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— Police Powers—

Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton

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1. — Use of Screen Capture Software to Record Computer Chats does Not Constitute an Intercepted Telecommunication

Facts: On February 28, 2012, a police officer created a Hotmail email account for a fictitious fourteen-year-old girl, named “Leann” together with a Facebook page, profile and picture. On March 20, 2012, the officer received a Facebook message from the Appellant. There was an exchange of emails over approximately two months, during which the Appellant stated that he was twenty-three years of age (he was in fact thirty-two). A meeting at a park

between “Leann” and the Appellant was arranged for May 22, 2012, at which time the Appellant was arrested and charged with communicating for a sexual purpose with a person he believed to be under the age of 16.

In order to ensure that the messages between the Appellant and “Leann” were preserved, and that all information on the screen was captured, the officer employed “Snagit” a screen shot program that captures video display and audio output. The trial judge described the “Snagit” as akin to a photo or real evidence, but found that the use of the program constituted an unreasonable search under s. 8 of the *Charter* as the investigating officer failed to obtain an authorization for a consent interception under s. 184.2 of the *Criminal Code* to use “Snagit” to record the Appellant’s telecommunications. The trial judge refused to exclude the evidence under s. 24(2) as a remedy for the breach of the Appellant’s rights, and the Appellant was convicted. As an alternate remedy for the s. 8 breach, the trial judge reduced the sentence imposed by two months under s. 24(1) of the *Charter*. The Crown appealed the sentence imposed, on the basis that the trial judge erred in concluding that the use of the screen capture program constituted an intercept of a telecommunication. The Appellant cross-appealed on the basis that the he had a subjective expectation of privacy in the content of the telecommunications with “Leann.”

Held: Crown appeal allowed.

Part VI of the *Criminal Code* applies only where a telecommunication is “intercepted”. The fact that, unknown to the sender, the recipient of a telecommunication is a police officer does not change the nature of the communication, or transform receipt of it by the intended recipient, into an interception. If “Leann” had, in fact, been a fourteen-year-old girl, it could not be said that her receipt of the communications from the Appellant constituted an interception.

The use of the “Snagit” program did not affect the manner in which the communications came into the possession of the police officer. The program was simply a means to retain a communication. Making a copy of a received message, either on paper, or electronically, could not be characterized as an interception.

In all the circumstances, the Appellant’s subjective expectation of privacy in the messages sent to “Leann” was not objectively reasonable. The Appellant was using electronic social media to communicate and share information with a person he did not know, and whose identity he could not confirm. On an objective analysis, the Appellant must have known that he lost control over any expectation of confidentiality in the messages; s. 8 of the *Charter* was not engaged.

Commentary: This case represents a common-sense consideration of the use of a computer software program to create an electronic record of a telecommunication and the application of the principles in *R. v. Spencer*, 2014 SCC 43, 2014 CarswellSask 343, for assessing whether or not a subjective expectation of privacy is objectively reasonable. The Newfoundland and Labrador Court of Appeal recognized that the software at issue was no more complex, or unusual, than taking a photograph or making a copy of a document. The fact that the communication that was later preserved was originally sent over the Internet did not substantially change the analysis. The court did not rule that an objectively reasonable expectation of privacy could not ever attach to a Facebook message, but that in this case, since the Appellant did not know, and could not confirm the identity of the recipient of his communications, his expectation of privacy in their contents was not objectively reasonable. This may not, however, be the end of the story. In the case of *R. v. Marakah*, 2016 ONCA 542, 2016 CarswellOnt 10861, the Court of Appeal for Ontario held that a person does not have a reasonable expectation of privacy in sent text messages because the sender does not retain control over what the receiver will do with the received text messages. The British Columbia Court of Appeal came to the opposite conclusion in *R. v. Pelucco*, 2015 BCCA 370, 2015 CarswellBC 2386. *Marakah* is scheduled to be heard by the Supreme Court of Canada on March 23, 2017.

R. v. Mills, 2017 NLCA 12, 2017 CarswellNfld 58 (N.L. C.A.)

2. — Consideration of Totality of Circumstances Results in Finding that Grounds to Arrest are Objectively Reasonable

Facts: On January 27, 2011, police received information from an unknown tipster that a man named "Aghasi" said to be associated with a particular address in Burnaby, B.C., and a man named "Henareh" were involved in importing opium into Canada. The information was relayed to the Canada Border Services Agency ("CBSA"). A short time later, police received additional information from the tipster that the opium was coming from Iran, and that there was a large amount of opium in Aghasi's residence. The officer attended at the residence alleged to belong to Aghasi, and spoke to the occupant, Aghasi Ravandi. He confirmed that he was from Iran and indicated that his father was an opium addict, but said he had never seen any in the apartment. The officer was invited inside to do a cursory search, and no opium was discovered.

Approximately one month later, the officer received information from the CBSA that four large packages from Iran and addressed to Ravandi had been referred to secondary inspection. Three of the packages contained samovars, or teapots, and a fourth contained rugs. A deconstruction of the samovars revealed approximately 18 kilograms of opium. Police and the CBSA began to plan for a controlled delivery of the packages. Three days before execution of the plan, Ravandi unexpectedly attended at the CBSA to collect the package. Surveillance was marshalled and Ravandi was observed sitting at table in a café. A second Persian man, later identified as the Appellant, was also present in the café. Ravandi and the Appellant were observed typing on handheld devices but did not speak or acknowledge each other. Both men later exited the café at about the same time. The Appellant got into a Honda Civic and drove away. Ravandi collected the packages from the CBSA office and loaded them into a U-Haul van. He then drove to a building associated with the licence plate of the Honda Civic. Shortly thereafter, the Appellant and Ravandi transferred the packages into the Honda. Both got into the Honda and drove away. The Honda drove a circuitous route to a park where it left the sight of the surveillance team for about seven minutes. The Honda then drove to Ravandi's residence and dropped Ravandi off at the front of the building. The Appellant then drove to the back of the building, was stopped and arrested for importing a controlled substance. A search of the Honda revealed 13.78 kilograms of opium in three coolers located underneath a blanket in the trunk.

At trial, the Appellant sought the exclusion of the evidence obtained from the search of the Honda on the basis that the police did not have objectively reasonable grounds to arrest. He conceded that if the grounds for arrest were reasonable, the search of the Honda was a valid search incident to arrest. The trial judge disagreed, and the Appellant was subsequently convicted of possession of opium for the purpose of trafficking. The Appellant appealed on the basis that the trial judge misapprehended key parts of the evidence on the *Charter voir dire*.

Held: Appeal dismissed.

There is no question that the officer in this case subjectively believed that he had reasonable and probable grounds to arrest the Appellant. He relied on the tips received from the confidential informant, the behavior of the two men at the café and the surveillance evidence in forming his grounds for arrest. In *R. v. Storrey*, 1990 CarswellOnt 78, [1990] 1 S.C.R. 241, the Supreme Court of Canada held that there is both a subjective and objective element to the test for an arrest under s. 495 (1)(a) of the *Criminal Code* without a warrant: a reasonable person placed in the position of the officer must be able to conclude there are reasonable and probable grounds for the arrest. The standard requires something more than mere suspicion, but something less than proof on a balance of probabilities: *Mugesera v. Canada*, 2005 SCC 40, 2005 CarswellNat 1740. The appropriate standard is reasonable probability: *R. v. Debot*, 1989 CarswellOnt 111, [1989] 2 S.C.R. 1140. A reviewing court's analysis of the objective reasonableness of an arresting officer's belief must take into account the officer's knowledge and experience with respect to the matter under investigation: *R. v. Luong*, 2010 BCCA 158, 2010 CarswellBC 1244.

The trial judge correctly approached the analysis in this case based on the totality of the information available to

the arresting officer. This included the detailed nature of the information obtained from the confidential tipster, some of which was confirmed in material ways, including the activities of Ravandi in collecting the shipment, surveillance observations including their behavior in the café, their subsequent contact and what appeared to be counter-surveillance driving. Nor did the trial judge err in finding that the officer believed that the package transferred to the Honda contained opium, given that all four packages were similar in size and colour.

Commentary: This is a straightforward and succinctly written judgment covering the basics regarding the law regarding grounds for arrest.

R. v. Henareh, 2017 BCCA 7, 2017 CarswellBC 23 (B.C. C.A.)

3. — Intercepted Communications Excluded for Serious Section 8* Charter *breaches

Facts: The Applicants were charged with an offence under the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34. They brought a *Garofoli* application, challenging three authorizations that the police had obtained to intercept their private communications.

The factual background to the investigation that led to the authorizations was as follows. The Government of Bangladesh intended to award a $50 million construction supervision contract (”CSC”) relating to the planned construction of a large bridge: the Padma Bridge. Five companies were short-listed for the CSC: AECOM, HPR, Halcrow, Oriental and a Canadian company, SNC Lavalin. One of the Applicants, Kevin Wallace (”Wallace”), was a senior executive at SNC Lavalin.

The World Bank was a primary lender in relation to the project. The international organization has a unit charged with the investigation of allegations of fraud, corruption, collusion and other improper activities in relation to World Bank financed projects (”the INT”). In March 2011, the RCMP was approached by an INT investigator, Paul Haynes (”Haynes”) concerning allegations respecting possible corruption involving SNC Lavalin on the Padma Bridge project. Haynes provided the RCMP with information the World Bank had received from four “tipsters” about alleged corruption on the CSC contract, all of whom had communicated by way of email.

Sgt. Jamie Driscoll (”Driscoll”) of the RCMP subsequently swore an Information to Obtain (”ITO”) a Part VI application on May 24, 2011, relying heavily on the information provided by the tipsters through the World Bank. None of the tipsters had previously provided information to the police or to the INT. Tipster #4’s allegations were very general and essentially irrelevant to the allegation respecting SNC Lavalin. The motivation and criminal antecedents, if any, of Tipster #1 and Tipster #3 were unknown. Tipster #2 was involved as a competing bidder, and acknowledged being involved in his own corrupt efforts in respect of the CSC. Most, if not all, of the information provided by Tipsters #1-3 had been received by them from other sources. The RCMP did not speak with either Tipster #1 or #3, and neither purported to have first-hand knowledge of the allegations they recounted to the INT. Tipster #2 also provided second-hand (or worse) hearsay obtained from sources that only Tipster #2 vouched for. An RCMP officer spoke with Tipster #2, but only by telephone. The RCMP did not undertake any independent investigation of the allegations made. They did not speak with any of the people who were identified by the tipsters as being in a position to provide direct information regarding the allegations.

In addition to relying on the hearsay information of the tipsters, the RCMP relied on the travel histories of the Applicants to try to connect one or more of the individuals to an alleged meeting that Tipster #2 said had taken place in Dubai where, it was said, “the deal for the CSC” had been made. Tipster #2 had said that he knew this because a “foreign public official” had told “someone” who had told Tipster #2. Directly after recounting this information, the affiant set out certain information regarding travel undertaken by each of the Applicants (obtained from the Canada Border Services Agency “CBSA”). The information did not establish where the Applicants had been, but instead revealed only the dates on which they had returned to Canada through Toronto Pearson

International Airport. In the next paragraph, the affiant included further information from Tipster #2 from a different source, which included the assertion that a high official from SNC Lavalin was at the Dubai Meeting, and that Wallace "would definitely be" that person.

The affiant did not reveal that the CBSA has access to more detailed information regarding a person's travel outside of Canada, which the RCMP had not obtained. The RCMP requested that additional information of the CBSA on the same day the first authorization was granted (May 24, 2011). The result of that request was obtained in early June, and failed to show that Wallace had been in Dubai at any point in time. The RCMP subsequently obtained two renewals, and the affiant failed to reveal this new information in either the ITO filed for the second or third authorization.

Held: The court assessed the tipsters' information contained in the ITO on the basis of "the three Cs" test in *R. v. Debot*, 1989 CarswellOnt 111, [1989] 2 S.C.R. 1140; that is, was the information provided by the informant compelling, credible, and corroborated. Nordheimer J. found that information fell seriously short of satisfying any of the "Cs". While in some circumstances weaknesses in one area can be compensated by strengths in the other two, "[n]one of the areas provide any appreciable level of strength such that they could bolster the others". In making its assessment, the court emphasized the RCMP's failure to undertake any independent investigation of any of the allegations being made.

The court was particularly critical of the affiant's use of the travel information to lead the reader to draw the inference that Wallace had travelled to Dubai, finding that, "this is, in my view, precisely the type of language in an ITO that the Supreme Court of Canada decried in *Araujo* [2000 SCC 65, 2000 CarswellBC 2440], that is, language that tricks the reader into believing something, the truth of which is, in fact, unknown", and holding that "[i]t was improper for the affiant to create the circumstances, for an inference to be drawn, when he had no idea whether the inference was a true one, and thus could not have a reasonable belief as to its possible truth. That impropriety was heightened by the fact that the RCMP could have accessed information to determine whether the inference was a reasonable one, but did not do so, until after the authorization was obtained." The court concluded that the ITO (either edited or unedited version) failed to show reasonable and probable grounds to believe that the alleged offence had taken place. Finally, the court concluded that investigative necessity had not been made out.

The intercepted communications were excluded pursuant to s. 24(2) of the *Charter*. In making this determination, the court again emphasized the affiant's treatment of the travel information, holding at paragraph 93 that, "As may be apparent from my recitation of this issue earlier, I find the manner in which that information [the travel information] . . . was included in the ITO, in the manner that it was, especially when it had not been checked out against the more detailed travel information that the RCMP knew existed and, indeed, subsequently obtained. That would be serious enough, but the matter is elevated to an entirely different level by the failure of the affiant to mention the fact, that the inference was disproved, in the two subsequent ITO's".

Commentary: This judgment stands as a cautionary tale to affiants of wiretap authorizations regarding the importance of providing full, frank and fair disclosure to the issuing justice on an *ex parte* application for a wiretap. Misleading or material incomplete disclosures will simply not be tolerated. It is also a strong judgment underlining that reliance on unsubstantiated rumours provided by more than one untested and anonymous informers will not constitute reasonable grounds. (There was no appeal by the Crown.)

R. v. Wallace, 2017 ONSC 132, 2017 CarswellOnt 72, [2017] O.J. No. 708 (Ont. S.C.J.)

4. — Asking What Someone is Carrying may Not Engage Section 8 of the Charter

Facts: Someone had been attempting to register an SUV in the name of a person whose identity had been

stolen. Late one night, a police officer saw the vehicle and pulled it over.

Mr. Patrick was driving. He had three passengers. The passenger in the front seat appeared unconscious and no one seemed to know why the officer could not rouse him. One of the men in the backseat looked as if he had been in a fight. The lone female officer thought that her safety was at risk. She returned to her vehicle and asked for backup. Before three other officers arrived on scene, the original officer discovered that the three passengers were known to be violent.

All of the officers then went to the vehicle. The men were asked to get out. Mr. Patrick initially hesitated when asked to leave the vehicle. Nor did he did put his hands where the instructing officer could see them. Another officer yelled at him to put his hands where they could see them, at which time he complied and stepped out. The original officer could see a bulge in his shoulder area. She asked him: “Do you have something on you?” He responded that he had a shotgun. He was immediately arrested and the sawed off shotgun was removed.

He said he would like to avail himself of counsel, but was not provided with a cell phone at the roadside. He made his call over 30 minutes later, once at the police station.

A search warrant was obtained for his residence.

The respondent argued that his s. 8 *Charter* rights had been breached when he was asked if he had something on him. He also argued that his s. 10(b) rights were infringed when he was not provided with immediate resort to counsel. Finally, he argued that his s. 8 rights had been breached when the search warrant was obtained. The trial judge agreed that his rights had been breached in each of these ways and excluded the evidence. Mr. Patrick was acquitted. The Crown appealed.

Held: The appeal was granted and the respondent was ordered to stand trial again, although only on just less than half of the charges.

The Crown alleged a number of errors on appeal. The first relates to the findings about improper investigative detention and that a detainee cannot be asked a question. Fitch J.A. provides a thorough review of the law of investigative detention and search incident to detention. He observes that the risks to police safety may increase when motor vehicles occupied by a group of men, known to have connections to the drug trade and a propensity for violence, are approached in the darkness. This is the situation that confronted the officers on the night in question.

While Mr. Patrick conceded at trial that the pat-down search was permissible, the Court of Appeal noted the trial judge’s rejection of this fact. The appellate court found it “curious” that the trial judge would, without notice to the Crown, disregard the concession. The court found that the rejection was rooted in an error in law. Search powers incident to investigative detention are not restricted to “reactive searches”, permissible only after some form of action has been initiated by the detained group. The test is tied to the officer’s subjective belief that there is a safety-based concern and the objective reasonableness of that belief in all of the circumstances.

While the Court of Appeal has left it for the new trial judge to determine the legality of the safety search, Fitch J.A. commented that it was incumbent on the trial judge to consider all of the evidence in determining the legality of the search, including: (i) the vehicle occupants’ reputation for violence; (ii) known connections to the drug trade; (iii) one of the passengers appeared to have been assaulted; (iv) deceptive behaviour occurred; (v) the stop was in full darkness; (vi) the driver’s initial failure to comply with the direction to put his hands where they could be seen; and (vii) the apparent bulge in the driver’s shoulder area. All of these things would seem to support an investigative detention.

As for the questioning of Mr. Patrick about whether he had something on him, such questions do not lead to an automatic s. 8 breach. The court made three main points: (1) where necessary, searches conducted incident to investigative detention can extend beyond simple pat-down searches; (2) searches done incident to investigative detention must be considered against their underlying rationale — the prevention of avoidable harm through brief and minimally intrusive searches; and (3) the police must be given reasonable latitude in deciding how to conduct a search.

As for the last consideration, Fitch J.A. held: “As this case illustrates, detainees may be in possession of concealed, loaded firearms. Detainees may also be in possession of concealed sharp objects like knives or uncapped hypodermic needles that could seriously injure an officer conducting a pat-down search if no prior inquiry is made of the detainee about whether they are in possession of any such items.” While detainees do not have to answer questions asked, depending on the context, there is nothing wrong with the police asking questions to guide their conduct when they search.

As for the s. 10(b) breach found by the trial judge, the wrong legal test had been applied. The provision of this *Charter* right was treated as near-absolute and near-immediate. No scope was given to the fact that exigencies will sometimes permit delaying the implementational component of the s. 10(b) right. The question is whether the Crown has met their onus is establishing on a balance of probabilities that the provision of the right had to be delayed.

All of these legal errors required a new trial on three counts on the indictment.

Commentary: This is a lengthy and important judgment relating to police powers. It reflects a very nice consolidation of the law relating to the powers associated to investigative detention, search and questioning incident to investigative detention, and s. 10(b) rights. It reflects a highly practical application of the law in this area.

The judgment reminds us that the law needs to balance police powers with individual rights and that these things do not always clash. For instance, Fitch J.A. makes the very practical observation that a simple and well-placed question about whether a detainee is carrying a weapon may protect everyone present, including the detainee.

Interestingly, the court is very careful to note that an individual does not have to answer questions asked, but that the police may be afforded even further latitude in determining the manner of search if a detainee declines to respond. Justice Fitch is also careful to point out that while the issue did not require determination in this case, it may well be the case that any answer given in the context of an investigative detention, during the suspension of the right to counsel, may not be admissible at trial.

R. v. Patrick, 2017 BCCA 57, 2017 CarswellBC 257 (B.C. C.A.)

5. — Hotel Room Searched Without Warrant Breaches Section 8

Facts: The accused and his girlfriend were dealing drugs from a hotel room. Other hotel occupants complained. The hotel manager became concerned and asked for the police to attend. Upon police arrival, they were told that the manager wanted the people out. The police obtained the card key for the room from hotel security.

They knocked at the door, announced they were the police, and entered. They found the accused and his girlfriend. There were various types of drugs and cash. A search incident to arrest revealed a couple of cellular phones that were later searched. The phone contents then led the police to a few other locations that the police believed were being used by the accused to traffic drugs. The police set up surveillance in those buildings.

The accused argued that his s. 8 *Charter* rights were breached when the police entered the hotel room without

warrant. He also argued that the later warrantless surveillance at the apartment buildings constituted a s. 8 breach. He asked for the exclusion of all evidence seized from the hotel room and from the later search of the apartments.

Held: The trial judge found a s. 8 *Charter* breach resulted from the warrantless entry into the hotel room. The accused had a reasonable expectation of privacy in the room: *R. v. Wong*, 1990 CarswellOnt 58, [1990] 3 S.C.R. 36. The police required lawful authority before entering the room.

While s. 2 of the *Trespass to Property Act* might give rise to a police power to enter a hotel room to remove an occupant in some limited circumstances, it was not permissible here. Where an occupant refused to leave a hotel room after being directed to do so by the occupier of the premises or a person authorized by the occupier, according to Goldstein J., it may be possible to have the person removed by the police. This can be done without a warrant.

The difficulty in this case is that the accused had not been clearly told to leave the premises. While the hotel manager wanted him out, and told the police that she wanted him out, she had not clearly told him to leave the premises. As such, the police could not enter to effect the ejection. By entering the room, even at the manager's request, the police were exceeding the scope of their common law duties.

As for the surveillance, the accused was not permitted to reside at one of the buildings and, as such, his reasonable expectation of privacy was not high. This is particularly true as it comes to the common areas. As it relates to the other building, surveillance was done in various areas, including the parking garage, hallway, elevator and lobby area. While the police learned the apartment number by conducting this surveillance, there is little expectation of privacy in the unit number in a multi-unit building. As such, there was no "stand-alone violation" of s. 8 arising from the surveillance.

Notwithstanding the s. 8 breach in this case, the evidence was not excluded.

Commentary: As noted by the trial judge in this case, there is a dearth of authority when it comes to searching hotel rooms and the privacy interests engaged. While it has been a long time since *Wong* was decided in 1990, the seminal case recognizing a s. 8 reasonable expectation of privacy in respect to hotel rooms, not a great deal of movement has been made since then.

Perhaps because of the dearth of authority, this is an interesting case that discusses the tension that arises when a hotel manager, in control of the premises, wants an occupant ejected. The approach taken by Goldstein J. reinforces the fact that people maintain a privacy interest in their premises and it cannot be easily overcome. While it appears that hotel managers can solicit the assistance of the police in having a difficult occupier ejected, this cannot be done too early in the process. The manager must first take steps to effect this end before the police enter a room without warrant.

As for the surveillance conducted inside of the apartment buildings, it too is an interesting approach. In *R. v. White*, 2015 ONCA 508, 2015 CarswellOnt 10185, the court reinforced that people who live in multi-unit dwellings may well maintain a degree of privacy over the common areas. This judgment reinforces the importance of a contextual analysis, focusing on the facts at play in *White*. Goldstein J. emphasizes that *White* was a small condominium building and the police were able to see inside of a locker area and hear what was happening in the unit. This is unlike the observations made in this case. The judgment focuses on the fact that s. 8 is only engaged when the police go beyond making simple observations that are visible to all inside the building.

R. v. Wawrykiewicz, 2017 ONSC 569, 2017 CarswellOnt 1021 (Ont. S.C.J.)

6. — DRE Recognized as an Expert Without Voir Dire

Facts: Mr. Bingley was seen driving erratically. He pulled into a parking lot and struck a car. An officer who attended at the scene noted that the appellant's eyes were "glassy" and bloodshot. He was stumbling, and slurring his words. After passing a roadside screening test, the officer called for a standard field sobriety test.

A drug recognition evaluation was done and Mr. Bingley failed. He admitted that he had smoked marihuana and had taken two Xanax in the 12 hours prior to driving. After having failed the drug test, Mr. Bingley provided a sample of his urine that confirmed the presence of the substances he admitted to, plus cocaine.

The Crown called the drug evaluation officer at the appellant's first trial. He was permitted to testify as an expert. Mr. Bingley was acquitted. The Crown appealed and a new trial was ordered. The Crown sought to admit the drug evaluation officer's evidence again, but his request was denied. The trial judge determined that he could not be qualified as an expert because he had not been trained in the underlying science. The appellant was acquitted.

The Crown successfully appealed and a new trial was ordered. The Court of Appeal upheld the decision and ordered a new trial 2015 ONCA 439, 2015 CarswellOnt 8987. The Supreme Court heard the appeal. The real issue was whether a drug recognition evaluation opinion could be automatically given as expert opinion evidence and, if not, whether the officer's evidence was admissible as expert opinion evidence in this case.

Held: The majority concluded that, while a drug recognition expert [DRE] opinion is not automatically admissible as opinion evidence, it was admissible in this case.

In brief, and among other things, s. 254(3.1) of the *Criminal Code* gives an officer, with reasonable grounds to believe that a person is committing or within the preceding three hours has committed an offence under s. 253(1)(a) as a result of the consumption of drugs, the ability to require the person to submit to an evaluation conducted by an "evaluating officer" [DRE] to determine if the person's ability to operate a vehicle was impaired by a drug. As noted by the majority, the DREs receive special training and certification under the relevant legislation. The DRE administers a 12-step evaluation, which provides the reasonable grounds that a person is impaired by a drug under s. 254(3.4). Where this occurs, the police can take tests of oral fluid, urine or blood to determine if drugs are in the driver's body.

The majority rejected the Crown's position that the DRE's opinion is automatically admissible at trial because the legislative scheme has supplanted the common law admissibility rules related to opinion evidence: *R. v. Mohan*, 1994 CarswellOnt 66, [1994] 2 S.C.R. 9; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, 2015 CarswellNS 313. Clear and unambiguous language is needed to displace common law rules. Parliament provided no such language in the statutory scheme and, as such, there are no automatic admissibility rules for opinion evidence in a drugged driving trial. The statutory scheme is an investigatory and not evidentiary scheme.

Nonetheless, the common law rules related to expert opinion evidence are divided into two categories: (1) the four *Mohan* criteria (relevance, necessity, absence of an exclusionary rule and special expertise); and (2) the weighing of the risks and benefits of admissibility. This analysis must not be conducted in a vacuum. It must be considered against the fact that the DREs are necessarily trained under the statutory scheme.

In this case, the DRE was trained. The question on the expert evidence inquiry was whether he had a special expertise required under the fourth prong of *Mohan*. This condition for admissibility requires that the expert offering the opinion must have an expertise outside the knowledge and experience of the trier of fact. The DREs are literally "drug recognition experts". They are certified for these purposes. They receive special training for this purpose. While their tests assist in investigations, the application of the 12-step test is relevant evidence and can assist a trier of fact.

The fact that a DRE does not necessarily know the underlying science matters not. The test for expertise is knowledge outside the experience and knowledge of the trier of fact. Knowledge of the underlying science is not a requirement. Moreover, the test is *prima facie* reliable seeing as Parliament has established, through the adoption of Regulations, that the 12-step drug evaluation is sufficiently reliable for purposes of a DRE's determination of impairment in the first place.

The opinion was admissible without a *voir dire*. A new trial was ordered.

Commentary: This is an important case. While the majority concluded that the statutory scheme does not support automatic admissibility of DRE opinion evidence, it strongly supports the expertise of DREs in detecting signs of drug impairment. It also supports the view that DREs maintain a special knowledge related to drug impairment, a knowledge that is statutorily required and supported. It is also one that extends beyond the ken of the average trier of fact.

While the court warned against allowing DREs to testify beyond their area of expertise, warning trial judges to remain vigilant about keeping their evidence within their areas of expertise, the majority has supported the view that admissibility *voir dire* will not always be required. Where it is clear that the *Mohan* criteria for admissibility have been met, the trial judge is not obliged to hold a *voir dire* to assess the admissibility of this evidence. As noted by McLachlin C.J., "To so require would be otiose, if not absurd, not to mention a waste of judicial resources." This result should streamline trials involving allegations of drugged driving.

R. v. Bingley, 2017 SCC 12, 2017 CarswellOnt 2406 (S.C.C.)

7. — Step Six: Amicus *to be Appointed Only in Exceptional Circumstances*

Facts: Search warrants were obtained on the basis of confidential informant (CI) information. The Crown agreed that after redactions were made in order to protect the identities of the CIs, there was insufficient information remaining to support the warrants.

The trial judge provided a judicial summary relating to the redacted informations. He denied the request for more information, finding that to release anything further would compromise the identity of the CIs. He also refused the defence request to appoint *amicus* to provide input on the review of the redacted ITOs. The challenges to the warrants were dismissed, the accused was convicted and he appealed.

Held: The Court of Appeal dismissed the appeal.

The court reviewed the test for determining whether a judicial summary provides sufficient information. The summary has to provide a "meaningful basis upon which to challenge whether the affiant made full and frank disclosure": *R. v. Debot*, 1989 CarswellOnt 111, [1989] 2 S.C.R. 1140; *R. v. Crevier*, 2015 ONCA 619, 2015 CarswellOnt 15760. While judicial summaries, designed to protect confidential informant information are necessarily general, they must provide an accused with sufficient knowledge about the nature of the redactions so as to be in a position to challenge the warrant in argument or by evidence: *Crevier*, at para. 72.

There was sufficient information provided in this case to permit this objective to be achieved.

The appellant also argued that *amicus curiae* should have been appointed. The appellant said that this occurs in the "vast majority of cases" and is "by and large a constitutional necessity to step six". The court rejected this argument. First, the court found no evidence that *amicus* is appointed in the vast majority of cases. While *amicus* is and should be appointed in some cases, it is not always required. This is largely a matter of judicial discretion and deference should be shown. The trial judge did not err by deciding not to appoint *amicus* in this case.

Commentary: This is a short but helpful decision dealing with sometimes vexing issues about how to conduct step six hearings under *R. v. Garofoli*, 1990 CarswellOnt 119, [1990] 2 S.C.R. 1421. It reinforces the court's prior statements in cases like *Crevier* and *R. v. Reid*, 2016 ONCA 524, 2016 CarswellOnt 10411, dealing with redactions and judicial summaries. While judicial summaries of redacted information must be somewhat general, the key is that they contain enough detail that there is a "meaningful basis" upon which the defence can challenge the evidence.

As for the *amicus* issue, this decision should provide courts with some comfort that *amicus* is not always required simply because the Crown and court may see something that the defence cannot see. As noted in *R. v. Shivrattan*, 2017 ONCA 23, 2017 CarswellOnt 329, *amicus* can be appointed to deal with CI issues in "particularly difficult cases". This judgment makes it clear that the defence must show why the appointment of *amicus* is necessary in a particular case. A part six proceeding is not "tantamount to a secret trial". The court wholly rejected this characterization of the part six stage. Rather, it is an evidentiary hearing.

R. v. Thompson, 2017 ONCA 204, 2017 CarswellOnt 3240 (Ont. C.A.)

8. — Failure to Produce Copy of Search Warrant does Not Necessitate Exclusion of Evidence

Facts: On July 17, 2013, the deceased phoned his wife while on his way to the Appellant's home to sell marihuana. The deceased promised to call his wife back in 15 or 20 minutes, after he left the Appellant. The deceased was not heard from again, and was reported missing a few days later. An investigation identified the Appellant as the last person known to have interacted with the deceased. The Appellant spoke with police three times before he was identified as suspect.

Approximately one month later, police obtained a warrant to search the Appellant's property. The Appellant asked to see the warrant and police advised that it was sealed, and in any event, did not have a copy of the search warrant with them. This was false; there was a copy of the warrant in a police vehicle, but the officers either chose, or were directed, not to show the warrant to the Appellant. Police seized the remnants of an Orange Crush box (similar to a box used by the deceased to store cash) in a garbage bag on the Appellant's front lawn. This box appeared to be covered with blood splatter. DNA analysis later revealed the blood to belong to the deceased. A bloodstain discovered on the Appellant's coffee table also matched that of the deceased.

At trial, the Appellant sought the exclusion of the evidence obtained via the search of the Appellant's residence, alleging the police breached his rights under s. 8 of the *Charter* in refusing to provide him with a copy of the search warrant on execution, a violation of s. 29 of the *Criminal Code*. On the *voir dire*, the lead investigator testified that he believed only verbal notice of the warrant was necessary. The trial judge found this to be an incorrect interpretation of the law, amounting to a violation of s. 8 of the *Charter* and that this conduct fell on the spectrum between carelessness and negligence. However, the trial judge held that since the Orange Crush box was discovered on the Appellant's lawn in a garbage bag, the Appellant's expectation of privacy was low, and as such, the effect on the Appellant's *Charter*-protected interests was minimal. The trial judge refused to exclude the evidence under s. 24(2). The Appellant was eventually convicted of second-degree murder, and appealed, in part, on the ground that the trial judge erred in refusing to exclude the Orange Crush box.

Held: Appeal dismissed.

Absent exigent circumstances, s. 29 of the *Criminal Code* imposes a mandatory duty on peace officers to produce a copy of a search warrant. The refusal in this case was intentional, and the trial judge did not err in finding that non-compliance with s. 29 constituted a violation of s. 8. The trial judge properly considered the factors set out in *R. v. Grant*, 2009 CarswellOnt 4104, [2009] 2 S.C.R. 353. The trial judge made no error of law, nor misapprehension of the facts. He was entitled to conclude that the seriousness of the breach was at the low end

of the spectrum, given the fact that the conduct was somewhere between carelessness and negligence; that this was not a warrantless search; the Appellant's lowered expectation of privacy in items clearly abandoned as garbage, and; that the Appellant received oral disclosure of the scope of the warrant.

Commentary: Section 29 of the *Criminal Code* sets out the duties of peace officers executing a process or warrant to carry a copy of the order authorizing the process, where it is feasible to do so and to produce it on request. The purpose of the provision is to allow the occupant to know why the search is being carried out, in order for the occupant to understand their legal position relative to the search: *R. v. Cornell*, [2010] 2 S.C.R. 142. In this brief set of reasons, the Court of Appeal for Alberta confirmed the trial judge's ruling that strict compliance with s. 29, while a breach of s. 8 of the *Charter*, will not necessarily result in the exclusion of the evidence under the analysis conducted under *R. v. Grant*, 2009 CarswellOnt 4104, [2009] 2 S.C.R. 353. Had the trial judge committed an error in the *Grant* analysis, specifically that the failure to produce the search warrant was a deliberate breach of s. 29, or that the Appellant had a high degree of expectation of privacy in the evidence seized, the result may well have been different.

R. v. Jerrett, 2017 ABCA 43, 2017 CarswellAlta 161 (Alta. C.A.)

9. — Discovery of Drugs in Inventory Search Held Lawful

Facts: A police officer stopped the accused's vehicle shortly after midnight. The officer knew that the accused was bound by an undertaking not to be within the limits of the particular city.

The officer decided to take the accused to the police station, and to have the vehicle towed because it was in an unsafe location.

While waiting for the tow truck, the officer seized a wallet from the passenger floor and a computer bag from the passenger seat of the vehicle. The officer testified that both were in plain view, and that he seized them pursuant to a police force policy to do an inventory search of vehicles when they are towed. He said that the purpose of the policy is to ensure the safekeeping of the subject's personal possessions and avoid civil liability on the part of the police.

The officer returned to the police vehicle with the wallet and the computer bag. He asked the accused if there were any other items he wanted removed from the car. The accused said that he did not want anything else removed. He asked the officer to leave the wallet and the computer bag in the car because he trusted tow truck operators more than he trusted the police.

The officer did not return the items to the car. He took them to the police station. There he opened the bag to do an inventory of its contents. Inside it, he found a laptop, a large amount of cash, bear spray, and quantities of individually bagged drugs.

The accused was charged with possession of drugs for the purpose of trafficking. At trial, he challenged the lawfulness of the search of the computer bag, and sought to exclude the items found inside it.

Held: Application dismissed.

The trial judge noted that the provincial motor vehicle statute authorizes police to move a vehicle to a safe location, or to have it towed to a safe place. The authority to tow a vehicle carries the responsibility to take care of it and its contents, and where appropriate, to conduct an inventory of its contents. The trial judge accepted that the rationale behind an inventory search is to serve the interests of any person with an interest in the property and who looks to the police to safeguard it, to address public safety concerns with contraband being held in police controlled storage facilities, and to guard against civil liability for loss of or damage to property.

The trial judge accepted the officer's testimony that the purpose of removing the computer bag and the wallet was to do an inventory search. The car was being towed because it was in an unsafe location. The officer had the authority to conduct an inventory search. The rationales for conducting an inventory search of the car's contents were applicable to conducting an inventory search of the computer bag at the police station.

The trial judge also found that the search was conducted in a reasonable manner. He rejected the argument that the officer should have allowed the accused to make other arrangements for the removal of the vehicle, such as calling a friend to move it or arranging his own tow. The accused did not ask to make other arrangements for his vehicle. It was late at night, there were no other occupants of the car, and it was parked in an unsafe location. It would not have been prudent for the officer to sit at the side of the highway while the accused made calls on the off chance that someone could come and pick up his vehicle.

Commentary: The trial judge noted decisions of the Ontario Court of Appeal that held that highway traffic legislation does not demand the impounding of all vehicles, and that the power to impound can be abused by the police. For those reasons, the reasonableness of police conduct must be assessed against the totality of the circumstances, on a case by case basis.

R. v. Russell, 2017 BCPC 60, 2017 CarswellBC 552 (B.C. Prov. Ct.)

10. — Failure to Comply with "Forthwith" Standard at Roadside Results in Exclusion of Breath Test Results

Facts: The accused's car rear-ended another vehicle. The officer who was dispatched to deal with the incident approached the accused, who was seated in the driver's seat of his car. The accused said that he and his girlfriend, who was in the passenger seat beside him, had had an argument.

The officer asked him to get out of the car. The accused did so. The officer detected an odour of alcohol on the accused's breath as they spoke by the side of the car. The accused said that he had been distracted during an argument with his girlfriend, and hit the other vehicle. The officer asked if he had been drinking. The accused said that he had one drink.

Shortly after 11:15 p.m., the officer decided that he had grounds to make the roadside demand, based on the accused's location in the driver's seat, the odour of alcohol on his breath, his admission of alcohol consumption, and the unlikelihood that a sergeant who was first to arrive at the scene and who pointed out the accused as the driver had been there for more than three hours.

The officer told the accused that he was going to "put a test on him". The officer requested the accused's driving-related documents, and went to speak to the sergeant who was on scene, about a "possible domestic incident", and his intention to administer the approved screening device. He returned a minute later. The accused was looking for his wallet in the car. The officer asked him whether he was licensed to drive, and about his alcohol consumption.

At 11:25 p.m., the officer read the accused the approved screening device demand. The accused provided a sample that registered a "Fail". The officer arrested the accused for impaired driving, read him the breathalyzer demand and explained it, and gave him his rights to counsel. The officer briefed another officer, caught up with his notes, and completed the necessary computer system entries. At 11:42 p.m., he took the accused to a police station. There the accused spoke with duty counsel and then provided breath samples. The blood alcohol concentration readings were each 140 milligrams of alcohol in 100 millilitres of blood. A toxicologist put the accused's blood alcohol concentration at between 140 and 195 milligrams of alcohol in 100 millilitres of blood at the time of driving.

At his trial for driving over 80, the accused contended that the roadside approved screening device demand was not made "forthwith" as required by s. 254(2) of the *Criminal Code*, or alternatively that the roadside samples were not taken "forthwith". He contended that there was a *Charter* infringement and sought the exclusion of the evidence of his blood alcohol concentration readings and the toxicological report, under s. 24(2) of the *Charter*.

Held: Evidence excluded.

The trial judge relied on *R. v. Bernshaw*, 1994 CarswellBC 3038, [1995] 1 S.C.R. 254, for the proposition that compliance with the "forthwith" standard in s. 254(2) is both a statutory and constitutional precondition for a lawful search and seizure. Both the demand for an approved screening device sample *and* its provision must be "forthwith". While s. 254(2) speaks only of a motorist's obligation to provide a sample "forthwith", it is long settled that there is a complementary constitutional duty on an officer to make the roadside demand as soon as he or she forms the requisite reasonable suspicion.

The trial judge noted that there is no fixed standard for "forthwith", and some elasticity may be justified in demanding situations. He held that the standard for "forthwith" is one of "circumstantial immediacy", meaning as the Ontario Court of Appeal put it in *R. v. Quansah*, 2012 ONCA 123, 2012 CarswellOnt 2569, a delay that is no more than reasonably necessary to enable the officer to properly discharge his or her duty.

The trial judge found that at approximately 11:15 p.m., the officer advised the accused that he was going to "put a test on" him. This reflected the officer's crystallized belief that he had the requisite reasonable suspicion to make the screening device demand. The roadside screening did not commence for 10 or 11 minutes after the officer made this informal demand. Alternatively, and more accurately according to the trial judge, the officer did not make a demand until he read it from his notebook at 11:25 p.m., some 10 minutes after he formed the reasonable suspicion to make such demand. His verbalization of the demand was not made "forthwith". There were no exigent or pressing circumstances that excused the delay. Both ss. 8 and 9 of the *Charter* were breached.

On the application of s. 24(2), the trial judge found that the breach was serious. The failure to immediately make the demand was inconsistent with well-settled law. The officer did not set out to subvert the accused's rights, but his conduct reflected a disregard for the constitutional rationale for the "forthwith" requirement. The search and seizure of the breath samples was toward the less invasive end of the continuum of privacy interests, but the accused's arrest and detention for several hours flowed from the breach. His s. 9 interests were meaningfully infringed. While the evidence was real, the longer term repute of the administration of justice was better served by exclusion in a case where the police conduct signaled an inexplicable misapprehension of constitutional norms.

Commentary: This case is an application of the principle espoused in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, that ignorance of *Charter* standards by the police must not be encouraged, and negligence or wilful blindness cannot be equated with good faith. Once the trial judge found that the officer was indifferent to his statutory and constitutional obligations, the scales necessarily tipped in favour of exclusion of the evidence.

R. v. Buenrostro-Ramirez, 2017 ONCJ 101, 2017 CarswellOnt 2932 (Ont. C.J.)

11. — No Charter Breach where Accused Not Offered Consultation with Counsel at Roadside

Facts: The police stopped the accused who had been driving erratically on downtown streets early in the morning. After the police read him the approved screening device demand, the accused provided a roadside breath sample. He registered a "Fail". He was arrested for a drinking driving offence, and was read his right to counsel at roadside. He responded that he wished to speak to duty counsel.

The accused was taken to a police station, where an officer called duty counsel. Duty counsel phoned back

minutes later. The accused spoke with the duty counsel in private. He then provided two breath samples, as a result of which he was charged with driving over 80.

At trial, the accused argued that his *Charter* s. 10(b) right to counsel was breached because he was not allowed to consult counsel at roadside. He testified that he had a cell phone with him, and would have called duty counsel to ask if he had to blow into the approved screening device. He sought the exclusion of the breath test results.

Held: There was no s. 10(b) violation.

The trial judge found that although the officers who stopped the accused did not have a roadside screening device with them and had to send for one from a nearby police station, it took only six or seven minutes for the device to arrive. The police acted promptly to administer the test. The device arrived at 1:53 a.m. and by 1:57 a.m. the accused had failed the test. There was no realistic opportunity for the accused to consult with counsel from the roadside, either before the approved screening device arrived or between its arrival and the taking of the test. The trial judge rejected the defence argument that because duty counsel called back to the police station quickly once contacted, he or she would have done so if contacted while the officers and the accused were at the scene. Even if that had happened, the trial judge was not persuaded that the accused could have been given privacy to consult with counsel before the approved screening device was administered.

Commentary: The trial judge appears to have accepted that had there been a delay at roadside there might have been a realistic opportunity for the accused to consult with counsel then. He specifically referred to cases that provided examples of what may amount to such a realistic opportunity. On the facts of this case, however, there simply was insufficient time for consultation with duty counsel from the roadside.

R. v. Davloor, 2017 ONCJ 47, 2017 CarswellOnt 2259 (Ont. C.J.)

12. — Failure to Record Investigatory Interaction Not a Charter Violation

Facts: The accused was observed by a civilian to be driving erratically, swerving and braking. She phoned the police to report a possible impaired driver and provided the licence plate and location of the accused's truck.

A police officer located the truck and pulled it over. He spoke with the accused, and formed the suspicion that the accused had alcohol in his body. He made the approved screening device demand. The accused replied that he did not think he wanted to provide a breath sample. When his jeopardy was explained to him, he said, "No I will fail, a half dozen beers".

The accused was arrested, and given his right to counsel. He said that he did not want to contact a lawyer. He was put in a police car equipped with an in-car camera, and taken to a police station.

The officer was wearing a lapel microphone throughout his dealings with the accused, but it did not record their interaction. The officer testified at trial that he did not turn the microphone off. It was not working.

At trial, the accused argued that s. 7 of the *Charter* was breached. The fact that the officer's lapel microphone was not working meant that the police did not comply with their obligation to preserve relevant evidence.

Held: There was no s. 7 breach

The trial judge found that the officer checked his equipment at the start of his shift to ensure that everything was operating. However, the lapel microphones were known to consistently malfunction. The officer did not intentionally turn his microphone off. It simply failed to operate. The trial judge held that there is no constitutional obligation on the police to record interactions with members of the public. There is a distinction between evidence

that has been lost or destroyed, and evidence that was never created. A failure to create evidence cannot be equated with a failure to preserve evidence.

Commentary: The trial judge pointed out that in *R. v. Oickle*, 2000 SCC 38, 2000 CarswellNS 257, the Supreme Court of Canada did not find that the failure to record a police interrogation constituted a *Charter* breach, even though a recording can greatly assist the trier of fact in assessing the confession. That being so, it was even less arguable that the failure of the police to record an investigatory interaction would give rise to a s. 7 violation. There may, however, be scope to argue that s. 7 is violated where the police deliberately turn off a recording device to avoid creating a record of what was said or done.

R. v. Coombs, 2017 ABPC 34, 2017 CarswellAlta 306 (Alta. Prov. Ct.)