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Police Powers Newsletter
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— Police Powers—

Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton

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1. — Does the Lack of a Caution Prior to a Police Interview of a Suspect Render the Statement Involuntary?

Facts: The appellant was convicted by two separate juries of two separate murders. During the investigation, the

police uncovered evidence leading them to believe that the appellant might have been involved in both events. An officer went to the appellant's home and, after learning that he was not there, left his business card asking the appellant to call him. The officer also spoke to the appellant's lawyer and let him know that the police wanted to speak with his client. The appellant in turn called the officer and provided an exculpatory statement. He then called back a couple of weeks later and insisted on taking a polygraph test. The appellant was brought to the police station to do so, and, at this point, the police advised the appellant of his rights. In particular, the police told the appellant that he could speak to a lawyer before starting the process and that any statement made during the test could be used against him. The appellant proceeded to take the test and, during the interview, the appellant admitted to being present at the killings of both victims. He also gave several inconsistent statements. The interview concluded when the appellant asked to speak to a lawyer, received legal advice, and then decided not to keep talking.

The main issue on appeal was whether the appellant's statements made during the course of the polygraph test ought to have been admitted at trial or, alternatively, excluded on the basis that they were involuntary.

Held: The Ontario Court of Appeal held that there was no basis to interfere with the trial judge's conclusion that the statements were voluntary.

The court began by noting that there was no question as to any inducements, threats, or police trickery.

It also rejected the appellant's argument that because he was not cautioned and advised of his rights at the time of his first contact with police — a time at which he was a "suspect" in the investigation rather than mere "person of interest" — his subsequent interview during the polygraph test was tainted.

The court made two points in so holding. *First*, it noted that the trial judge made a factual finding that the appellant was *not* a suspect at the time of the earlier contact as he had not yet been arrested or detained. *Second*, the court stated that the absence of a caution is a mere factor to be considered on the voluntariness inquiry — and it is not determinative. In the court's words, "[e]ven where a person is a suspect, the absence of the standard caution is only one factor to be considered in the voluntariness analysis — just as the presence of such a caution does not automatically lead to the conclusion that a statement is voluntary." And, in the present case, it was clear that the appellant chose to speak with police during all of his interactions.

Commentary: The case highlights the difficult situation that police may find themselves in when conversing with a person whom they believed may be linked to criminal wrongdoing. Once that individual becomes a "suspect," the law provides that the lack of a caution prior to any police contact can tip the voluntariness scale in favour of excluding any incriminating statements (although, as the Court of Appeal noted, the absence of a caution is not determinative). See, e.g., *R. v. D. (A.)*, [2003] O.J. No. 4901, 2003 CarswellOnt 4275 (S.C.J.). The problem for police is that the line between "suspects" and mere "persons of interest" is not always clear. In this case, the court seemed to believe that a person becomes a suspect at the point of detention or arrest; another court might take a different view — and perhaps focus more appropriately on the point at which the police had reasonable grounds to suspect the appellant was involved in the commission of the offence — such that his or her rights under ss. 9 and 10 of the *Charter* are engaged. Either way, police should tread carefully and keep in mind that there is a need for a caution in cases of doubt. After all, a suspect who, like the appellant, is eager to speak with police and provide his or her version of events is perhaps likely to do so — cautioned or not.

R. v. Pearson, 2017 ONCA 389, 2017 CarswellOnt 7385 (Ont. C.A.)

2. — Do Reasonable Grounds to Search a Place Translate into Reasonable Grounds to Search the Person Associated with it?

Facts: On the basis of information provided by two confidential informants, the police obtained two search

warrants to search the accused's home and car. Armed with the warrants, officers were assigned to surveil the accused and saw him leave a different address carrying a knapsack. The police followed the accused and, eventually, decided to detain and investigate him. In doing so, they searched his knapsack and found a firearm. The accused was arrested.

Importantly, the officers who detained and searched the accused had been briefed prior to the event by another officer that the accused was believed to be in the possession of a firearm. The officers believed that the warrants related to "firearms and ammunition."

At trial, the accused brought a *Charter* application seeking to exclude the fruits of the search. He argued that the police lacked reasonable and probable grounds to conduct the investigative detention and that the fruits of the search ought to be excluded from trial.

Held: The trial judge held that there was a lawful basis for the stop and the search that occurred during the course of it. The court noted that, for an investigative detention to be lawful, the police must have a reasonable suspicion that the individual is implicated in criminal activity and that the detention is necessary. See *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 CarswellMan 303 at paras. 34, 45. In coming to this belief, the police are entitled to rely upon information and direction from other officers. As for a "safety search," the police must have reasonable grounds to believe that officer or public safety is at risk. When the condition exists, the searching officer is entitled to conduct a "pat-down search" of the detainee — which can include the "person, place or object in the vicinity." See *R. v. Plummer*, 2011 ONCA 350, 2011 CarswellOnt 4748 at paras. 53, 58.

The judge concluded that, on the evidence presented, there was an objectively reasonable basis for the searching officers to believe that there were grounds to stop and investigate the accused. They knew search warrants had been issued and they were entitled to rely on the subjective belief of their briefing officer that the accused was in recent possession of a firearm. Also, the search of the knapsack was a reasonable safety search. It was carried across the accused's chest and, given the officers' suspicions and the nature of the stop, the police had good reason to be concerned for their safety.

Commentary: The case raises an interesting question as to whether a search warrant pertaining to a home or car *also* provides grounds to believe the suspect associated with those locations is in possession of the item to be searched for on his or her person. The answer is likely, "No." As a matter of common sense, the existence of an item at a specific location does not necessarily translate into reasonable grounds to believe that a person associated with the residence is carrying the item at all times — particularly when outside of the place to be searched.

At the same time, there was a much more straightforward route for the police accomplishing the same result in this case — which avoids this tricky issue altogether. On the basis of the warrants and their directing officer's statement that the accused was in possession of a firearm, the police had reasonable grounds to believe that the accused was committing a criminal offence — meaning that the detaining officers could have just arrested him at any time. And, once the accused was under arrest, the officers would have been entitled to conduct a search of his person and knapsack pursuant to the common law search incident to arrest power.

In other words, there was no need for an "investigative detention." It seems the police had sufficient grounds to skip ahead and make an arrest from the outset — and that would allow them to conduct the search at issue. See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 487, 495(1).

R. v. Holman, 2017 ONCJ 327, 2017 CarswellOnt 7612 (Ont. C.J.)

3. — Do the Police have to Implement Rights to Counsel when a Detainee does not Invoke the Right?

Facts: The appellant was found guilty of operating a motor vehicle "over 80." He appealed his conviction on the basis that his rights to counsel under s. 10(b) were violated at the time of his arrest. The relevant facts were as follows: the appellant was placed under arrest after the investigating officer noticed signs of impairment and the appellant failed a screening test. The officer then read the appellant his rights to counsel from a police issued card but, out of mere inadvertence, did not ask the appellant if he wished to speak with a lawyer. Instead, the officer went directly to the breath demand. Upon arriving at the station, the officer realized her mistake and asked the appellant if he wanted to speak to a lawyer. He responded, "No, not now."

The appellant argued that his response was equivocal and the officer was obligated to follow up to make sure that he understood his rights. The officer's failure to do so, in his opinion, amounted to a *Charter* violation.

Held: The summary conviction appeal court upheld the trial judge's decision that the appellant's s. 10(b) rights were not violated. The court stated that, under s. 10(b), police have a duty to inform detainees of their rights to counsel immediately upon detention or arrest. At that point, it falls to the detainee to exercise his or her rights with diligence. If the detainee exercises his or her rights, then the police obligation to implement rights to counsel will apply; if the detainee does not exercise his or her rights, then the police have no further duties. In setting out this view of the law, the court distinguished the detainee's decision not to invoke rights to counsel with his or her waiver of those rights *after* they have been elected. A strict test applies to the waiver of *Charter* rights, see *R. v. Prosper*, [1994] 3 S.C.R. 236, 1994 CarswellNS 25, but police need not concern themselves with the issue if the detainee never invokes the right in the first place.

Applying this law, the court noted that the trial judge found as a fact that the appellant was advised of his rights and decided not to invoke them. In the appeal court's view, that finding was reasonable. The officer complied with the informational component of s. 10(b), and the appellant's response when asked if he wanted to speak with counsel (*i.e.*, "No, not now") amounted to a "provisional refusal" of the right.

Commentary: The result in this matter follows from the sometimes ignored principle under s. 10(b) that, like the police, detainees also have obligations when it comes to the right to counsel. In particular, detainees must assert their rights with diligence and continue to do so throughout the period of detention. Among other things, this duty of diligence means invoking rights to counsel clearly and unequivocally when given the opportunity to do so.

This rule is not without criticism, however. In holding that the police duty to implement rights to counsel arises only after a detainee elects to invoke or exercise his or her rights, there is a real risk of weakening rights to counsel by offering protection only to those persons who are both knowledgeable of their rights and assertive enough to exercise them. Someone who, like the appellant, says that they do not want to speak to counsel "now" may not realize that, unless they expressly invoke the right at some point in the future, the police will not make any further efforts to get them the assistance of a lawyer.

R. v. Shain, 2017 SKQB 115, 2017 CarswellSask 209 (Sask. Q.B.)

4. — How Long can the Police Wait when Implementing Rights to Counsel?

Facts: An officer arrested the appellant without a warrant at a local convenience store. He cautioned the appellant and provided him with the advice required by ss. 10(a) and (b) of the *Charter*. The appellant, in turn, responded with a request to speak with counsel, and the officer told him that he could speak with a lawyer when they arrived back at the station. Once at the station, the arresting officer did not facilitate any contact between the appellant and his lawyer. Instead, he turned the appellant over to another officer who against reiterated the police caution and *Charter* advice. This time, the appellant asked to speak with a specific lawyer. And, again, the officer did not facilitate this request. Instead, the officer offered to contact duty counsel. The appellant declined and the officer proceeded to speak with the appellant for around half an hour. Then, eventually, the appellant was given

an opportunity to speak with his counsel of choice before providing incriminating evidence.

The issue on appeal (among others) was whether the appellant's *Charter* rights were violated by the police failure to implement his rights to counsel and, if so, whether the trial judge erred in failing to assist the self-represented appellant in raising this challenge at trial (a question not addressed here).

Held: The Ontario Court of Appeal held that the police violated the appellant's rights to counsel. The court noted that the implementational component of s. 10(b) is engaged once a detainee invokes the right to speak with a lawyer. At that point, the police have a duty to afford the detainee a reasonable opportunity to exercise the consultative aspect of s. 10(b), and officers must refrain from eliciting evidence from the individual until he or she has had an opportunity to do so.

Here, the appellant indicated on two occasions that he wanted to speak with a lawyer. The police failed to provide him with an opportunity to do so until some much later point in time. The appellant was in the control of the police and could not interfere with the police investigation. There was no exigency that would have allowed the police to hold off on implementing his rights.

Commentary: The case provides a good reminder of the police duty to implement rights to counsel at *the first reasonable opportunity* — not at a moment of police choosing some considerable time after the detainee has invoked his or her rights. See *R. v. Taylor*, [2014] 2 S.C.R. 495, 2014 CarswellAlta 1154. The appellant attempted to invoke his rights *twice* and it seems the police had plenty of opportunity to afford him the chance to do so. Instead, they waited unreasonably and it gave rise to a clear *Charter* violation.

R. v. Richards, 2017 ONCA 424, 2017 CarswellOnt 7622 (Ont. C.A.)

5. — Does the Duty of Full and Frank Disclosure Apply in* Ex Parte *Section 490 Proceedings?

Facts: Toronto police seized a valuable diamond from a pawnbroker after coming to the belief that it had been stolen from its true owner and then pawned by the thief. The diamond was held by the police during criminal proceedings against the thief pursuant to a court order issued under s. 490(1) of the *Criminal Code*. At the conclusion of those proceedings, the police advised all potential interested parties — namely, the pawnbroker and the estate of the person from whom the police believed that it was stolen — that the police no longer needed the diamond. In response, the pawnbroker brought an application for the return of the diamond under s. 490(7) of the *Code*, and the presiding judge ordered the diamond's release to the pawnbroker under s. 490(9). The estate appealed the order and claimed that it was denied procedural fairness and the ability to assert its rightful ownership interest — as it was denied notice of the s. 490 proceedings.

Held: The Ontario Court of Appeal held that the duty of full and frank disclosure applies in *ex parte* s. 490(7) proceedings and the pawnbroker violated this duty in bringing its application without advising the court of the estate's competing interest.

In so holding, the court noted that s. 490 provides a comprehensive set of rules for preserving and disposing of property seized by peace officers in the execution of their duties. Ultimately, the goal is to return seized items to their lawful owners or persons who are lawfully entitled to their possession. To that end, s. 490 proceedings can proceed on an *ex parte* basis given that the legislation sets out the requirements for who gets "notice" of applications for the return of seized property — and it does not require notice to *all* interested parties. In the present matter, for example, s. 490(7) required the pawnbroker to give notice to the Attorney General of Ontario but no one else. As such, the application proceeded *ex parte* vis-à-vis the estate.

This, in turn, meant that the usual rule of full and frank disclosure in *ex parte* matters had to apply. Absent such a rule, s. 490(7) would do little more than encourage a rush to the courthouse — allowing one party to assert their

ownership interest unchallenged while, at the same time, concealing information about other parties who would assert their rights if given notice and an opportunity to do so. The pawnbroker's s. 490 application fell well short of this standard.

Commentary: The case sets out a potentially important rule for police to follow when navigating the nuanced provisions of s. 490 of the *Criminal Code*. The decision provides two clear rules. *First*, s. 490 proceedings can operate on an *ex parte* basis when one party interested in seized property seeks to preserve or dispose of it without notice to another interested party. *Second*, if the proceedings are *ex parte*, then the usual rule of full and frank disclosure is going to apply. The court was concerned specifically with applications brought under ss. 490(7) and 490(10) — which allow third parties to assert an interest in seized items. But the same rules might also apply to those provisions more commonly relied upon by police. For this reason, officers filing applications under s. 490 ought to consider whether there is another party interested in the subject property. If so, they ought to disclose that party's interest along with making any other disclosure that is appropriate in the circumstances.

R. v. Floward Enterprises Ltd. (H. Williams and Co.), 2017 ONCA 448, 2017 CarswellOnt 8248 (Ont. C.A.)

6. — Placing Potential Suspect in the Back Seat of a Police Car Places Individual under Detention and Triggers Sections 10(a) and (b) Charter *Rights*

Facts: On August 18, 2014 the applicant drove an SUV Westbound on Queen Street East around 1:25 a.m. The SUV struck a pedestrian who was standing on the sidewalk and died in the hospital as a result of his injuries at 1:51 a.m. Mr. Brown was approached by a witness who heard the noise and he told her to call 911.

The first officer arrived at the scene at 1:35 a.m. and was told 10 minutes later that the victim had succumbed to his injuries. Mr. Brown identified himself as the driver of the vehicle to the officer, and told him that he had an issue with his brakes and was going to take his car to a mechanic. However, an automotive technician later examined the SUV and concluded that there was no defect with the brakes. The officer told Mr. Brown that he could have a seat in a police vehicle and that he was not under arrest. Mr. Brown sat in the vehicle at 2:11 a.m. He remained in the vehicle from 2:11 a.m. until 6:23 a.m., without food or drink, and between 2:16 a.m. and 2:18 a.m., the officer and Mr. Brown had a conversation that was video and audio recorded by the police vehicle. This conversation included Mr. Brown stating that he smoked weed prior to the accident and that his cell phone rang causing him to look at the screen. When he looked up, he says that he saw the victim on the floor. Then around 2:19 a.m. Mr. Brown called his mother and discussed: his conversation with the officer, the incident, and that he did not know what happened because the incident was so quick.

A different officer arrived at the scene around 1:41 a.m., and was involved in placing Mr. Brown into the back of the police vehicle. At 5:20 a.m. a police sergeant advised this second officer that the victim had died and ordered him to place Mr. Brown under investigative detention. At 5:22 a.m., the second officer informed Mr. Brown that he was under investigation for criminal negligence causing death and read him his rights to counsel.

The Crown sought a ruling on the voluntariness of the two statements about consuming marijuana and looking at his telephone, while the defence argued that the statements were made in violation of Mr. Brown's s. 10(a) and (b) *Charter* rights and should be excluded as evidence.

Held: Mr. Brown's s. 10(a) and (b) *Charter* rights were violated and the statements were excluded.

Whether someone is detained or not influences whether that person should have been warned that what they say could be used as evidence against them. *R. v. Worrall*, [2002] O.J. No. 2711, 2002 CarswellOnt 5171 (S.C.J.), stated that a police officer should inform a person that their answers could be used as evidence in a prosecution against them if they have information that would alert any reasonably competent investigator to the prospect that the victim's death may be associated with the act committed by the person being interviewed. This remains true

even if they are not yet arrested or detained. The officer here knew the victim had died, did not advise Mr. Brown of this fact, and admitted that he would have placed Mr. Brown under detention if he tried to leave the scene. Therefore, Mr. Brown was entitled to know that he was not required to speak to the police and that anything he said could be used against him. Without this, Mr. Brown had no understanding of the consequences of speaking and was unable to assess the jeopardy he was under. Consequently, the Crown failed to support that the statements were made voluntarily.

Mr. Brown had the right upon arrest or detention to be informed of the reasons therefor, and to retain and instruct counsel without delay and be informed of that right. The court found that Mr. Brown was detained the moment he was placed in the back of the police vehicle. At that time he was identified as the driver of the SUV and his liberty was curtailed. Section 10(a) has been deemed a right that an individual is entitled to immediately, and a breach of that right was not a trivial matter (*R. v. Nguyen*, 2008 ONCA 49, 2008 CarswellOnt 298). *R. v. Thompson*, 2013 ONSC 1527, 2013 CarswellOnt 3048, articulated that, if that information can be communicated quickly, there is no reason not to do so. Here, there was no reason not to advise Mr. Brown that the victim had died and the reason for his detention. This also related to his s. 10(b) rights, as he would not have known to contact counsel if he did not know the consequences he faced. Section 10(b) also requires immediacy, and the police failed to inform him of those rights until the sergeant arrived at the scene. Thus, Mr. Brown's s. 10(a) and (b) rights were violated.

Section 24(2) requires an analysis into whether the evidence at issue should be excluded because its ultimate admission would bring the administration of justice into disrepute. The court found that the *Charter* infringing conduct of the officers was serious as they did not turn their minds to Mr. Brown's rights without good reason and they knew the victim had died, but did not inform him. Failing in this nature departed from the standard of conduct that was expected of officers. Second, the infringements of s. 10(a) and (b) could not be considered technical when someone was not informed of their rights and was questioned on video. Third, the exclusion of the statements would not preclude the Crown from proceeding with the prosecution. Subsequently, the court found that, on balance, the statements Mr. Brown made to the officer should be excluded.

A statement made to someone that is not a person in authority can fall outside the scope of this analysis. However, the statement Mr. Brown made to his mother was made immediately after speaking with the officer, and considering the temporal connection between the evidence and the breach, the court found the statement to be obtained in a manner that infringed his *Charter* rights. Thus, the statement he made to his mother was also excluded.

Commentary: This case is a straight forward example of a s. 10(b) and s. 24(2) analysis. It has been well asserted in case law that officers cannot elicit information from those who are detained or arrested without upholding their s. 10(a) and (b) rights, because without advisement, they would not have full awareness of the choices they can make with regard to speaking to officers and the subsequent consequences of doing so. This case demonstrates that the court cannot condone breaches of these vital rights when the circumstances reveal that the officers at issue had no reason not to provide the requisite cautions and information.

R. v. Brown, 2017 ONSC 2408, 2017 CarswellOnt 6455 (Ont. S.C.J.)

7. — Mr. Big Operation Stands within Legal Parameters and Obtained Statements are Deemed Admissible

Facts: On September 9, 2013, three men went to a residence uninvited. The owner of the residence released his dog on them and followed the dog as it chased them away. One of the men that was running away turned around and shot at the owner, who suffered serious injuries as a result of multiple pellet hits. On November 11, 2013, three or four men went to another residence uninvited in their car. One of these men had a gun and fired several bullets into the door and window of the home. Multiple bullets struck the owner causing serious injuries.

Following these events, confidential informants told police that Mr. Marsh was involved but there was no solid evidence to support this. Accordingly, the police decided to engage in an undercover operation in order to obtain evidence in this regard. They had to use out of province officers because both Mr. Marsh and Mr. Shaw, applicant, were known to local police. In November 2013, surveillance of Mr. Marsh began, and in December he was arrested for breach of recognizance. The next day, two of the undercover officers joined in the cells where Mr. Marsh was being held and engaged in conversation with him. These conversations included the disclosure of Mr. Shaw's telephone number, self-initiated discussions of illegal drugs, a spontaneous statement that he shoots people, and further disclosure of his specific arrest. Mr. Marsh also told the undercover officers that he owned guns and received cocaine in the mail. These statements were not elicited by the officers and were also deemed to be spontaneous.

Upon receiving the telephone number from Mr. Marsh, the officers called it and reached Mr. Shaw. The undercover officers then met with Mr. Shaw, which led to his participation in their fictitious crimes. Mr. Marsh was also included in some crimes following his release. All of the in-person conversations between the undercover officers and the applicants were intercepted by hidden listening or video devices, recorded, stored on a hard drive, and replayed in court.

Mr. Marsh and Mr. Shaw challenged the undercover operation and their statements. Mr. Marsh specifically argued that the cell plant of the undercover officers was a violation of his s. 7 right to silence, that the continuing operation was a Mr. Big play and that the evidence obtained is presumptively inadmissible, and that his post-arrest admissions were involuntary. Mr. Shaw argued that the cell phone communication between him and the officers violated his s. 8 *Charter* right. He further argued that the continuing operation was a Mr. Big play and that the evidence obtained was presumptively inadmissible.

Held: The applications were dismissed.

The court found that the cell plant communications did not result in a s. 7 *Charter* violation. While the right to silence was a fundamental principle of justice, in the absence of eliciting behaviour on the part of police, there was no violation of the right (*R. v. Hebert*, [1990] 2 S.C.R. 151, 1990 CarswellYukon 7. Here, the undercover officers did not engage in any eliciting behaviour, the cell plant was only 36 hours long with the applicant sleeping much of the time, and there was nothing approaching an interrogation. Mr. Marsh also made many of his comments spontaneously. Further, the subsequent statements that Mr. Marsh made also did not violate his right to silence. When police officers persist in questioning a suspect after they assert their rights to silence, they are simply engaging in common police tactics that did not violate his rights.

They did not deprive Mr. Marsh of his operating mind and he was well aware of his rights to counsel. *R. v. Singh*, 2007 SCC 48, 2007 CarswellBC 2588, has also made clear that a suspect's right to remain silent does not mean that they have a right not to be spoken to by the police.

The judge further concluded that this was a "Mr. Big" operation, but limited that statement by stating that it only marginally qualified. *R. v. Hart*, 2014 SCC 52, 2014 CarswellNfld 215 [*Hart*], lists the typical markers of a "Mr. Big" operation, and here there were elements, *e.g.*, befriending the applicants, invitation to be part of a fictitious criminal organization, reference to a "big guy", and the suggestion of possible financial rewards. However, more severe elements such as, significant financial rewards, threats of violent repercussions for betraying the trust of the fictitious organization, and powerful inducements, were not present in this case, making the circumstances at hand tilt slightly toward being deemed a "Mr. Big" operation.

Notwithstanding, the determination of whether the applicant's confessions were admissible must be assessed on the test developed in *Hart*. This involved first assessing whether the Crown established that the probative value of the confession outweighed its prejudicial effect, if any, and secondly, whether the defence established that the

undercover operation crossed the line into an abuse of process. Here, the probative evidentiary value of the applicant's confessions was high and they were not the result of extreme inducements. While counsel tried to argue that Mr. Shaw was mentally vulnerable, the court held that there were no such concerns with regard to his communications with the undercover officers that were evident from the recordings. The court also held that there was little prejudice, as the fictitious offences the applicants engaged in did not involve any violence, and therefore any prejudice that might arise was outweighed by the probative value of the evidence. Further, since there were no overwhelming inducements or benefits placed on Mr. Shaw, the undercover tactics were reasonable in relation to the severity of the crimes that were being investigated. The applications were ultimately dismissed.

Commentary: This case involves an assessment of the use of the controversial "Mr. Big" undercover police technique. For Mr. Marsh and Mr. Shaw, the operation employed by the officers was found to be neither intricate nor outrageous. It utilized typical police techniques that did not involve any shocking threats or promises. Consequently, it was clear that this scenario did not cross the line into an operation that would warrant the exclusion of evidence. In this case scenario, *Hart* provides leeway for officers to utilize this technique so long as their evidence is sufficiently probative and their way of obtaining it does not cross the line into an abuse of power.

R. v. Shaw, 2017 NLTD(G) 87, 2017 CarswellNfld 198 (N.L. T.D.)

8. — Insufficient ITO Results in Significant Amount of Evidence Excluded

Facts: On March 5, 2015, a search warrant was executed at two residential condominiums in London, Ontario. Both condos were owned by the applicant's mother. The applicant resided in one with his mother, because of bail conditions he was subject to, while his girlfriend and child lived in the other. From the search, a variety of items were seized including, cannabis marijuana and resin valued at $242,360 and cash in Canadian currency totaling $12,555, along with other items consistent with drug trafficking.

It was argued that the ITO contained insufficient reasonable grounds to support the issuance of the warrant for both locations, which fostered a s. 8 *Charter* violation upon the police searching and seizing the items found in the residences, and that the evidence should be excluded under s. 24(2) of the *Charter*.

First, the application was argued on the facial validity of the redacted ITO. The trial judge found that it did not contain reasonable probable grounds to support that there was drug trafficking at either of the target locations. The information in the ITO, in its totality, and the reasonable inferences that could be drawn from it, could not support the issuance of the warrant. Second, the Crown asked the court to consider the excised redacted material and whether that material *could* have supported the issuance of the warrant. Review of this material did not resolve the insufficiencies of the ITO.

Held: The application was allowed and the evidence was excluded.

The question to be answered in assessing the final validity of a warrant is whether the ITO contained reliable evidence that might reasonably be believed on the basis of which the warrant *could* have been issued. The insufficiency of the ITO in this case was due to the absence of any information or evidence connecting the applicant's alleged drug business to either residence that was searched. The ITO failed to provide information which could be used to reasonably infer that the applicant was selling drugs from, or storing drugs, at either of the locations. As the warrant could not stand, the searches were unlawful, and therefore breached the applicant's s. 8 *Charter* rights.

Pursuant to the s. 24(2) analysis mandated by *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, the court first examined the seriousness of the *Charter* infringing conduct, which included consideration of the nature of the police conduct that led to the discovery of the evidence. The facts in this case revealed cavalier grounds in the preparation of an ITO for a search warrant. Not only did the ITO not provide any evidence or information to

connect the alleged drug business to the locations, it also unfairly suggested that the applicant was involved in greater criminal activity than he was charged with, which made it highly misleading.

Lastly, the ITO contained information that the applicant was dealing cocaine, but no cocaine was found. Marijuana fell under a different drug substance Schedule than cocaine, under which it was deserving of less severe penalties. Thus, the heightened interest in having cases that involve cocaine trafficking adjudicated on their merits is diminished with regard to marijuana. The case of *R. v. Morelli*, 2010 SCC 8, 2010 CarswellSask 150, emphasized that the administration of justice will be significantly undermined if evidence obtained from private places is obtained on the basis of a search warrant that has misleading, inaccurate, or incomplete information. Examination of all these considerations reveals that allowing the evidence to be settled at trial would bring the administration of justice into disrepute.

Commentary: A large amount of evidence was excluded, which supports the position that warrants and reasonable grounds must be sufficient in order to search an individual's residence. *R. v. Silveira*, [1995] 2 S.C.R. 297, 1995 CarswellOnt 21, supports that a person's home is a place with a high expectation of privacy. Breaches of s. 8 pertaining to unlawful searches of a home cannot be taken lightly, regardless of the offence at hand, and the court emphasized that allowing searches of residences based on evidence of suspected offences from locations unconnected to an individual's residence would have broad-sweeping implications.

R. v. Kofman, 2017 ONSC 3140, 2017 CarswellOnt 7645 (Ont. S.C.J.)

9. — Reasonable and Probable Grounds Deemed Insufficient to Allow a Variety of Judicial Authorizations to Stand

Facts: On July 19, 2014, a woman was attacked at knifepoint near her car in a parking lot. The attacker threatened her with death and fled the scene with her purse and keys. Four days later, the applicant was arrested when he was found in the victim's lobby holding her keys and with a knife strapped to his body. Five days later, the police executed a search warrant on his residence, and found the victim's purse. On January 26, 2015, another woman was approached and assaulted by a man in a bridal store in Toronto. He escaped but was captured on surveillance cameras, and is believed to be the applicant. On February 11, 2015, another woman was attacked in her apartment and the man was captured on surveillance. The superintendent saw a man that matched the one from the surveillance outside the building the next day and took his picture. The man in the photo was also believed to be the applicant.

Additionally, it is stated that between December 20, 2014 and February 12, 2015, the applicant posted a variety of fake job ads on Craigslist, allegedly so that he could attract potential victims for sexual offences although no meetings were ever followed through.

The search of Mr. Ricciardi's residence led to the seizure of a pair of sunglasses, a pair of handcuffs, a book on forensic evidence, certain writings on notes, and a laptop computer from his bedroom. Data from his laptop was obtained and included resumes and photographs relating to Craigslist, Craigslist artifacts, evidence that suggests attempts to buy firearms and handcuffs online, evidence of internet searches and access to pornography related to rape videos and to websites related to rape. Evidence was also found on his cell phone and in his cell phone billing records.

The applicant was charged with several offences: attempted sexual assault, attempted kidnapping, robbery, unlawful confinement, assault, and criminal harassment. A variety of prior judicial authorizations were used to obtain the evidence used. The applicant sought to have all of the evidence excluded under s. 24(2) of the *Charter* in relation to a s. 8 *Charter* violation that arose from the invalidity of the six judicial authorizations. The first challenge was that the affiant officer did not provide full, fair, and frank disclosure to the issuing justice. The

second challenge was to the use of a telewarrant to search the applicant's home for a pair of sunglasses and a pair of black leather gloves. Upon finding those items, police also found handcuffs, and a number of items, including the laptop on a desk next to the bed. Third, the applicant challenged the use of the telewarrant to seize the laptop computer. Fourth, the applicant challenged two warrants to search the contents of the laptop. Fifth, the applicant challenged the search of his flip phone. Last, the applicant challenged the production order on Rogers Communications.

Held: The application was allowed in part.

First, the applicant argued that the ITOs, when viewed against the entire police investigation, were misleading. He argued that they allegedly did not contain full, fair, and frank disclosure because the ITO was not to simply investigate the incident involving the first victim. He contested that the purpose was much broader, even though the police did not have sufficient grounds to believe that he was involved in the other attacks. To make this argument, an applicant must establish that the police hid the true purpose of the warrants from the issuing justice and, further, that if the true purpose was disclosed then no issuing justice could have issued the warrants, or that the non-disclosure of the true purpose for the warrants was so serious that the court should quash the search warrants (see: *R. v. Morris*, [1998] N.S.J. No. 492, 1998 CarswellNS 489 (C.A.) and *R. v. Colbourne*, [2001] O.J. No. 3620, 2001 CarswellOnt 3337 (C.A.)). On the *voir dire*, the officer testified that he did not include the details of the additional offences because he did not have reasonable and probable grounds for them, and that the purpose of the searches was to seek evidence in relation to the listed offences: the first attack and his failure to comply bail charge. He also stated that the suspicion of the applicant's additional involvement in the other offences with unknown victims was not hidden from the issuing justice.

The court concluded that although the officer could have provided more details, the failure to do so was not fatal to the use of the warrant. The officer was a credible witness and he adequately described his thought process in crafting the warrant. There is nothing wrong with using a legitimately obtained search warrant to obtain evidence of other offences. Both the plain view doctrine and statutory provisions of ss. 489(1) and (2) of the *Criminal Code* allowed police powers to seize items beyond the scope of a warrant where there are reasonable and probable grounds to believe that items seized in plain view would afford evidence in respect of offences (*R. v. Spindloe*, 2001 SKCA 58, 2001 CarswellSask 303 and *R. v. Jones*, 2011 ONCA 632, 2011 CarswellOnt 11405. The officer was further held to have made full, fair, and frank disclosure.

Second, the applicant raised a variety of challenges to the use of the telewarrant that was obtained to search the apartment, including that the search of the applicant's laptop went beyond the scope of the warrant. Since the seized items were not listed in the search warrant, it provided no lawful basis for these additional seizures. The court found that the officer did not subjectively believe on a reasonable and probable ground basis that the items were evidence in relation to the criminal offences under investigation. Suspicion was not enough to make an additional seizure lawful. Subsequently, the content of the seized textbook and observations made of the activated screen of the laptop were excised, as the police had no lawful basis to make such observations.

Third, the police obtained a telewarrant to enter the house and seize the laptop computer. The warrant also authorized a night time entry, which was justified by the need to preserve evidence as the police believed that evidence may be destroyed by "supporters" of the applicant. However, the court found this position to be without any support. A s. 8 violation was found as there was no basis to have authorized this entry. There was also insufficient evidence to infer that the officer believed, on reasonable and probable grounds, that the computer would provide evidence of the listed offences. The seizure of the computer went beyond the original ITO and thus the ITO used for the second warrant should have established a separate basis whereby the seizure would provide evidence, and it did not.

Fourth, the court determined that the two warrants obtained to search the contents of the laptop were fatally

flawed. The warrant did not list the specific files, data, or documents that would commonly be found on a computer, but instead, listed "the computer" and nothing more specific. The court held that this meant that the warrant authorized the police to search "the computer for the computer" which was a flaw that could not be saved by reference to the ITO. *R. v. Parent* (1989), 47 C.C.C. (3d) 385, 1989 CarswellYukon 6 (C.A.) held that it is a warrant that authorizes a search, not an ITO. Further, the grounds that were articulated by the officers are ultimately not able to support the basis of reasonable and probable grounds to believe that the laptop would contain evidence pursuant to the listed offences. The court found that since the prior searches were unlawful, and that portions of the ITO were excised, the remaining ITO provided an insufficient basis for issuing the warrant.

Moreover, the ITO that supported the seizure and search of the applicant's flip phone and the production order for the communications records, was also found to be insufficient. The grounds listed provided no more than an expression of the officer's hopes of what he would find on the phone, which did not amount to the requisite grounds. Nonetheless, the court held that the ITO did establish reasonable grounds to suspect that the records sought would afford evidence of the offences under investigation. In the end, each additional search beyond the original ITO and warrant was found to have failed on the basis of insufficient grounds.

Commentary: This case is left without a determination under s. 24(2) of the *Charter* as to whether the evidence should be excluded following an analysis of *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104. However, the case demonstrates that it is highly important for police officers to have sufficient grounds in an ITO in order to support the issuance of a warrant. This is especially relevant with regard to computers, laptops, and cell phones. The court stated that these items cannot be searched in the absence of specific grounds which must support an inference that an accused utilized the specific items to assist himself with the commission of an alleged offence.

R. v. Ricciardi, 2017 ONSC 2788 (Ont. S.C.J.)

10. — Systemic Disregard for* Charter *Rights Renders Individual Breach More Serious

Facts: A civilian who became concerned when he saw the accused driving erratically called 911. The police officer who responded noticed that the accused's vehicle was swerving within its lane, and stopped the vehicle. The officer went to the car and knocked on the driver's window. The accused, who was in the driver's seat, fumbled with the button that opened the window. Once the window was open, the officer detected a strong odour of an alcoholic beverage. He told the accused to get out of the car. When the accused did so, he was unsteady on his feet and appeared to be drowsy.

The officer arrested the accused for impaired driving. He handcuffed the accused and escorted him to the police cruiser. There he did a pat-down search, and then put the accused in the back of the cruiser.

The officer went back to the accused's car to look for identification, which the accused said was in the centre console. The officer also seized another, unspecified, item. Meanwhile, a second officer arrived and spoke with the accused.

A few minutes later, the arresting officer returned to the police cruiser. He advised the accused of his right to counsel. When asked if he wished to speak to a lawyer, the accused gave the officer a name and a telephone number.

The officer took the accused to a police station. There the officer tried to contact the named lawyer, but was unsuccessful. He then called duty counsel, who spoke to the accused.

The accused provided two breath samples, both of which were well "over 80". He was charged with driving over 80.

At trial, the accused argued that because he was not told immediately of his right to counsel, there was a breach of s. 10(b) of the *Charter*. He sought exclusion of the breath test results and utterances that he made during the testing process.

Held: Application granted.

Section 10(b) of the *Charter* provides that upon arrest or detention, individuals must be advised of their right to retain and instruct counsel "without delay". In *R. v. Suberu*, 2009 SCC 33, 2009 CarswellOnt 4106, the Supreme Court of Canada held that "without delay" means immediately.

The arresting officer did not advise the accused of his right to counsel immediately. Instead, he chose to look for the accused's identification, and then seize some unspecified item from the vehicle. This was a violation of s. 10(b).

The trial judge referred to over a dozen cases where officers from the particular police force appeared to have had difficulty understanding and applying the immediacy requirement of s. 10(b). The systemic nature of the problem rendered the breach sufficiently serious that even though the impact on the accused's *Charter*-protected interests was moderate, and notwithstanding society's interest in an adjudication on the merits, exclusion of the breath test results and any utterances by the accused during the testing process was necessary to maintain the long-term repute of the administration of justice. The trial judge termed it "simply unacceptable" for the police to ignore a well-established duty imposed on them by the *Charter*.

Commentary: This case is a good example of the importance of tracking other instances of violation of *Charter* rights by officers of a particular police force. Systemic disregard of *Charter* rights can provide a context within which to evaluate a breach in a given case. Tracking other violations will not necessarily require a disclosure application that may well fail on the basis that it is a "fishing expedition". As this case illustrates, a search of other reported decisions can yield the necessary information.

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

11. — Issuance of Telewarrant Justified where Court House Closed at Time of Application

Facts: A confidential informant told the police that she or he had purchased cocaine from the accused and the accused's roommate, and that the accused was in possession of a gun. The police conducted surveillance at the address provided by the confidential informant. They saw the accused there. The police obtained a telewarrant to search the accused's residence for a handgun, identification and cocaine.

The next day, the accused was observed conducting several hand to hand transactions suggestive of drug trafficking. He was arrested, and found to be in possession of narcotics. The police then executed the search warrant at the accused's residence. They discovered both powder and crack cocaine, Canadian and American currency, and drug paraphernalia. No gun was located.

The accused was charged with possession of cocaine for the purpose of trafficking and possession of the proceeds of crime.

At trial, the accused brought a s. 8 *Garofoli* application to challenge the legality of the search warrant and the admissibility of the evidence obtained by its execution. The Crown conceded that after the ITO was redacted to protect the confidential informant's identity, it did not establish reasonable and probable grounds for issuing the warrant. The Crown resorted to the "Step 6" procedure. The trial judge dismissed the *Garofoli* application, and convicted the accused.

The accused appealed. He contended that the conditions for issuance of a telewarrant had not been satisfied.

Held: Appeal dismissed.

Section 487.1 of the *Criminal Code* provides for the issuance of a telewarrant where the applicant believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to apply for a warrant. In the ITO, which was submitted at 8:32 p.m., the affiant deposed that it was then after 4:00 p.m., the court house was closed, and a justice of the peace was not available in the jurisdiction.

The appellate court noted that the telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week. The court accepted that the impracticability requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought. It does not require that an immediate need for a warrant be demonstrated. The onus is on the party challenging the issuance of the telewarrant to demonstrate that it was practicable for the affiant to have made an in-person application.

Here, the affiant explained that the court house was closed when the application was made. Further, the trial judge concluded that waiting 12 hours to obtain a search warrant might have frustrated the process because it might have stale-dated the confidential informant's information, and because guns and drugs are easily transportable. The trial judge did not err in concluding that the impracticability requirement for a telewarrant had been met.

Commentary: The Court of Appeal for Ontario noted that this case was similar to the circumstances in *R. v. Clark*, 2017 SCC 3, 2017 CarswellBC 95, where the Supreme Court of Canada dismissed an appeal from a decision upholding the issuance of a telewarrant. In that case, the police officer deposed that it was impracticable to obtain a search warrant in person because he was working a nightshift in the early morning hours and the local court house was closed. The Supreme Court of Canada agreed with the observation that it was not necessary that the affiant actually contact the court house to enquire about the availability of a justice for an in-person application. It was obvious from the statement that the court house was closed and that one would not be available.

R. v. Reid, 2017 ONCA 430, 2017 CarswellOnt 7996 (Ont. C.A.)

12. — Limitations Imposed on Cross-Examination of Affiant

Facts: The police obtained a telewarrant authorizing searches of the accused's home and vehicle for drugs. The ITO was based largely on information provided by a confidential informant who had purchased cocaine from the accused. Using that information, the police conducted surveillance on a car that the informant described as being used in drug transactions. The driver of the car matched the description provided by the confidential informant. A check on the licence plate revealed that the car was owned by the accused and registered to a particular address. Other police enquiries indicated that the accused was living at that address.

The police arrested the accused as he got out of his car. They found cocaine and a large quantity of cash on his person. In the car, they found more cocaine. A search of the accused's residence yielded a large quantity of cocaine as well as oxycodone and marijuana, and more cash.

At trial, the accused contended that there were not reasonable and probable grounds to justify issuance of the telewarrant, and that his *Charter* s. 8 right had been breached. Several paragraphs of the ITO were heavily redacted to protect the identity of the confidential informant. Crown counsel conceded that the redacted ITO would fail to satisfy the test on review, and asked the trial judge to engage in a "Step 6" analysis. The trial judge conducted an *ex parte* hearing, and ordered that additional, previously redacted material as well as a judicial

summary be disclosed to the defence.

The accused then sought leave to cross-examine the affiant.

Held: Application granted in part.

The trial judge observed that the test for granting leave to cross-examine an affiant is whether the proposed cross-examination is useful in demonstrating that the affiant knew or ought to have known information contained in the ITO was false. The applicant must demonstrate that there was a reasonable likelihood that the proposed questioning would generate evidence discrediting the existence of one or more grounds for the issuance of the warrant.

Crown counsel conceded that cross-examination was appropriate in some areas, including the confidential informant's motivation in providing the information and whether the confidential informant harboured *animus* towards the accused. The trial judge declined to permit cross-examination in a number of other areas. These included points that the defence could argue without any need to cross-examine the affiant, and matters that did not relate to a material fact. The trial judge concluded, after cross-examination of the affiant, that there was no material non-disclosure by the affiant, and that there was more than a sufficient basis for the authorizing justice to issue the warrant.

Commentary: This decision is in keeping with appellate court authority restricting the basis on which leave to cross-examine an affiant can be granted, and if leave is granted, focusing the cross-examination on the reasonableness and honesty of the affiant's belief as to the existence of reasonable and probable grounds for issuance of the warrant, and not on the ultimate accuracy of the information relied on by the affiant. The need for a cautious approach on an application to cross-examine is particularly important where, as here, there is a risk that such questioning might reveal the identity of a confidential informant. Where the proposed topics for cross-examination can be addressed through argument, there will not be a sufficient basis to permit cross-examination.

R. v. Reid, 2017 ONSC 3234, 2017 CarswellOnt 7945 (Ont. S.C.J.)

13. — Delay in Providing Access to Counsel did not Breach Charter

Facts: The police obtained a warrant to search the accused's apartment, as he was believed to be a participant in a sophisticated drug trafficking operation. The lead investigator sought and obtained authorization from a sergeant to conduct a no-knock forced entry early in the morning in the hope of catching the accused asleep. The police were concerned that the accused would destroy evidence if they used a standard knock and announce approach.

Tactical team officers went to the apartment just after 9:00 a.m. They forced the door open with a battering ram. The first officer entered the apartment with his gun drawn. The accused was told to show his hands and come toward the officer. When the accused did not comply with the officer's directions, the officer administered three open hand "stuns" (strikes) to the accused. The officer got the accused to the ground, and handcuffed him. He gave the accused his *Charter* rights, cautioned him and told him that he was detained for a *CDSA* warrant. The accused was seated at the end of the bed and given a copy of the search warrant. The accused said that he understood what he had been told. When asked if he wanted to contact a free lawyer or any other lawyer, he replied that he wanted to contact another lawyer.

The officer did not give the accused the opportunity to contact a lawyer from the apartment, because of officer safety concerns. He later testified that the police intended to execute search warrants at other residences and there were concerns about the safety of the officers involved. Additionally, it was impracticable to give the

accused privacy to make a telephone call to counsel from the apartment while the search was taking place.

The officer turned the accused over to a second officer at 9:20 a.m., so that the accused could be taken to a police station where private access to counsel would be possible.

The second officer told the accused of his right to counsel and took him to a police station. There he turned the accused over to the lead investigator just before 10:00 a.m. At 11:01 a.m. the lead investigator arrested the accused for possession of cocaine for the purpose of trafficking and possession of the proceeds of crime. He told the accused of his *Charter* rights. The accused said that he wanted to speak to a lawyer and needed to contact a friend to get the lawyer's name. The officer told him he would have to wait until all searches were completed. The officer later testified that the primary concern that caused the police to delay in affording the accused the opportunity to consult counsel until all related searches were completed was officer safety, although the potential for the destruction of evidence was also a concern.

At 12:28 p.m. the lead investigator was advised that the final search was executed. He then allowed the accused to call a friend, who would contact a lawyer. The accused was permitted to make numerous calls after that, to friends and a lawyer although he was unable to speak with counsel.

At trial, the accused applied to exclude the cocaine, cash and drug paraphernalia seized in the search of his apartment, on the ground that his *Charter* s. 10(b) right to counsel was breached by the delay in providing him access to counsel.

Held: Application dismissed.

The trial judge acknowledged that s. 10(b) imposes a duty on the police to provide access to counsel immediately upon detention. A delay may be justified in exceptional or exigent circumstances. The burden is on the Crown to justify the delay. There must be evidence from which a judge can conclude that specific articulated concerns existed at the time the accused's right was suspended.

The trial judge found that the Crown had demonstrated that there were specific concerns about officer safety and the possible destruction of evidence, related to the execution of multiple residential search warrants that morning. There was evidence that the targets of the warrants were involved with one another in a commercial drug trafficking operation. The police had a valid basis for concern that the targets might communicate with one another before the commencement of all of the searches, thereby putting officer safety at risk. If the accused had been given access to a telephone immediately upon arrest, he could have alerted the others to the search at his apartment, and so create a potentially dangerous situation at the other target locations. Additionally, such advance notice would have afforded ample opportunity for the destruction of evidence. The existence of such a risk was illustrated by the fact that the accused contacted a friend, and not counsel when ultimately given access to a telephone. The almost three hour delay in permitting the accused to contact counsel resulted from exigent circumstances. There was no s. 10(b) breach.

Commentary: It was critical to the trial judge's analysis that this was not a case of a vague or generalized threat to interference in the search warrant process, or of the police simply pursuing a policy or practice of denying a detainee access to counsel until a specific phase of the investigation was completed for the sake of investigatory expediency. There was evidence upon which the trial judge could find that the lead investigator turned his mind to the specifics of the particular situation, and made a decision based on his assessment of that situation as it related to officer safety and the destruction of evidence.

R. v. Chang, 2017 ABQB 348, 2017 CarswellAlta 913 (Alta. Q.B.)

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