia rule. Here it was enforced to refuse a *Charter voir dire* in circumstances where there was no prospect that an inquiry into the evidence getting techniques used in the U.S. *could* have triggered any *Charter* violations or remedy.

R. v. Mehan, 2017 BCCA 21, 2017 CarswellBC 68 (B.C. C.A.)

3. — Photographs of Messages Displayed on iPhone Lock Screen Constitute Unreasonable Search and Seizure

Facts: The accused was the driver and sole occupant of a rental vehicle stopped by a member of the Edmonton Police Service ("EPS") in response to a complaint about a possible impaired driver. The officer did not observe any signs of impairment, but requested that the driver provide a sample of his breath into an approved screening device ("ASD"). For reasons that are not entirely clear, the driver was arrested for possession of marihuana and possession of a prohibited weapon (brass knuckles).

Before leaving the scene, the police searched the vehicle and found a total of eight cellphones: four on the driver's seat; two in the centre console; and two in the glove box. All eight phones were seized.

On examining the cellphones at the police station, officers learned that only three of the phones were turned on and functional. One of the cellphones, an iPhone, was on, but locked with a password. The settings of the iPhone permitted communications received to be displayed on the lock screen. In order to read the screen, police had to press the "open" button and scroll up. The messages on the screen were suggestive of drug-dealing.

One officer was tasked to photograph the cellphone display. This officer also accessed the contact list in another of the functioning cellphones and found a number associated to the contact who sent the messages to the iPhone. The searching officer testified that she did not record many of the investigative steps taken with the phones, including recording access to the contact list, or removing the battery from the phone to look for a pin number to unlock it. She testified that she did not believe that she reviewed incoming messages or the call log on the phone which contained the contact list, but conceded it was possible that she did. She also did not record who else viewed the phones. Importantly, she testified that there was no investigative urgency to the examination of the cellphones, and that the investigation would not be hampered by the failure to do so.

The accused argued that the photographs taken by police did not meet the test for warrantless searches of cellphones set out in *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202, and sought the exclusion of the photos under s. 24(2). The Crown took the position that when dealing with cellphones there is always a need for police to act "promptly", and applied within the *Charter voir dire* to tender the photos into evidence.

Held: The Crown's application to adduce the photos into evidence on the *voir dire* was dismissed. The photos were excluded under s. 24(2).

The search of the cellphone in this case did not conform to the four-part test articulated by the Supreme Court of Canada to search a cellphone incident to arrest in *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202: (i) the arrest must be lawful; (ii) the search must be truly incidental to arrest; (iii) the nature and extent of the search must be tailored to its purpose, and; (iv) detailed notes of the search must be taken. In *Fearon*, the Supreme Court held that a search that is truly incidental to arrest must be strictly applied to permit searches that must be done promptly to effectively serve law enforcement purposes like protection of the police, the accused or the public; preserving evidence; and, if the investigation will be significantly hampered absent the ability to promptly conduct the search, discovering evidence.

On the evidence at the *voir dire*, the second and fourth requirements of *Fearon* were not satisfied. The evidence of the officer who conducted the search of the cellphones was that there was no need for the phones to be searched promptly, and that the investigation of the accused would not be hampered by a failure to do so. The Crown's submission that all cellphone searches must be conducted promptly was contrary to the balance the Supreme Court was attempting to strike when approving limited warrantless searches of cellphones. Moreover, the officer who conducted the search did not take detailed notes of how the search was conducted, and exactly what was examined. *Fearon* was decided months before the searches that occurred in this matter, such that there was no excuse for the failure to abide by the guidelines set out in that case. The search in this case constituted a violation of the accused's rights under s. 8 of the *Charter*.

The photos were excluded under s. 24(2) of the *Charter*. The first of the factors to be considered as set out in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, was the nature of the *Charter*-infringing conduct. Here, the EPS was a highly professional organization with its own legal advisors. It was difficult to imagine that within the six months since the release of *Fearon*, any police officer would not at least have been alerted to the need to get advice or guidance about the implementation of the *Fearon* standard. While the individual officer had no intention of breaching the law, accepting evidence acquired through a lack of knowledge of the new legal standard might appear to condone indifference to constitutional rights. The most important factor in making an assessment under s. 24(2) here was that, because there was no recording of how the search was conducted, and what was searched, it was impossible to gauge the severity of the impact of the breach on the accused's *Charter*-protected right to privacy. Finally, the exclusion of the evidence would not significantly impact the adjudication of the trial on the merits, as the police acquired other evidence in support of the charges against the accused.

Commentary: This case represents a straightforward application of the principles for the warrantless search of a cellphone incident to arrest articulated in *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202 and emphasizes the obligation of police officers to know the law, and to conduct their investigations in a *Charter*-compliant manner.

R. v. Millett, 2017 ABQB 9, 2017 CarswellAlta 6 (Alta. Q.B.)

4. — Failure to Inform "Persons of Interest" as to Reason for Detention Results in Breach of Sections 10(a) and (b), Exclusion of Evidence

Facts: The applicants, Egal and Bryan, along with two others, were charged with second-degree murder as a result of an altercation with the victim at his apartment building, first inside and then outside in the parking lot where he was brutally stabbed. Police obtained security camera images of persons inside the apartment building before the killing. In the early days of the investigation, the identity of the individuals on the security camera was not known. The day after the killing, Egal and Bryan had an interaction with four members of the Toronto Police Service near the apartment building. At trial, the Crown sought to adduce evidence of this interaction, to connect Egal and Bryan to the security camera images, to show the prior association of all four accused before the killing and the subsequent association of Egal and Bryan after the killing. The defence resisted the application on the basis that the interaction violated the rights of the accused under s. 10(a) and (b) of the *Charter*.

The next day, officers tasked to assist in the investigation of the killing were shown images from the security cameras and certain individuals were identified as "persons of interest." Four officers were dispatched to the office of the apartment building to pick up more video images. On their return trip to the station, the officers observed two men walking in the same direction, near the scene of the crime. One of the officers testified that one of the men looked familiar to the individuals identified as "persons of interest" on the security camera. Accordingly,

police stopped the vehicle and engaged the two men. All four officers testified on the *voir dire*.

P.C. Boumeester said that he had a brief conversation with Egal about where he was coming from and where he was going. Egal produced identification. P.C. Boumeester noticed a cut on Egal's lip, which Egal explained he sustained while playing basketball the night before. P.C. Boumeester testified that the men were not detained, and could have chosen to walk away from the interaction at any time. P.C. Boumeester also agreed that at the end of the interaction, the men were told that they could go; he insisted the expression was a way of ending the conversation, not that the men required permission to leave.

P.C. Bhatti testified that during the briefing, he thought that he had a "slight idea" that one of the persons on the security camera footage might have been Egal. P.C. Bhatti testified that he was the officer who initiated the interaction with the men, as he indicated that he saw Egal, and said that Bryan resembled a "person of interest" on the video. P.C. Bhatti testified that the interaction was "part social and part not" and that he spoke to Bryan during the encounter. P.C. Bhatti testified that Bryan, without prompting, produced identification. He further testified that the entire interaction took place over 10 minutes. P.C. Bhatti indicated that he kept notes of the conversation on a "scratch paper" (which turned out to be a 208 card), but that he later shredded the scratch paper.

Held: Application allowed. The evidence of the interaction was excluded under s. 24(2).

Essentially, every aspect of the interaction with Egal and Bryan was subject to the conflicting accounts of the officers. The evidence of the officers was rife with inconsistencies on every issue, including: the information received about the homicide and the source of the information; which officers recognized which individual, and whether it was from the video or past dealings; whether the officers discussed the nature of the interaction before exiting the patrol car; the length of the encounter; whether computer checks were performed; whether the men were told they were allowed to leave; and whether the officers prepared their notes independently or together.

The evidence of the officers was that Egal and Bryan were "persons of interest" in the investigation of the homicide, as opposed to "suspects." This distinction was not important in this case. Like suspects, persons of interest are capable of being psychologically detained, depending on the specific circumstances of the police encounter.

The modern approach to psychological detention is found in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104. Recognizing that not every police interaction is a detention for the purposes of the *Charter*, the question is whether the person is meaningfully constrained, and has a genuine need of the additional rights accorded by the *Charter*, namely, the right to be informed of the reasons for the detention and the right to consult with counsel: *Grant*, at para. 26.

If the conduct of the officers on the street was anything like their collective testimony on the *voir dire*, Egal and Bryan would have been confused by their interaction with police. The minimization of the officers in their evidence signals caution. The detention was far from fleeting. A reasonable person in the circumstances of Egal and Bryan would have felt that their liberty was constrained and they were not free to continue on their way; both men were detained for the purposes of s. 10 of the *Charter*.

The exclusion of evidence under s. 24(2) was warranted in this case. The breach was moderately serious. While the police did not intend to infringe the rights of the accused, the minimization of the interaction by the officers and the characterization of it as a "social call" heighten the seriousness of the breach. The officers gave little thought to what they were doing, both individually and as part of a group of four. In *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, at para. 92, the court confirmed the "presumptive general, though not automatic, exclusion of statements obtained in breach of the *Charter*" and there is no reason to deviate from that approach in this case.

Commentary: This case represents a common sense application of the rules under *Grant* for determining when a detention occurs, such as will give rise to the duty to comply with s. 10(b) of the *Charter*. The case is also a cautionary tale for police services. The four detaining officers' evidence was so inconsistent and poorly documented as to give the reviewing court serious concerns regarding the credibility of their accounts.

R. v. Jama, 2017 ONSC 470, 2017 CarswellOnt 821 (Ont. S.C.J.)

5. — Presenting Accused to Breath Technician "as Soon as Practicable" Not Required for Valid Breath Demand

Facts: The accused was found drunk and asleep in the driver's seat of a motor vehicle in the deserted parking lot of a drinking establishment. The engine of the motor vehicle was running.

The police administered the roadside screening device. The accused registered a "Fail". He was arrested for impaired care and control, and taken to a police station. At some point, another officer spoke to him about an unrelated matter. While at the station, the accused refused to comply with the breath demand, and was charged with refusing to provide breath samples.

At trial, the accused argued that it was a precondition to a valid breath demand that he be presented to the breath technician as soon as practicable, that the Crown had not proved this precondition beyond a reasonable doubt, and that accordingly he had not refused to comply with a valid demand. The trial judge acquitted the accused on this basis. The Crown appealed.

Held: Appeal allowed and conviction entered.

The summary conviction appeal judge concluded that there is no requirement that an accused be presented to the breath technician as soon as practicable, in order for a breath demand to be valid. Section 254(3) of the *Criminal Code* requires that the police officer make a demand for breath samples as soon as practicable, and that the demand require the accused to provide the breath samples as soon as practicable. The statutory provision does not include a requirement that the accused be given the opportunity to provide breath samples as soon as practicable, in order for the demand to be valid. Section 258(1) requires that each breath sample be taken as soon as practicable, but that is as a precondition to the prosecution relying on the breathalyzer test results as proof of the accused's blood alcohol level at the time of the offence, something that is irrelevant where the accused refuses to provide breath samples.

Commentary: The summary conviction appeal judge noted there are cases that suggest that presenting the accused to a breath technician as soon as practicable is not a precondition to a lawful breath demand, and others that suggest that it is a precondition to a valid demand. But, all of those cases are decisions of provincial court judges, and so not binding on a summary conviction appeal court.

R. v. Green, 2017 ONSC 119 (Ont. S.C.J.)

6. — Failure to Permit Cross-Examination of Affiant Results in New Trial

Facts: The police obtained a telewarrant for two units at a condominium building. The Information to Obtain alleged that SS was using both apartments to further his drug trafficking activity. The ITO did not mention JS. The grounds for the affiant's belief came almost exclusively from information provided to him by a confidential informant.

The police executed the warrant. In unit 504, they found the accused JS. In unit 904, they found the accused SS. In both units they found firearms, ammunition, and drugs.

The defence was permitted to cross-examine the ITO affiant at the preliminary hearing.

At trial, the accused applied to exclude the items found in the apartments, on the ground that the telewarrant was invalid and the searches violated s. 8 of the *Charter*. The Crown gave the defence a heavily redacted version of the ITO. The majority of the redactions were made to protect the identity of the confidential informant. On the application, the Crown conceded that the redacted version of the ITO did not reveal grounds upon which a justice, acting judicially, could be satisfied that there were reasonable grounds to search the units. The Crown invoked Step Six of the *Garofoli* procedure and prepared a proposed summary of the redacted parts of the ITO. The trial judge went through that summary in open court, in the presence of defence counsel, comparing it to the

unredacted version of the ITO. The trial judge found that some of the redactions were unnecessary to protect the confidential informant's identity. He also modified some of the Crown's summaries of the redacted parts of the ITO, to include additional information for the defence.

The Crown accepted the trial judge's modifications of the redactions and the summary of the redactions. Defence counsel received the ITO as redacted by the trial judge, and the trial judge's summary of the redactions.

Defence counsel made various motions on the s. 8 application. In particular, they argued that *amicus curiae* should be appointed and allowed to see the unredacted ITO to assist the trial judge in determining what redactions were necessary and how to summarize them, and that leave to cross-examine the affiant should be granted. The trial judge dismissed both motions.

The accused were convicted at trial, and appealed.

Held: Appeal allowed, and new trial ordered.

The Court of Appeal concluded that the defence was entitled to cross-examine the affiant on the proceedings before the trial judge. The court reiterated that the defence does not have a right to cross-examine the affiant, and must demonstrate that there is a reasonable likelihood that the proposed cross-examination would generate evidence discrediting the existence of one or more of the grounds for the issuance of the warrant. Where the defence shows that reasonable likelihood, the defence is entitled to cross-examine the affiant as part of the s. 8 application at trial, regardless of whether that cross-examination will add to the cross-examination of the affiant conducted at the preliminary hearing. The defence cannot be obligated to accept cross-examination at the preliminary inquiry as a substitute for cross-examination at trial.

The appellate court further concluded that the trial judge erred in taking into account his own assessment of the confidential informant's reliability based on his reading of the unredacted ITO to refuse the application to cross-examine the affiant. The ultimate reliability of the information in the ITO is not in issue on a motion to cross-examine the affiant. The trial judge is concerned only with whether there is a reasonable likelihood that the proposed cross-examination would assist in determining whether the grounds existed for the issuance of the warrant. The defence is not required to show that the cross-examination will assist in demonstrating the confidential informant's unreliability.

The appellate court found no error, however, in the trial judge's refusal to appoint *amicus* on the Step Six procedure. In *R. v. Basi*, 2009 SCC 52, 2009 CarswellBC 3869, it was established that the discretion to appoint *amicus* on a Step Six procedure exists in "particularly difficult cases". The Court of Appeal held that it is the responsibility of the defence to demonstrate why the specific circumstances of the case require the appointment of *amicus*, and to set out a proposed procedure that will allow *amicus* to perform the assigned role while protecting the confidential informant's identity. The defence did neither in this case.

Commentary: This decision contains a helpful overview of the process involved in challenging the validity of a search warrant, and in particular its sub-facial validity, where information from a confidential informant is involved. It also provides a fact-specific illustration of the kind of information that the defence may point to as grounds to justify cross-examination of the affiant.

R. v. Shivrattan, 2017 ONCA 23, 2017 CarswellOnt 329 (Ont. C.A.)

7. — Racial Profiling by Customs Agents may Constitute a Charter *Violation*

Facts: The accused, a black woman, arrived at Pearson Airport on a flight to Toronto from Jamaica. At the primary customs inspection point, she was referred by a Canada Border Service Agency ("CBSA") agent for secondary inspection. A search of her luggage resulted in the discovery of a quantity of cocaine. She was arrested.

At the preliminary hearing, the agent at primary inspection who decided to send the accused for secondary inspection testified that she did so based on the following indicators: the accused was arriving from a drug source

country; she had a cash paid ticket; it was a third party ticket; the accused was unemployed; her voice was trembling; she made no eye contact; and she voluntarily wanted to show the agent a funeral memorial/invitation card. The agent who conducted a personal search of the accused after arrest testified that agents are given information about trends in regard to countries from where drugs are coming. She said that when she worked secondary inspection, she often searched white travellers coming from Jamaica. She said that agents are trained to treat everyone the same, and she had not observed any differences in the numbers of black and white passengers coming from Jamaica with respect to referral for secondary inspection. She said that when questioning a traveller, agents look for indicators suggesting things that are out of the norm.

At trial, the accused alleged that the decision to refer her to secondary inspection was a matter of racial profiling, and violated her *Charter* rights. She brought a third party records application, relying on the evidence at the preliminary inquiry as suggesting that her race and place of origin played a role in her being singled out for a secondary search. She sought CBSA training materials/documents/videos on racial profiling and/or anti-discrimination, with respect to how grounds are formulated to send individuals entering Canada for secondary inspection.

Held: Application dismissed. The materials sought were not "likely relevant" to an issue at trial.

The trial judge relied on the definition of racial profiling in *R. v. Richards* (1999), 26 C.R. (5th) 286, 1999 CarswellOnt 1196 (C.A.), at para. 24. There the court described racial profiling as "that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group."

The trial judge noted that he was not aware of any appellate court decision on the issue of racial profiling and a traveller's referral to secondary inspection. He accepted, for the purpose of the application, that if racial profiling can be established as the reason for sending a traveller to secondary inspection, that person's *Charter* rights may have been violated.

He found, however, that there was no evidence, direct or indirect, to conclude or even suspect that racial profiling and/or discrimination were factors in directing the accused to secondary inspection. The fact that the accused was travelling from Jamaica and that it is considered a drug source country was only one of a number of indicators. On its own, it fell well short of evidence of racial profiling. The disclosure sought by the defence was not likely relevant. The trial judge concluded that the application was a fishing expedition.

Commentary: The trial judge adverted to several decisions of trial courts where it has been accepted that if racial profiling was a factor in a decision to refer an accused for secondary inspection, there is a breach of s. 7 of the *Charter*, because racial profiling contravenes the principles of fundamental justice. He noted, however, that the Supreme Court of Canada held in *R. v. Simmons*, [1988] 2 S.C.R. 495, 1988 CarswellOnt 91 that routine questioning or routine luggage searches conducted on a random basis by customs officials at the border do not constitute detention, and that there is a lower reasonable expectation of privacy at customs, such that ss. 9 and 8 of the *Charter* are not breached by such activity.

R. v. Simpson, 2017 ONSC 491, 2017 CarswellOnt 756 (Ont. S.C.J.)

8. — Disclosure of Documents Falling Outside Investigative File Ordered on Garofoli *Application*

Facts: The police obtained a search warrant on the basis of an Information to Obtain that relied almost entirely on an appendix which set out information provided by the police officer handler of a confidential informant. That information came from the confidential informant in a series of meetings. It included assertions that the informant had purchased cocaine from one of the accused, and that that accused was still selling cocaine.

On execution of the warrant, the police found cocaine, a large amount of cash, and related items. The accused were charged with possession of cocaine for the purpose of trafficking and possession of the proceeds of crime.

The Crown provided the defence with a heavily redacted version of the ITO. At trial, the accused brought a *Garofoli* application and alleged that the search warrant was granted in violation of s. 8 of the *Charter*. As a

preliminary matter, the accused sought disclosure of the handler's notes of his meetings with the informant, and any documents laying out or reporting an investigative plan to try to obtain a search warrant. The defence contended that the disclosure sought would assist them in establishing that the confidential informant was, in fact, a police agent, that the affiant knew or ought to have known this fact, and that the failure to disclose it in the ITO violated the affiant's obligation to make full and frank disclosure. The Crown opposed the application, and argued that it was a fishing expedition based on speculation.

Held: Application granted in part.

The trial judge referenced jurisprudence standing for the proposition that on a *Garofoli* application, the accused is entitled to full production of the investigative file, subject to privilege and providing that the material is not clearly irrelevant. The investigative file includes all materials accumulated by the police during the investigation and relied upon in the search warrant material. The trial judge observed, however, that notes made by the handler of a confidential informant generally are not part of the investigative file, unless the handler is also the affiant of the ITO, or unless the handler passed on his/her notes to the affiant. The trial judge also observed that while documents outside the investigative file are presumptively irrelevant, they may be required to be disclosed if the accused shows there is a reasonable possibility/reasonable likelihood that such materials will assist the court in relation to an issue on the *Garofoli* application.

The trial judge found that as the handler was not the affiant, even though his notes would have informed the information he provided to the affiant, there was no evidence that the affiant relied on them directly. The notes were not required to be disclosed as part of the investigative file.

However, the trial judge found that the accused had met the reasonable possibility/reasonable likelihood test for disclosure of the notes. Information in the ITO, such as that the police had an ongoing relationship with the claimed informant, that information about current as opposed to past drug sales by the accused was important because surveillance was not an option, that the claimed informant understood he or she would not receive consideration unless an arrest and seizure was made, and that the claimed informant had a series of meetings with the handler in which he or she reported buying drug, raised the reasonable possibility that the claimed informant may have been given implicit direction by the police and taken on the role of a police agent rather than a confidential informant. There was a reasonable possibility/reasonable likelihood that the disclosure of the notes would assist the court in relation to a material issue on the *Garofoli* application.

The disclosure order was made subject to argument about blanket privilege or editing to protect privilege.

The trial judge declined to order disclosure of any investigative plans. There was no clear evidence that they existed. If they did, they fell outside of the investigative file, and there was no reasonable possibility/reasonable likelihood that the disclosure of them would assist the court in relation to a material issue on the *Garofoli* application.

Commentary: The trial judge followed two Ontario Superior Court decisions dealing with disclosure of documents in the *Garofoli* context: *R. v. McKenzie* (2016), 26 C.R. (7th) 112, 2016 CarswellOnt 659, and *R. v. Ahmed*, [2012] O.J. No. 6643, 2012 ONSC 4893. Borrowing from those decisions, he set out a helpful summary of the principles that apply to such applications, particularly where there is a claim that information was received from a confidential informant.

R. v. Basios, 2017 ONCJ 6, 2017 CarswellOnt 402 (Ont. C.J.)

9. — Voluntariness Rule does Not Apply to Statements Made by Non-Suspect

Facts: Two police officers arrived at Ms. Teng's residence in response to 9-1-1 calls that she and her landlord placed. The first officer on scene could see what appeared to be a dead body lying under a sheet in a back storage room. The door to the room was open and the lights were on.

The landlord informed the officer that Ms. Teng was moving out. Ms. Teng said that her husband had died of a heart attack the week before.

The officer told Ms. Teng to wait in the kitchen while he spoke to the landlord. After doing so, the officer spoke to Ms. Teng. He asked her to identify herself and inquired what had happened. She told the officer that her husband had suffered a heart attack the previous Friday and died as a result. She said that she did not know what to do and said that she had told no one about his death.

The officer said that he only asked general questions in an effort to determine what was going on. When asked if Ms. Teng was a "suspect", he answered that she was, "in a way like there's a dead body which is belong to her husband and she's the wife and when she told me he died of a heart attack the body is there since last Friday ...". While he did not have a specific crime in mind, the officer testified that it was a "suspect situation". While the officer said that he did not have to force Ms. Teng to stay, she would not have been permitted to leave had she tried to do so.

As for the second officer, he found the scene curious. He said that while there was a body covered in a blanket, and this was "strange", he sees a lot of strange things on the job. At the outset, he did not necessarily think anything criminal had happened. Rather, he was initially thinking that it was a case of "sudden death". Like the other officer, he said that while Ms. Teng did not try to leave, had she attempted to do so, he would have stopped her. The second officer asked Ms. Teng where her husband had died and she acknowledged that she had dragged him to where he lay.

The admissibility of the statements was challenged. It was said that they were involuntary and that because Ms. Teng had been detained, her right to counsel had been breached.

Held: The applications were dismissed.

On the voluntariness issue, MacDonnell J. reviewed the law, including the burden of persuasion being on the Crown to prove voluntariness beyond a reasonable doubt. The prime concerns under the voluntariness rule include probing whether: (1) the statement was induced by hope of advantage or fear of prejudice emanating from promises, threats or mistreatment; (2) whether there were oppressive circumstances; (3) whether the declarant had an operating mind; (4) whether improper trickery was used; and (5) whether the defendant was aware of her jeopardy.

MacDonnell J. reminds that not all statements made to persons in authority are subject to the voluntariness rule. It depends on the accused's status at the time the statement is made. As Iacobucci J. set out in *R. v. Oickle*, 2000 SCC 38, 2000 CarswellNS 257, the voluntariness rule only applies when a person who is a "suspect" is questioned by a person in authority. *Amicus* argued that a person is a suspect when a warning should be given. He said that a warning should be given when there exist reasonable and probable grounds to suspect the person has committed a crime. Citing from Justice Marin's text, *Admissibility of Statements* (9th ed.), "An easy yardstick to determine when a warning should be given is for a police officer to consider the question of what he or she would do if the person attempted to leave the questioning room or leave the presence of the officer where a communication or exchange is taking place." As noted by MacDonnell J., this passage was cited with approval in *R. v. Singh*, 2007 SCC 48, 2007 CarswellBC 2588, at paras. 32-33.

Justice MacDonnell rejected the suggestion that the above passage defines when a person becomes a suspect. It is merely intended as an "easy yardstick" to assess when a caution should be given. The passage is not intended to define when a person becomes a suspect, but what should be done once he or she is a suspect. The fact an officer may detain a person if they try to walk away, does not mean that they are necessarily a suspect for purposes of the voluntariness doctrine. To introduce this notion would be to add a circumstance beyond what exists at the time of the interaction.

In this case, the trial judge determined that while both officers said that they would have stopped Ms. Teng had she tried to leave, she was not a suspect at the time that they questioned her. Despite the unusual circumstances in which they found themselves, the officers were a long way from linking the accused with a crime. Assuming that she was a suspect her statements were voluntarily given.

As for detention, the accused was neither physically nor psychologically detained. While she was told to wait in the bedroom area while information was taken from the landlord, a reasonable person in her position would not

think that the direction constituted a detention. This kind of deprivation of liberty is "not ... significant enough to attract *Charter* scrutiny": *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, at para. 36, as cited in *Teng*, 2017 ONSC 567 at para. 44.

The application was dismissed and the statements found admissible.

Commentary: As the Crown bears the onus on the voluntariness rule, it is frequently resorted to. This judgment provides an excellent reminder of the core principles involved in the application of the voluntariness rule, including the fact that a person has to be a "suspect" at the time that the statement is made for the rule to apply. There has been some debate over the years about when a person becomes a "suspect" for purposes of administering the caution and triggering the voluntariness doctrine. The passage from Justice Marin's book is often cited as the guiding doctrine as to when one's status as a "suspect" crystallizes. This case provides a fresh perspective on the issue, suggesting that the "walk-away" principle is not the defining factor in determining an accused's status at the time of the statement. While the passage from Justice Marin's book is helpful in terms of setting the yardstick for when a caution should be administered, it may not be as helpful in setting the point at which a person becomes a "suspect".

R. v. Teng, 2017 ONSC 567, 2017 CarswellOnt 920 (Ont. S.C.J.)

10. — Police Warrantless Entry to Apartment does Not Taint Subsequent Warrant

Facts: The appellant was associated to people who were under police surveillance. The police eventually started to surveil him. He was seen driving to an apartment and then parking underground. After a short while, he was seen leaving in his car and driving to a parking lot. He was then seen giving a package to another person who emerged from a second parked car. The police moved in and arrested the second person. The package contained one kilogram of cocaine.

The appellant was chased by the police and eventually arrested. His car was searched incident to arrest. Among other things, the police found two key fobs. They returned to the apartment that the accused had been seen emerging from before he dropped off the package. The landlord would not provide any personal information about the appellant, but told the police that the key fobs were associated with two different apartments, one of which was on the eleventh floors. The landlord also told the police that the key associated to the eleventh floor apartment had been used at a time proximate to when the appellant was caught on video getting off of the elevator on the eleventh floor.

The police went to the apartment and entered using the key fob taken from the appellant's car. They located evidence of drug trafficking. They touched nothing, left and got a warrant.

The appellant argued that he had been unlawfully arrested resulting in a s. 9 breach, that his s. 8 rights had been breached when the police obtained information about the key fob and video surveillance, that his s. 8 rights had been breached when the police entered his apartment on a warrantless basis, and that the search warrant would not have issued but for the s. 8 breach arising from the warrantless entry. The trial judge dismissed all *Charter* complaints but the one related to the warrantless entry. She concluded that despite the breach, after excising certain information from the Information to Obtain ["ITO"], the warrant would have issued in any event. No evidence was ordered excluded and Mr. Saciragic was convicted. He appealed.

Held: The appeal was dismissed.

Justice Miller agreed with the trial judge's assessment of reasonable grounds to arrest. He provided a brief review of the two elements required for reasonable grounds to arrest: (1) the arresting officer must subjectively believe there are reasonable grounds to make the arrest; and (2) there must be an objective basis for that subjective belief: *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CarswellOnt 78, at pp. 250-51 [S.C.R.]. There were ample grounds to arrest.

As for the s. 8 argument, it was also rejected. The police were permitted to obtain some information from the property manager. Miller J.A. emphasized that only "reasonable" expectations of privacy are protected. In order to

determine whether the information provided is s. 8 protected, the court must consider four broad headings: (1) the subject matter of the alleged search; (2) the accused's interest in the subject matter; (3) the accused's subjective expectation of privacy in the subject matter; and (4) whether the accused's subjective expectation of privacy is objectively reasonable having regard to the totality of circumstances: para. 28. See also: *R. v. Spencer*, 2014 SCC 43, 2014 CarswellSask 342, at para. 18.

Only a biographical core of personal information is protected under s. 8: *R. v. Plant*, [1993] 3 S.C.R. 281, 1993 CarswellAlta 94, at pp. 292-293 [S.C.R.]. No intimate details about the appellant were offered up by the landlord to the police. They were merely told that the two key fobs were used in the specified time and that video surveillance showing someone matching the appellant's description attended the 11th floor of the apartment at a particular time and then left. Nothing about this information revealed anything about the appellant's activities while inside of the apartment.

Justice Miller writes that the court must look beyond the actual information given, and consider what they were able to learn as a result of the information. Here, by obtaining the information, the police were able to ascertain the appellant's municipal address. A physical address does not reveal private information about an individual. It is publicly available information that many have access to. The appellant's use of this unit, accessing it from public spaces within the apartment building, diluted any reasonable expectation of privacy he may have otherwise had in it. The trial judge did not error in concluding he had no privacy interest in the information provided.

As for the issuance of the search warrant, the Court of Appeal agreed with the trial judge's analysis. Aside from the information obtained from the initial warrantless entry of the unit, the warrant would have issued. Minutes before trafficking in a kilogram of cocaine, the appellant briefly attended the apartment in question. This would have provided ample grounds upon which to obtain a warrant. All references to the warrantless entry were properly excised by the trial judge and the issuance of the warrant was considered solely on the basis of the remaining information in the ITO. The trial judge did not error.

The appeal was dismissed.

Commentary: This is a very interesting case that underscores the importance of first determining whether s. 8 applies because the accused enjoys a reasonable expectation of privacy in respect to what is searched. A great deal of time has been spent in the past number of years determining how a "reasonable" expectation of privacy should be identified in the electronic age. *Spencer* dealt with the question of whether a reasonable expectation of privacy attaches to customer name and address information capable of connecting on-line internet activity with a particular individual. In *Spencer*, the court concluded that such information must be obtained by way of prior judicial authorization owing to its private nature. The court used a *Spencer-type* analysis to consider whether the appellant had a reasonable expectation of privacy in this case. Interestingly, in this case, the police were operating in the real, as opposed to the virtual, world. Despite the fact that a residential address was clearly protected in *Spencer*, this case suggests that it is not protected in the non-internet world. The court advanced a rationale for distinguishing between these environments. According to Miller J.A.'s analysis, the address in this case was an already highly public fact. The appellant chose to use an address in a building that could only be accessed by public hallways and within which there were public spaces. As such, he could not reasonably think he enjoyed a reasonable expectation of privacy in respect to the address information.

The result in this case demonstrates the importance of conducting an individualized analysis respecting whether an individual has a reasonable expectation of privacy in any given situation. If the answer is no, then s. 8 of the *Charter* does not protect the individual from state action. One cannot simply look to categories of information to determine whether they are privacy protected. As this case reveals, while an address may be protected in one environment (like the internet), it may not be protected in another. It is the totality of circumstances that must be taken into account.

R. v. Saciragic, 2017 ONCA 91, 2017 CarswellOnt 1107 (Ont. C.A.)

11. — The Subsidiary Basis upon which to Challenge a Search Warrant

Facts: The police obtained a search warrant to enter and search a residential address, believed to contain a grow

operation. Upon entry they found a gun, ammunition, drugs, and a marihuana grow-op.

At trial, Mr. Paryniuk challenged the search warrant, claiming it breached his s. 8 rights. He asked for the exclusion of all evidence arising from the search. The trial judge provided an initial ruling, excising the contents of the Information to Obtain ["ITO"] said to be irrelevant, improper, inaccurate and misleading. Considering the balance of the ITO, the trial judge was satisfied that there remained sufficient credible and reliable information upon which the warrant "could" have issued: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119. This resulted in a finding that the warrant had been properly issued.

Following upon this initial ruling, the trial judge asked counsel for submissions on whether the tendering of certain information in the ITO, "criminal allegations ... with the potential to jeopardize fairness and justice", should be addressed outside of the *Garofoli* process. Counsel proceeded to make submissions. Mr. Paryniuk maintained that the police approach was subversive of the prior authorization process and the evidence should be excluded.

In his second ruling, the trial judge dismissed this complaint, finding that the issue was whether there had been "an abuse of process that [had] reached the level of being subversive to the extent that the defendant is entitled to some other relief under the *Charter* or at common law". The trial judge acknowledged a "residual discretion sounding in 'abuse of process' that could result in the quashing of a warrant", but that the improprieties in this case did not rise to this level and dismissed the application. While the affiant had engaged in what the trial judge considered to be some problematic conduct, it did not amount to a "subversion or corruption of the process".

Ultimately, the accused was found guilty. He appealed from his convictions, claiming that the trial judge had, essentially, conflated the subsidiary ground for challenging a search warrant and the abuse of process doctrine. By doing so, the trial judge was said to have applied too exacting a standard for review of the police conduct.

Held: The appeal was dismissed.

Following a review of the approach to *Garofoli* applications, Watt J.A. discusses the discretion to set aside otherwise valid search warrants. He notes that *Garofoli* does not acknowledge a residual discretion. Instead, the "sole impact of fraud, non-disclosure, misleading evidence and new evidence" factors into the *Garofoli* test regarding whether there continues to be a basis for the issuance of the authorization: *Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452.

Justice Watt goes on to discuss *R. v. Araujo*, 2000 SCC 65, 2000 CarswellBC 2440, and the Supreme Court's post-*Garofoli* return to the test for reviewing warrants. In *Araujo*, at para. 54, Le Bel J. sets out Cromwell J.A.'s (as he then was) comments in *R v. Morris* (1998), 134 C.C.C. (3d) 539, 1998 CarswellNS 489 (C.A.), at p. 553 [C.C.C.], including that "conduct of the police in seeking prior authorization" may be "so subversive of that process that the resulting warrant must be set aside to protect the process and the preventative function it serves". This passage from *Morris*, quoted in *Araujo*, is often cited as support for the residual basis upon which to challenge a warrant.

Watt J.A. notes that the passage in *Morris* is *obiter* since the court was dealing with errors committed in good faith and the reference to *Morris* in *Araujo* should be seen as "illustrative of the need for a contextual analysis" in reviewing prior authorizations. It is not an express acknowledgement by the court of a residual discretion to set aside prior authorization on the basis of conduct considered subversive to the process.

A careful review of authorities following upon *Morris* and *Araujo* is conducted. In *R. v. Bacon* [*R. v. Cheng*], 2010 BCCA 135, 2010 CarswellBC 624, the court recognized a residual discretion to strike down a warrant for abuse of process. In *R. v. Vivar*, 2009 ONCA 433, 2009 CarswellOnt 2886, at para. 2, the court recognized that it has a residual discretion that may be exercised where the conduct is "so subversive of the search warrant process as to, in effect, amount to an abuse of process and require that the warrant be quashed".

An abuse of process can be rooted in risks to trial fairness or undermining the integrity of the trial process. State conduct risking the integrity of the trial process engages the residual aspect of the abuse of process doctrine: *R. v. Babos* [*R. c. Piccirilli*], 2014 SCC 16, 2014 CarswellQue 575, at para. 31. Remedies short of a stay of proceedings may be adequate to dissociate the justice system from the state conduct. Watt J.A. makes the

observation that the appellant's argument before the trial judge was the equivalent of a request for a stay of proceedings based on what he said was a serious subversion of the process. Such a request under the abuse of process doctrine will only be granted in the "clearest of cases": *R. v. Jageshur* (2002), 169 C.C.C. (3d) 225, 2002 CarswellOnt 3561 (C.A.), at para. 69.

In the end, while the court accepts that *Garofoli* and *Araujo* do not specifically grant a residual discretion to set aside a warrant despite passing the *Garofoli* test, the Ontario Court of Appeal has acknowledged this residual discretion in multiple prior cases. So have other appellate courts. In all cases, the threshold test for invoking the residual discretion is high and, in some, the test requires conduct amounting to an abuse of process.

In this case, among other things, the court concludes that the trial judge did not find conduct amounting to subversion or corruption of the pre-authorization process. Subversion means to corrupt, undermine, weaken, destroy or disrupt a system or process. The mere mention of "abuse of process" did not constitute self-misdirection by the trial judge. While people may disagree on whether the claim is one of abuse of process, it focuses on conduct risking the integrity of the pre-authorization process and, thereby, invokes the same language as the residual category of abuse of process.

Commentary: This is a very important judgment that carefully analyses the residual approach to challenging prior authorizations. While the judgment acknowledges that neither *Garofoli* nor *Araujo* have acknowledged a residual discretion to challenge prior authorizations, various appellate courts have: *R. v. Kesselring* (2000), 145 C.C.C. (3d) 119, 2000 CarswellOnt 1413 (C.A.); *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273, 2001 CarswellOnt 3337 (C.A.), *Lahaie v. Canada (Attorney General)*, 2010 ONCA 516, 2010 CarswellOnt 5274; *Bacon*; *R. v. McElroy*, 2009 SKCA 77, 2009 CarswellSask 436; leave to appeal refused [2009] S.C.C.A. No. 281, 2009 CarswellSask 702; *Morris*.

While the court says that the trial judge's use of the phrase "abuse of process" was not self-misdirection, it is not actually the abuse of process doctrine that is being engaged. Notwithstanding this fact, the tests between the residual aspect of the abuse of process doctrine and the residual aspect to challenging prior authorization are roughly equivalent, particularly where a finding of a breach will result in the exclusion of evidence and, thereby, gut the prosecution. In the end, their residual category for attacking prior authorization remains intact and a high standard of review attaches. It is not unreasonable to think that this issue may reach the Supreme Court before long.

R. v. Paryniuk, 2017 ONCA 87, 2017 CarswellOnt 1077 (Ont. C.A.)

12. — Arrest Lawful where Officer Testifies about "Suspicion"

Facts: Mr. Kucerak was driving his motor vehicle when he passed over into the oncoming traffic lane. He was then involved in a single vehicle accident, hitting a pole and rolling three times. When he left the vehicle, he was unsteady on his feet and disoriented, but the officer thought it was because of the accident.

The appellant was transported to the hospital. When speaking to him in this indoor environment, the officer noticed the odour of alcohol on his breath. He also noticed glassy, red eyes. Combined with other factors, including the single vehicle accident, the officer arrested Mr. Kucerak for impaired driving. His blood alcohol level was determined to be above the legal limit.

At trial, the appellant brought a s. 9 challenge, arguing that he had been unlawfully arrested because the officer did not have sufficient grounds to make the arrest. The trial judge dismissed the application. The appellant was convicted and then appealed.

Held: Justice Miller dismissed the summary conviction appeal.

The primary ground of appeal rested on the fact that the arresting officer had testified in cross-examination that he suspected that the appellant had been in care and control of the vehicle while impaired by alcohol. The appellant argued that suspicion failed to meet the requisite threshold required for reasonable and probable grounds to arrest.

Justice Miller reviewed the threshold test for arrest. She concluded that to establish reasonable and probable grounds for arrest, an officer must subjectively "believe" that a person has committed or is about to commit a crime and that the belief is objectively reasonable in the circumstances. She referred to *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CarswellOnt 78, in support of this threshold test.

While the officer needed to hold a subjective belief in his grounds for arrest, Miller J. agreed with the trial judge's analysis that nothing turned on the use of the word "suspicion" in this case. While the arresting officer agreed in cross-examination that he had a "suspicion" that the appellant was impaired, in re-examination he reiterated his grounds to arrest and testified that while at first he had a suspicion, he then formed the "opinion" that the appellant was impaired while driving.

While the officer used the word "suspicion", the grounds supported a subjective belief and the trial judge did not err in concluding so. Nor did the trial judge err in finding that the subjective belief was objectively reasonable in the circumstances.

Commentary: This case demonstrates the critical importance of using appropriate language in articulating one's grounds for arrest. There are many fluctuating threshold tests for the exercise of statutory and common law police powers. Officers exercising these powers must be in tune with the appropriate tests and be able to explain, through the use of precise language, why they exercised their powers in a particular way. In this case, the officer's use of the word "suspicion" could have been fatal to the inquiry regarding grounds. In the end, he was given a pass because the trial judge made a factual determination that while he used the word "suspicion", based on the totality of circumstances, he must have meant "belief". This conclusion was likely rooted in the fact that in re-examination he explained that he graduated from suspicion to opinion. While it was entirely open to the trial judge to come to the factual determination she did, and the appellate court must defer to that finding, the careless use of language here could have resulted in a very different outcome.

The lesson to be learned is that despite the labyrinth of tests for exercising police powers, the police are obligated to know those tests and only act when they have been met.

R. v. Kucerak, 2017 ONSC 883, 2017 CarswellOnt 1330 (Ont. S.C.J.)

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