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*1. — A judge of the Ontario Court of Justice in Peel finds that a nine-minute delay in reading the "*Brydges*" warning after an arrest for over 80 mgs warrants exclusion of the breath results because delays in informing detainees of their right to counsel are systemic in Peel*

Section 10(b) of the *Charter* provides that "Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right".

Over seven years ago, the Supreme Court of Canada made it clear in *R. v. Suberu*, [2009] 2 S.C.R. 460, 2009 CarswellOnt 4106 (S.C.C.), that police are required to inform detainees of their right to counsel "immediately" upon detention.

Police officers in Peel Region, which is just west and northwest of Toronto, have not always heeded that injunction. There have been a spate of cases from the Ontario Court of Justice at Peel in which judges have found breaches of s. 10(b) where officers have unjustifiably delayed the reading of the "*Brydges*" warning following arrests for offences under s. 253 of the *Criminal Code*

As I noted in "The Milligan Criminal Law Advisor" in December of 2015, in *R. v. Ahmad*, 2015 ONCJ 620, 2015 CarswellOnt 16712 (Ont. C.J.), Justice Schreck found that a seven-minute delay in reading the right to counsel

following an arrest for over 80 mgs was a breach of s. 10(b). He also found that the police committed a separate breach of his s. 10(b) rights by not affording him another chance to speak to counsel when he said that he was not sure that he trusted duty counsel. Having found, as he put it at para. 28 of that judgment, "two distinct breaches of s. 10(b) of the *Charter*, which suggests a pattern of disregard for the *Charter* . . . ", he excluded the results of the intoxilyzer tests. The failure to read the "*Brydges*" warning promptly after arrest was a systemic problem in Peel, he found, and this strengthened the case for excluding the results of the breath tests under s. 24(1) of the *Charter*.

In a more recent case, Justice Schreck found that the Peel Regional Police breached the s. 10(b) rights of Ms Sandhu in that there was a nine-minute delay in reading her the "*Brydges*" warning after arresting her for over 80 mgs. The officer believed (incorrectly) that he was obliged to inform a detainee of their right to counsel "as soon as practicable" after their arrest.

Unlike in *Ahmad*, there was no other *Charter* violation. Schreck J. nonetheless decided to exclude the breath results under s. 24(2) of the *Charter*.

Justice Schreck noted, at para. 9, that:

> *Suberu* was decided over seven years ago. As the Court noted, the concept of immediacy leaves little room for misunderstanding. Despite this, the police in Peel Region have repeatedly demonstrated what is at best a failure to grasp the dictates of this judgment, or, at worst, an unwillingness to follow it.

After reciting the Peel cases decided in the last few years in which officers failed to read the right to counsel "immediately" upon arrest, Justice Schreck held that the problem was systemic in Peel and this rendered the breach more serious.

Despite the reliability of the results of the intoxilyzer tests, he concluded that the seriousness of the breach was such that exclusion was necessary to protect the long-term repute of the administration of justice and he entered an acquittal.

R. v. Sandhu, 2017 ONCJ 226, 2017 CarswellOnt 5063 (Ont. C.J.).

2. — The Supreme Court of Canada holds that the opinion evidence of duly qualified DRE officers will be admissible at trial even if they are not experts in the science that underlies the 12-step test they administer

Section 254(3.1) of the *Criminal Code* provides:

> If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under paragraph 253(1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, and to accompany the police officer for that purpose.

"Evaluating officers" are also called "drug recognition experts" (DRE) and are trained to conduct 12-step drug evaluations authorized under regulations to the *Criminal Code*. At trials, the Crown calls the DRE officers to give their opinion as to whether the 12-step test indicated impairment by drug or drugs.

In *R. v. Bingley*, 2015 ONCA 439, 2015 CarswellOnt 8987 (Ont. C.A.), the Ontario Court of Appeal held that DRE opinion evidence is admissible under the provisions of the *Criminal Code* without the necessity of a *Mohan* voir

dire.

A majority in the Supreme Court of Canada recently disagreed with the Ontario Court of Appeal that, under s. 254(3.1) DRE officers' expert opinion is automatically admissible. But they went on to decide, however, that the evidence of a duly qualified DRE will invariably be admissible at trial, having regard to common law principles, even if that expert does not have the necessary training or knowledge of the science that underlies the 12-step evaluation.

Moldaver J., who wrote for the majority, held, at para. 25, that the Parliament established, through the adoption of regulations, that the 12-step evaluation is sufficiently reliable for the purposes of the DRE's determination of impairment under s. 254(3.1). The DRE is established by Parliament to possess special expertise outside the experience and knowledge of the trier of fact. Thus, he or she is an expert for the purpose of applying the 12-step evaluation and determining whether the evaluation indicates impairment. "His expertise,"Moldaver J. noted at para. 27, "has been conclusively and irrebuttably established by the Parliament." This is the case even if the DRE is *not* an expert is the scientific foundation of the 12-step test.

It is of course up to the judge to determine what *weight* to give the opinion evidence of DRE officers.

The expertise of the DRE, the majority noted, is, however, generally *confined* to administering the 12-step test and drawing an opinion that arises from it. If the Crown or defence propose to elicit opinion evidence beyond that, a *voir dire* is necessary.

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

3. — The British Columbia Court of Appeal establishes a range of sentence of 18-36 months for offenders who engage in low-level street trafficking of fentanyl

The British Columbia Court of Appeal recently decided an appeal brought by the Crown from a six-month sentence for street-level trafficking in fentanyl by a first time offender.

The respondent sold or tried to sell fentanyl to an undercover officer in Vancouver. When arrested, he was in possession of some 13 "flaps" of fentanyl (2.6 grams), 18 "flaps" of cocaine (4.2 grams) and several rocks of crack cocaine with a total weight of 3.2 grams.

He was addicted to, or was dependent upon, Tylenol 3's for some years.

He pleaded "not guilty" to the offences he was charged with, but changed his plea to guilty when the trial judge ruled that the drugs found in his possession after his arrest were admissible at the trial.

The Crown sought a sentence of 18 months and they submitted that the range of sentence went from a suspended sentence and probation to 36 months.

The trial judge found that general deterrence and denunciation were "paramount considerations" in sentencing the respondent. In this regard, the trial judge noted that fentanyl is some 20 to 50 times more potent than heroin. A dose of only 2 milligrams — the size of a grain of salt — is a fatal overdose.

The British Columbia dismissed the appeal, but unanimously held that the range of sentence for lower-level street trafficking in fentanyl should be increased to 18 to 36 months.

Newbury J.A., who dissented, would have allowed the appeal and imposed a sentence of 18 months.

She noted, at para. 44, that sentences for street-level trafficking in fentanyl in British Columbia were "markedly out of step" with those in other provinces. For example, in *R. v. Klammer*, 2016 ONSC 4038, 2016 CarswellOnt 9709 (Ont. S.C.J.), an Ontario judge imposed a sentence of 33 months prison upon a first offender with a history of addiction to painkillers. In *R. v. Fyfe*, 2017 SKQB 5, 2017 CarswellSask 34 (Sask. Q.B.), Danyliuk J. imposed a five-year prison sentence (less credit for pre-sentence custody) to a first offender whose addiction to oxycontin developed into an addiction to fentanyl. He pleaded guilty to two counts of trafficking. One of his customers died after buying a fentanyl pill from him.

British Columbia, Justice Newbury noted, had the one of the worst, if not the worst, problems with fentanyl in Canada. Thus, she proposed that the range for lower-level street dealers of fentanyl should start at 18 months. She did not specify what the upper end might be but suggested, at para. 45, that it

> . . . might well exceed 36 months, especially if the offender has a substantial record involving the sale of fentanyl.

The majority dismissed the appeal because public awareness of the grave dangers of fentanyl was not as great at the time the offence was committed as it was when the appeal was heard.

As Harris J.A., who wrote for the majority, put it at para. 48, fentanyl is "a scourge". It, he said,

> poses intolerable risks of accidental overdosing because it is so much more powerful than morphine.

Street drugs are often mixed with fentanyl and this greatly enhances its danger. To quote Justice Harris again, at para. 49,

> . . . other drugs do not kill as frequently, accidentally or as unpredictably as fentanyl.

Nevertheless, since the offence was committed, as he put it at para. 50,

> . . . there has been a profound and enormous escalation in the extent of the fentanyl crisis and public awareness of it.

The majority agreed with the range of sentence that Newbury J.A. proposed, but because the sentence that the respondent received was not demonstrably unfit at the time when it was imposed, they would not increase his sentence and dismissed the appeal.

R. v. Smith, 2017 BCCA 112, 2017 CarswellBC 643 (B.C. C.A.).

4. — A judge of the Ontario Court of Justice releases an accused on his own recognizance for a charge of taking part in a gang sexual assault

Justice Nakatsuru has just been elevated to the Ontario Superior Court of Justice from the Ontario Court of Justice. He is a very highly regarded judge and a recent decision of his amply bears out his exemplary reputation for fairness.

Just before his elevation to a higher court, he heard, while sitting in *Gladue* court in Toronto, an application for bail brought by a young Mohawk man who was charged, together with two other men, with taking part in a gang sexual assault.

Although the applicant did not have anyone who was prepared to be his surety, Justice Nakatsuru decided to release him on his own recognizance. He was required to report to the Toronto Bail Programme as a term of his

release.

His written judgment was directed at the applicant (and not to counsel or a higher court) and is a model of lucidity and compassion.

The men that the applicant was alleged to have committed the sexual assault with had been released on bail because members of their families were prepared to be their sureties. The applicant, by contrast, had no one who would be his surety, and therefore languished in jail.

This struck Nakatsuru J. as being unfair, especially when the evidence of guilt was stronger against one of his co-accused than it was for the applicant. As Nakatsuru J. put it at para. 14:

> Your co-accused have people. They are out on bail. There is no one for you. You remain in jail.

To quote him, again, at para. 19:

> Their family bailed them out. No one is here for you. They are out. You are in.

As he put it at para. 20,

> Your indigenous identity has meaningfully contributed to the situation where you have no surety.

The judge held that the secondary grounds did not warrant detention because the applicant was not arrested for some seven months after the offence was allegedly committed and in that time he did not seek or bother the complainant. Nor was detention justified on the tertiary grounds: that one of the co-accused had his bail confirmed in a bail review heard by, as Nakatsuru J. put it at para. 21, "a higher judge than me", went a long way in establishing that detention was not required in the public interest.

R. v. Sledz, 2017 ONCJ 151, 2017 CarswellOnt 3692 (Ont. C.J.).

5. — The Supreme Court of Canada sheds light on what "exigent circumstances" are for the purposes of s. 11(7) of the*Controlled Drugs and Substances Act *and excludes a large quantity of drugs and loaded firearms arising from an unlawful and warrantless entry into a private residence.

RCMP officers responded to a 911 call from a woman who was crying and apparently injured. After speaking to her mother who directed them to the appellant, the officers attended at the appellant's apartment building.

The building manager gave them the appellant's apartment building number and told them that the woman who called 911 had been taken to hospital. The police knocked on the door to the appellant's apartment and announced their presence. The appellant opened the door and one of the officers, Cst Dykeman, noticed the smell of raw and smoked marihuana.

After questioning the appellant about the 911 call and satisfying themselves that no one was in need of assistance, the officers asked him about the odour of marihuana. He first denied there was an odour of marihuana but then acknowledged that he had some unconsumed portions of "roaches" in his apartment.

The officers told him that they would have to seize the roaches, but they would treat this as a "no case" seizure, that is to say, they would not charge him for possession of marihuana.

The appellant agreed to hand over the roaches and then tried to close the door. Cst Dykeman blocked the door with his foot. He said at the trial that he would not have let the appellant out of his sight out of concern for the "officer's safety". (The mother of the woman who called 911 told the police that the appellant had a shotgun.) He

followed the appellant into the apartment and one of the other officers followed the officer out of concern for his (Cst Dykeman's) safety.

Once inside his apartment, the appellant grabbed a bag containing the roaches to hand to the police. At that time, Cst Dykeman saw a bullet proof vest on a couch, a handgun on an end table and a bag of pills (which he thought were ecstasy) on a speaker stand. He then arrested the appellant and searched him, finding a cell phone and a large amount of cash. A sweep of the apartment revealed two large bags of pills (also believed to be ecstasy) and a bag of crack cocaine on a shelf.

After securing the apartment, the police returned to the detachment and obtained a telewarrant under s. 11(1) and (2) of the *Controlled Drugs and Substances Act* (*CDSA*). When they executed the warrant, they found large quantities of cocaine, methamphetamine, ecstasy, marihuana and oxycodone. The aggregate wholesale value of the drugs, Moldaver J. pointed out in his dissenting judgment, was over $50,000.00. The police also found three semi-automatic pistols, all of which were restricted firearms, and a loaded revolver, a prohibited firearm. All of the firearms were loaded.

Section 487.1(9) of the *Criminal Code* requires police to file a report "as soon as practicable . . . " and, at all events, within seven days of the execution of a warrant, which sets out the items they seized and their grounds for seizing anything not specifically enumerated in the warrant. The police in this case filed a report, but it was both late and incomplete.

The appellant argued at trial that the officers' entry into his apartment and their warrantless search upon entry were unlawful. The trial judge concluded that the common law duty to protect life and public safety and exigent circumstances within the meaning of s. 11(7) of the *CDSA* justified the entry and search of the apartment. The trial judge held that the police breached s. 8 in that their report was both late and incomplete, but declined to exclude the drugs and firearms under s. 24(2). The trial judge convicted the appellant on all counts.

The appellant argued for the first time on appeal (to the British Columbia Court of Appeal) that the trial judge failed to determine the voluntariness of his statement about having roaches in the apartment before relying on it at the *Charter* application. He also argued that the trial judge erred in finding that exigent circumstances justified the entry into his residence.

The British Columbia Court of Appeal dismissed the appeal. They held that the confessions rule did not apply to *Charter* applications. They also agreed that it was "impracticable" for the police to obtain a warrant and therefore the police were entitled to rely on exigent circumstances to enter the residence. The officer who followed Cst Dykeman was also justified in entering the apartment out of concern for Cst Dykeman's safety. They went on to find that the trial judge's decision to admit the oppugned evidence under s. 24(2) was entitled to deference. It was, they found, unnecessary to find whether the late filing of the incomplete return breached s. 8 of the *Charter*.

The appellant appealed further to the Supreme Court of Canada. There was a split in the court on the appeal, but only on whether the evidence found and seized by the police should be excluded under s. 24(2) of the *Charter*.

Both the majority, written by Brown J., and the minority, written by Moldaver J., who was joined by Gascon J., held that the confessions rule should not be applied to statements of the accused tendered in *Charter* applications.

To require a *voir dire* regarding voluntariness of an accused's statement tendered at *Charter* applications would, in the words of Brown J., at para. 24, "...stifle police investigations, compromise public safety and needlessly lengthen a complicated *voir dire* proceedings."

Section 11(7) of the *CDSA* permits the police to enter a place without a warrant to search for drugs

> if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

Section 529.3(1) of the *Criminal Code* authorizes police to enter a dwelling house to arrest or apprehend a person therein where there are "exigent circumstances". "Exigent circumstances" are defined in s. 529.3(2) as including when a police officer

> (a) has reasonable grounds to suspect that entry into the dwelling house is necessary to prevent imminent bodily harm or death to any person; or
>
> (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling house and that entry into the dwelling house is necessary to prevent the imminent loss or imminent destruction of the evidence.

Brown J. rejected the submission that the definition of "exigent circumstances" in s. 529.3(2) should be applied to define the "exigent circumstances" as it appears in s. 11(7) of the *CDSA* but he noted that the circumstances in which the "exigent circumstances" have been recognized by courts have borne a close resemblance to the categories set out in s. 529.3(2). After reviewing case law, he had this to say at para. 33:

> The common theme emerging from these descriptions of "exigent circumstances" in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety . . .

Even where exigent circumstances exist, Brown J. noted, that is not enough to justify a warrantless search of a residence under s. 11(7); those circumstances must also render it "impracticable" to obtain a warrant. He disagreed with the British Columbia Court of Appeal's interpretation that the impracticability of obtaining a warrant can itself comprise exigent circumstances. As he put it at para. 34, impracticability does not beget exigent circumstances; rather, "exigent circumstances must be shown to cause impracticability."

"Impracticable" within the meaning of s. 11(7) of the *CDSA* contemplates that the exigent nature of the circumstances are such that taking time to obtain a warrant would, to quote Justice Brown's reasons for judgment at para. 36,

> . . . seriously undermine the objective of police action — whether it is preserving evidence, officer safety or public safety.

As Brown J. put it at para. 37:

> . . . in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

Was a warrantless search under s. 11(7) justified? The Court of Appeal held that if the police let the appellant close the door when he said he was going to get his roaches to turn over to them, he may well have destroyed them. The probability that the appellant would have destroyed the roaches when the officers wanted to seize on a "no case" basis — with no legal consequences to him — did not remotely approach s. 11(7)'s threshold of urgency. No situation of urgency, Brown J. concluded, compelled immediate action.

Nor was it, according to Brown J., "impracticable" to obtain a warrant. The police could have arrested the appellant and obtained a warrant to enter his apartment and seize the roaches. "Impracticable" is not the same

thing as "inconvenient". If the situation was not serious enough to arrest and apply for a warrant, it could not have been serious enough to intrude into a private residence without a warrant.

The Court of Appeal's findings about the officers' concern for officer's safety put the cart before the horse. As Justice Brown put it at para. 40:

> . . . concern for officer's safety did not drive the decision to proceed with warrant-less entry; rather, warrantless entry gave rise to concern for officer's safety.

The Supreme Court unanimously decided that the police could not avail themselves of the authority of s. 11(7) of the *CDSA* to authorize their entry and search of the appellant's home, and, therefore, they infringed the appellant's rights under s. 8.

Justice Moldaver, who wrote the dissent, would not have excluded the evidence found by the police. His decision to admit the evidence arose, in part, from the trial judge's finding of good faith on the part of the police. He also held that the law regarding exigent circumstances was less than clear and this too militated against excluding evidence.

As Brown J. suggested at para. 46, however, the police " . . . were not operating in unknown legal territory", as Moldaver J. suggested. The presumptive unreasonableness of warrantless searches and the high degree of privacy attached to a person's home have been well known for many years. The Supreme Court of Canada in *R. v. Grant*, [1993] 3 S.C.R. 223, 1993 CarswellBC 1168 (S.C.C.), *R. v. Silveira*, [1995] 2 S.C.R. 297, 1995 CarswellOnt 525 (S.C.C.) and *R. v. Feeney*, [1997] 3 S.C.R. 1008, 1997 CarswellNat 3124 (S.C.C.) emphasized the Crown must have shown real urgency in order to justify reliance on exigent circumstances as the legal basis for a warrantless entry into a person's home. Negligence in meeting *Charter* standards is not the same thing as good faith. The first "Grant" factor favoured exclusion.

As regards the second "Grant" factor, Brown J., at para. 49, quoted with approval from para. 78 of *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 CarswellOnt 4104 (S.C.C.) (hereinafter, "Grant 2009"):

> An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

Although the police decided to obtain a warrant after their entry and cursory sweep, the impact of the s. 8 breach upon the appellant was "significant".

That the charges were, as Justice Brown put it at para. 52, "indisputably serious" and the evidence was highly reliable and essential to the Crown's case supported the admission of the evidence. But, to quote him at para. 53, the officers' conduct

> . . . while not egregious, represented a serious departure from well-established constitutional norms.

Brown J. quoted again from para. 84 in *Grant* 2009 that the seriousness of the charge " . . . has the potential to cut both ways".

While it was a "close call", the long-term interests of the administration of justice required that he exclude the evidence and acquit the appellant.

Both the majority and dissenting judges declined to decide if the filing of a late and incomplete report is a breach of s. 8.

As noted above, Moldaver J. found a breach of s. 8 but would not have excluded the evidence under s. 24(2). He made an interesting observation at para. 98:

> Where there was a significant intrusion on the appellant's privacy interests albeit one that occurred in circumstances where the law was unclear and the police were acting in good faith, I would not foreclose the possibility that a remedy short of exclusion might be available under s. 24(1) of the *Charter*, perhaps in the form of a sentence reduction.

Because this was not raised by the appellant, "it must be left for another day."

R. v. Paterson, 2017 SCC 15, 2017 CarswellBC 687 (S.C.C.).

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