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— Milligan's Criminal Law Advisor—*By Jeffrey Milligan* (Formerly The David Rose Criminal Law Advisor, and Neuberger Rose Criminal Law Advisor)

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1. — The Supreme Court of Canada affirms the importance of the "ladder principle" incorporated in ss. 515(2) and (3) of the Criminal Code

The Supreme Court of Canada recently decided an appeal in which the Crown appealed a finding by a judge of the Ontario Superior Court of Justice that s. 515(2)(e) of the *Criminal Code* was unconstitutional.

Section 515(2)(e) permits a judge or justice to require both a cash deposit and surety supervision as conditions of release if the accused resides out of the province or more than 200 km from the place where he or she is in custody.

The Supreme Court of Canada held that the judge, who decided an application for a bail review of a detention order, erred in holding that s. 516(2)(e) denied the applicant bail; thus, it was unnecessary to rule on whether s. 515(2)(e) violated s. 11(e) of the *Charter*. In their decision, the Supreme Court of Canada affirmed the importance of the "ladder principle" codified in s. 515(2) and (3) of the *Criminal Code*.

The respondent, Mr Antic, was arrested in Windsor, Ontario, and charged with drugs and firearms offences. He was ordinarily resident in Ontario but spent much of his time in the United States and had no assets here. Although he offered a surety release, he was denied bail at his bail hearing, owing to a "substantial flight risk".

He commenced a bail review under s. 520 of the *Criminal Code* and offered a pledge or a cash deposit as well as two additional sureties — his father and grandmother — with a view to meeting the flight risk. The judge hearing the bail review rejected the new plan and upheld the detention order.

The judge insisted on a cash deposit because he was concerned that Mr Antic could abscond if what was at stake was a "mere pledge" of $10,000 from his grandmother. He "speculated", as Wagner J. put it at para. 12, that Mr Antic would assume that if he absconded, the state would not seize his elderly grandmother's house. Thus, a surety bail alone was not, for the bail review judge, adequate to bind the conscience of the applicant. The bail review judge wrote that he would have released the applicant on a bail with *both* a cash deposit and surety supervision, but Mr Antic did not qualify for this because he was ordinarily resident of the province and lived within 200 km of where he was in custody.

A second bail review was brought before the same judge after Mr Antic had pleaded guilty to the drug charges (thus removing the "reverse onus" from play) and after a co-accused had been released. The bail review judge still upheld the detention order because he was concerned about the flight risk.

In a third bail review, the same judge found that s. 515(2)(e) violated s. 11(e) of the *Charter* (the right not to be denied reasonable bail) and struck down the geographical limitation within s. 515(2)(e). He also released him on a surety bail with a cash deposit in the amount of $100,000.

Mr Antic was released after over a year in pre-trial custody once he raised the funds to make the $100,000 cash deposit.

The Supreme Court of Canada granted leave to appeal the bail review because there is no right of appeal a decision under s. 520 of the *Criminal Code* to the Ontario Court of Appeal.

Beginning in the sixties, scholars and courts began to recognize that requiring a cash deposit as a precondition to bail could operate harshly against the poor. In 1972, the *Bail Reform Act* codified the "ladder principle" that is now incorporated in s. 515(2) and (3) of the *Criminal Code*. The "ladder principle" requires that the form of release be no more onerous than is required. In the words of Healy JCQ, as he then was, in *R. v. Anoussis*, 2008 CarswellQue 8409, 2008 QCCQ 8100 (C.Q.), which was quoted with approval at para. 29, "release is favoured at the earliest reasonable opportunity and . . . on the least onerous grounds".

The statutory regime in s. 515(2) and (3) requires that an accused be released "on his giving an undertaking with conditions" but it is open to the prosecutor to show cause why a more stringent form of release, or a detention order, is justified. Each form of release, moving up the "ladder" from s. 515(2)(a) to s. 515(2)(e) involves, as Wagner J. wrote at para. 46, "more burdensome conditions of release for the accused than the one before it".

Section 515(3) prohibits a judge or justice from imposing a more onerous form of release unless the Crown shows why a less stringent form of release is inappropriate: "The justice shall not make an order under any of paragraphs 2(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made."

Justice Wagner held that a pledge and a cash deposit perform the very same function: the accused or his or her surety may lose his or her money if the accused breaches a term of the bail. As Wagner J. put it at para. 49, "Release with a pledge of money thus has the same coercive power as release with a cash deposit."

Thus, the bail review judge erred in that he insisted on a cash deposit despite the availability of a pledge. To quote Justice Wagner at para. 52, he "was fixated on a cash deposit because he believed the erroneous assumption that cash is more coercive than a pledge" whereas "a recognizance is functionally equivalent to a cash bail and has the same coercive effect". The bail review judge misapplied the "ladder principle".

He also erred in holding that the "pull of bail" would not be strong enough without a cash deposit. He was concerned that Mr Antic believed that the state would not take forfeiture proceedings against her elderly grandmother. This was, Wagner J. concluded, improper conjecture.

Further, the quantum was set well beyond the reach of the accused and his sureties. Courts have long held that it is impermissible to "fix the amount of a surety or cash deposit so high as to effectively constitute a detention order", as Justice Wagner wrote at para. 56. Not surprisingly, it took months and months for the accused to raise the money for the cash deposit.

Not only was the bail review judge's insistence on cash bail unreasonable in that he did not apply the "ladder principle", but the quantum he set was Mr Antic's "*de facto* prison" because it was too high.

Requiring a cash deposit has the potential to result in increased incarceration of accused persons and restricts impecunious persons from judicial interim release. An accused person's release should not be contingent on his or her ability "to marshall funds or property in advance", as Professor Martin Friedland put it in his landmark study on bail.

Had the bail review judge properly applied the bail provisions, the Supreme Court concluded, Mr Antic would have been given reasonable bail. They reversed the finding of unconstitutionality and ordered the release by replacing his release order with a cash-only bail on the same terms.

In the closing paragraphs of the decision, Justice Wagner noted with dismay that the bail provisions of the *Criminal Code* are applied unevenly and inconsistently across this country and, notwithstanding s. 11(e) of the *Charter*, the number of persons on remand has increased dramatically in recent years.

R. v. Antic, 2017 SCC 27, 2017 CarswellOnt 8134 (S.C.C.).

2. — The Ontario Court of Appeal finds that a lawyer failed to give a client effective assistance at his trial because she also acted for — and did not disclose this to her client — a man who might plausibly have been a third-party suspect

The Ontario Court of Appeal recently shed light on how a conflict of interest on the part of defence counsel can give rise to a claim against that lawyer of ineffective assistance of counsel.

Mr Baharloo was convicted of possession of just over 11 grams of crack cocaine for the purpose of trafficking. He appealed his conviction and argued that his lawyer was in a conflict of interest and, thus, he was deprived of effective representation.

The drugs were found in two baggies at his feet on the floor of a car in which he was a passenger. According to his evidence at trial, he was being given a lift by a woman he had just met a few days earlier in a car she said she had borrowed from her roommate. He only met the other passenger a few days earlier as well. Mr Baharloo denied that the drugs that were found at his feet ever belonged to him or that he knew they were there. This, of course, leaves open the possibility that they belonged to someone else, perhaps the driver of the vehicle, the passenger or the owner of the car, a Mr Banda.

Both the driver and passenger were charged, but the charges were withdrawn when they provided statutory declarations that the drugs were not theirs. Mr Banda, the owner, was never charged. Neither the driver, nor the passenger or Mr Banda testified at the trial.

Unbeknownst to the appellant, his trial counsel also acted for the owner of the car on criminal charges that included possession of cocaine.

The Court of Appeal held that his trial counsel was in a conflict of interest which rendered her representation of him to be ineffective and they ordered a new trial.

When the appellant retained his trial counsel not long after he was arrested, she was acting for the owner of the car on two counts of breach of recognizance charges. She later acted for him — while she was retained by Mr Baharloo — on another set of charges that included possession of stolen property, public mischief and assault with intent to resist arrest.

Shortly after Mr Baharloo's preliminary inquiry was completed, Mr Banda again retained Mr Baharloo's lawyer on possession of cocaine charges. That retainer was terminated and the charge was ultimately dismissed or withdrawn (it is unclear which from the reasons for judgment) shortly before Mr Baharloo's trial. But Mr Banda then retained her for a charge of breach of recognizance and that retainer was later terminated.

Thus, while she was acting for the appellant, she acted for Mr Banda, at least for a time, on *four* sets of charges, including possession of cocaine.

His trial counsel never disclosed to him that she ever acted for the owner of the vehicle in which he was a passenger and he did not find this out until after he was convicted. He was shocked by what he learned and deposed in a "fresh evidence" affidavit that he felt "betrayed".

The duty of counsel to provide effective assistance to their clients require counsel to give each client their undivided loyalty: *R. v. W. (W.)*, 1995 CarswellOnt 983, 25 O.R. (3d) 161 (Ont. C.A.) at p. 171-2.

To establish a lack of effective assistance of counsel based upon a conflict of interest, an appellant must establish:

> (a) A conflict of interest on the part of counsel; and
>
> (b) As a result of that conflict, some impairment of counsel's ability to effectively represent the client's interests. The appellant need not demonstrate that, but for the ineffective assistance of counsel, the verdict would have been different.

The case law establishes a two-step test to determine whether a lawyer's acceptance of a retainer would conflict with his or her duty of loyalty to a current client.

The first step is whether a "bright line" rule, articulated by the Supreme Court of Canada in *R. v. Neil*, [2002] 3 S.C.R. 631, 2002 CarswellAlta 1301 (S.C.C.), applies:

> A lawyer may not represent one client whose interests are directly adverse to the immediate interests of another client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice) and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

When this "bright line" rule does not apply, the lawyer may still be in conflict if, as the Supreme Court of Canada put it in *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 S.C.R. 649, 2013 CarswellSask 432 (S.C.C.), "the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected." This is a more "contextual" analysis of the risk of whether there might be "conflicting pressures on judgment" that may detrimentally favour one client over the other.

The Court of Appeal held that, at the very latest, when Mr Banda retained the lawyer for the charge of possession of cocaine charge, "the interests of the appellant and Banda were clearly opposed". At that time, the obligation to effectively represent the appellant required the lawyer to consider and investigate the availability of a defence that implicated a third-party suspect or suspects — the driver, passenger and Mr Banda, her repeat client. As Brown, J.A. put it at para. 43, "this would pit the appellant's legal interests directly against those of Banda".

To quote Brown, J.A. at para. 50, for Mr Baharloo's trial counsel to investigate and advance a third-party defence on his behalf, "she would have to throw another client, Banda, 'under the bus'." There was a "real risk" that she would "soft peddle" her representation of the appellant to avoid harming the interests of Mr Banda.

Even though the cocaine charge against Mr Banda had been either dismissed or withdrawn prior to Mr Baharloo's trial, the third-party suspect defence was "realistically available" and required counsel's consideration.

Thus, the appellant established that there was an actual conflict of interest arising from his trial lawyer's concurrent representation of both him and the driver of the car and that that conflict impaired her ability to effectively represent him in that it deprived him of a "realistically available" third-party suspect defence.

A new trial was allowed.

R. v. Baharloo, 2017 ONCA 362, 2017 CarswellOnt 6556 (Ont. C.A.)

3. — A judge of the Ontario Superior Court of Justice reduces a sentence by one year to compensate for harsh conditions of pre-sentence custody

Mr Innis recently pleaded guilty to importing a large quantity of cocaine into Canada. It was brought in a shipping container from Guyana.

It fell to Madam Justice Forestell, of the Ontario Superior Court, to determine the appropriate sentence for him.

Mr Innis was charged with a co-conspirator, who pleaded guilty on an earlier date; she received a prison sentence of 10 years pursuant to a joint submission.

As Forestell J. noted in her reasons for sentence, the range for these offences was recently considered by Justice Code in *R. v. Duncan*, [2016] O.J. No. 1013, 2016 CarswellOnt 2872 (Ont. S.C.J.). He concluded that the range of sentence for "mere" couriers of multiple kilograms of cocaine is nine to 12 years and the range of sentence for leaders of conspiracies to import multiple kilograms of cocaine is 12 to 19 years.

Forestell J. found that Mr Innis' role was not a "mere" courier, but he played a role that was closer to a courier than it was to a principal or leader. She found that his role and that of the co-conspirator were roughly the same.

To what degree should the principle of parity affect the imposition of a fit sentence for Mr Innis?

While the co-conspirator's guilty plea was "pivotal" in the resolution in other cases, her sentence was at the very lowest end of the range. She took part in two *subsequent* conspiracies to import drugs before her arrest, which, of course is a significantly aggravating factor.

Moreover, as Forestell J. noted at para. 28, that her sentence was based on a joint submission "reduces the utility of the sentence for parity consideration": *R. v. Reader*, 2008 CarswellMan 155, 2008 MBCA 42 (Man. C.A.) at paras. 17-9.

Mr Innis had no Canadian criminal record, but he had received a two-year sentence in Trinidad and Tobago for the possession of cocaine for the purpose of trafficking. He became involved in the offence to which he pleaded guilty less than a year after he was released from prison there. This, of course, is also a significantly aggravating factor.

Forestell J. decided that, having regard to all of the circumstances, the fit sentence for Mr Innis, before allowing credit for pre-sentence custody, was 10 years.

He spent some 36 months, 15 days in pre-sentence custody in Toronto and was entitled, pursuant to s. 719(3.1) of the *Criminal Code*, to credit for 1.5 days for each day of pre-sentence custody. This is equivalent to 54 months and 23 days and he received credit for this in accordance with the statute.

But in view of the extremely harsh conditions that prevailed in the detention centres where Mr Innis was on remand, Forestell J. reduced his sentence by one year.

Evidence was called at his sentencing hearing that he was subjected to "lockdowns" at the Toronto South Detention Centre on 297 days. At the Toronto East Detention Centre there were "lockdowns" on 22 days, but he was given access to fresh air on only 59 days of the 218 days that he spent there.

Justice Forestell considered the recent case of *R. v. Duncan*, 2016 CarswellOnt 15975, 2016 ONCA 754 (Ont. C.A.) in which the Ontario Court of Appeal held, as she put it at para. 35, that "in appropriate circumstances, particularly harsh pre-sentence incarceration conditions can provide mitigation apart from and beyond the 1.5 day credit set out in s. 719(3.1) of the *Code*". At para. 35 of her judgment she quoted the Court of Appeal in *Duncan*, *supra*, with approval: " . . . in considering whether an enhanced credit should be given the court will consider the presentence incarceration and the impact of those conditions upon the accused".

To quote her at para. 36:

> I do not read the endorsement in *Duncan* as requiring evidence of the specific impact on the offender in every case. Where, as in the case before me, the evidence establishes that the offender was confined to a cell for extended periods of time on multiple days and denied access to fresh air for a total of over one year of his incarceration, hardship may be inferred.

Forestell J. noted that the UN Standard Minimum Rules for Treatment of Prisoners provides that each prisoner should have at least one hour of suitable exercise in the open air every day. She observed with dismay that Mr Innis was denied access to fresh air for over one-third of the time he spent in pre-sentence custody.

It was, she wrote at para. 38, "shocking" that detention centres in Ontario "are consistently failing to meet minimum standards established by the United Nations in the 1950's" and held that a further reduction of one year of his sentence was warranted.

R. v. Inniss, 2017 ONSC 2779, 2017 CarswellOnt 6969 (Ont. S.C.J.)

4. — Justice Schreck of the Ontario Court of Justice again excludes the results of breath tests where a Peel officer breaches s. 10(b) of the* Charter *by not promptly advising a detainee of his right to counsel

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

As we saw two months ago in "The Milligan Criminal Law Advisor", Justice Schreck of the Ontario Court of Justice in Peel held earlier this year that where police did not promptly advise a detainee of his right to counsel after his arrest for "over 80 mgs" this was a breach of s. 10(b) that warranted the exclusion of the breath results under s. 24(2) because this was a systemic problem in Peel: *R. v. Sandhu*, 2017 ONCJ 226, 2017 CarswellOnt 5063 (Ont. C.J.). In that case — and in an earlier case of his, *R. v. Ahmad*, 2015 CarswellOnt 16712, 2015 ONCJ 620 (Ont. C.J.) — Schreck J. recited a long (and growing) list of cases in which courts found that the police officers breached s. 10(b) by not promptly advising detainees of their right to counsel.

Last month, Justice Schreck followed his judgment in *Sandhu*, *supra*, and — again — excluded breath readings

under s. 24(2) where an officer failed to advise a detainee of his right to counsel "immediately" after his arrest.

In that case, an officer responded to a 911 call about an erratic driver and stopped the defendant's vehicle at 1:12 am. The officer arrested the defendant at 1:14 am for impaired driving and asked him to exit his vehicle. The officer then handcuffed him, patted him down and placed him in the back of his cruiser.

He then returned to the defendant's car to look for the defendant's identification. Another officer arrived on scene by the time the arresting officer began his search.

The arresting officer did not read the "*Brydges*" warning until 1:21, some seven minutes after the arrest. In cross-examination, the officer — to Justice Schreck's dismay — disagreed with the proposition that he should have advised the defendant of his right to counsel before undertaking the search for his identification.

Justice Schreck's reasons at para. 26 deserve quotation:

> As in *Sandhu*, I find the systemic nature of this problem renders the breach sufficiently serious that notwithstanding its moderate impact on Mr Simpson's *Charter*-protected interests and notwithstanding society's interest in an adjudication on the merits, exclusion of the evidence is required to maintain the long-term repute of the administration of justice. It is simply unacceptable for the police to repeatedly ignore a well-established duty imposed on them by the *Charter*, as the Peel police have done with respect to the immediacy requirement in s. 10(b). As a result, the breath test results and Mr Simpson's statements during the testing procedure are excluded.

Unfortunately for Mr Simpson, he was convicted of the offence of impaired driving based on the testimony of a civilian witness and the arresting officer.

R. v. Simpson, 2017 ONCJ 321, 2017 CarswellOnt 7585 (Ont. C.J.)