CHARTER LAW

Table of Contents

Section 7

A. RIGHT TO SILENCE

i. General Principles

It is an error of law to draw an adverse inference against the accused's for his pre-trial silence: *R v CG,* 2016 ONCA 316 at paras 6-7

That being said, once "uncontradicted evidence points to guilt beyond a reasonable doubt", the accused's silence will sometimes mean that he has failed to "provide any basis for concluding otherwise": *R v Bokhari,* 2018 ONCA 183 at para 3

An accused person is entitled to remain silent and to hear the Crown's case before deciding whether to give evidence or how to respond. A suggestion that the accused is giving his story for the first time at trial amounts to an attack on his right to silence.

Absent evidence of recent fabrication, a Crown cannot allege that an accused person has tailored his evidence after receiving Crown disclosure or after hearing the Crown's evidence at the preliminary inquiry or at trial: *R v John,* 2016 ONCA 615 at paras 60-61.

A suggestion by Crown counsel that the accused is required to provide the police with information or otherwise be helpful to the police undermines his right to silence. An accused does not forfeit his constitutional right to silence because he chose to speak about some but not all of the details that he later testified to at trial. If such a suggestion is made, the trial judge must give a limiting instruction; otherwise, the jury can be left with the impression that if the accused were an innocent person, he would have volunteered to the police at the first opportunity the exculpatory information he now offers at trial. The trial judge must address the real danger that a jury could make the leap from their disbelief of an accused's exculpatory explanation to a finding of guilt based on that disbelief, especially if given for the first time at trial: *R v JS,* 2018 ONCA 28 at paras 50-51, 55, 63, 64; *R v Kiss,* 2018 ONCA 184 at para 37

It is also wrong to use the fact that the accused remained silent, instead of offering an explanation to the authorities on a previous occasion, to reject an account offered by the accused for the first time at trial: *R v Kiss,* 2018 ONCA 184 at para 38-39

In contrast, when the accused has given a prior voluntary statement, he has given up the right to silence. A trier of fact can rely on material inconsistencies between his prior statement and testimony; this includes material omissions from a prior statement. Omissions can be integral to the existence of material inconsistencies between two versions of events: *R v Hill,* 2015 ONCA 616 at para 45

However, the omissions from the pre-trial statement must be material enough to rely upon fairly. Further, the difference between the accused offering inconsistent versions on precisely the same topic and being selective about what topics are discussed must be respected. The former may count against the credibility of the accused's testimony whereas the latter may not: *R v Kiss*, 2018 ONCA 184 at paras 47-48

While the Crown cannot rely on pre-trial silence as evidence of guilt, an co-accused can attack the credibility of another accused by referring to the other accused's pre-trial silence: *R v Zvolensky,* 2017 ONCA 273 at para 157

In considering the reasonableness of a verdict, an appellate court may infer from the appellant's failure to testify, an inability to provide an innocent explanation: *Tsekouras* at para 227; see also *R v George-Nurse,* 2018 ONCA 515 at paras 17, 18, and 33

It is an error of law to suggest that an accused has scripted his/her evidence to the disclosure, but not to the Crown's case at trial. Permitting this would convert a constitutional right into a trap, and raise concerns about the right to silence: *R v Brown,* 2018 ONCA 9; *R v Johnson-Lee,* 2018 ONCA 1012, at para 58

However, questions relating to disclosure are not always prohibited. In *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.), for example, the manner in which the accused testified raised the possibility that the jury would use phone records admitted into evidence as confirming his testimony. Cross-examination showing that the accused had access to those phone records through disclosure before testifying was therefore appropriate. No allegation of tailoring was being made.

The cross-examination was designed to expose a source of knowledge that had fallen into issue: *Johnson-Lee* at para 59

In some limited circumstances, a trier of fact may draw an adverse inference from the accused's failure to call a witness. The adverse inference principle is "derived from ordinary logic and experience". It is not intended to punish the accused for failing to call a witness

An adverse inference may only be drawn where there is no plausible reason for not calling the witness. Even where it is appropriate to draw an adverse inference, it should not be "given undue prominence and a comment should only be made where the witness is of some importance in the case".

Commenting upon the failure of the defence to call a witness runs the clear risk of reversing the burden of proof. As well, trial counsel will frequently make choices about not calling potential witnesses, the reasons for which are often entirely unrelated to the truth of any evidence a witness may give. For instance, an honest person may have a poor demeanour, resulting in a strategic choice not to have the individual testify. Or, the evidentiary point to be made by a person may already have been adequately covered by others: *Jolivet*, at para. 28. Allowing an adverse inference to be taken from the failure to call a potential witness runs the risk of visiting strategic litigation choices upon the accused. Accordingly, an adverse inference should only be drawn with great caution

Where comment is appropriate, the "only inference that can be drawn" is not one of guilt, but an inference that, had the witness testified, his or her evidence would have been unfavourable to the accused. This inference can impact on an assessment of the accused's credibility. Cross-examination on the failure of the defence to call a witness will only be appropriate in those rare circumstances where this adverse inference is open to be drawn: *R v Degraw,* 2018 ONCA 51 at paras 30-32, 44

B. RIGHT TO DISCLOSURE

i. GENERAL

The acused has a constitutional right to disclosure of all material that could reasonably be of use in making full answer and defence of the case against

him/her as guaranteed by s. 7 of the *Charter*: *R. v. Tossounian*, 2017 ONCA 618 at para 15

Under *Stinchcombe*, the Crown will have to disclose material that it cannot put into evidence itself, but that the defence may use in cross examination. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not by the prosecutor: *R v Natsis,* 2018 ONCA 425 at para 30;

The "mere reasonable possibility" that discrepancies in a witnesses evidence contained within outstanding disclosure could have been used to impeach the credibility of witnesses "is all that is needed for it to be possible to hold that there was a reasonable possibility that the failure to disclose impaired the overall fairness of the trial:" *R v Tossounian,* 2017 ONCA 618 at para 30 [citations ommitted]

911 calls fall under the rubric of *Stinchcombe* disclosure: *R v MGT,* 2017 ONCA 736 at para 119

i. ESTABLISHING A BREACH OF THE RIGHT TO DISCLOSURE AT TRIAL OR APPEAL

Where evidence proposed for admission on appeal has to do with information that was not disclosed prior to trial, an appellant must first establish that the undisclosed information meets the *Stinchcombe* standard and thus amounts to a breach of the appellant's constitutional right to disclosure.

Provided the undisclosed information satisfies the *Stinchcombe* threshold, thus the failure to disclose it establishes a breach of the appellant's constitutional right to disclosure, the accused must next establish, on a balance of probabilities, that the disclosure failure impaired the accused's right to make full answer and defence.

To establish on a balance of probabilities that the failure to disclose impaired their right to make full answer and defence, an accused must demonstrate that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

To appraise the impact of the disclosure failure on the reliability of the trial result, an appellate court must consider whether there is a reasonable possibility that the undisclosed evidence, when considered in the context of the trial as a whole,

could have had an impact on the verdict rendered or the overall fairness of the trial process.

To evaluate the impact of the disclosure failure on the overall fairness of the trial process, the appellate court must assess, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if timely disclosure had been made. In other word, the appellate court must consider whether the disclosure failure would have had an impact on the conduct of the defence at trial.

An important factor in considering the impact of a disclosure failure on the overall fairness of the trial process is the diligence of defence counsel in pursuing disclosure from the Crown. A lack of due diligence in pursuing disclosure is a significant factor in determining whether the Crown's non-disclosure affected the overall fairness of the trial process. Indeed, where defence counsel knew or ought to have known of a disclosure failure or deficiency on the basis of other disclosures, yet remained passive as a result of a tactical decision or lack of due diligence, it is difficult to accede to a submission that the disclosure default affected the overall fairness of the trial: *R v MGT,* 2017 ONCA 736 at paras 120-125; *R. v. Tossounian*, 2017 ONCA 618 at para 15; *R v Natsis,* 2018 ONCA 425 at para 33; *R v Jiang,* 2018 ONCA 1081, at para 4; see also paras 16-19

The appropriate focus in most cases of late or insufficient disclosure under s. 24(1) is the "remediation of prejudice to the accused" and the "safeguarding of the integrity of the justice system: *Natsis* at para 35

ii. Lost Evidence

In *Abedi,* the Court of Appeal refused to allow an appeal based on alleged prejudice to the accused due to the loss of the complainant's recorded statement at trial. The Court held that other evidence containing essentially the same information existed, namely, the officer's notes, which were contemporaneous and detailed. The defence did not suggest that the notes were inaccurate or missing any important details: *R v Abedi,* 2017 ONCA 724

C. RIGHT TO A FAIR TRIAL

See 11(d) Below

D. RIGHT TO FULL ANSWER AND DEFENCE

The right to make full answer and defence is a central constitutional right. The manner in which it is pursued can vary in an infinite variety of ways and on a case-by-case basis. In *N.S.*, at para. 50, Doherty J.A. emphasized the importance of full answer and defence to a fair trial from the perspective of both the accused and broader societal interests:

Full answer and defence is, in turn, a crucial component of a fair trial, a constitutionally protected right and the ultimate goal of the criminal process. Trial fairness is not measured exclusively from the accused's perspective but also takes account of broader societal interests. Those broader interests place a premium on a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process, including, but not limited to, the accused: *R v Dunstan,* 2017 ONCA 432 at para 73
For principles on cross-examination, see General Principles on Law: Cross-examination

E. RIGHT TO SECURITY OF THE PERSON

It is not every qualification or compromise of a person`s security that comes within the reach of s. 7 of the *Charter*. The qualification or compromise must be significant enough to warrant constitutional protection.

Security of the person protects both the physical and psychological integrity of the individual. For a restriction of security of the person to be established, the state action in issue must have a serious and profound effect on a person's psychological integrity: *R v Donnelly,* 2016 ONCA 988 at paras 106-107

Note, see *Saadati v Moorhead*, 2017 SCC 28, in which the Supreme Court of Canada held that neither expert evidence nor proof of recognized psychiatric illness is required for recovery for mental injury in the civil context.

The descriptive "serious state-imposed psychological stress" fixes two requirements that must be met before the security of the person interest protected by s. 7 becomes engaged. First, the psychological harm must be state imposed, that is to say, the harm must result from actions of the state. And second, the psychological harm or prejudice must be serious. It follows that not every form of psychological prejudice or harm will constitute a violation of s. 7. In other words, there is something qualitative about the type of state interference that ascends to the level of a s. 7 infringement. Nervous shock or psychiatric illness are not necessarily required, but something greater than "ordinary stress or anxiety" is.

The effects of the state interference are to be assessed objectively. The court gauges their impact on the psychological integrity of a person of reasonable sensibility, not one of exceptional stability or of peculiar vulnerability: *Donnelly* at paras 108-109

F. ABUSE OF PROCESS

The doctrine of abuse of process is not a tool for assessing the quality of prosecutorial decisions. It is a tool for addressing conduct of the Crown that is egregious and seriously undermines the fairness of the proceeding or the integrity of the administration of justice. Simply put, it is about misconduct, not poor performance: *Jackson v Ontario,* 2017 ONCA 812 at para 2

Section 8

A. REASONABLE EXPECTATION OF PRIVACY

iii. General Principles

Every investigatory technique used by police does not amount to a “search” within or for the purposes of s. 8 of the Charter. Police conduct that interferes with a reasonable expectation of privacy constitutes a "search" for the purposes of s. 8 of the Charter: *R v Law*, 2002 SCC 10 (CanLII), at para. 15; *R v Tessling*, at para. 18; *R v Wise,* 1992 CanLII 125 (SCC),

Note, it is not only the type of police conduct that determines whether a search has occurred, but also the purpose of that conduct that is controlling. A search is about looking for things to be used as or to obtain evidence of a crime: *R v Rutledge,* 2017 ONCA 635 at paras 19-21

In order to engage section 8 of the *Charter,* the individual must first have a reasonable expectation of privacy in the thing searched. Only where state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a “search” within the meaning of s. 8: *R v Jackman,* 2016 ONCA 121 at para 21

The subject matter of a privacy claim may be the person of the claimant, a place, information, or a combination of the three. The factors that will be relevant to the determination of whether a reasonable expectation of privacy exists and the weight to be assigned to any particular factor will depend in large measure on the subject matter of the privacy claim. For example, if the privacy claim is informational, the potential capacity of the information to reveal core biographical data relating to the claimant will be crucial in assessing the privacy claim. However, if the subject matter of the privacy claim is a place, control over that place will play a central role in assessing the validity of a reasonable expectation of privacy claim. If the privacy claim has both a territorial and informational component, then all of the relevant factors will be considered: *R v Le,* 2018 ONCA 56 at para 36

There is a distinction between a desire for privacy and an expectation of privacy. Only the latter is relevant to a s.8 analysis: *R v Duong,* 2018 ONCA 115 at para 7

An individual’s reasonable expectation of privacy must be assessed contextually, and may vary depending on the nature of the circumstances: *R v Jackman,* 2016 ONCA 121 at para 21

The reasonable expectation of privacy inquiry must also reflect a normative evaluation of societal expectations and aspirations as they relate to personal privacy.The assessment of whether a person has a reasonable expectation of privacy is not limited by, or dependent upon, property law concepts even if the subject matter of the claim is real property. Those concepts can, however, inform the inquiry into issues like control and access that are central to the reasonable expectation of privacy inquiry when real property is the subject matter of that inquiry: *R v Orlandis-Habsburgo*, 2017 ONCA 649 at paras. 41-43; *R v Le,* 2018 ONCA 56 at para 49

An accused mounting a s. 8 claim may rely on the Crown's theory of the case to establish a subject expectation of privacy. She may ask the court to assume as true any fact that the Crown has alleged or will allege in the prosecution against him in lieu of tendering evidence probative of those same facts in the *voir dire*: *R v Jones,* 2017 SCC 60 at paras 19, 30-33

iv. Personal Privacy

Personal privacy equates with a person's right to require that the state leave him or her alone, absent reasonable grounds to justify interfering with that person's privacy: *R v Le,* 2018 ONCA 56 at para 52

v. Privacy in Real Property

The right to be left alone, when exercised in relation to real property must include some ability, either as a matter of law, or in the circumstances as they existed, to control who can access and/or stay on the property. One cannot realistically talk about a reasonable expectation of privacy in respect of real property without talking about an ability to control, in some way, those who can enter upon, or remain on, the property: *R v Le,* 2018 ONCA 56 at para 52

There may well be circumstances in which an invited guest has the *de facto* power to control who can access or stay on a property. In those situations, the visitor may well have a reasonable expectation of privacy in the property: *Le* at para 53

Presence is relevant to a reasonable expectation of privacy inquiry. However, its relevance, when the claim is purely territorial, lies in its potential, depending on the circumstances, to support a finding that the individual claiming the privacy

interest has some kind of control over who could access or remain on the property. Physical presence may be evidence of control: *Le* at para 54

vi. Informational Context

For a thorough review of the jurisprudence on reasonable expectation of privacy, particularly in the context of informational privacy, see *R v Orlandis-Habsburgo,* 2017 ONCA 649 at paras 39-115; see also *R v Marakah,* 2016 ONCA 542 at paras 46-56

In the informational context, s.8 of the Charter protects "a biographical core" of information that "tends to reveal intimate details of the lifestyle and personal choices of the individual." A physical address does not, of itself, reveal intimate details about one's personal choices or way of life. Ordinarily, it is publicly available information: *R v Saciragic*, 2017 ONCA 91

Depending on the totality of the circumstances, an accused person may retain a reasonable expectation of privacy in text messages that have been sent to another person's phone and subsequently obtained by the police: *R. v. Marakah*, 2017 SCC 59; *R v Ritchie,* 2018 ONCA 918

It is objectively reasonable for the sender of a text message to expect that a service provider will maintain privacy over the records of his or her text messages stored in its infrastructure: *R v Jones*, 2017 SCC 60

vii. Specific Examples

a) In Public

For the purpose of s.162(1)(c) [voyeurism], "[i]f a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy. This includes a school setting: *R v Jarvis,* 2017 ONCA 778 at para 108

b) In another person's home

Factors relevant to the question of "standing" to challenge a search of another person's home include whether the accused: is a tenant; has a house key; gets mail at the residence; is present when the warrant occurred testified about a reasonable expectation of privacy in the home: *R v Henry,* 2016 ONCA 873 at paras 6-7

A finding of constructive possession is not inconsistent with a finding that an accused has no standing to advance a section 8 argument in relation to a search of the premises where drugs were found: *R v Qiang Wu,* 2017 ONCA 620 at paras 23-25

In *Duong,* the Court of Appeal held that the factors of possession and control of a dwelling house are undermined where an elaborate fraud was used to obtain possession. The factor of historical use of a property was also undermined where the property was not used as a residence but as a meth lab to be later discarded. The ability to regulate access was undermined where the possessors had no legal right to do so: *R v Duong,* 2018 ONCA 115 at para 6

In *Le,* the Court of Appeal held that the accused did not have a reasonable expectation of privacy in the backyard of his neighbour's home. Though an invited guest, Mr. Le did not have control over who could access and remain on the property.

B. ANCILLARY POWERS DOCTRINE

In the absence of statutory authority, the common law can provide authority to search or seize a car. For example, in Haflett, the Court of Appeal employed the ancillary powers doctrine to validate the police impounding of a motor vehicle. The Court found that the police common law authority to impound a motor vehicle will arise where, in the circumstances, the ability to impound the vehicle and have it towed away is a reasonable exercise of the police common law duty to prevent crime, to protect the life and property of the public, and to control traffic on the public roads: *R v Haflett,* 2016 ONCA 248 at para 23

C. IMPLIED LICENSE DOCTRINE

The implied licence doctrine is the common law solution to the clash between police duties and the property rights of the individual. Under that doctrine, property rights or, in constitutional terms, the privacy of the owner/occupier, must yield, but only to the extent needed to allow the police, in the execution of their duties, to go onto the property to make contact with the owner or occupant: *R v Le,* 2018 ONCA 56 at paras 26, 29

The occupier of a dwelling gives an implied licence to any member of the public, including police officers, on legitimate business to come to the door of the dwelling and knock. The implied licence can be revoked by, for example, putting up signs prohibiting entry or by locking an entry gate.

Additionally, when members of the public (including police) exceed the terms of the implied licence, they approach the property as intruders. The officer must have a *bona fide* belief that gives rise to a reasonable suspicion of criminal activity being perpetrated against the owner or occupant or the property. The police officer must be able to demonstrate an objective basis in fact that gives rise to his suspicion. There must be some articulable cause above the level of a mere "hunch", "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.

Occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock.

Since the implied invitation is for a specific purpose, the invitee's purpose is all-important in determining whether his or her activity is authorized by the invitation. Where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the accused through "knocking on the door", the police have exceeded the authority conferred by the implied licence to knock: *Le* at paras 97-102

D. CONSENT SEARCHES

With respect to s. 8, a consent to search requires that the Crown demonstrate on a balance of probabilities that the consent was fully informed. IN *R. v. Wills* (1992), 70 C.C.C. (3d) 529, the Court of Appeal outlined a number of factors required to establish valid consent to a search. Among these factors is a requirement that the individual giving consent be aware of the potential consequences of giving the consent. In other words, the person asked for his or her consent must appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation, including the nature of the charge or potential charge which he or she may face: *R v Sabir,* 2018 ONCA 912, at para 34

E. SEARCH WARRANTS

i. DEFINITION

A search warrant is an order issued by a justice of the peace that authorizes the police to enter a specified place to search for and seize specific property: *R v Ting,* 2016 ONCA 57 at para 47

ii. GENERAL WARRANTS

A peace officer may obtain a general warrant pursuant to s.487.01, which authorizes a peace officer to "use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property."

Section 487.01(1)(c) provides that a general warrant is not available where there is another statutory provision that "would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done."

However, there is nothing in the language of s. 487.01(1)(c) that precludes a peace officer from obtaining a general warrant solely because he or she has sufficient information to obtain a search warrant. Resort to a search warrant is

only precluded when judicial approval for the proposed technique, procedure or device or the doing of the thing" is available under some other federal statutory provision.

That the police are in a position to obtain a search warrant does not prevent them for continuing to investigate using all other lawful means at their disposal. In many cases the information the police present in support of an application for a general warrant would also support an application for a search warrant. There is nothing wrong in utilizing a general warrant to obtain information with a view to gathering additional and possibly better evidence than that which could be seized immediately through the execution of a search warrant.

A general warrant is to be "used sparingly as a warrant of limited resort" so that it does not become an "easy back door for other techniques that have more demanding pre-authorization requirements.

Where police are confronted with the choice between a series of conventional warrants or an application for a general warrant, if they apply for a general warrant they must meet the stricter requirements of s. 487.01, which can only be issued by a judge, not a justice of the peace, and they must establish that it is in the best interests of the administration of justice to issue the general warrant: *R v Jodoin,* 2018 ONCA 638, at paras 1, 11, 13, 14

iii. THE ITO

Applying for and obtaining a search warrant from an independent judicial officer is the antithesis of willful disregard of Charter rights. However, where the ITO that formed the basis for the issuance of the warrant is found to be insufficient to support it, the proper approach to determine the seriousness of the *Charter* breach is to first consider whether the ITO was misleading. If it was, the seriousness will depend on whether the use of false or misleading information was intentional or inadvertent: *R v Szilagyi,* 2018 ONCA 695 at para 54

A section 8 breach will arise where significant redaction renders the ITO insufficient to support the issuance of an ITO. However, where the court, after being able to review and summarize the unredacted ITO, finds reasonable and probable grounds to support the issuance of the warrant, this will militate in favour of inclusion of the evidence because, in such cases, the *Charter* violation

does not arise from police misconduct in preparing the ITO but only as a matter of law from the Crown's inability to disclose enough of the information in the ITO to demonstrate at the trial the reasonable and probable grounds that did exist: Szilagyi, at paras 66-67, citing *R v Learning* 2010 ONSC 3816

a) Reasonable Grounds to Believe

The ITO must contain reasonable grounds to believe that there is evidenc respecting the commission of an offence in the location to be searched. "Reasonable grounds to believe" is constitutionally defined as credibly-based probability. This standard exceeds suspicion, but falls short of a balance of probabilities: *R v Herta,* 2018 ONCA 927, at para 20

Reasonable grounds can be based on a reasonable belief that certain facts exist even if it turns out that the belief is mistaken: *R v Robinson,* 2016 ONCA 402 at para 40. But, for example, see *R v Brown, 2012 ONCA 225,* in which two officers with the same information arrived at different conclusions as to the existence of reasonable grounds

ITO must contain information about the informer's source of knowledge regarding the presence of criminal activity and where it will be located; otherwise, there is nothing in the information to compel a belief that the criminality would be in the location when the search was conducted. Failure to specify this information constitutes a serious and significant deficiency in the ITO. *R v Szilagyi,* 2018 ONCA 695 at para 47-48

On the issue of the informant's credibility and reliability, the ITO must indicate whether the Justice of the Peace was aware of any record for crimes of dishonesty or other offences relevant to credibility. It is insufficient to simply indicate, for example, that the informant was involved in the drug trade and expect the justice to infer criminal involvement that could undermine the informant's credibility. The purpose and effect of disclosing an informant's police involvement is to give the issuing justice a full picture of the credibility and reliability of the informant, particularly when the entire warrant is based on that person's information. It is not to say one thing but expect the justice to infer another.

An informant's credibility and reliability may not be enhanced simply because the ITO indicated that s/he had previously provided reliable information. However, in

some cases, the inability to assess the credibility of the source may be compensated for by the quality of the information and corroborative evidence: *Szilagyi,* at paras 50-51, 69-70; see also para 60 and 61 referencing *R v Rocha,* 2012 ONCA 707

A trial judge has residual discretion to set aside a search warrant, despite the presence of reasonable and probable grounds for its issuance, where the judge is satisfied that the conduct of the police has been subversive of the pre-authorization process leading to the issuance of the search authority. However, the threshold is high. Subversion requires an abuse of the pre-authorization process by non-disclosure or misleading disclosure or their like: *R v Paryniuk*, 2017 ONCA 87, at paras. 62-74.

b) Manner of Execution

Police choices about equipment and the manner of execution of a search need not be included in the ITO. These decisions are better considered as part of the inquiry into whether the search was conducted in a reasonable manner. This is supported by the fact that the statutory form used for an ITO, Form 1, makes no reference to the manner of execution: *R v Rutledge,* 2017 ONCA 635 at para 22

iv. Facial Validity of Warrant

In order to be facially valid, it is fundamental that a warrant contain an adequate description of: 1) the offence; 2) the place to be searched; and 3) the articles to be seized: *R v Ting,* 2016 ONCA 57 at para 50; *R v Saint,* 2017 ONCA 491

a) The Place to be Searched

Without an adequate description of the place to be searched, a warrant is invalid because: 1) the issuing justice cannot be assured that s/he is not granting too broad an authorization, or an authorization without proper reason; 2) the police officers called on to execute the search warrant would not know the scope of their search powers; and 3) those subject to the warrant would be left in doubt as to whether there is valid authorization for those searching their premises: see *Ting; Saint* at para 7

Just what constitutes an adequate description will vary with the location to be searched and the circumstances of each case.

With respect to a multi-unit, multi-use building, as seen in this case, the description must adequately differentiate the units within the building: *R v Ting,* 2016 ONCA 57 at paras 48-51

It is not enough for the ITO to accurately describe the premises to be searched. For a search warrant to fulfill its functions, those who are relying on it – including police officers who are executing it and third parties whose cooperation is sought – must not be required to look past the warrant to the ITO: *R v Ting,* 2016 ONCA 57 at paras 59-60

The inadequacy of the warrant is not remedied by the fact that the police nonetheless executed the warrant at the correct residence, because in such circumstances they may be guided by their personal knowledge of the premises to be searched, not by the warrant itself: *R v Ting,* 2016 ONCA 57 at para 61

If police enter the wrong premises based on a facially invalid ITO, and then promptly leave, the intiial entry does not preclude obtaining a second warrant properly identifying the premise to be searched. If, however, they remain and search the premises and remain present until a second warrant is obtained, the second warrant is invalid: *R v Ting,* 2016 ONCA 57 at paras 54-55

b) The date of execution of a warrant

A non-expiring warrant would undermine the purposes for the warrant requirement in the first place: facilitating meaningful judicial pre-authorization; directing and limiting the police in the execution of the search; and allowing occupants to understand the scope of their obligation to cooperate with the search.

There is an implied requirement that warrants be executed within a reasonable time of being issued. Warrants that are not executed within a reasonable time, whether because of delayed execution or because an unreasonable time frame is expressly authorized by the warrant, have long attracted judicial disapprobation: *R v Saint,* 2017 ONCA 491 at para 9

Where, however, the Information to Obtain requested a warrant to permit police to enter the residence on a specific day, and the warrant was on that day, and no other date appears on the warrant, it is implicit that the warrant that was sought was intended to be executed on the day it was issued. In such a circumstance, the date of issuance stated on the warrant is also the date for execution: an express specification of the date for execution would be superfluous: *Saint* at para 19

See, for example, *R v Malik*, 2002 BCSC 1731, where the Crown conceded that a warrant that similarly authorized a search "at any time" was open-ended and therefore invalid, and that a search conducted two days after the warrant was issued violated s. 8 of the Charter;

But see also *R v Shivrattan*, 2017 ONCA 23. In that case, and in the context of assessing the reasonableness of a nighttime search pursuant to a CDSA warrant, Doherty J.A. interpreted "at any time" in s. 11 of the CDSA as obviating the need for special justification for execution after 9:00 p.m. for warrants issued under the *Criminal Code,* as required by s. 488 of the Criminal Code.

The prospective execution of a search, based on a future contingency, together with the simultaneous execution of related searches is not contemplated by a conventional search warrant: *R v Jodoin,* 2018 ONCA 638 at para 19

v. Amplification of the Warrant

When a reviewing judge determines whether the warrant could have been issued, s/he may be permitted to rely on "amplification evidence", which is additional evidence presented at the voir dire.

The limitations to the use of amplification evidence include that: 1) it is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds; 2) It cannot be used to provide evidence that was not known to the police at the time the ITO was sworn; 3) it is to be used only to correct "some minor, technical error in the drafting of the affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable

and probable grounds and had demonstrated investigative necessity but had, in good faith, made" such errors: *R v Ting,* 2016 ONCA 57 at paras 63-64, 70

Amplification evidence may be used to correct good faith errors of the police in preparing the ITO, as long as it was available at the time of the warrant application: *R v Lowe,* 2018 ONCA 110 at para 38

vi. Excising the Warrant

A reviewing judge has no jurisdiction to excise correct information from an affidavit: *R v Min Mac,* 2016 ONCA 379 at para 59

vii. Subfacial Falidity of the Warrant

Where police misconduct lead to the obtaining of a search warrant, the fact that the issuing judge was told about the misconduct does not impact the seriousness of the breach under s.24(2). It is axiomatic that there be truthful disclosure in the ITO. Anything less would compound the police misconduct: *R v Strauss,* 2017 ONCA 628 at para 48

To rely on an after-the-fact acknowledgement of wrongdoing as a way to diminish the seriousness of a breach, and thereby achieve admission of the evidence, would give the police a licence to engage in misconduct and render the *Charter*'s protection meaningless: *Strauss* at para 50

A trial judge has residual discretion to set aside a search warrant, despite the presence of reasonable and probable grounds for its issuance, where the judge is satisfied that the conduct of the police has been subversive of the pre-authorization process leading to the issuance of the search authority. However, the threshold is high. Subversion requires an abuse of the pre-authorization process by non-disclosure or misleading disclosure or their like: *R v Paryniuk*, 2017 ONCA 87, at paras. 62-74.

viii. Night-time Entry

Where police seek to conduct a night search, s. 488 of the *Criminal Code* provides that the ITO is to include reasonable grounds for the search to be executed by night. A night search is only meant to be invoked exceptionally.

In *Lowe,* the Court of Appeal upheld the night entry that the police successfully requested in an ITO on the basis of an "imminence of a threat to public safety" arising from an alleged firearm in the residence: *R v Lowe,* 2018 ONCA 110 at paras 64-67

ix. CONFIDENTIAL INFORMANTS

a) General Principles

In circumstances where confidential informant information is at issue, the factors apply. One must weigh whether the informant was credible, whether the information predicting the commission of a criminal offence was compelling, and whether the information was corroborated by police investigation. The totality of the circumstances must meet the standard of reasonableness: *R v Dhillion,* 2016 ONCA 308 at para 30

Weakness in one of the *Debot* criteria can be compensated for by strengths in the other areas: *R v Herta,* 2018 ONCA 927, at para 34

b) Debot Factor #1: Credibility

Factors tending to show that the credibility of the informant(s) is weak:

- Where the CI is untested.
- Where the CI is said to be reliable and accurate, but no support is given for this assessment.
- The lack of information about whether the CI has a criminal record - especially when s/he is described as being deeply entrenched in the criminal sub-culture: *Dhillion,* at para 31
- The lack of information about the duration of the relationship between the CI and the handler
- The lack of information about the past reliability of the CI's information
- The lack of information about the CI's motivation to give information: *R v Herta,* 2018 ONCA 927, at para 32

Factors tending to enhance credibility:

- The fact that the police know the informants and they are not anonymous tipsters.
- The fact that the informants are informed of the potential criminal consequences if they lied or embellished the information they provided: *Dhillion* at para 32;

Where the police rely on an untried informant, “the quality of the information and corroborative evidence may have to be such as to compensate for the inability to assess the credibility of the source": *Dhillion* at para 33 (citation to *Debot*); *Herta* at para 34, 39

c) Debot Factor #2: Compellibility

Factors tending to show that the information is compelling:
The information is fairly detailed and specific (e.g., it describes various personal characteristics of the respondent, the types of drugs being trafficked, where the transactions occurred, and how they were carried out, as well as the target's precise address).
The fact that the CI knew the target personally (e.g., as a customer) and therefore had first-hand knowledge. This relationship helps to alleviate the concern that they were just perpetuating rumours or gossip: *Dhillion* at paras 34-35

Conclusory statements that do not provide a basis to assess their veracity and do not disclose the source of the information are not compelling: *R v Herta,* 2018 ONCA 927, at para 47

d) Debot Factor #3: Corroboration

Factors tending to support corroboration of the information:

- The consistency of information from several informants. This is distinguishable from circumstances in which there is only one anonymous or untried informant.
- Where police confirm the accuracy of specific information during their investigation (e.g., the target's name, the colour, make, and age of the his vehicle; the target's ethnicity, address, his approximate age, his criminal record, and the criminal activity alleged).

Note, there is no need to confirm the very criminality of the information given by the tipster, but there must be more than corroboration of innocent or commonplace conduct when the police are relying on an untested informant. Corroboration must be such so as to remove the possibility of innocent coincidence: *Dhillion* at paras 39-44; *R v Herta,* 2018 ONCA 927, at para 38

In *Herta,* the Court of Appeal held that there was insufficient corroborative evidence to warrant the belief that the target was in possession of the gun. This was in light of the fact that the corroborative facts related to information that many people would know, such as the target's telephone number, the type of car he was driving and where he was hanging out: 2018 ONCA 927, at para 40

e) Piercing Informer Privilege

Informer privilege is a fixed rule of law. In order to overcome that privilege, an accused person must persuade a judge that their innocence is at stake unless the privilege is set aside: *R v Durham Regional Crime Stoppers Inc.*, 2017 SCC 45 at para 11

x. Testing the Evidence at Trial: Cross Examination of Affiant

a) Standard of Review:

Absent error in law, a failure to consider relevant evidence, a material misapprehension of evidence, or an unreasonable factual finding, the appellate court must defer to the trial judge's assessment of the effect of the cross-examination on the sustainability of the authorization: R v Hall, 2016 ONCA 013at para 52-53

The court must also defer to the findings of fact made by the reviewing judge in his or her assessment of the record, as amplified on review, as well as to his or her disposition of the s. 8 Charter challenge: *R v Min Mac,* 2016 ONCA 379 at para 34

The task for the reviewing judge is to determine whether on the supportive affidavit, as amplified by evidence adduced on the review, there was sufficient

reliable evidence that might reasonably be believed on the basis of which the authorizing judge could have concluded that the probable cause requirement had been met: *R v Min Mac,* 2016 ONCA 379 at para 29

b) General Principles

The cross-examination of the affiant may be intended to show either that: 1) there were misleading facts or omissions in the affidavit, which should be excised or amplified; OR 2) the informant was not credible or reliable, therefore requiring that all of the information s/he provided must be disregarded: *R v Hall*, 2016 ONCA 013 at paras 50-51. See example of intentional and grossly negligent police misconduct in drafting afidavit: *Hall* at paras 43, 65

Cross-examination of the affiant may occur where the accused shows that the proposed cross-examination will elicit testimony that tends to discredit the existence of a pre-condition to the issuance of the warrant, as for example, reasonable and probable grounds: *Min Mac* at para 27

xi. Testing the Evidence at Trial: Garafoli Applications

Review of principles and procedure to be applied on a Garafoli Application: *R v Beauchamp*, 2015 ONCA 260 (where underlying charge was conspiracy); *R v Crevier*, 2015 ONCA 619

a) The Test

The test is whether the information in the affidavit or ITO, considered as a whole, constitutes sufficient reliable evidence that might reasonably be believed on the basis of which the relevant search authority *could* have issued: *R v Nero,* 2016 ONCA 160 at para 126

b) The Standard of Review

The standard of review on appeal is one of deference to findings of fact made by the motions judge. Absent a demonstrated misapprehension of the evidence, a failure to consider relevant evidence, a consideration of irrelevant evidence, an unreasonable finding or an error of law in the application of the governing

principles, the appellate court will not interfere with the decision of the motions judge: *Nero* at para 124

c) Excising Information

A reviewing judge has no jurisdiction to excise correct information from an affidavit: *R v Mac,* 2016 ONCA 379 at para 59

d) Appointing Amicus

The trial judge has discretion to appoint amicus to assist in the consideration of issues relevant to confidential informants in "particularly difficult cases". But the appointment of amicus on a step six procedure is the exception rather than the rule. It is incumbent on the defence to demonstrate why the appointment of amicus is necessary in a particular case and to set out a proposed procedure for the use of amicus that protects the confidentiality of the CI's identity: *R v Shivrattan*, 2017 ONCA 23, at paras. 65-66; *R v Thompson*, 2017 ONCA 204 at para 17.

There are many sensitive issues that would have to be resolved before the trial judge could appoint amicus on a "Step Six" procedure," including the relationship between amicus and defence counsel. Steps would have to be taken to ensure that amicus did not inadvertently disclose anything that would reveal the identity of the CI: *Shivrattan* at para 67; *Thompson* at para 21.

xii. ELECTRONIC SEARCHES (MOBILES AND COMPUTERS)

It cannot be assumed that a justice who has authorized the search of a place has taken into account the privacy interests that might be compromised by the search of any computers or mobile communication devices that might be found within that place: *Nero* at para 157

A computer search requires specific pre-authorization. If police intend to search computers or mobile communication devices found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice, by information on oath, that they have reasonable grounds to believe that any computer or other mobile communication device they discover will contain the things for which they are looking: Nero at para 158-159

A broad search of multiple devices or large amounts of data unrelated to the specific investigation may violate s.8 of the *Charter*: *R v John,* 2018 ONCA 702 at para 25 (citations omitted).

a) Child Pornography cases

In a search warrant targeting child pornography on a computer, it may be reasonable for police to look at all image and video files. In a case where there are multiple users of the computer, it may also reasonable be reasonable for police to examine the internet search history and the dates and times of access to the accused's internet accounts to identify the person searching for child pornography. The search for the identity of the person searching for child pornography may also justify the police looking at documents, banking records, and other programs or files: *R v John,* 2018 ONCA 702 at paras 21-22

There need not be prior evidence of concealment of incriminating evidence before police can look at all images and videos stored on a computer in this kind of investigation where some child pornography has been located on the computer on initial examination. Rather, a search of all images and videos is appropriate in an investigation like this precisely to determine whether there is more child pornography on the computer. To limit police to searches by hash values, file names and download folders would be to provide a roadmap for concealment of files containing child pornography.

Nor is a search necessarily overbroad because it is not tailored to a date range in terms of the files searched, provided the police are looking for images and videos of child pornography and evidence that might show who was responsible for that content: *John* at paras 24-25

xiii. NOTICE REQUIREMENTS

A search warrant can include a statutorily-mandated requirement to inform the recipient of the existence and execution of the warrant within 180 days after the warrant's execution: *R v Coderre,* 2016 ONCA 276 at para 2

The requirement of after-the-fact notice casts a constitutionally important light back on the statutorily authorised intrusion because s. 8 protects an "ability to identify and challenge such invasions, and to seek a meaningful remedy."

The failure to abide by a statutorily-mandated requirement to provide notice fails to give effect to those protections and, therefore, infringes the Charter: *Coderre* at para 13

F. SAFETY SEARCHES

It is only when police officers have reasonable grounds to believe that there is an imminent threat to their safety that it will be reasonably necessary to conduct such a search: *R v Jupiter,* 2016 ONCA 114at para 1

Where officers decide to conduct a "safety" search before they arrive at a place and regardless of what happens when they get there, that predetermination by the officers, while not conclusive as to the propriety of the safety search, goes a long way in support of a conclusion that the safety search cannot be justified on the basis of a reasonable apprehension of imminent harm: *Jupiter* at para 2

For an extensive review of general principles governing the authority for police to conduct a safety search incidental to an investigative detention, particularly pursuant to a 911 call, see *R v Lee,* 2017 ONCA 654 at paras 27-43. See especially the concurring reasons of Pardu J beginning at para 72.

G. SEARCH INCIDENT TO ARREST

A search incident to arrest is only valid if the arrest itself is lawful. has its genesis in a lawful arrest.

The search must be truly incidental to the arrest. There must be some reasonable basis for the search, for example, to ensure the safety of the public and police; to protect evidence from destruction; or to discover evidence. To be truly incidental to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. This involves both subjective and objective elements. The police must have one of the purposes for a valid search incident to arrest in mind when conducting the search. And the searching officer's belief that this purpose will be served by the search must be reasonable: *R v Gonzales,* 2017 ONCA 543 at para 98

Where the justification for a search incident to arrest is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the arrest has been made. What matters is that there be a link between the location and purpose of the search and the

grounds for the arrest: A search incident to arrest may include a search of an automobile of which the arrested person is in possession, but the scope of that search will depend on several factors: *Gonzales* at para 99 *R v Fearon*, 2017 SCC 77 at paras. 22, 25

For analysis on warrantless search of camera pen and admissibility of the evidence, see *R v Jarvis,* 2017 ONCA 778

i. POST-SEIZURE SUPERVISION

Section 489.1(1) applies to seizures made by peace officers as a result of searches incident to arrest. Where the thing seized is not being returned to the person lawfully entitled to possess it, s. 489.1(1)(b)(ii) requires the seizing officer, as soon as it is practicable to do so, to report to a justice that she or he has seized something and is detaining it to be dealt with by the justice under s. 490(1).

The *Report to a Justice* must be in a statutory form – Form 5.2. This form must describe the authority under which the seizure was made; the thing that was seized; and where, how or where applicable by whom it is being detained. The officer who files the report must date and sign it.

The reporting requirement of s. 489.1(1)(b)(ii) provides a link to s. 490(1) and ensures long-term post-seizure supervision of the things seized by a judicial officer: *R. v. Garcia-Machado*, 2015 ONCA 569 at paras. 15-16.

Failure to file a *Report to a Justice* in Form 5.2 means that no post-seizure supervision of the thing seized will take place: *Garcia-Machado*, at para. 16. But failure to file a *Report to a Justice* as soon as practicable after a thing has been seized also has a constitutional dimension: the continued detention constitutes a breach of s. 8 of the *Charter*: *Garcia-Machado*, at paras. 44-48.

Neither section 489.1 nor Form 5.2 has anything to say about how the report is to be provided to a justice. The *Report* requires the signature of the peace officer who submits it, but does not require or provide space for a justice to sign the report to acknowledge its receipt, endorse a disposition or advise the submitting officer of either event.

Section 490 governs extended detention of seized items. Section 490(2) requires notice to the person from whom a thing has been seized if the thing has been

detained more than three months from the date of seizure. Neither the section nor any other *Code* provision prescribes a form for the notice, although s. 490(2)(a) describes the procedure as a "summary application". But one thing is clear: while the provision provides the opportunity, no obligation is imposed upon the person from whom the thing was seized to take any steps for its recovery: *R v Tsekouras,* 2017 ONCA 290 at paras 95-100.

ii. CELLPHONES

Excerpts from R v Tsekouros, 2017 ONCA 290 at paras 84-94

A cellphone may be searched incident to arrest, provided what is searched and how the search is conducted are strictly incidental to the arrest and the police keep detailed notes of what has been searched and why: *R v Fearon*, 2017 SCC 77 at para. 4. The search must be truly incidental to the arrest, that is to say, exercised in the pursuit of a valid purpose related to the proper administration of justice: *Fearon*, at paras. 16 and 21.

The scope of the search of a cellphone or similar device incident to arrest must be tailored to the purpose for which it may lawfully be conducted. Not only the nature, but also the extent of the search performed on the cellphone or similar device must be truly incidental to the particular arrest for the particular offence. As a general rule, therefore, only recently sent or drafted emails, texts, photos and the call log may be examined: *Fearon*, at para. 76.

The searches must be done promptly to effectively serve their purpose, such as the discovery of evidence: *Fearon*, at para. 75. However, cellphone searches incident to arrest are not routinely permitted simply for the purpose of discovering additional evidence. A cellphone or similar device search incident to arrest for the purpose of discovering evidence is only a valid law enforcement objective when the investigation will be stymied or significantly hampered without the ability to search the device incident to arrest. Investigators must be able to explain why it was not practical, in all the circumstances of the investigation, to postpone the search until they could obtain a warrant: *Fearon*, at para. 80.

Officers executing the search must make detailed notes of what they have examined on the device and how it was searched. The applications searched,

the extent and time of the search. Its purpose and duration. See, *Fearon*, at para. 82.

H. STRIP SEARCHES

A strip search is defined as "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments: *R v Pilon,* 2018 ONCA 959, at paras 13, 28

The common law search incident to arrest power includes the authority to conduct a strip search. A strip search must be related to the reasons for the arrest itself. For example, where the arrest is for an offence involving possession of contraband and the purpose of the search is to discover contraband secreted on the arrestee's person.

Strip searches must not be carried out as a matter of routine, an inevitable consequence of every arrest. In addition to the reasonable grounds which must underpin the arrest for it to be lawful, additional reasonable and probable grounds must also justify the strip search. The mere *possibility* of an individual concealing evidence is not sufficient to justify a strip search to locate that evidence: *R v Gonzales,* 2017 ONCA 543 at paras 135-139; *Pilon* at paras 15, 16

An arrested person's non-cooperation and resistance does not necessarily entitle the police to engage in behaviour that disregards or compromises his physical and psychological integrity and safety: *Pilon* at para 16

Strip searches should be conducted at a police station unless there are exigent circumstances requiring that the detainee be searched prior to being transported to a police station: *Pilon* at para 17

The following guidelines provide a framework for police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:

> 1. Can the strip search be conducted at the police station and, if not, why not?

2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?

3. Will the strip search be authorized by a police officer acting in a supervisory capacity?

4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?

5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?

6. What is the minimum of force necessary to conduct the strip search?

7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?

8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?

9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?

10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?

11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted? : *Pilon* at para 19

In *Pilon,* the Court of Appeal accepted that the jurisprudence has thus far only recognized safety concerns as justifying a field strip search on the basis of exigent circumstances. However, the court left open the possibility that very serious and immediate concerns about the preservation of evidence may create an urgent and necessary need to conduct a strip search in the field: paras 26-27

I. EXIGENT CIRCUMSTANCES

i. THE RIGHT TO PRIVACY IN ONE'S HOME

The s. 8 right to be secure against unreasonable searches protects a person's expectation of privacy from state intrusion. Nowhere is that expectation of privacy higher than in one's home. To enter a home, police ordinarily need previous authorization: a warrant. Warrantless entries of a home are presumed to be unreasonable and in breach of s. 8. However, statutory and common law exceptions exist: *R v Davidson,* 2017 ONCA 257 at paras 2-21

Police are entitled to enter a home in response to a 911 call to determine whether the caller is in need of assistance; in doing so, they are not trespassing: *R v Zarama*, 2015 ONCA 860

ii. UNDER THE CONTROLLED DRUGS AND SUBSTANCES ACT

Exigent circumstances under s. 11(7) of the CDSA exist if: 1) the police have grounds to obtain a search warrant under s. 11 of the CDSA (the probable cause requirement); and 2) the police believe, based on reasonable grounds, that there is imminent danger that evidence located in the premises will be destroyed or lost, or that officer or public safety will be jeopardized if the police do not enter and secure the premises without delay (the urgency requirement): *R v Phoummasak,* 2016 ONCA 46 at para 12: *R v Paterson,* 2017 SCC 17 at para 37

Evidence that the police had grounds to obtain a search warrant, but instead proceeded with other investigative measures, can in some situations afford evidence that the police set out to create exigent circumstances to justify entry into a premise without a warrant: *R v Phoummasak,* 2016 ONCA 46 at paras 14-16

iii. UNDER THE CHILD AND FAMILY SERVICES ACT

Under s. 40(2), a child protection worker may obtain a warrant to seize a child from a home if reasonable and probable grounds exist to show the child is in

need of protection and a less restrictive course of action will not protect the child adequately. Section 40(7) authorizes a child protection worker to enter a home without a warrant to bring a child to a place of safety, but only if two conditions are met. The child protection worker must believe on reasonable and probable grounds that:

- The child is in need of protection; and
- There would be a substantial risk to the child's health or safety during the time needed to obtain a warrant or to bring the matter on for a hearing.

Section 40(11) supplements s. 40(7) and provides that if necessary the child protection worker can enter a home by force to search for and remove a child. Section 40(13) provides that a police officer has the same powers as does a child protection worker under s. 40(2), (7) and (11): *R v Davidson,* 2017 ONCA 257 at paras 38-42

iv. Under the Criminal Code

Under s. 529.3 of the *Criminal Code*, the police may enter a home without a warrant to arrest or apprehend a person if the conditions for obtaining a warrant exist but "exigent circumstances" – that is, urgent or pressing circumstances – make it impractical to obtain one. The Code includes among exigent circumstances those where the police have reasonable grounds to suspect entry into the home is necessary to protect a person's imminent harm or death, or to prevent the imminent loss or destruction of evidence: *R v Davidson,* 2017 ONCA 257 at para 21

v. At Common Law

The police have a common law duty to protect a person's life or safety and that duty may, depending on the circumstances, justify a forced, warrantless entry into a home. For example, when the police receive a 911 call they have authority to investigate the call, which can include a warrantless entry into a home to determine whether the caller is in need of help. The police must, however, reasonably believe that the life or safety of a person inside the home is in danger. And once inside the home, their authority is limited to ascertaining the reason for

the call and providing any needed assistance. They do not have any further authority to search the home or intrude on a resident's privacy or property: *R v Davidson,* 2017 ONCA 257 at paras 22-27

In *Davidson,* the Court of Appeal found that the police warrantless entry into the home was not justified by exigent circumstances. The entry was therefore unlawful and the evidence discovered as a result of that entry, drugs, was excluded.

J. MOTOR VEHICLE SEARCHES

Where the police conduct a valid HTA stop and thereafter legitimately form reasonable and probable grounds to arrest and search a vehicle, the fact that the police had a dual HTA/criminal purpose at the very outset of the stop does not taint the lawfulness of the initial stop and detention: *R v Johnson,* 2016 ONCA 31 at para 9

The police decision to call a tow truck to remove a vehicle does not justify an inventory search in every case: *R v Harflett,* 2016 ONCA 248 at para 29-30

K. BORDER-SEARCHES

Persons arriving at the border have a reduced expectation of privacy. Because of individuals' reduced expectation of privacy at the border, section 8 is not engaged by routine questioning and luggage searhes: *R v Johnson,* 2016 ONCA 31 at paras 16, 23

Section 8 is not engaged by a routine dog-sniff search at the border, which falls within the catgory of routine border-searches that attract no reasonable expectation of privacy: *R v Johnson,* 2016 ONCA 31at paras 22, 24-26. However, a dog-sniff search that is specifically targeted towards a suspect at the border is distinguishable and may engage s.8 of the Charter: *R v Johnson,* 2016 ONCA 31 at para 27

i. Manner of Execution of a Search

In an assessment of the manner in which a search has been executed, a reviewing court balances the rights of suspects, on the one hand, with the requirements of safe and effective law enforcement, on the other.

Police decisions about the manner in which a search will be carried out fall to be adjudged by what was or should reasonably have been known to them at the time the search was conducted, not through the lens of how things turned out to be. Police are entitled to some latitude on how they decide to enter premises under a warrant. Omniscience is not a prerequisite for a search to be conducted in a reasonable manner: *R v Rutledge,* 2017 ONCA 635 at paras 25-26

L. BODILY SEARCHES

For an overview of the jurisprudence relating to police officers' seizure of blood samples taken at the hospital, see *R v Culotta,* 2018 ONCA 665, especially the dissenting opinion of Pardu J.A.

M. PRODUCTION ORDERS

i. Challenging a Production Order

a) The Test

The enabling warrant or order is presumed to be valid, but this presumption is rebuttable: *R v Nero,* 2016 ONCA 160 at para 68

b) Standing to Challenge

In *Jones,* 2017 SCC 60 the Supreme Court held that it is objectively reasonable for the sender of a text message to expect that a service provider will maintain privacy over the records of his or her text messages stored in its infrastructure, but that the accused's rights were not violated because the text messages were legitimately seized by police pursuant to a production order.

c) General Principles

Like the authorizing justice, the reviewing judge is entitled to draw reasonable inferences from the contents of the ITO. That an item of evidence in the ITO may support more than one inference, or even a contrary inference to one supportive of a condition precedent, is of no moment: *Nero* at para 71

Inaccuracies and omissions in the ITO are not, without more, fatal to the adequacy of the material to establish the necessary conditions precedent: *Nero* at para 72

The judge may consider documents relating to the order or warrant, any additional evidence adduced at the hearing and the submissions of counsel. The review requires a contextual analysis of the record: *Nero* at paras 67-68

Hearsay statements of a CI can provide reasonable and probable grounds to justify a production order: *Nero* at para 75

Corroboration is not required on every single detail, but the ITO should describe efforts to confirm the credibility and reliability of the source: *Nero* at para 76.

d) Appeal

On appeal, deference is owed to the findings of fact made by the reviewing judge in his assessment of the record, as well as to his disposition of the s. 8 *Charter* challenge. In the absence of an error of law, a misapprehension of material evidence or a failure to consider relevant evidence, the appellate court should not interfere: *Nero* at para 74

The test or standard a reviewing judge is to apply is whether the ITOs contained sufficient reliable evidence that might reasonably be believed on the basis of which the authorizing justice could have concluded that the conditions precedent required to be established had been met: *Nero* at paras 66, 69, 70

ii. TEXT MESSAGES

Production orders may authorize the seizure of historical text messages. A production order must not, however, authorize the production of any text messages that are either not yet in existence or are still capable of delivery (i.e.,

in the transmission process) at the time the order is issued. This should be clear from the face of the order. A production order should not be used to sidestep the more stringent Part VI authorization requirements for intercepts: *R v Jones,* 2017 SCC 60

N. NUMBER PRODUCTION WARRANTS

The principles governing review of production orders are applicable to the review of number production warrants: *Nero* at para 69

O. INTERCEPTION OF PRIVATE COMMUNICATIONS: S.186(1)

The acquisition of historical text messages does not constitute an intercept: *R v Jones,* 2016 ONCA 543 at paras 20-36

i. THE TEST

There are two conditions precedent required to grant an authorization to intercept private communications: 1) that it would be in the best interests of the administration of justice to do so ("probable cause"); and 2) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures ("investigative necessity"): *R v Nero,* 2016 ONCA 160 at para 114

iii. THE PROBABLE CAUSE REQUIREMENT

The probable cause requirement demands reasonable and probable grounds to believe that: 1)a specified crime, and "offence" as defined in s. 183(1) of the Criminal Code, has been or is being committed; and 2)the interception of the private communication sought will afford evidence of the, or an, offence for which authorization is sought. The analysis must involve a common sense approach that takes into account that the subject matter of the investigation is future communications, not yet in existence: *Nero* at paras 115-116

iv. THE INVESTIGATIVE NECESSITY REQUIREMENT

The investigative necessity requirement does not dictate that interception of private communications is an investigative tool of last resort. This factor is met where, practically speaking, there is no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry: *Nero* at paras 118-122

Whether investigative necessity is established is informed by the investigative objectives pursued by the police. The requirement may be met where an investigative objective is to obtain evidence confirmatory of information provided by a source whose testimony is not available through no fault of or connivance by the authorities, or is subject to special scrutiny. The requirement applies to the investigation as a whole, not to each individual target. The supportive affidavit need not demonstrate investigative necessity on an individual target basis

The police have have more need for wiretapping where they are trying to move up the chain and catch the higher-ups in the operation. However, the fact that wiretap authorization might inevitably be required because of the nature of the activity being investigated does not excuse the police from the obligation to establish a firm evidentiary foundation for the authorization through the use of less intrusive methods of investigation: *R v Mac,* 2016 ONCA 379 at paras 39-40

See also *R v Beauchamp*, 2015 ONCA 260, at paras 115-129; *R v Telus,* 2013 SCC 15

See generally *R v Duarte*, [1990] 1 SCR 30, which deals with the simultaneous interception of voice communication by the state.

v. "KNOWN" PERSONS UNDER S. 185(1)(E)

Section 185(1)(e) of the Criminal Code enacts the standard for including persons as “known” in the supportive affidavit. The standard is a modest one:

The threshold for describing a person as a “known” in the supportive affidavit is a modest one. Investigators need not have reasonable and probable grounds to believe that the person was involved in the commission of an offence being investigated. Provided investigators know the identity of the person and have

reasonable and probable grounds to believe that the interception of that person's private communications may assist the investigation of an offence, that person is a "known" for the purposes of s. 185(1)(e).

vi. The Standard of Review

The standard of review on appeal is one of deference to findings of fact made by the motions judge. Absent a demonstrated misapprehension of the evidence, a failure to consider relevant evidence, a consideration of irrelevant evidence, an unreasonable finding or an error of law in the application of the governing principles, the appellate court will not interfere with the decision of the motions judge: *Nero* at para 124

Section 9

Police duties and their authority to do things in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it helped the police perform their assigned duties. Where that conduct interferes with the liberty or freedom of an individual, it will be lawful only if and to the extent it is authorized by law: *R v Gonzales,* **2017 ONCA 543** at para 61

A. DEFINITION OF "ARBITRARY"

A lawful detention is not arbitrary within s. 9 of the Charter unless the law authorizing the detention is itself arbitrary. On the other hand, a detention not authorized by law is arbitrary and violates s. 9 of the Charter:

A discretionary statutory authority may be arbitrary where the statute provides no criteria, express or implied, to govern its exercise. A discretion to detain persons will be arbitrary if there are no criteria, express or implied, which govern its exercise. A detention governed by unstructured discretion is arbitrary: *R v Donnelly,* 2016 ONCA 988 at paras 69-70

A. GENERAL PRINCIPLES ON ARREST

An arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Further, those grounds must be objectively justifiable to a reasonable person placed in the position of the officer: *Dhillion* at para 24

The standard is met at the point where credibly-based probability replaces suspicion: *Dhillion,* at para 25

Reasonable grounds can be based on a reasonable belief that certain facts exist even if it turns out that the belief is mistaken: *R v Robinson,* 2016 ONCA 402 at para 40. But, for example, see *R v Brown, 2012 ONCA 225,* in which two officers with the same information arrived at different conclusions as to the existence of reasonable grounds

In determining whether the arresting officer had reasonable and probable grounds to arrest based on his own observations, it is irrelevant that other officers also made those observations, if those observations did not factor into the arresting officer's decision to arrest: *R v Gonzales,* 2017 ONCA at para 543 at para 106

An officer cannot rely upon an accused's refusal to answer questions as a factor supporting reasonable and probable grounds to arrest, as this "extracts a price for the exercise of a constitutional right:" *Gonzales* at para 105

When considering the objective reasonableness of the subjective grounds for arrest, a court must look to the totality of the circumstances, and it is not appropriate to consider each fact in isolation: *R v Labelle,* 2016 ONCA 110 at para 10

Where confidential informant information is the basis of grounds to arrest, the *Debot* factors apply. The court must weigh whether the informant was credible, whether the information predicting the commission of a criminal offence was compelling, and whether the information was corroborated by police investigation. The totality of the circumstances must meet the standard of reasonableness: *Dhillion* at para 30

For "a non-exhaustive legal backdrop to review of the exercise of police arrest powers" by Justice Hill, see *R v Cunsolo,* [2008] OJ No 3754 (Sup Ct Jus) at para 68; see also *R v Censoni,* [2001] OJ No 5189 (Sup Ct Jus) at paras 30-40

B. GENERAL PRINCIPLES ON DETENTION

vii. REASONABLE SUSPICION STANDARD

The police may detain a person for investigative purposes if they have reasonable grounds to suspect that the person is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances: *R v Darteh,* 2016 ONCA 141 at para 4; *R v McGuffie,* 2016 ONCA 365 at para 35

The standard "reasonable grounds to suspect" requires that the police have a "reasonable suspicion" or a suspicion that is grounded in objectively discernible facts, which could then be subjected to independent judicial scrutiny: *R v Darteh,* 2016 ONCA 141 at para 4

Reasonable suspicion may be grounded in a constellation of factors, even if any one of those factors on its own would not have been sufficient: *R v Darteh,* 2016 ONCA 141 at para 7

A standard of reasonable suspicion addresses the possibility of uncovering criminality, not a probability of doing so as is the case for a reasonable belief: *R v Nero,* 2016 ONCA 160 at para 73

viii. DURATION AND NATURE OF DETENTION

Principles below excerpted from *R v Barclay,* 2018 ONCA 114 at paras 21-32

An investigative detention must be "brief in duration" and conducted in a reasonable manner.

There is no bright line temporal rule in determining when an investigative detention becomes unjustifiably long. The word "brief" is descriptive and not

quantitative. It describes a range of time and not a precise time limit. The range, however, has temporal limits and cannot expand indefinitely to accommodate any length of time required by the police to reasonably and expeditiously carry out a police investigation. This requirement of brevity applies even if the police treatment of the suspect is otherwise exemplary during the period of detention.

All investigative detentions must be "brief" because the state interference with the individual's liberty rests on a reasonable suspicion of criminal activity, a much lower standard than the reasonable and probable grounds needed for an arrest.

The purpose of the brief detention contemplated under the investigative detention power is to allow the police to take investigative steps that are readily at hand to confirm their suspicion and arrest the suspect or, if the suspicion is not confirmed, release the suspect. The police cannot use investigative detention as an excuse for holding suspects while the police search for evidence that might justify the arrest of the suspect. Nor does investigative detention mean that the police can detain suspects indefinitely while they carry out their investigation: *v McGuffie,* 2016 ONCA 365 at paras 38-39

The permitted duration of an investigative detention is determined by considering whether the interference with the suspect's liberty interest by his continuing detention was more intrusive than was reasonably necessary to perform the officer's duty, having particular regard to the seriousness of the risk to public or individual safety. In other words, the duration and nature of an investigative detention must be tailored to the investigative purpose of the detention and the circumstances in which the detention occurs.

The permitted duration of an investigative detention is case-specific. Some of the relevant factors include:

- the intrusiveness of the detention.
- the nature of the suspected criminal offence.
- the complexity of the investigation.
- any immediate public or individual safety concerns.
- the ability of the police to effectively carry out the investigation without continuing the detention of the suspect.
- the lack of police diligence.
- the lack of immediate availability of the required investigative tools.

C. DETENTION VERSUS ARREST

"[A]n investigative detention is not the same thing as an arrest and could not be allowed to become “a de facto arrest”. The significant interference with individual liberty occasioned by an arrest is justified because the police have reasonable and probable grounds to believe that the arrested person has committed an offence. Investigative detention does not require the same strong connection between the detained individual and the offence being investigated. The detention contemplated by an investigative detention cannot interfere with individual liberty to the extent contemplated by a full arrest," *R v McGuffie,* 2016 ONCA 365 at para 37

B. PSYCHOLOGICAL DETENTION

Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider the following factors:

a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or singling out the individual for focused investigation.

b) The nature of the police conduct, including: the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

c) The particular characteristics or circumstances of the individual where relevant, including: age; physical stature; minority status; and level of sophistication

The central question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. The basis of psychological detention, absent a legal requirement to comply, remains that of a demand by the police officer coupled with a reasonable belief that there is no option but to comply with that demand.

The test for psychological detention must be determined objectively, having regard to all the circumstances of the particular situation. The focus is on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops. The objective nature of the inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections.

The views of the arresting officers may be significant in determining whether a psychological detention has occurred. However, those subjective intentions are not determinative: *Grant* at para. 32. Similarly, while the test is objective, the individual's specific circumstances must be taken into account, as will his or her personal circumstances, including age, physical stature, and minority status, and level of sophistication. The individual's perception at the time may also be relevant: *R v NB,* 2018 ONCA 556 at para 112 – 117, 119 (citing *Grant*)

The police are entitled to question anyone in the course of investigating an offence or determining whether an offence has been committed, but they have no power to compel answers. Police questioning, even at a police station, does not necessarily result in a detention where the accused attended voluntarily as a result of a request and there was no evidence that he or she felt deprived of his liberty: *NB* at para 119

D. THE SMELL OF MARIJUANA AS GROUNDS

No bright line rule prohibits the presence of the smell of marijuana as the source of reasonable grounds for an arrest. However, what is dispositive are the circumstances under which the olfactory observation was made. Sometimes, police officers can convince a trial judge that their training and experience is sufficient to yield a reliable opinion of present possession. It is for the trial judge

to determine the value and effect of the evidence: *R v Gonzales,* 2017 ONCA 543 at para 97

The sense of smell is highly subjective. Where the police are advised by a confidential informant that s/he smelled marijuana coming from property associated to the suspect, this does not give rise to grounds to arrest, especially where there is no indication that the CI has special or even reliable olfactory powers or training or experience in detecting the odour of marijuana. It does, however, give the police grounds to detain: *R v Barclay,* 2018 ONCA 114 at para 36

E. MOTOR VEHICLE DETENTIONS

i. General Principles

A roadside stop of a vehicle for a provincial regulatory offence under statutes like the HTA (e.g. speeding) is a detention: *R v Harflett,* 2016 ONCA 248 at para 18

Where the police conduct a valid HTA stop and thereafter legitimately form reasonable and probable grounds to arrest and search a vehicle, the fact that the police had a dual HTA/criminal purpose at the very outset of the stop does not taint the lawfulness of the initial stop and detention: *R v Johnson,* 2016 ONCA 31 at para 9

Sometimes, a traffic stop may have more than one purpose. However, the mere existence of another purpose motivating the stop, beyond highway regulation and safety concerns, does not render the stop unlawful. But the additional purpose must itself not be improper, or proper but pursued through improper means, and must not entail an infringement on the liberty or security of any detained person beyond that contemplated by the purpose that underpins s. 216(1): *R v Gonzales,* 2017 ONCA 435 at para 58

Gathering police intelligence falls within the ongoing police duty to investigate criminal activity. And so it is that it is permissible for police to intend, within the confines of a stop and detention authorized by the *HTA* to avail themselves of the opportunity to further the legitimate police interest of gathering intelligence in their investigation of criminal activity: *Gonazles* at para 59

ii. SECTION 48(1) OF THE HTA

Section 48(1) of the *Highway Traffic Act* reads:

A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 254 of the *Criminal Code* (Canada).

Police officers have the right to stop a vehicle for the purpose of checking on the sobriety of the driver. This is a power that the police have both at common law and through statutes such as the *Highway Traffic Act*: *R. v. Orbanski; R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 41.

The actions of the police in stopping a vehicle under their authority at common law or by statute only constitutes an unconstitutional stop if the reason for the stop is unconnected to a highway safety purpose: *R v Gardner,* 2018 ONCA 584 at paras 21-22

iii. SECTION 216(1) OF THE HTA

Section 216(1) of the *HTA* authorizes a police officer to stop vehicles for highway regulation and safety purposes, even where the stops are random. This detention is circumscribed by its purpose. It is limited to the roadside. It must be brief, unless other grounds are established that permit a further detention. An officer may require a driver to produce the documents drivers are legally required to have with them. To check those documents against information contained in databases accessible through the onboard computer terminal in police vehicles, an officer is entitled to detain the vehicle and its occupants while doing so.

In addition to requiring production of various documents associated with the operation of a motor vehicle, a police officer, acting under the authority of s. 216(1) of the *HTA*, may also make a visual examination of the interior of the vehicle to ensure their own safety during the detention. However, s. 216(1) does not authorize more intrusive examinations of the interior of the vehicle or inquiries of any occupant directed at subjects not relevant to highway safety concerns: *R v Gonzales,* 2017 ONCA 435 at paras 55-56

Stops made under s. 216(1) will not result in an arbitrary detention provided the decision to stop is made in accordance with some standard or standards which promote the legislative purpose underlying the statutory authorization for the stop, that is to say, road safety concerns. Where road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those concerns cannot be summoned to legitimize the stop and some other legal authority must be found as a sponsor: *Gonzales* at para 60

iv. Standard of Review

A trial judge's finding that highway regulation or safety concerns was a purpose that animated a traffic stop is a finding of fact. As a consequence, the finding is subject to deference and cannot be set aside by this court unless it is unreasonable or based upon a material misapprehension of the evidence adduced at trial: *R v Gonzales,* 2017 ONCA 435 at para 57

F. BORDER DETENTIONS

Routine border searches do not result in a detention and therefore do not give rise to any right to counsel or the right to remain silent: *R v. Jackman,* 2016 ONCA 121 at para 33; *R v Sinclair,* 2017 ONCA 287 at para 6

The correct analysis to determine detention in an international border context is whether the border officer has decided, because of some sufficiently strong particularized suspicion, to go beyond routine questioning of a person and to engage in a more intrusive form of inquiry". Where the officer has made that decision, the individual may be detained, even when subject to that routine questioning: see *R. v. Jones* (2006), 81 OR (3d) 481 (CA), at para. 42; see also *R v Peters,* 2018 ONCA 493 at para 8

The trial judge must assess the objective reasonableness of the border officer's subjective belief, through the lens of a reasonable person standing in the shoes of the [border] officer: *Peters* at para 9

Where, following a routine sniffer dog search at the border, a sniffer dog alert arises, this alert, standing alone, does not necessarily give rise to such a particularized level of suspicion that the accused's case ceases to be routine: *R v. Jackman,* 2016 ONCA 121 at para 33; *Sinclair* at para 7

In *Peters,* the Court of Appeal found that the trial judge was entitled to rely on the officer's testimony that in his experience, X-ray anomalies in food products often yield innocent results and so, at the point of the X-ray, the level of particularized suspicion did not lead to questioning beyond what was routine.

C. COMMON LAW: WATERFIELD TEST

Absent statutory authority to legitimize police conduct, the common law may prevail. The Waterfield analysis provides a two-step test to determine whether police conduct that interferes with an individual's liberty is lawful at common law. The first inquiry or step requires a determination of whether the police conduct that gives rise to the interference falls within the general scope of any duty imposed upon an officer by state or at common law. Where this threshold has been met, the second step or stage requires a determination of whether the conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

The second step or stage involves and requires a balancing of the competing interests of the police duty and the liberty interests at stake. This entails consideration of whether an invasion of individual rights is necessary for the police to perform their duty, and whether the invasion is reasonable, in light of the public purposes served by effective control of criminal conduct, on the one hand, and respect for the liberty and fundamental dignity of individuals, on the other. Relevant factors to consider include:

i. the duty being performed;
ii. the extent to which some interference with individual liberty is necessary to perform that duty;
iii. the importance to the public good of the performance of that duty;
iv. the liberty intruded upon;
v. the nature and extent of the intrusion; and
vi. the context in which the police/citizen confrontation took place: *R v Gonzales,* 2017 ONCA 435 at paras 62-63

G. STANDARD OF REVIEW

The trial judge's factual findings are entitled to deference. Whether the factual findings of the trial judge amount at law to reasonable and probable grounds is a question of law and is reviewed on a standard of correctness: *R v Dhillion,* 2016 ONCA 308 at para 22

section 10(a)

Any person who has been detained or arrested has the right to be informed promptly and clearly of the reasons for the detention or arrest, pursuant to s.10(a). Section 10(a) extends to includes both temporal and substantive aspects.

A functional equivalent of the term “promptly” in s. 10(a) is the phrase “without delay”, which appears in s. 10(b). There, the phrase is synonymous with “immediately”, but does permit delay on the basis of concerns for officer or public safety.

The right to prompt advice of the reasons for detention is rooted in the notion that a person is not required to submit to an arrest if the person does not know the reasons for it. But there is another aspect of the right guaranteed by s. 10(a). And that is its role as an adjunct to the right to counsel conferred by s. 10(b) of the *Charter*. Meaningful exercise of the right to counsel can only occur when a detainee knows the extent of his or her jeopardy.

To determine whether a breach of s. 10(a) has occurred, substance controls, not form. It is the substance of what an accused can reasonably be supposed to have understood, not the formalism of the precise words used that must govern. The issue is whether what the accused was told, viewed reasonably in all the circumstances, was sufficient to permit him to make a reasonable decision to decline or submit to arrest, or in the alternative, to undermine the right to counsel under s. 10(b): *R v Gonzales,* 2017 ONCA 543 at paras 122-125; *R v Sabir,* 2018 ONCA 912, at para 33

In other words, Section 10(a) does not require that detainees be told of the technical charges they may ultimately face. A person will be properly advised of the reason for their detention if they are given information that is sufficiently clear and simple to enable them to understand the reason for their detention and the extent of their jeopardy: *R v Roberts,* 2018 ONCA 411 at para 78

There are times when a police officer must go beyond disclosing the grounds for arrest. For example, in *R. v. Carter*, 2012 ONSC 94, Mr. Carter, arrested for drug offences, was suspected of committing a murder. While under arrest, Mr. Carter was interviewed about the murder. The court held that s. 10(a) was breached

because he was not told what he was really being questioned about: *approved* in *R v Roberts,* 2018 ONCA 411 at para 75

Quite simply, if the police wants to use a person detained for one offence as a source of self-incriminating information relating to a different offence – including an aggravated form of the offence for which they have been detained – the police must tell the detainee this before proceeding. Indeed, they must tell the arrested detainee what they are being investigated for before they have been given their right to counsel: *R v Roberts* at para 76

Satisfaction of the informational duty may be complicated in certain cases where the detainee positively indicates a failure to understand his or her rights to counsel. In such cases, the police cannot rely on a mechanical recitation of those rights; they must make a reasonable effort to explain those rights to the detainee: *R v Culotta,* 2018 ONCA 665 at para 29

Section 10(b)

A. GENERAL PRINCIPLES

Section 10(b) creates the right to retain and instruct counsel without delay, and the right to be informed of that right without delay.

i. THE INFORMATIONAL COMPONENT

Police do not have a duty to positively ensure that a detainee understands what the rights under s. 10(b) entail. Officers are only required to communicate those rights to the detainee. Absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution: *R v Culotta,* 2018 ONCA 665 at para 38

If a detained person, having been advised of his right to counsel, chooses to exercise that right, the police must provide the detained person with a reasonable

opportunity to exercise that right and must refrain from eliciting incriminatory evidence from the detained person until he has had a reasonable opportunity to consult with counsel: *R v Hamilton,* 2017 ONCA 179 at para 71; *R v GTD,* 2018 SCC 7

If an accused person asserts his/her right to speak to a lawyer when read his/her rights, then the question "Do you wish to say anything in answer to the charge?" asked at the conclusion of the standard caution, violates the police duty to hold off questioning. Any statements elicited as a result of this question may be excluded: *R v GTD,* 2018 SCC 7

The rights created by s. 10(b) attach immediately upon detention, subject to legitimate concerns for officer or public safety: *R v McGuffie,* 2016 ONCA 365 at paras 41-42

Those concerns must be circumstantially concrete. General or theoretical concern for officer safety and destruction of evidence will not justify a suspension of the right to counsel. Rather, the assessment of whether a delay or suspension of the right to counsel is justified involves a fact specific contextual determination. The trial judge must analyze whether any concerns on the part of the police were reasonable in the circumstances: *R v La,* 2018 ONCA 830, at paras 39, 41; see also *R v Rover,* 2018 ONCA 745 at para 26-28, 32-33

In *R v Mian,* 2014 SCC 54, the Supreme Court of Canada upheld the trial judge's finding that an unjustified 22-minute delay in complying with the informational duties under s.10(a) and (b) constituted a *Charter* breach. The court further upheld the trial judge's decision excluding the evidence of cocaine found in the investigation under s.24(2).

A police officer has an obligation under s.10(b) of the *Charter* to afford an accused person not only a reasonable opportunity to contact counsel of his choice but also to facilitate that contact: *R v Vernon,* 2016 ONCA 211 at para 2

Absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it": *R v Tyler*, 2015 ONCA 599

ii. The Implementational Component

The s. 10(b) jurisprudence has, however, always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those circumstances often relate to police safety, public safety, or the preservation of evidence. For example, the police could delay providing access to counsel in order to properly gain control of the scene of the arrest and search for restricted weapons known to be at the scene. Specific circumstances relating to the execution of search warrants can also justify delaying access to counsel until the warrant is executed.

However, concerns of a general or non-specific nature applicable to virtually any search cannot justify delaying access to counsel. The suspension of the right to counsel is an exceptional step that should only be undertaken in cases where urgent and dangerous circumstances arise or where there are concerns for officer or public safety. The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police must also take reasonable steps to minimize the delay in granting access to counsel. A policy or practice routinely or categorically permitting the suspension of the right to counsel in certain types of investigations is inappropriate.

The justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Furthermore, if the police determine that some delay in allowing an arrested person to speak to counsel is justified to permit execution of the warrant, then they must consider whether it is necessary to arrest the individual before they execute the warrant. The police cannot create a justification for delaying access to counsel by choosing, for reasons of convenience or efficiency, to arrest an individual before seeking, obtaining, and executing a search warrant. Police efficiency and convenience cannot justify delaying an arrested person's right to speak with counsel for several hours: *R v Rover,* 2018 ONCA 745 at para 26-28, 32-33; *R v La,* 2018 ONCA 830, at para 45

iii. Spontaneous Statements

If a detainee makes an un-elicited and spontaneous incriminating statement after being appropriately cautioned, there is no violation of s. 10(b): *R v Miller,* 2018 ONCA 942, at para 14

iv. Counsel of Choice

The right of an accused person to choose his or her counsel does not require the state to pay for an accused person's chosen counsel, even where the accused person wins a Rowbotham order. The exception is where a) counsel of choice is necessary to a fair trial; or b) where accused shows he cannot find competent counsel under Legal Aid rates & conditions: *R v. Hafizi*, 2015 ONCA 534

v. Counsel at Trial

As important as the right to counsel is, it is not an unlimited right. It must be balanced against the timely disposition of cases. The decision to grant or not to grant an adjournment for an accused to retain counsel is a matter that is within the discretion of any trial judge. An appellate should only interfere with a trial judge's refusal to grant an adjournment if it deprives an accused of a fair trial or the appearance of a fair trial: *R v Patel,* 2018 ONCA 541 at para 3

vi. Changed Circumstances

When the reason for a subject's detention has changed, an officer is obliged to re-perform their s. 10 *Charter* obligations: *R. v. Blake*, 2015 ONCA 684; *R v Roberts,* 2018 ONCA 411 at para 76

vii. Roadside Sobriety Tests

The constitutional right to be protected from conscription until a reasonable opportunity to consult counsel has been provided would be breached by roadside sobriety testing, unless the testing is a demonstrably justifiable and reasonable

limit on this constitutional right that is prescribed by law: *R v Roberts,* 2018 ONCA 411 at para 87

In this regard, the Court of Appeal has held that conscripting detainees through roadside sobriety testing provided for in provincial highway traffic legislation is demonstrably justifiable and reasonable. This includes questions about alcohol consumption and co-ordination tests. Such roadside sobriety testing is reasonable and justifiable so long as the evidence obtained is used solely to support an officer's ground for arrest or detention. In contrast, it would be disproportionate, and therefore not demonstrably justifiable, to use conscripted evidence as proof of impairment during a trial: *Roberts* at para 88

B. A TAINTED SECOND STATEMENT

The Plaha test applies in determining whether, when the police have obtained a statement in violation of s. 10(b), and the suspect gives a second statement after having consulted a lawyer, the second statement was "obtained in a manner" that infringed the Charter: *R v Hamilton*, 2017 ONCA 179 at para 45

There are two components to the s. 24(2) analysis. The first is a threshold requirement: was the impugned statement obtained in a manner that infringed a Charter right? If that threshold is crossed, one turns to the second "evaluative" component of s. 24(2) to determine whether the admission of the impugned evidence would bring the administration of justice into disrepute.

A generous approach is to be taken to the threshold issue. The relationship between the breach and the impugned evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous. In *Plaha,* a six and a half hour gap between the two statements was sufficient to make out a temporal connection. In *Hamilton,* a four-hour gap between the two statements was sufficient to make out a temporal connection: *Hamilton* at paras 38-42, 51.

The police can make a "fresh start" by clearly severing their subsequent interrogation from the earlier Charter breach.

In *Hamilton,* the Court of Appeal found that the second statement was tainted and should have been excluded in circumstances where the police did not give a fresh start warning, despite the fact that: the accused received legal advice after

the first statement and before he made the second statement; the accused told the second statement officer that he was aware of his right to silence and that duty counsel had told him not to speak to police; the accused was aware of the charges that he faced throughout; during the interview, the second statement officer affirmed the accused's right to silence; and, the second statement officer did not refer to the accused's first statement during his interview with him: *Hamilton* at paras 56-59

C. PROSPER WARNING

The "Prosper warning" is meant to equip detainees with the information required to know what they are giving up if they waive their right to counsel. A Prosper warning is not required in all cases. It is needed only if a detainee has asserted the right to counsel and then apparently changes his mind after reasonable efforts to contact counsel have been frustrated. In such circumstances, the burden of establishing a waiver of those rights is on the Crown and is a high one, requiring proof of a clear, free and voluntary change of mind made by someone who knew what they were giving up. A proper Prosper warning is therefore significant in enabling the Crown to prove waiver of the right to counsel in such cases.

It is helpful in understanding the Prosper warning to appreciate the rights that are stake when a detainee waives their right to counsel. Specifically, when a detainee asserts their desire to exercise the right to counsel, either expressly or by not waiving their right to counsel, the police are obliged to cease questioning and are under a duty to facilitate the exercise of that right. The temporary obligation to cease questioning also extends to other efforts to elicit evidence from the detainee, and is often referred to as the obligation or duty to "hold off", since there is no problem in properly using the detainee as a source of evidence after they have exercised or relinquished their right to counsel.

The proper warning imposes an additional informational obligation on police that is triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, the police are required to tell the detainee of his right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity.

If the detainee is not reasonably diligent in exercising the right to counsel, the duty to hold off will be suspended and the police may question the detainee. The obligation on the police to make efforts to facilitate contact with counsel will also be suspended. The right to receive a Prosper warning at the time will also be lost. After all, there is no need to advise a detainee of what they will lose if they waive their right to consult counsel without delay, where the detainee has already forfeited that right by not being reasonably diligent in exercising it: *R v Fountain,* 2017 ONCA 596 at paras 27-30

D. EXCLUSION OF EVIDENCE

A court may exclude evidence not seized as a result of a s.10(b) violation. While the "obtained in a manner" component is usually established where there is a causal connection between the evidence seized and the Charter right violated, this is not always the case. The "obtained in a manner" component also includes temporal and contextual connections: *R v Shang En Wu,* 2017 ONSC 1003; *R v Pino*, 2016 ONCA 389

An officers' ignorance of the very well-entrenched rights of an accused to immediate access to counsel puts their conduct on the very serious end of the spectrum under the first branch of the *Grant* analysis: *R v La,* 2018 ONCA 830, at para 45

On the second branch of the Grant analysis, a trial judge must consider the extent to which the s. 10(b) breach undermined all the interests it protects, *regardless* of whether the police succeeded in obtaining an incriminating statement from the accused. Those interests go well beyond the accused's fair trial rights as considered by the trial judge and include the vulnerability of an arrested accused who requires the immediate ability to consult with a lawyer to obtain counsel, not just for legal advice, but as a lifeline to the outside world: *R v Pino*, 2016 ONCA 389, at para. 105; *R v Rover*, 2018 ONCA 745 at para. 45; *La* at para 48

The impact on the accused's *Charter*-protected interests may be reduced if it is clear that the detainee would have made the statement in question notwithstanding the *Charter* breach: *R v Miller,* 2018 ONCA 942, at para 21

Section 11(b)

A. THE TEST

In *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada created a new s.11(b) framework, which is based upon a presumptive ceiling that defines unreasonable delay. The presumptive ceiling is set at 30 months for cases going to trial in the superior court; beyond this ceiling, delay becomes "presumptively unreasonable" (para 46).

Defence delay does not count towards the presumptive ceiling. Defence delay has two components: waiver and delay caused solely by the conduct of the defence. Waiver by an accused must be clear and unequivocal, and made with full knowledge of the rights being waived and the effect of the waiver on those rights. The court cannot accept the failure to assert the right, silence, or lack of objection as constituting a valid waiver. Importantly, waiver also implies choice. As the Supreme Court noted in *R v Askov*, [1990] 2 SCR 1199, "unless some real option is available, there can be no choice exercised and as a result waiver is impossible" (para 106).

The second type of defence delay occurs when defence conduct directly causes delay, or when both the Crown and court are ready to proceed but the defence is not. However, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay." Defence applications and requests that are not frivolous will typically not contribute to defence delay: *Jordan,* paras 60-66.

Delay arising from frivolous positions taken by defence counsel constitute defence delay: *R v Mallozzi,* 2017 ONCA 644, at para 41

For example, in *RB,* the Court of Appeal held that the entire period of delay arising from the accused's flight from Canada in breach of his bail conditions constituted defence delay. The court rejected the argument that the state's failure to seek his surrender pursuant to an extradition treat meant that the Crown was responsible for a large period of the delay: *R v RB,* 2018 ONCA 594

Although actions that are legitimately taken to respond to the charges will fall outside of defence delay, when what prevents the matter from proceeding is simply that the defence is not available when the Crown and the court are, this

constitutes defence delay and will be subtracted from the total delay: *R v Mallozzi,* 2018 ONCA 312 at para 6

Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption that the delay is unreasonable. In order to do so, the Crown must establish that there were exceptional circumstances outside of their control, and that these circumstances were both (1) reasonably unforeseeable or reasonably unavoidable and (2) the Crown could not reasonably remedy the delays once they occurred. In other words, the Crown must prove that it took "reasonable available steps to avoid and address the problem before the delay exceeded the ceiling" (*Jordan* at paras 69-70).

An exceptional circumstance typically falls into one of two categories: discrete events and particularly complex cases. The former concerns events such as medical or family emergencies and unforeseen events at trial (e.g., a recanting witness) that cause delay. Such delay should be subtracted from the total delay used in determining whether the presumptive ceiling has been breached (*Jordan,* paras 71-75).

Two mistrials qualify as discrete, exceptional events that were reasonably unforeseeable: *R v Mallozzi,* 2017 ONCA 644, at para 41

In a vigorously contested, multi-day and witness trial, it is not in itself a discrete exceptional event that the trial judge required time to provide the parties with reasons. In other words, the time while the decision is under reserve does not constitute a discrete exceptional event: *R v MacIsaac,* 2018 ONCA 650 at para 48

Similarly, the decision whether to seek leave to appeal is not an unforeseeable or unavoidable event of the sort contemplated by *Jordan*. On the contrary, it is a routine matter that arises in every case in which an appeal from conviction succeeds: *MacIsaac* at para 51

Particularly complex cases are those that require an "inordinate amount of trial or preparation time such that delay is justified." This may be because of the nature of the evidence (e.g., voluminous disclosure, a large number of witnesses, complex and lengthy expert evidence, charges covering a long period of time etc.) or the nature of the issues (e.g., a large number of charges and pre-trial applications, and novel or complicated legal issues. The 11(b) application will fail

if the court finds that the case was particularly complex such that the delay is justified (*Jordan*, paras 77-80)

Complexity can also arise from cases involving more than one accused. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case: *Jordan,* at para. 77; *R v Gopie,* 2017 ONCA 728 169; *R. v. Manasseri,* 2016 ONCA 703 at para. 311; *R v Jurkus,* 2018 ONCA 489 at para 66. There are a host of reasons why accused charged in relation to the same incident should be tried together, such as: conserving judicial and trial resources; avoiding inconsistent verdicts; and avoiding witnesses having to testify more than once: *Gopie,* at para. 138; *Jurkus* at para 68

In addition, under *Jordan*, "prejudice will no longer play an explicit role in the s. 11(b) analysis," Once the ceiling is breached, the accused person is presumed to have suffered prejudice to his Charter-protected liberty, security of the person, and fair trial interests (*Jordan*, para 54).

The Jordan framework applies to all cases currently in the system. However, for cases that exceed the presumptive ceiling, a "transitional exceptional circumstance" applies if "the Crown satisfies the court that the time the case has taken is justified based on the parties reasonable reliance on the law as it previously existed." This necessitates a contextual assessment of the delay under the previous framework, including the allocation of delay under the Morin categories, the prejudice to the accused, the seriousness of the offence, and the institutional delay previously acceptable in the region in issue – as these considerations would have informed the parties' behaviour prior to Jordan: *Jordan* at paras 95-97; *R v Manasseri,* 2016 ONCA 703 at para 321; *R v McManus,* 2017 ONCA 188

In *Gopie*, at para. 178, the Court of Appeal emphasized the following relevant factors informing a transitional exceptional circumstances analysis: (i) the complexity of the case; (ii) the period of delay in excess of the *Morin* guidelines (a total period of between 14 to 18 months for institutional delay for matters proceeding in superior courts); (iii) the Crown's response, if any, to any institutional delay; (iv) the defence efforts, if any, to move the case along; and (v) prejudice to the accused: see also *R v Jurkus,* 2018 ONCA 489 at para 75

The inquiry into whether the Crown took reasonable steps to minimize delay remains a contextual one. In light of *Jordan*, reasonable efforts must be made to

obtain continuation dates as quickly as possible. However, the reality of extremely busy provincial courts, handling the vast majority of criminal matters, must also be kept in mind: *R v Jurkus,* 2018 ONCA 489 at para 59

JPT teleconferences may be appropriate in some situations, particularly where a long delay may be generated to accommodate personal attendance. When this arises, counsel must inform the court of their availability to proceed this way.

Generally speaking, however, personal appearances for JPTs are preferable. Personal appearance accords with the purpose pre-trials are designed to achieve. They are designed to promote general efficiency in the criminal justice system by, among other things, facilitating resolutions, resolving issues, simplifying motions, arriving upon agreed facts, identifying triable issues and setting meaningful schedules. In this age of concern about delay in our criminal justice system, there is an added premium on ensuring the success of judicial pre-trials. Undoubtedly, personal attendance enhances the opportunity for meaningful discussions and successful outcomes: *R v Jurkus,* 2018 ONCA 489 at paras 32-33

While delay in pursuit of extradition proceedings has been attributed to the Crown, delay arising from an accused's flight from the jurisdiction is attributable to defence delay and is to be subtracted from the net Jordan delay: *R v Burke,* 2018 ONCA 594

i. RETRIALS

The *Jordan* criteria must be understood in the context of the Crown's duty to re-try cases as soon as possible. The 18-month presumptive ceiling established for a first trial may be too long in the circumstances of a re-trial. Re-trials must receive priority in the system, and in the normal course re-trials in the Ontario Court of Justice should occur well before *Jordan*'s 18-month presumptive ceiling. It may be that a lower presumptive ceiling is appropriate for re-trials: *R v MacIsaac,* 2018 ONCA 650 at paras 27-28, 52, 59

Where an appeal is allowed allowing a new trial, the 11(b) clock starts to run from the date of the appellate court's decision. This is because the right to be tried within a reasonable time arises on being charged with an offence. An appellate

court's order quashing the appellant's conviction leaves him/her in the position of being a person charged with an offence: *MacIsaac* at para 31

D. STANDARD OF REVIEW

Although underlying findings of fact are reviewed on a standard of palpable and overriding error, the characterization of those periods of delay and the ultimate decision as to whether there has been unreasonable delay are subject to review on a standard of correctness: *R v Jurkus,* 2018 ONCA 489 at para 25

The parties are not stuck on appeal with an erroneous position taken on a s. 11(b) application at trial: *Jurkus* at para 71

B. EXAMPLES OF RECENT 11(B) CASES:

SCC Trilogy accompanying *Jordan*: *R v Williamson*, 2016 SCC 28; *R v Cody,* 2017 SCC 31; *R v Vassell,* 2016 SCC 26

Co-accused delay: see *R v Gopie,* 2017 ONCA 728 at paras 123-142 and 171; see also *R v Manasseri,* 2016 ONCA 703; *R v Jurkus,* 2018 ONCA 489 at para

Transitional and Exceptional circumstances: *Gopie; Baron, R v Coulter*, 2016 ONCA 704; *R v Manasseri*, 2016 ONCA 703; *R v McManus*, 2017 ONCA 188; *R v Gordon*, 2017 ONCA 436; *R. v DC,* 2017 ONCA 483; *R v Mallozzi*, 2017 ONCA 644; *R v Pyrek*, 2017 ONCA 476; and *R v Picard*, 2017 ONCA 692; *R v Jurkus,* 2018 ONCA 489; *R v Lopez-Restrepo,* 2018 ONCA 887; *R v DA,* 2018 ONCA 96; *R v Saikaley,* 2017 ONCA 374; *R v Baron,* 2017 ONCA 772; *R v Mallozzi*, 2017 ONCA 644; 2018 ONCA 312

Complexity: *R v Lopez-Restrepo,* 2018 ONCA 887

Section 11(d)

Any person accused of a crime is entitled to a fair and impartial trial. Trial judges are charged with ensuring that, to the degree possible, such a trial will take place. A critical component of ensuring a fair and impartial trial revolves around the conduct of the trial judge. As is often said, "justice should not only be done, but should manifestly and undoubtedly be seen to be done." In that same spirit, a trial judge must be conscious of not only being impartial, but being seen to be impartial: *R v Hungwe,* 2018 ONCA 456 at para 39

For more on reasonable apprehension of bias, see General Topics on Law: Bias

The right of an accused person to choose his or her counsel does not require the state to pay for an accused person's chosen counsel, even where the accused person wins a Rowbotham order. The exception is where a) counsel of choice is necessary to a fair trial; or b) where accused shows he cannot find competent counsel under Legal Aid rates & conditions: R v. Hafizi, 2015 ONCA 534

A trial judge should grant an adjournment for an accused to retain counsel if it is necessary for a fair trial or the appearance of a fair trial. However, as important as the right to counsel is, it is not an unlimited right. It must be balanced against the timely disposition of cases. There comes a point at which the court is entitled to refuse any further adjournments for the purpose of retaining counsel.

On appeal, the appellate court should only interfere with a trial judge's refusal to grant an adjournment if it deprives an accused of a fair trial or the appearance of a fair trial: *R v Patel,* 2018 ONCA 541 at para 3

Section 11(e)

A. THREE CLEAR DAYS' ADJOURNMENT: S. 516(1)

Section 516(1) of the *Criminal Code* permits a justice, before or at any time during the course of a judicial interim release hearing, on application by the prosecutor or accused, to adjourn the proceedings and remand the accused in

custody in prison. Where the adjournment exceeds three clear days, the consent of the accused is required. It necessarily follows that an adjournment that is not more than three clear days does not require any consent on the part of the accused: *R v Donnelly,* 2016 ONCA 988 at para 76

B. REMEDY FOR VIOLATION

In *Kift,* the Ontario Court of Appeal upheld a trial judge's decision to remedy a 15-day detention without bail through the exclusion of evidence obtained from the appellant during his detention and the remission of his sentence - rather than by granting a stay of proceedings: *R v Kift,* 2016 ONCA 374 at paras 5-8

Section 11(f)

In *R v Peers,* 2017 SCC 13 and *R v Aitkens,* 2017 SCC 14, the Supreme Court of Canada upheld the Alberta Court of Appeal's majority decision in *Aitkens* to deny an interpretation of 11(f) of the *Charter* that would allow the Appellants the right to a jury trial where their offences carried a maximum sentence of fives years less a day and a fine of up to $5. 11(f) guarantees a right to a jury trial where the maximum sentence is five years. The appellants argued that the potential punishment of five years less a day, plus a $5 million fine, amounted to a "more severe punishment" which generated the right to a jury trial.

The Supreme Court agreed with the Alberta Court of Appeal decision in *Aitkens*, which held that, on a proper purposive interpretation of s. 11(f) of the Charter, the expression "imprisonment for five years or a more severe punishment" should be interpreted as primarily engaging the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. This interpretation appropriately serves the purpose of the Charter in distinguishing between those crimes that are serious enough to warrant a jury trial and those that were not. A maximum penalty of "five years less a day" does not become a more severe penalty just because some collateral negative consequences are added to it: 2017 SCC

Section 11(h)

Section 11(h) looks forward from the date of sentencing and applies to legislation or other state action that is said to increase the punishment imposed on the offender at the time of sentence.

Section 11(h) promotes finality and fairness in the sentencing process by enjoining state conduct that adds to the punishment already imposed for the offence. Section 11(h) crystallize[s] punishment at the time that sentence is imposed. The protections afforded by s. 11(h) apply only if the challenged state conduct amounts to "punishment:" *R v Dell,* 2018 ONCA 674, at paras 32-34

In *Whaling*, for example, the Supreme Court held that the repeal of early parole for offenders who were already serving their sentence amounted to the imposition of a second and additional punishment for the offence, and thereby violated s.11(h) of the Charter: *Whaling v. Canada (Attorney General)*, 2014 SCC 20

A. DEFINITINO OF PUNISHMENT

If a prohibition that is imposed as part of a criminal sentencing process meaningfully restricts the liberty or security interest of an accused, the object of the prohibition is sufficiently punitive to attract the presumption against retrospectivity, even if it also serves to protect the public. *R v Hooyer,* 2016 ONCA 44 at paras 41-44. E.g.: a DNA order or a sex-offender registry order would not be regarded as punishment: para 45

In deciding whether a particular legislative provision, or other state action, amounts to punishment, the court takes a pragmatic and functional approach, focusing on the actual impact of that legislation or state conduct on the offender's liberty and security interests. In other words, what does the impugned state action actually do to the offender's liberty expectations?

Sanctions, which are imposed as a consequence of conviction in furtherance of the purpose and principles of sentencing, are viewed as punishment. Similarly, other changes in the terms or conditions of a sentence that thwart or compromise

the offender's reasonable liberty or security of the person expectations will be regarded as punishment for the purposes of s. 11(h) and s. 11(i).

Legislation or other state conduct that does not impose or alter a criminal sanction may still constitute punishment under s. 11(h) or s. 11(i). Changes in the conditions of an offender's sentence can sufficiently compromise reasonable settled expectations of liberty to constitute additional punishment for the purposes of s. 11(h) and s. 11(i). It is a question of degree: *R v Dell,* 2018 ONCA 674 at paras 53, 55, 56, 58

Section 11(i)

A. GENERAL PRINCIPLES

Section 11(i) is applicable if there has been a change in the penalty, whether an increase or a decrease, between the date when the offence was committed and the date when the sentence is imposed.

Section 11(i) enhances the predictability and fairness of the sentencing process by identifying the applicable sentencing provisions when those provisions have been changed in the course of the process, and by preventing the retrospective application of harsher penalties. The protections afforded by s. 11(i) apply only if the challenged state conduct amounts to "punishment:" *R v Dell,* 2018 ONCA 674, at paras 32-34

B. DEFINITION OF "TIME OF SENTENCING"

For the purpose of section 11(i), sentencing for murder involves a unique two-step process. The first step is taken when the sentence is imposed and the second occurs if and when an application for a reduction of the period of parole ineligibility is made. Even though the second part of the process occurs after the person has served at least 15 years of her sentence, for the purposes of s. 11(i),

the “time of sentencing” can encompass both steps in the process: *Dell* at para 39

Other cases have that the phrase “time of sentencing” in s. 11(i) should be read as reaching the time at which an appeal court reviews the fitness of a sentence imposed at trial. Changes in sentencing provisions made between the trial and the appeal, which increased or decreased the sentence for the offence as it stood when the crime was committed, were subject to review under s. 11(i): *Dell* at para 40

C. DEFINITION OF PUNISHMENT

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D. APPLICATION OF THE PRESUMPTION

The application of the presumption against retrospectively applies to criminal laws. It does not depend on the specific terms of an order made by a judge under a criminal law in a given case: *R v Hooyer,* 2016 ONCA 44 at para 46

E. TIME OF COMMISSION

Section 11(i) fixes "the time of commission" of the offence as one of the two relevant points in time to be considered when applying the section - the other being the time of sentencing. A crime is committed when culpability attaches. In the case of a conspiracy, liability attaches when the accused forms the agreement to commit the offence: *R v Lalonde*, 2016 ONCA 923, at paras 26-28

F. SPECIFIC EXAMPLES

The presumption against retrospectively applies in interpreting the temporal scope of that section: *R v Hooyer,* 2016 ONCA 44 at paras 48-49

In *Lewis,* the Court of Appeal agreed with the appellants that the repeal of early parole provisions between the commission of their offences and their sentencing violated s.11(i), and those offenders were entitled to the benefit of the "lesser punishment" that is, the parole regime that included access to early parole: *Canada (Attorney General) v. Lewis*, 2015 ONCA 379

In *R v Lalonde*, 2016 ONCA 923, the Court of Appeal held that the retrospective abolition of *eligibility for* accelerated parole increased the punishment on inmates and therefore violated s 11(i).

In *Dell,* the Ontario Court of Appeal held that the 2011 amendments to the "faint hope clause" violate s.11(i). The faint hope clause grants the right to an offender serving a murder sentence to apply after 15 years to a jury for a reduction in their parole ineligibility term. The 2011 amendments imposed a judicial screening mechanism that required judges to first determine whether the application has a "substantial likelihood" of success. By removing potentially meritorious applications from consideration by a jury, the amendments were not rationally connected to the government's objective of preventing families of murder victims from being exposed to meritless faint hope applications. The amendments also did not minimally impair 11(i) rights. By contrast, the 1996 amendments, which

required judges to first determine whether the application has a "reasonable prospect" of success, were upheld.

Section 12

Section 12 of the *Charter* provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."

A mandatory minimum sentence will constitute cruel and unusual punishment under s. 12 if it is grossly disproportionate to the punishment that would be appropriate, having regard to the nature of the offence and the circumstances of the offender.

To meet the grossly disproportionate standard, the sentence must be "more than merely excessive" or "disproportionate. The sentence must be so excessive as to outrage standards of decency and be disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable.

The s. 12 analysis involves two steps. The first is to determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing under the *Criminal Code*. It is not necessary to fix the sentence or sentencing range at a specific point, but the court should consider the rough scale of the appropriate sentence.

At the second step the court must ask whether, in view of the fit and proportionate sentence, the mandatory minimum sentence is grossly disproportionate to the offence and its circumstances: *Lloyd*, at para. 23. There are two stages to the gross disproportionality analysis. The first stage is to consider whether the impugned sentencing provision is grossly disproportionate in its application to the individual offender (the particularized inquiry). If a sentencing provision is not grossly disproportionate in relation to the offender before the court, the second stage is to consider whether it is grossly disproportionate when applied in "reasonably foreseeable" circumstances. Legislation should *not* be struck down based on scenarios that would be "far-

fetched", "marginally imaginable", or "remote:" *R v Vu,* 2018 ONCA 436 at paras 19-23 [citations omitted]

Constitutional challenges rooted in section 12 of the *Charter* can be argued on the basis of reasonable hypotheticals involving the "best offender": *R v Nur,* 2015 SCC 15; *R v McIntyre,* 2018 ONCA 210 at para 28

Various factors may inform the gross disproportionality analysis, both as it applies to the particular accused and to reasonable hypotheticals. Such factors include: (i) the gravity of the offence; (ii) the personal characteristics of the offender; (iii) the particular circumstances of the case; (iv) the actual effect of the punishment on the individual; (v) the penological goals and sentencing principles reflected in the challenged mandatory minimum; (vi) the existence of valid, effective, alternatives to the mandatory minimum; and (vii) a comparison of punishments imposed for other similar crimes: *Vu* at para 24

Mandatory minimum sentences affect the range of sentence, ceating an "inflationary floor" that that sets a new minimum punishment applicable to the best offender.

The effect of the inflationary floor is that because the "best offender" must receive the minimum sentence, which may be a higher sentence than the one that would have been given without the minimum, the sentences for more culpable offenders are increased as well, so that the whole range increases. The cases referred to above all reflect that effect.

As a result, where a mandatory minimum sentence has been ruled unconstitutional, a trial judge who is determining a fit sentence can give less weight to sentences imposed when the mandatory minimum sentence was in effect: *R v Delchev,* 2014 ONCA 448 at paras 18-19

Section 13

In *White*, [1999] 2 S.C.R. 417 at para. 67, the Supreme Court held that where a driver is statutorily compelled to make a statement for highway traffic purposes, the driver is entitled to use immunity in criminal proceedings in relation to the contents of that statement. The court set out the test for determining whether a statement is statutorily compelled. The court also held, at para. 89, that statutorily

compelled statements are to be automatically excluded from evidence under s. 24(1) of the *Charter*: *R v Roberts,* 2018 ONCA 411 at para 37

Note that, although drivers in general know that they have a duty to report an accident and that they have to 'talk to the police' about it, this proposition of common sense is not a legal rule that creates a presumption of statutory compulsion: *Roberts* at para 55

Further, s. 7 prevents statutorily compelled statements from being used for any purpose in a criminal trial, including during a *Charter voir dire* to establish whether an officer had reasonable and probable grounds to arrest the subject: *Roberts* at para 39; *R. v. Soules*, 2011 ONCA 429.

Lawfully obtained evidence conscripted from a detainee through roadside sobriety testing is admissible to establish grounds for an arrest or detention, but such evidence is not admissible as proof of actual alcohol consumption or impairment. According to the law of Ontario, evidence is conscripted in the relevant sense only if the act directed by the officer is, itself, a sobriety test. If an officer directs a motorist to get out of the car not as a sobriety test, but to facilitate further investigation, including gathering other information about sobriety through questioning once the driver is outside of the car, observations made of the motorist while exiting the car are admissible at trial to prove impairment.

Sobriety testing is not confined to the physical co-ordination tests prescribed by regulation as contemplated by s. 254(2)(a) of the *Criminal Code*. Sobriety testing can include questions asked about alcohol consumption, directions to detainees to perform physical challenges not provided for in s. 254(2)(a) such as informal co-ordination tests, or directions to exit a motor vehicle, or directions to blow into the face of an officer: *R v Roberts,* 2018 ONCA 411 at paras 82-83, 88, 91, 93

Section 14

A. GENERAL PRINCIPLES

To establish a violation of s. 14, the appellant must demonstrate, on a balance of probabilities, that he was actually in need of such assistance at trial – i.e., that he

did not understand or speak the language being used in court: *R v Chica,* 2016 ONCA 252 at para 26

An Accused's s. 14 Charter rights do not depend on his having asserted the right to interpreter assistance. Nonetheless, the timing of his interpreter complaint may undermine his assertion that he needs such assistance to properly comprehend the evidence or defend himself at trial. This is particularly so if the issue is raised for the first time on appeal: *Chica* at para 34

i. On Appeal

Absent any indication from a fair reading of the trial transcript that the accused did not understand the proceedings or that he could not be understood for language-related reasons, the trial judge in not obliged, on his own motion, to conduct an inquiry into the accused's need for an interpreter or to order one: *Chica* at para 35

Section 24(1)

A. GENERAL PRINCIPLES

A "just and appropriate remedy" will:

1. Meaningfully vindicate the rights and freedoms of the claimants
2. Employ means that are legitimate within the framework of our constitutional democracy
3. Be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
4. Be fair to the party against whom the order is made: *R v Singh,* 2016 ONCA 108 at para 67

The power to grant remedies under s. 24(1) is “part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law”: *Singh* at para 67

Neither the Superior Court of Justice nor the Summary Conviction Court has jurisdiction to entertain an application for an alleged breach of a Charter right once a stay is entered pursuant to section 579: *R v Martin,* 2016 ONCA 840 at paras 38, 42

However, in a situation where a trial judge comes to a final disposition in a matter, including entering a judicial stay of proceedings, he or she retains jurisdiction to craft an appropriate remedy for a Charter violation, including awarding costs, where appropriate. That is because a

remedy under s. 24(1) of the Charter, in those circumstances, is part of the trial judge's discretionary adjudicative process. *Martin* at para 39

A. REMEDY OF DECLARATION

B. REMEDY OF COSTS

i. JURISDICTION

Statutory courts have jurisdiction to hear applications for Charter relief, and grant costs as part of a remedy under s. 24(1). The implied power is linked to the court's control of its trial process: *R v Martin,* 2016 ONCA 840 at para 35

The Summary Conviction Court does not have jurisdiction to hear a costs application when the Crown exercises its prerogative to enter a stay pursuant to section 579 of the Criminal Code because, in these circumstances, the Court's process if not invoked: *Martin* at para 36

ii. WHEN AVAILABLE AS REMEDY

A trial judge may award costs against the Crown for a breach of its disclosure obligations in circumstances where there is a marked and unacceptable departure from the reasonable standards expected of the prosecution: *R v Singh,* 2016 ONCA 108 at para 32

Given the policy concerns associated with exposing prosecutors to civil liability, it is necessary that the liability threshold be set near the high end of the blameworthiness spectrum - where conduct such as deliberate failure to disclosure exculpatory evidence lies: ***Singh*** at para 36

Costs should not be awarded if alternative remedies under s.24(1) can address the *Charter* breach: *Singh* at para 37

Costs orders will not be made against the Crown for the misconduct of other parties, such as witnesses or investigative agencies, unless the Crown has participated in the misconduct: Singh at para 45

a) Factors to consider

The costs award against the Crown should provide "a reasonable portion" of the costs an accused incurs to secure his Charter rights. How the precise calculation should be done, as noted, is a matter for the trial judge's discretion, but the following factors should be considered where the issue is non-disclosure:

- the nature of the case and the legal complexity of the work done;
- the length of the proceedings;
- the nature and extent of the misconduct found;
- the impact of the misconduct on the rights of the accused;
- the efforts (or lack thereof) of defence counsel to diligently follow up on disclosure; and
- the actual impact upon the accused's ability to defend the charges in the future: *Singh* at paras 41-42, 57

The fact that an accused is legally aided is relevant in determining the last factor - impact on ability to defend charges and whether this was engaged because of financial hardship: *Singh* at para 65

b) Quantum

The fact that an accused is legally aided is relevant ot the quantum of costs: *Singh* at para 66

B. REMEDY OF A STAY

ii. THE TEST

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome

2. There must be no alternative remedy capable of redressing the prejudice (E.g., exclusion of evidence or sentence remission: *R v Kift,* 2016 ONCA 374 at para 5); and

3. Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in

having a final decision on the merits: *R v Babos,* 2016 SCC 16 at para 32; *R v Kift,* 2016 ONCA 374 at paras 7-8

A stay is a prospective remedy, not a redress for past state misconduct: *R v Gowdy,* 2016 ONCA 989

C. REMEDY OF SENTENCE REDUCTION

While state misconduct can mitigate a sentence, the general rule is that a sentence reduction outside statutory limits is not an appropriate remedy under s.24(1) unless the constitutionality of the statutory limit itself is challenged. Such a remedy would only be appropriate in exceptional cases: *R v Gowdy,* 2016 ONCA 989; *R v Donnelly,* 2016 ONCA 998

Section 24(2)

A. STANDARD OF REVIEW

Absent legal error, a palpable and overriding error, or an unreasonable conclusion, the appellate court must defer to the trial judge's ruling: *R v Hall,* 2016 ONCA 013 at para 63; *R v Ting,* 2016 ONCA 57 at para 74; *R. v. McGuffie*, 2016 ONCA 365, at para. 64; *R v Gonzales,* 2017 ONCA 543 at para 161

Appellate intervention may also be warranted where the trial judge erred in law in his/her application of the legal test or principles or failed to consider relevant factors or circumstances that could affect whether admitting the evidence would bring the administration of justice into disrepute: *R v Szilagyi,* 2018 ONCA 695 at para 41

Where the trial judge has considered the three lines of inquiry, appellate courts should defer to the trial judge's ultimate decision. Deference is not warranted, however, where the trial judge's reasoning on the application of s. 24(2) of

the Charter was sparse, deficient and erroneous in material ways: *R v Harflett*, 2016 ONCA 248 at para 55

Where the appeal court considers the trial judge's finding of no charter breach to be in error, the appeal court owes no deference to the trial judge's section 24(2) analysis: *R v. Wong*, 2015 ONCA 657

When the trial judge did not find a *Charter* violation and therefore did not undertake a s. 24(2) analysis, an appellate court may, upon finding a *Charter* violation, conduct it's own 24(2) analysis, provided that there is a sufficient evidentiary record to do so. Otherwise, the appellate court may remit the matter to the trial judge to determine the issue: see, for example, *R v Pilon,* 2018 ONCA 959, at para 43; *R v Ritchie,* 2018 ONCA 918, at para 19

B. THE TEST

iii. PRECONDITION: OBTAINED IN A MANNER

The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal, or a combination of the three. The connection must be more than tenuous: *Coderre* at paras 14-18

Indeed, a temporal connection alone may be sufficient to meet the "obtained in a manner" criterion: *R v Rover,* 2018 ONCA 745 at para 35

A breach that does not have a causal, contextual, or temporal connection to the obtaining of evidence does not trigger 24(2). However, those breaches are not irrelevant to a 24(2) analysis that arises on other breaches that do have such a connection. If s. 24(2) is engaged, the conduct of the police throughout their investigation and even throughout the prosecution, are germane to the admissibility inquiry required under s. 24(2): *R v Boutros,* 2018 ONCA 375 at para 26

The "obtained in a manner" requirement allows the court, in an appropriate case, to exclude the evidence because of a Charter breach occurring after the evidence was discovered: *R v Pino,* 2016 ONCA 389 at para 48; *R v Shang En Wu,* 2017 ONSC 1003

Evidence obtained pursuant to a lawful production order, or search warrant, may still be obtained "in a manner" that infringed a *Charter* right, where unlawful police conduct was a component of the investigative process that lead to the issuance of the order or warrant: *R v Boutras,* 2018 ONCA 375 at paras 17-22

iv. STEP 1: SERIOUSNESS OF THE BREACH

As a general rule, faced with genuine uncertainty, police should err on the side of caution by settling on a course of action that is more, rather than less respectful of the accused's privacy rights: *R v Fearon*, 2014 SCC 47 at para. 94.

The court must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the Charter: *R v Coderre*, 2016 ONCA 276 at para 20

Various factors may attenuate or exacerbate the seriousness of the *Charter*-infringing state conduct. Extenuating factors, such as the need to prevent the disappearance of evidence, or good faith on the part of investigators, may attenuate the seriousness of police conduct that results in a *Charter* breach. On the other hand, no rewards are given for ignorance of *Charter* standards. Negligence or wilful blindness is not the equivalent of good faith. Nor can good faith be based on an unreasonable error or ignorance about the officer's scope of authority. The more deliberate the conduct of the police in breach of the *Charter*, the more likely this line of inquiry will favour exclusion: *R v Tsekouras,* 2017 ONCA 290 at para 109; *R v Gonzales,* 2017 ONCA 543 at para 158

The seriousness of police conduct that resulted in Charter violations will be mitigated to the extent that the lawfulness of their conduct was legally uncertain at the time: see, for example, *R v Boutros,* 2018 ONCA 375 at para 35. That being said, the police cannot choose the least onerous path whenever there is a gray area in the law. In general, faced with real uncertainty, the police should err on the side of caution by choosing a course of action that is more respectful of the accused's potential rights: *R v Fearon,* 2014 SCC 77 at para 94

Re Dishonest police conduct: "The integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the Charter. Few actions more directly undermine

both of these goals than misleading testimony in court from persons in authority:" *Pino* at para 102, quoting *R v Harrison*, 2009 SCC 34

When dealing with the systemic nature of the police misconduct, the issue is not punishment of the police but rather preservation of public confidence in the rule of law and its processes. Minor or inadvertent breaches may only minimally undermine public confidence. Wilful and ongoing disregard of *Charter* rights will have a negative effect on public confidence: *R v Strauss,* 2017 ONCA 628 at para 53

The systemic nature of the violation plays a central role in assessing its long-term impact on the proper administration of justice. Constitutional breaches that are the direct result of systemic or institutional police practices must render the police conduct more serious for the purposes of the s. 24(2) analysis. A police practice that is inconsistent with the demands of the *Charter* produces repeated and ongoing constitutional violations that must, in the long run, negatively impact the due administration of justice. This is so even if many of the breaches are never exposed in a criminal court. *R v Rover,* 2018 ONCA 745 at para 37, 40

It is an error of law for a trial judge to speculatively try to explain or justify police conduct that infringes the *Charter* (in the *Pino* case, dishonesty). This evidence must come from the evidentiary record (generally, the officers themselves) and it is the Crown's burden to advance any such explanation in this part of the analysis: *R v Pino,* 2016 ONCA 389 at paras 95-97; *Tsekouras* at para 113

A conclusion as to good faith cannot be grounded on a lack of bad faith. Ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith. For errors to be considered to have been made in good faith, they must be reasonable. And the police do not get credit for doing what is expected. Further, the *Charter*-infringing conduct in question need not be deliberate, nor result from systemic or institutional abuse to result in exclusion of evidence that was obtained as a result of a clear violation of well-established rules: *R v Szilagyi,* 2018 ONCA 695 at paras 55-57

To use after-the-fact acknowledgement of wrong-doing and a change in practice as a basis for minimizing the seriousness of the breach and admitting the impugned evidence “would render the *Charter*’s protection meaningless: *Szilagyi* at para 64; see also *R v Strauss,* 2017 ONCA 628 at para 60

a) Specific Examples from the case law

In *Harflett,* the officer's invariable practice of searching every car was said to fit the description of an impermissible "fishing expedition conducted at a random highway stop." This was characterized as falling at the serious end of the spectrum of state misconduct and therefore favoured exclusion of the evidence: *R v Harflett,* 2016 ONCA 248 at paras 40-45

Re firearms case: the breach does not have to be more serious when the evidence sought to be excluded is a firearms case. There is not a different test for admission where the impugned evidence is a firearm: *R v Dunkely,* 2015 ONCA 597 at para 53.

In *Ritchie,* the Court of Appeal found that the police misconduct of searching the Appellant's text messages on a third party's phone without a warrant was made more serious by the fact that the police searched the phone six months after they seized it, and obtained a warrant two months after that. The Court contrasted this to the case of *Marakah,*

In the appellant's case, the police searched Tsekouras' phone without a warrant six months after they seized it, and obtained a warrant two months after that

v. Step 2: Impact of the Breach on Accused's Charter Protected Interests

The second line of inquiry requires an examination of the extent to which the *Charter* breach actually interfered with or undermined the interests protected by the right infringed. Again here there is a spectrum: fleeting and technical to profoundly intrusive. The more serious the impact, the greater the risk that admission of the evidence will bring the administration of justice into disrepute by signalling to the public that the high-sounding nature of the rights is belied by their feeble evidentiary impact in proceedings against the person whose rights have been trampled: *R v Tsekouras,* 2017 ONCA 290 at para 110; *R v Gonzales,* 2017 ONCA 543 at para 159

To determine the seriousness of the infringement under this line of inquiry, a court must look to the interests engaged by the right infringed and examine the

extent to which the violation actually impacted on those interests. *Tsekouras* at para 111.

In assessing the actual impact of a breach on a *Charter*-protected interest of an accused, discoverability retains a useful role. The more likely that the evidence would have been obtained without the *Charter*-infringing state conduct, the lesser may be the impact of that *Charter*-infringing conduct on the underlying interests protected by the *Charter* right. The converse is also true. Of course discoverability is a double edged sword. It may signal that the breach of the accused's right was less serious. But it also renders the state conduct more egregious as the evidence was "discoverable" without breaching the accused's *Charter* rights: *Tsekouras* at para 112

The absence of any causal connection between the s. 10(b) breach and the obtaining of the evidence as a factor mitigating the impact of the breach on the appellant's *Charter*-protected interests: *R v Rover,* 2018 ONCA 745 at para 43

Re s.8: An unreasonable search that intrudes upon an area in which an individual reasonably enjoys a high expectation of privacy or that demeans a person's dignity is more seriousness than one that does not: *Tsekouras* at para 111. The impact of even a minimally intrusive search must be weighed against the absence of any reasonable basis for justification. The impact of an unjustified search is magnified where there is a total absence of justification for it: *R v Harflett,* 2016 ONCA 248 at paras 47, 56

For example, while drivers have a reduced expectation of privacy in their vehicles, this does not mean that an unjustified search is permissible. *Harflett* at para 48

In *Herta,* the Court of Appeal found that the impact on the accused's *Charter* protected interests lay at "the apex of seriousness." In that case, the accused's home was subject to an unlawful search warrant involving a third party target. The search was highly intrusive, and involved the breaching of the door, multiple police officers, sniffer dogs, Emergency Services Unit, photographs, and searching in floor vents. Although the breach was not very serious, the serious impact on the accused's privacy interests tipped the scale in favour of exclusion: *R v Herta,* 2018 ONCA 927, at paras 60-74

Re s.10: A sufficiently lengthy delay in providing access to counsel, even when the police do not attempt to question the arrested person, has a significant impact on the arrested person's rights. This is so having regard to the security of

the person interest protected by s. 10(b), and the risk posed to the accused's right against self-incrimination *R v Rover,* 2018 ONCA 745 at para 44

vi. STEP 3: SOCIETY'S INTEREST IN A TRIAL ON THE MERITS

The third inquiry is a matter of assessing the harms to individuals and groups in a society caused by the offence in question. This is an objective assessment of safeguarding society's interests – rather than responding to public outcry or expression of public concern: *R v Ting,* 2016 ONCA 57 at para 84

The third Grant factor cannot be used to systematically require the admission of reliable evidence obtained in plain disregard of an accused's Charter rights: *R v Harflett,* 2016 ONCA 248 at para 54

vii. BALANCING THE INTERESTS OF THE INDIVIDUAL AND SOCIETY

No overarching rule governs how the balance is to be struck: *R v Gonzales,* 2017 ONCA 543 at para 161

The first two lines of inquiry work together. Singly and in combination they pull towards exclusion of constitutionally-tainted evidence. The strength of the claim for exclusion equals the sum of the first two inquiries. The third and final inquiry resists this combined influence, pulling in the opposite direction with especial force when the evidence is reliable and crucial to the case for the Crown: *R. v. McGuffie*, 2016 ONCA 365, *R v Gonzales,* 2017 ONCA 543 at para 156

Where the first two lines of inquiry under *Grant* advance a strong case for exclusion, the third line of inquiry will rarely, if ever, tip the balance in favour of admissibility. On the other hand, where the first two lines of inquiry offer weaker support for exclusion, the third line of inquiry will almost certainly confirm the admissibility of the evidence: *McGuffie*, at para. 63; *Gonzales* at para 157

racial profiling

For a comprehensive review of the jurisprudence in this area, see David M Tanovich, "Applying the Racial Profiling Correspondence Test."

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For civil rewards for racial profiling, see *Elmardy v Toronto Police Services Board,* 2017 ONSC 2074

section 52(1) of the constituiton act

A. GENERAL PRINCIPLES

A declaration of invalidity made by a Superior Court of Justice is of general force and effect in the province in which it is made. Individual claimants do not have to re-litigate the issue to obtain a constitutional remedy: *R v Sarmales,* 2017 ONSC 1869; *R v Ali,* 2017 ONSC 4531

It is not open to a judge to declare statutory provisions invalid if those provisions do not apply to the accused's circumstances: *R v Vu,* 2018 ONCA 436 at para 107

B. JURISDICTION

The Superior Court of Justice does not have jurisdiction to declare unconstitutional law that does not apply to the accused: *R v Vu,* 2018 ONCA 436

C. ALTERNATIVE REMEDY OF READING DOWN

Reading down is “warranted only in the clearest of cases” where: (i) the legislative objective is obvious, (ii) reading down would not constitute an unacceptable intrusion in the legislative domain, and (iii) the remedy would not intrude upon budgetary considerations: *R v Vu,* 2018 ONCA 436 at para 90