FOR THE DEFENCE

CRIMINAL LAWYERS' ASSOCIATION NEWSLETTER VOL. 42, NO. 3 — SEPTEMBER 2022

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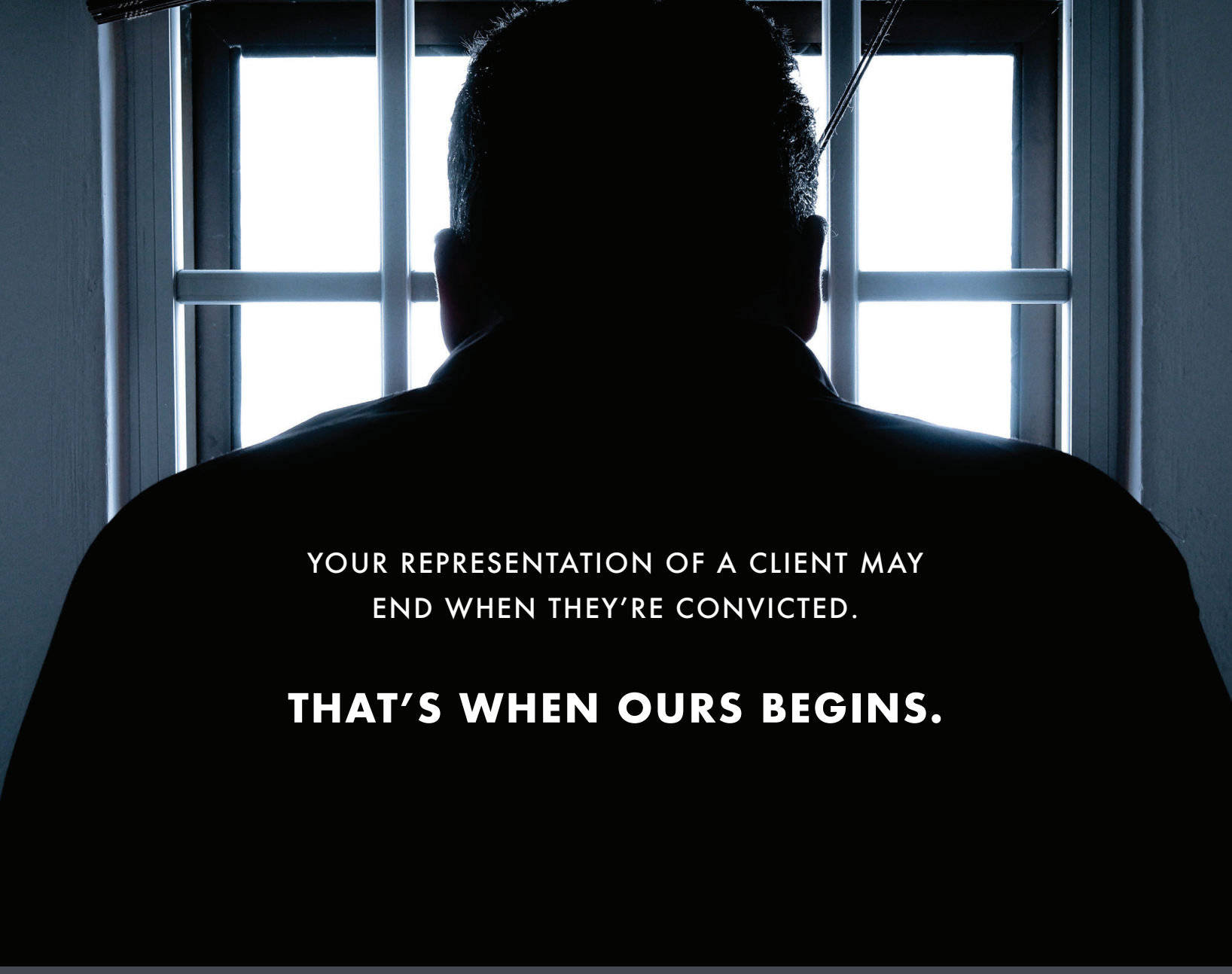

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IN THIS ISSUE

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PRESIDENT'S MESSAGE

Daniel Brown

The column you are about to read is a product of intensely mixed emotions.

Like all of you, I was shocked and saddened that John Struthers was compelled to abruptly end his term as President for medical reasons. I join in our collective thanks to John for his energetic dedication to the Association.

I have also experienced a heightened sense of duty to an organization which has enjoyed such remarkable success in spreading its message and influencing change. From our appellate interventions, to our active subcommittees, and the production of this very newsletter, the CLA is consistently a model of volunteer effort and sound, strategic judgement.

As a first priority, it is incumbent on us to continue the work John put into dealing with the repercussions of the COVID-19 crisis.

For the CLA, COVID-19 meant pivoting away from some of our other priorities in order to ensure the safety of our members and our clients within a court system that was forced to adapt on the fly.

With no real template from which to work, the challenges COVID-19 presented were extraordinary. Particularly in the early days, little was known about this threat to the health and safety of our clients and other justice participants. It was extremely gratifying to see hundreds of volunteers from our ranks come forward to provide legal advice and to ensure that detainees had access to bail.

Our Executive, Board and members also advocated for front-line workers in the justice system who faced significant health risks. Developing the Zoom court process and ensuring its integrity took enormous effort and coordination involving a wide range of people. We also worked tirelessly to perfect the use of remote disclosure and make sure our voice was heard when it came to health and safety protocols for in-person hearings.

It should not be lost on us that remote appearances have improved access to justice for many in the court system, giving them wider access to counsel across the province and making it easier for counsel to appear simultaneously in multiple jurisdictions. These advances will undoubtedly pave the way for post-pandemic changes that end up as permanent fixtures of the system. It was crucial to get them right. We should also take pride in the fact that our advocacy on behalf of inmates who faced the fear and uncertainty of COVID-19 fit squarely within the best traditions of the CLA.

All in all, the pandemic provided a sterling example of why our organization exists and how effectively it can mobilize to protect the interests of our members and others in the justice system who are vulnerable during a crisis.

We cannot, of course, permit the COVID-19 crisis to distract us from other pressing concerns. Prime among these is the imperative to make defence work as hospitable as possible for members who are understandably attracted to aspects of the Crown system, including stable pay and maternity leave.

We are actively assembling our own extended health benefits program that will be accessible to individuals and small firms on behalf of their employees, families, and themselves. In addition, recent changes to government programs now permit self-employed lawyers to opt into EI benefits that include the same maternity benefits other employees enjoy. We will be offering education sessions soon about these and other programs that hold considerable promise for practitioners.

Enhancing our mentorship programs - including regular, one-on-one meetings to review cases - is also a high priority. There was no better example of this need than the late Clayton Ruby, whose recent death was a terrible loss to the defence bar. Many of our brightest lights practiced alongside Clay at his venerable firms, where he consistently displayed a willingness to share and mentor younger colleagues. In keeping with this tradition, we are currently in the process of establishing a flexible, *ad hoc* mentorship program where senior counsel will be available to provide guidance to younger lawyers in their areas of specialty.

Rest assured, too, that our attention will not waver from the deplorable underfunding of Legal Aid. In this regard, we are closely watching our colleagues in Alberta and elsewhere as they initiate job actions and other negotiation tactics. Our own efforts to forge alliances and lobby both levels of government will unquestionably remain front and centre.

We will continue to push for laws that enhance the use of sentencing

alternatives, and which ensure fair treatment for all. Our emphasis on the decriminalization of drugs will also carry on, particularly given the disproportionate impact of the so-called war on drugs on racialized and marginalized clients.

The influence the CLA wields as a united force informs public discourse, shapes legislation and protects our ability to be fairly compensated for the tremendous role we play within the justice system. We bring our unique perspective to critical policy debates. Our legal interventions in appellate courts have persuasive, tangible results. Our presence at legislative hearings helps guide progressive law-making. In short, our voice is indispensable. The list of past presidents who helped compile this record of success is a roll call of legal giants. I intend to do everything I can to live up to their extraordinary standards.

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EDITOR'S NOTEBOOK

In July, we learned that our valiant leader, John Struthers, would be stepping down as CLA President on account of a serious health issue. It was astonishing to discover that the man, seemingly invincible, who had so fiercely advocated for the health and safety of others throughout the pandemic was now faced with his own health adversity.

At the time of his resignation, John was well into his second term as President. In addition, he had previously devoted many years to the CLA as a Director. We are all indebted to John for his unwavering commitment to our organization and the administration of justice. As President, he led with vision and courage through the unprecedented challenges presented by the pandemic. He played an invaluable role in protecting the justice system from collapse under the weight of COVID-19, while simultaneously seizing the opportunity for modernization that that same threat presented. Our gratitude and admiration remain with John as he commits himself to conquering the next obstacle.

With John's resignation comes a shuffle among the CLA executive. Daniel Brown has assumed responsibility as President, while Hussein Aly moves into a Vice-President position. We are fortunate to have capable and committed leaders who are prepared to move up the ladder at a time when impediments posed by the pandemic continue to linger.

In this issue, we place aspects of the *Garofoli* review process under a microscope. The *Garofoli* review can be a daunting venture. It is the *Charter* application brought by the defence to challenge the validity of a judicial authorization for warrants or wiretaps. The jurisprudence in this area is rich and evolving, making this a specialized and fluid sphere within the criminal law.

In many cases, the complexity and duration of a *Garofoli* application will exceed the complexity and duration of the trial proper. There can be numerous phases to these applications, the first being to establish standing to launch a challenge. If that hurdle is successfully negotiated, the defence may then have to survive a Crown application to have the *Garofoli* motion dismissed summarily pursuant to *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.). The road that follows may include applications to cross-examine the affiant or sub-affiant, and efforts to excise, amplify and/or add to the information to obtain the judicial authorization. Where redactions have been applied by the Crown for disclosure purposes, further extensive avenues of litigation surrounding the scope of those redactions may well follow. Finally, where the redacted ITO does not support the issuance of the warrant or wiretap authorization, the Crown may pursue a detour via Step 6 of the *Garofoli* procedure. These are only some of the components that may constitute a *Garofoli* application.

While there is sufficient scope to the theme of *Garofoli* applications to fill an entire book, this issue of *For the Defence* is more aptly viewed as an amuse-bouche on the topic. We are fortunate to have gathered a collection of timely *Garofoli*-themed articles from members who have been embroiled in these issues recently.

Naomi Lutes tackles the issue of standing as it pertains to the excision of information improperly included in an information to obtain. She argues that excision should be automatic even with respect to information unrelated to your client. Melina Macchia examines the troubling trend of police routinely utilizing a dynamic entry in the execution of search warrants, particularly in Ontario, and the corresponding difficulty in obtaining a remedy on a *Charter* application. She argues that greater oversight of this practice is required and that a requirement for prior judicial authorization of this technique should be imposed.

Two writing teams collaborated to

create harmonized articles on the issue of minimization clauses in wiretap authorizations. In Part 1, Marco Sciarra highlights a disturbing developing trend of police intercepting solicitor-client communications. He urges vigilance on the defence bar to be alive to whether reasonable minimization clauses were imposed by the issuing justice and whether unwarranted intrusions resulted. In Part 2, Laura Metcalfe and Wes Dutcher-Walls argue that modern privacy law demands an expanded reliance on minimization clauses. In particular, they emphasize the need to protect highly sensitive subject matter that is irrelevant to the investigation, such as sexual activity, confidential medical information, or religious communications.

The feature content ends with an article penned by Ramisha Farooq. She illuminates some issues relating to police use of social media in support of grounds for a judicial authorization to assist in future *Charter* challenges.

The guidance and practical tips that fill this issue are abundant. These will be invaluable as a reference when the next case that raises a potential *Garofoli* review comes along.

Jill Makepeace

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The Automatic Excision Rule and the Pernicious Concept of Standing in *Garofoli* Review

by Naomi Lutes

Photo courtesy of Greenspan Humphrey Weinstein LLP.

So, you want to bring a *Garofoli* application to review a warrant or wiretap authorization. You have discovered that the affiant has included information obtained through *Charter*-infringing conduct in the Information to Obtain ("ITO"). You think you have a slam dunk argument to automatically excise that information from the ITO – but do you?

One of the key tools in our arsenal as defence counsel seeking to challenge an ITO is the process of excision during the *Garofoli* procedure. The reviewing justice excises (a fancy word for removes or deletes) erroneous and misleading information, as well as the fruits of unlawful conduct. As a matter of logic, this makes good sense: why should the police be permitted to rely upon information which can be shown to be false or illegally-obtained? Such material should be deleted from the ITO because the issuing justice should never have seen it.

As sensible as the rule seems, it has been the subject of criticism from both the Crown and trial judges. As well, the excision procedure has fallen prey to the repeated prosecutorial refrain of "but you don't have standing". In the May 2022 issue of *For the Defence,* Wes Dutcher-Walls set out how defence counsel can resist the Crown's argument for s. 24(2) standing. In the same way, I hope this article provides you with key cases upon which you can rely to argue for the automatic nature of excision of *any* illegally obtained information – not only that which relates squarely to your client's personal *Charter* rights.

But let's take a step back: what is excision and what is it designed to do? The *Garofoli* review is an assessment of the Information to Obtain a warrant: it asks not whether the warrant

should have issued, but whether it could have.[1] Challenges to a warrant are characterized as either facial or sub-facial: the former looks at the "face" of the warrant "as is"; the latter permits the ITO to be corrected before asking whether it could have issued.[2]

Excision is an important aspect of the procedure. Before asking the ultimate question of whether the warrant could have issued, erroneous information must first be deleted. Excision's counterpart is amplification, which is the consideration of additional evidence presented by the Crown at the *voir dire* to correct minor errors in the ITO.[3]

There are two ways in which Crowns may push back on the rule: first, they may argue that it should not be automatic; and second, they may attempt to inject the notion of "standing" into the process. Both should be resisted.

It was in the Supreme Court's 1993 trilogy of *R. v. Grant*, *R. v. Plant,* and *R. v. Wiley* that the excision rule emerged.[4] This trilogy made it clear that both *Charter*-infringing conduct as well as erroneous information must be excised.[5] In *Grant*, Sopinka J. wrote for the Court that:

> ... in circumstances such as the case at bar where the information contains other facts in addition to those obtained in contravention of the Charter, it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: *Garofoli*, *supra*. In this way, the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event ...[6]

Similarly, in *Plant*, Sopinka J. wrote for the majority:

> This Court has determined that peace officers cannot benefit from their own illegal acts by including in informations sworn to obtain warrants facts which were retrieved through searches without lawful authority.[7]

The doctrine of excision has assumed the status of a rule because it is an automatic result where the defence establishes that the affiant knew or ought to have known that the ITO included information obtained in violation of an accused's *Charter* rights or was otherwise erroneous, misleading, or unlawful.[8] The types of information which you may seek to excise is not fixed and can include the following:[9]

i. Erroneous or false information;
ii. Irrelevant or improper information;
iii. Misleading or inaccurate information;
iv. Unlawfully obtained information;
v. Conclusory information lacking any factual underpinning;
vi. Privileged information; and,
vii. Information obtained as a result of breaches of an accused's *Charter* rights.

So why is there pushback against the rule given its logical and normative underpinnings? Simply put, the Crown does not like the excision rule. Excision can mean the collapse of a warrant because of the removal of the foundation for its issuance. There are two ways in which Crowns may push back on the rule: first, they may argue that it should not be automatic; and second, they may attempt to inject the notion of "standing" into the process. Both should be resisted.

Excision is Automatic

No matter how much Crowns don't like it, the law is clear that excision is automatic. It is not a "remedy" in the *Charter* sense of that word, but a result. It corresponds with amplification. Both are key parts of the *Garofoli* review process. This is not a s. 24(2) analysis where balancing occurs.

There is ample case law the defence can point to in order to support an argument for excision's automatic nature. Recently, the Quebec Court of Appeal dealt with this issue. The Crown argued on appeal that automatic excision leads to "incongruous" results because it deprives the Court of the ability to contextually assess police conduct as it would in a s. 24(2) analysis. Thankfully, the Court rejected this argument, reaffirming the automatic nature of the rule. The Court also reminds us that the s. 24(2) analysis will still occur – but only after a determination is made that the evidence was unlawfully obtained.[10] It is premature to inject s. 24(2) considerations, or any contextual balancing, at the excision stage.

Defence counsel should be aware, however, of existing judicial criticism. In *Jaser,* the Crown argued that the *Grant, Wiley,* and *Plant* line of authority had been misapplied and should be limited to the particular facts of those cases. Justice Code had some sympathy for this argument, pointing to the lack of a "doctrinal source" for the rule. As well, His Honour cited Justice Dambrot's previous decision in *Chau* which pointed to the apparent inconsistency between s. 24(2) exclusion and automatic excision.[11] Despite criticizing its "rigid and categorical" nature, Justice Code upheld the rule given the Supreme Court jurisprudence.[12]

Justice Pomerance was also critical

of the mechanical application of the rule in *Bhogal, infra*:

> As noted by Code J. in *R. v. Jaser*, 2014 ONSC 6052, it is odd to suggest that one might admit evidence at a trial yet force an automatic removal of that same evidence from the factual matrix in a search warrant. If a trier of fact could consider the evidence in arriving at a finding of guilt, why can a police officer not consider the evidence as grounds for an investigative step? ...[13]

Justice Pomerance concluded, however, that she was bound by the existing Supreme Court jurisprudence.

You should not have to establish a personal privacy interest to argue that the police should not be able to present unlawfully obtained evidence to the issuing justice.

I respectfully suggest that judicial criticism of excision's automatic nature is unwarranted, as it fails to account for the question of whether the affiant knew or ought to have known the information was false.[14] It also fails to consider the ultimate s. 24(2) analysis which will always follow in determining whether, even if the warrant fails, the evidence should nevertheless be admitted. It is also interesting that no corresponding judicial criticism is levied at the Crown's ability to seek to amplify the record in order to correct minor mistakes or omissions.

Justice MacDonnell in *Lam* offered a similar rebuttal to judicial criticism of the rule, noting that the criticism is based on the misconception that excision is concerned with admissibility: it is not. It is not a remedy but a mechanism during the review process.[15]

Standing – Excision for One or Excision for All?

Congratulations - you have convinced your trial judge that the rule of automatic excision is alive and well. But now you are confronted with the Crown's argument that the police misconduct relates not to your client, but to a co-accused or third party. The Crown takes the position that you don't have "standing" to argue for excision because your client's personal *Charter* rights are not engaged. Now what?

First, resist the manner in which the Crown attempts to frame the issue. You are not yet engaged in a s. 24(2) analysis but the *Garofoli* review procedure. You should not have to establish a personal privacy interest to argue that the police should not be able to present unlawfully obtained evidence to the issuing justice. Standing is a section 8 concept. Presumably your client has already established standing to challenge the warrant itself. Argue that an accused need only establish a reasonable expectation in the subject matter of the *search,* not in each piece of improperly obtained evidence which authorized that search.

Why should you need to assert standing to challenge what is obviously misleading or illegal information? Should this information not be automatically excised from the ITO no matter whose rights are concerned? Nowhere in *Grant, Plant,* or *Wiley* does the Supreme Court differentiate between so-called "third party" *Charter* rights and the *Charter* rights of the accused challenging the warrant. The language is much broader – the focus is not on "standing" but on preventing the state from benefiting from police misconduct.

To accede to the Crown's argument would permit the police to benefit from their own misconduct simply because the specific violation relates to a co-conspirator, co-accused, or third party. Such a limitation has the potential for abuse. Many wiretap authorizations or major search warrants involve projects with dozens, if not hundreds, of co-accused. In order to ensure these prosecutions aren't too unwieldy, the Crown generally splits these projects up into "groups." The composition of these groups is within the discretion of the prosecution. Imagine a situation where Mr. A was the subject of a warrantless search. The fruits of that search are relied upon by the affiant in the ITO. Mr. B points to the unlawfully obtained information and asks that it be excised. Not so fast says the Crown – Mr. A is in a different "group" and

... excision is an exercise which does not necessarily sacrifice the entirety of the warrant – a warrant can survive excision. This is because excision is not remedial like s. 24(2). Excision is not concerned with the overall integrity of the judicial system but with the accuracy of the information which was placed before the issuing justice.

charged on a separate information. He is a third party for the purposes of the *Garofoli* analysis and Mr. B has no "standing" to ask for excision. Or perhaps a serious infringement of Ms. C's rights occurred. The fruits of that unlawful conduct is critical to the ITO as against Ms. D. But the Crown stayed Ms. C's charges early on and now argues that Ms. D has no ability to excise this information.

Defence should characterize such a position for what it is – not an argument about the appropriate information to include for the subfacial challenge, but an attempt by the Crown to insulate state misconduct.

Indeed, in *Grant,* the Supreme Court emphasized that the police should not be able to benefit from the illegal acts of police officers. It does so while acknowledging that excision is an exercise which does not necessarily sacrifice the entirety of the warrant – a warrant can survive excision. This is because excision is not remedial like s. 24(2). Excision is not concerned with the overall integrity of the judicial system but with the *accuracy* of the information which was placed before the issuing justice.

Unfortunately, the Crown's "standing" argument has gained traction, particularly in British Columbia. The genesis of this line of authority appears to be the Ontario Court of Appeal's decision in *Chang,* upholding a trial decision of Justice Molloy.[16]

The investigation in *Chang* stemmed from a Quebec wiretap authorization. This wiretap investigation led the police to two Ontario residents. The Quebec RCMP sought the assistance of the Ontario RCMP. Ultimately, a wiretap authorization was obtained from the Ontario Superior Court. The Ontario wiretaps led police to the Appellant Mr. Chang. At trial, defence had sought to challenge not only the Ontario authorization but the underlying Quebec authorization. The trial judge had restricted the applicants' review to the facial validity of the Quebec authorization, not permitting them to go behind it. The Court of Appeal agreed with the scope of this review. It held that to permit a *Garofoli*-type review of the underlying Quebec authorization could result in a potentially infinite series of review of each aspect of the series of authorizations. As well, the Court upheld the trial judge's finding that Chang lacked standing to challenge the Quebec authorization, noting that that *Grant, Wiley,* and *Plant* trilogy was distinguishable as they involved a breach of the accused's *Charter* rights rather than a "third party rights".[17]

It is this passage which the Crown frequently cites as authority for the proposition that an accused must assert "standing" in the information he seeks to excise. But this is not what *Chang* says. Critically, the standing at issue in *Chang* was standing to conduct a *Garofoli*-type review of the underlying Quebec authorization. Mr. Chang was not intercepted on this authorization but only in the subsequent Ontario authorization. It does not appear that the accused had pointed to specific illegally obtained information in the Quebec authorization it wished to excise as opposed to a desire to conduct a full sub-facial review of that authorization. It was in this context that the Court of Appeal made its comments about standing.[18]

Unfortunately, many courts have interpreted *Chang* as holding that an accused must establish a personal right in not just the authorization being reviewed, but in *any* alleged police misconduct in order for the resultant information to be excised from an ITO. The British Columbia Supreme Court in *Kang* interpreted *Chang* in this manner and went on to conduct a comprehensive analysis of the issue of "standing" in relation to excision. It framed the question as one of "excision for one" as opposed to "excision for all". In other words, where there has been a breach of an individual's rights, who is entitled to have that information excised from an ITO?

Kang considered and rejected many of the Ontario decisions discussed below which support the notion of "excision for all" holding instead that:[19]

> . . . in order for an accused to have information, said to have been unconstitutionally obtained, excised from an ITO at a *Garofoli* review into the sufficiency of the authorization, **there needs to be a link between the accused and the information sought to be excised. That link is the standing requirement – a reasonable expectation of privacy in the item or place searched that is the subject of the proposed excision.** [emphasis added]

> What is less immediately clear, however, is whether this reasoning should hold for *Charter* breaches established by some accused on the indictment but which do not impact on the *Charter* rights of other accused. In my view, it must. To conclude otherwise would be to ignore the foundational principle that *Charter* rights are personal to the accused and that enforcement of *Charter* rights must be personal to the accused who make the challenge, as established in *Edwards*.

I would argue that the reasoning in *Kang* and the injection of the notion of standing into the excision process creates an artificial and incongruous division between illegally obtained or *Charter*-infringing information included in an ITO and incorrect or false information. *Kang* suggests that one needs "standing" to excise the former but not the latter. This type of division arguably does an end-run around the automatic nature of the excision process contemplated by the Supreme Court in its trilogy.

Should the issue of "standing" for excision of illegally obtained information rear its head in your case, the Crown will undoubtedly rely on *Chang* and *Kang*. Hold firm and urge your reviewing judge not to accede to

the analysis of the BCSC in *Kang*. The defence should be armed with the following key cases to respond: *Marakah, Guindon, Hamid, Colegrove, Mediati,* and *Hoang*.[20]

In *Guindon,* Justice Bird dealt with this issue squarely. The accused had standing to challenge the authorizations and production orders. They argued for excision of information obtained through an illegal arrest and search of someone not before the Court. The Crown argued that there was no "standing" to argue for the excision of this illegally-obtained information as it related to a third-party's *Charter* rights. After reviewing the cases, Justice Bird held that the applicants *could* argue for excision, as: "A failure to excise references to this evidence would permit the state to benefit from the illegal conduct of the police."[21]

Justice Petersen followed *Guindon* in *Hamid,* disagreeing with the Crown's interpretation of *Chang* and holding that: "In light of the jurisprudence on the automatic excision of "erroneous" information, it would be incongruous to preclude an applicant from seeking to excise information that was unconstitutionally obtained except in circumstances where the applicant could show that her or his own *Charter* rights were infringed."[22]

Alberta has taken a slightly different approach, relying on common law values to permit excision of illegally obtained (but not unconstitutionally obtained) information from an ITO, irrespective of whose personal rights are engaged.[23]

Recently, Justice Brothers of the Nova Scotia Supreme Court dealt with the issue in *Colegrove*.[24] In that case, the Crown argued against automatic excision in relation to the co-accused Mr. Hickey, based on breaches of Mr. Colegrove's rights. The Court considered the competing authorities including *Kang* as well as the competing Ontario trial decisions. Ultimately, Her Honour declined to follow *Kang,* preferring instead *Guindon* and *Hamid.* She also found that the "excision for one" cases read more into *Chang* than it actually states.[25]

Words matter. Characterizing the issue as a debate about "excision for all" frames the issue in a way which is already Crown-friendly. The term "excision for all" has a whiff of overbreadth to it. The Crown then attempts to limit what they call a remedy to those whose rights were directly breached. Whenever you can, flip the framing: this is not about a windfall for the applicant but about the court distancing itself from police misconduct. Go back to the language of *Grant, Wiley,* and *Plant*. The Supreme Court was clear that the police cannot benefit from their own unlawful activity by including certain information in an ITO.

Characterizing the issue as a debate about "excision for all" frames the issue in a way which is already Crown-friendly. The term "excision for all" has a whiff of overbreadth to it. The Crown then attempts to limit what they call a remedy to those whose rights were directly breached. Whenever you can, flip the framing: this is not about a windfall for the applicant but about the court distancing itself from police misconduct.

Remind the reviewing justice that this is not a s. 24(2) exercise – that is still to come. The *Garofoli* review should remain fixed on the contents of the warrant and what the affiant knew - not on which applicant among dozens or even hundreds has "standing" to ask for excision.

The standing as a prerequisite approach not only operates unfairly against those co-accused whose specific rights were not breached in the investigative process, but is an incredibly inefficient means of assessing the sub-facial validity of a warrant – taken to its logical extension, a reviewing justice would have to excise different pieces of information from the warrant depending on which particular accused is making the argument.

As a final note, remember that *Chang* is not dispositive and *Kang* is not binding in Ontario. I remain optimistic that the compelling and thoughtful analysis we see in cases like *Colegrove* and *Guindon* will ultimately win the day when the issue is inevitably considered on appeal.

Naomi Lutes is an associate with Greenspan Humphrey Weinstein LLP in Toronto.

NOTES:

[1] *R. v. Araujo*, 2000 CarswellBC 2438, 2000 CarswellBC 2440, 2000 SCC 65 at paras. 52, 58; *R. v. Morelli*, 2010 CarswellSask 150, 2010 CarswellSask 151, 2010 SCC 8 at para. 41.

[2] *R. v. Downes*, 2022 CarswellOnt 10738, 2022 ONSC 4308.

[3] Minor or technical errors made in good faith may be corrected through amplification by the introduction of evidence that was *available* at the time the ITO was prepared: *Morelli, supra*, note 1, at paras. 41-43; *R. v. Booth*, 2019 CarswellOnt 20149, 2019 ONCA 970 at paras. 57-59.

[4] *R. v. Grant*, 1993 CarswellBC 1168, 1993 CarswellBC 1265, [1993] 3 S.C.R.

223 (S.C.C.); *R. v. Plant*, 1993 CarswellAlta 566, 1993 CarswellAlta 94, [1993] 3 S.C.R. 281 (S.C.C.); *R. v. Wiley*, 1993 CarswellBC 1266, 1993 CarswellBC 504, [1993] 3 S.C.R. 263 (S.C.C.).

[5] *R. v. Araujo*, 2000 CarswellBC 2438, 2000 CarswellBC 2440, 2000 SCC 65 at paras. 56-58.

[6] *Grant, supra*, note 4, at pp. 251-252.

[7] *Plant, supra*, note 4, at p. 296.

[8] Don't forget this additional hurdle on the defence – you need to additionally show that the affiant knew or ought to have known that the evidence was false, misleading, etc.: *World Bank Group v. Wallace*, 2016 CarswellOnt 6580, 2016 CarswellOnt 6581, 2016 SCC 15.

[9] *R. v. Kang*, 2020 CarswellBC 3725, 2020 BCSC 1151 at para. 83.

[10] *R. v. Rizzuto*, 2021 CarswellQue 18456, 2021 QCCA 1789 at paras. 18-23. Additional cases which affirm the automatic nature of the rule include: *R. v. Barton*, 2021 CarswellOnt 8965, 2021 ONCA 451 at para. 7; *R. v. Shivak*, 2020 CarswellAlta 1557, 2020 ABQB 499; *R. v. Millard and Smich*, 2015 CarswellOnt 21043, 2015 ONSC 7500; *R. v. Flintroy*, 2019 CarswellBC 802, 2019 BCSC 213; *R. v. Sandhu*, 2018 CarswellAlta 314, 2018 ABQB 112.

[11] *R. v. Chau*, 1997 CarswellOnt 6617, [1997] O.J. No. 6322 (Ont. S.C.J.) at para. 50.

[12] *R. v. Jaser*, 2014 CarswellOnt 18937, 2014 ONSC 6052 at para. 32.

[13] *R. v. Bhogal*, 2020 CarswellOnt 19797, 2020 ONSC 7327 at para. 110.

[14] *World Bank, supra*, note 8.

[15] *R. v. Lam*, 2015 CarswellOnt 12204, 2015 ONSC 2131 at paras. 55-58; see also *R. v. Truong*, 2020 CarswellAlta 2746, 2020 ABQB 779 at para. 52.

[16] *R. v. Chang*, 2003 CarswellOnt 1007, 173 C.C.C. (3d) 397 (Ont. C.A.).

[17] *Ibid.,* at para. 35.

[18] See also Justice Dawson's comments and interpretation of *Chang* in *R. v. Merritt*, 2017 CarswellOnt 21213, [2017] O.J. No. 6924 (Ont. S.C.J.).

[19] *Kang, supra*, note 9, at paras. 234, 237, 238.

[20] *R. v. Marakah*, 2017 CarswellOnt 19341, 2017 CarswellOnt 19342, 2017 SCC 59; *R. v. Guindon*, 2015 CarswellOnt 20776, 2015 ONSC 4317; *R. v. Hamid, Leyva and Andrews*, 2019 CarswellOnt 17725, 2019 ONSC 5622; *R. v. Colegrove*, 2022 CarswellNS 335, 2022 NSSC 132; *R. v. Mediati*, 2018 CarswellOnt 3661, 2018 ONCJ 164; *R. v. Hoang*, 2018 CarswellOnt 17939, 2018 ONSC 6124.

[21] *R. v. Guindon*, 2015 CarswellOnt 20776, 2015 ONSC 4317. For other helpful cases see those relied upon by Justice Bird.

[22] *R. v. Hamid, Leyva and Andrews*, 2019 CarswellOnt 17725, 2019 ONSC 5622 at para. 46.

[23] *R. v. Croft*, 2013 CarswellAlta 2485, 2013 ABQB 716 at para. 33.

[24] *R. v. Colegrove*, 2022 CarswellNS 335, 2022 NSSC 132.

[25] *Ibid.,* at paras. 350-352.

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Smash and Secure, or Dynamic Entries: The Unfettered Ability of Police to Enter a Private Dwelling without Prior Announcement

by Melina Macchia

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Dynamic executions, or "no knock" entries, are becoming the standard way in which police execute search warrants in Canada. Dynamic entries also known as "no-knock", or "hard entries", refer to the police practice of utilizing force to gain rapid entry into a property. Police may use external equipment, such as flash bangs, balaclavas, battering rams, or other devices to quickly enter the premises, secure its occupants, and execute a search warrant.[1] Although this is a common occurrence, especially when police are investigating offences pursuant to the *Controlled Drugs and Substances Act*, and firearm related offences, it is supposed to be an exception to the common law "knock and announce rule" as articulated by the Supreme Court of Canada in *Eccles v. Bourque*.[2] Prior to entering a dwelling by force, the police must first give the occupant: (i) notice of presence by knocking or ringing the doorbell; (ii) notice of authority, by identifying themselves as law enforce-

While the jurisprudence has some semblance of oversight into the process, it is not enough to ensure that the entries are conducted reasonably, while also considering the ever-changing dynamic surrounding the execution of a search warrant.

ment officers; and (iii) notice of purpose, by stating a lawful reason for entry. Departures are justified, but only in exigent circumstances.

In short, exigent circumstances arise when police have "reasonable grounds in the circumstances to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence".[3] This "exception" allows police to depart from the "no knock" rule at their sole discretion. While the jurisprudence has some semblance of oversight into the process, it is not enough to ensure that the entries are conducted reasonably, while also considering the ever-changing dynamic surrounding the execution of a search warrant.

Further, the greater the entry departs from the knock and announce rule, the more difficult it will be for the Crown to justify the reasonableness of the search. However, officer safety is an accepted and common justification for dynamic entries.

Dynamic executions are subject to s. 8 *Charter* scrutiny and to eventual judicial oversight. However, the practical reality in advancing an effective section 8 application regarding the unreasonableness of the entry boils down to the decision-making process of police leading up to the execution, and trial judge's findings of fact. The Crown must provide an evidentiary basis to justify the existence of exigent circumstances and cannot provide an ex-post facto justification.

In *R. v. Bahlawan*, the Court found that the officers would only follow the "knock and announce" rule if there was "zero risk" to officer safety.[4] Similarly, in *R. v. Ruiz*, the police were unable to articulate how the decision was made to justify departing from the knock and announce principle when investigating drug and firearm related offences. The departure was unjustified when police conducted a dynamic entry on a premise that was previously investigated and took no steps to re-assess another mode of entry.[5]

While it may be a rarity to successfully advance a *Garofoli* application, alleging only that police conducted a dynamic entry, it could justify a successful leave to cross examine application. An evidentiary foundation to show that the police failed to utilize a decision-making process to depart from the knock and announce rule will be integral to the application. Further, the greater the entry departs from the knock and announce rule, the more difficult it will be for the Crown to justify the reasonableness of the search. However, officer safety is an accepted and common justification for dynamic entries. The reality is that dynamic entries can also be dangerous for police and civilians. Certain police tactics like dark coloured military uniforms, balaclavas, and flashbangs increase this risk. Flashbangs in particular, are also more dangerous than police may admit. In 2012, RCMP Corporal Leigh Schooley lost 4 fingers when a flashbang went off in her hand. Similarly, in Wisconsin, a flashbang permanently disfigured a toddler after police entered the wrong apartment and threw the device into the child's playpen. The takeaway is that dynamic entries may escalate situations that might not have otherwise turned violent.

The main issue with the current state of the law surrounding "dynamic entries" is that there is no requirement that police obtain prior judicial authorization, allowing for the non-knock entry. There is little to no external regulation of police using dynamic entries when executing a search warrant. While police policy may exist regarding the internal regulation of such practices, there is limited guidance on what is expected of police from the judiciary. Limits must be placed on police in a clear, and consistent manner by Parliament to minimize unreasonable searches. There ought to a clear way to ensure that dynamic entries do not become the default in Ontario.

In British Columbia, it is a rarity for police to use "no knock" entries in BC's lower mainland, which has a population of just under three million people. "The Vancouver Police Department told CBC News that it didn't do any [no-knock warrants] in 2019 or 2020, and the head of the RCMP's tactical unit for B.C.'s Lower Mainland region said last year that he could recall just one full-on "dynamic entry", as they're called, that his team did in the prior 12 months — and it wasn't a search for drugs".[6] If dynamic entries are such an essential police tool, it would be utilized uniformly by most major city police forces.

A proposal to ensure there is some oversight into the conduct of police in executing or utilizing dynamic entries ought to include a requirement to obtain judicial authorization before such practice is engaged. This would ensure that police do not default to using dynamic entries with impunity if a judicial officer is not presented with reasonable and probable grounds to justify its use. Or, a requirement to document the use of a dynamic or no-knock entry, similar to the obligation of police to submit a use of force report, could be implemented. Arguably, using a no-knock entry is a manner of force that should be documented by police. A failure to do so, without lawful explanation, could assist in advancing a section 8 application on this issue. Though, the

current state of the law focuses heavily on the decision-making process of police prior to the use of the no-knock entry.

In *R. v. Pilkington*, the Court found that blanket policies to use dynamic entries failed to meet the *Controlled Drugs and Substances Act* requirement that police exercise their powers with proportionality.[7] Blanket policies lack an accountable decision-maker exercising discretion, so they are able to assess the unique circumstances of each case, and each offender. And, blanket policies are inconsistent with the need for police to re-evaluate their course of action should circumstances change. If a knock and announce compliant entry becomes possible, the police must be able to consider it.

Arguably, using a no-knock entry is a manner of force that should be documented by police. A failure to do so, without lawful explanation, could assist in advancing a section 8 application on this issue.

The remedial approach in criminal law does not incentivize safer police behaviour because courts are unlikely to exclude evidence under s. 24(2), even with a s. 8 finding. The caselaw post *Cornell* was quantitatively less likely to exclude evidence from a dynamic warrant that violated the *Charter*. In *R. v. Thompson,*[8] police used a dynamic entry technique, which included no prior notice or announcement to the occupants of the home, breaking open the door with a battering ram, and deploying an explosive device which emitted a loud noise and bright light. Once inside, heavily armed officers secured the premises by pointing firearms at the occupants ordering them to lie on the floor, handcuffing them and removing them from the house in police custody. While the Court found a section 8 violation, it did not exclude the evidence. The Court reiterated that while there is no present authority requiring police to obtain prior judicial approval when seeking a search warrant of any plan they might have to execute the warrant without making the common law announcements, it would be "wise practice" to disclose such a plan to the issuing justice.

Ultimately, police can still forcibly enter a premise if no one answers their knock and announcement. Justice Laskin in *R. v. Pan*, stated that this is the "knock-and-break-in-the-door-if-no-one-answers rule".[9] The police can wait a reasonable amount of time, approximately 30-40 seconds before they force entry. This would be more than adequate to prevent the destruction of evidence as it is not enough time to dispose of large quantities of illicit substances, firearms or other drug paraphernalia.

Given the current state of the law, it is unlikely that you can hang your hat on a pre-trial application where it is alleged the police acted unreasonably and used excessive force during a dynamic entry. While you may obtain a finding that the police acted unreasonably, you will be unlikely to obtain an exclusionary remedy resulting in an acquittal.

Melina is a busy defence lawyer, practicing criminal defence at Kim Schofield and Associates, while also managing ten associates. She is committed to her cases, but also to her twin boys, husband, and dogs.

NOTES:

[1] Brendan Roziere & Kevin Walby, "Analyzing the Law of Police Dynamic Entry in Canada" (2020) 46:1 Queen's LJ 39., p. 41.

[2] *Eccles v. Bourque*, 1974 CarswellBC 354, 1974 CarswellBC 414, [1975] 2 S.C.R. 739 (S.C.C.).

[3] *R. v. Cornell*, 2010 CarswellAlta 1472, 2010 CarswellAlta 1473, 2010 SCC 31 at para. 18.

[4] *R. v. Bahlawan*, 2020 CarswellOnt 1807, 2020 ONSC 952 at para. 43.

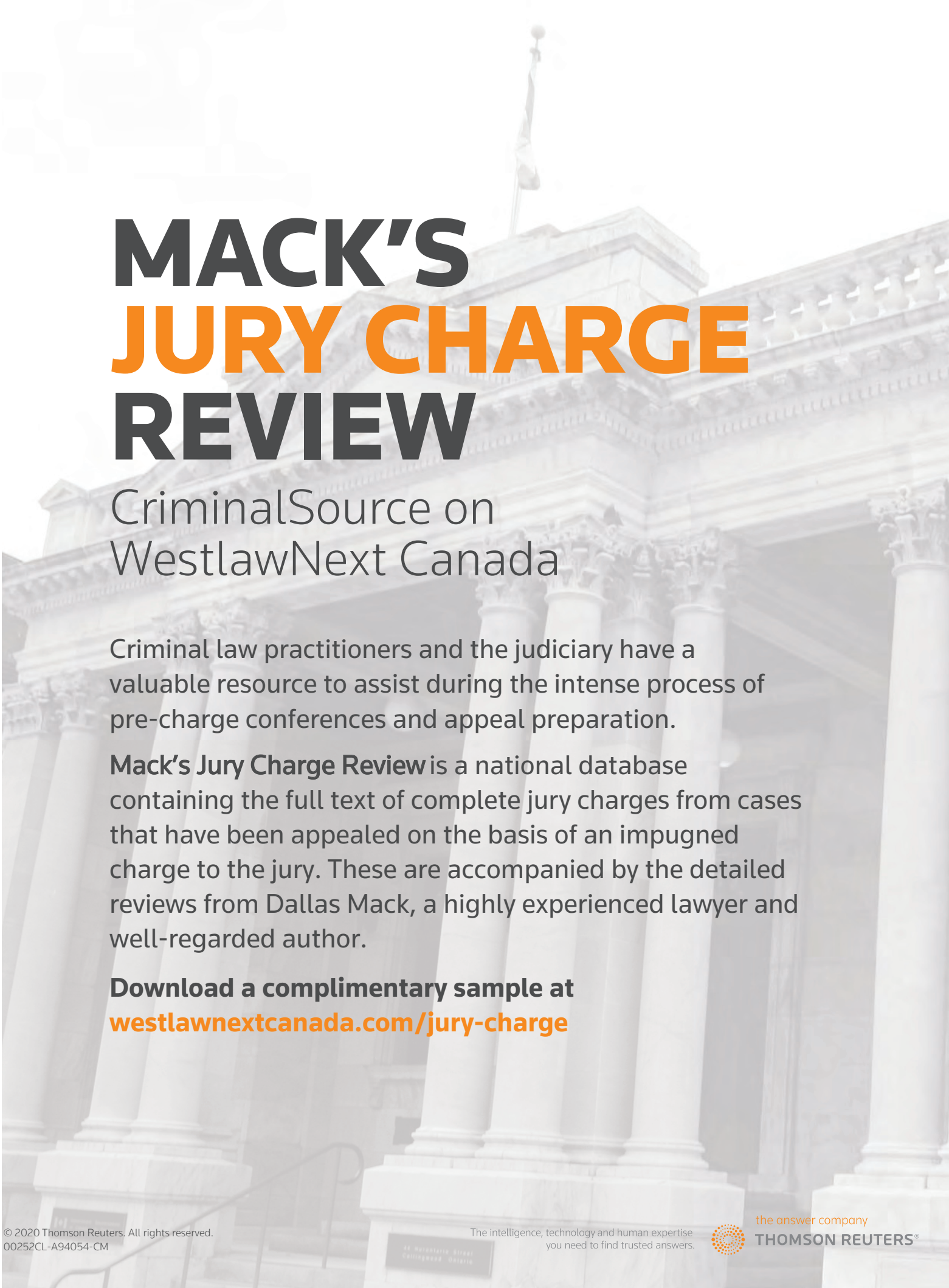
[5] *R. v. Ruiz*, 2018 CarswellOnt 19392, 2018 ONSC 5452 at paras. 3-4, 6.

[6] Judy Trinh & Zach Dubinsky, *Rapper Wants Justice after Ottawa Police 'Tore House Apart' in Failed No-Knock Raid* (July 21, 2022), online: CBC Investigates <Rapper wants justice after Ottawa police 'tore house apart' in failed no-knock raid | CBC News> .

[7] 2013 CarswellMan 185, 2013 MBQB 86 at para. 69.

[8] *R. v. Thompson*, 2010 CarswellOnt 3312, [2010] O.J. No. 2070 (Ont. S.C.J.) at para. 60.

[9] *R. v. Pan*, 2012 CarswellOnt 10986, [2012] O.J. No. 4162 (Ont. C.A.).



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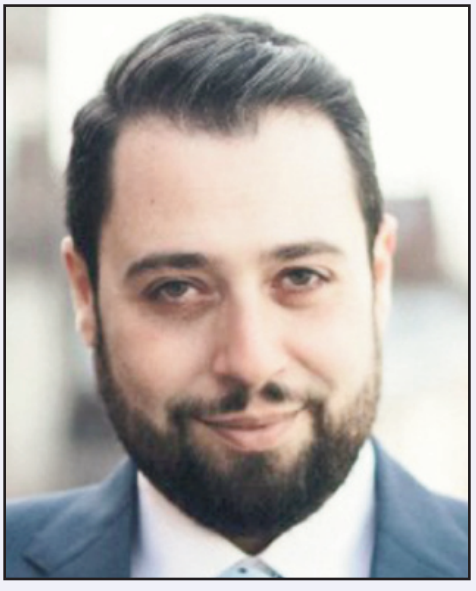
To Minimize or Not to Minimize Part 1: The failure to minimize an intercepted communication related to solicitor client calls can constitute an unreasonable search

by Marco Sciarra



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It has been an interesting trend in recent Part VI investigations that police have been caught intercepting solicitor-client communications. Of course, such breaches have not been widely available in the caselaw as most result in a Crown stay of proceedings under s. 579(1) of the *Criminal Code*. With limited judicial pronouncement, the background, challenge, extent of the violations and the result seem like nothing more than folklore. Given the prevalence of Part VI authorizations in combating crime, holding the police to strict compliance of the Part VI Order, particularly when breaches of solicitor-communications occur, should become a normal part of our challenges.

R. v. Garofoli[1] and subsequent caselaw affirm that in order for a search to comply with s. 8 of the *Charter*, it must be a reasonable one. A search will be reasonable – in the context of intercepted communications – when it is demonstrated that the interception was authorized by law, the law itself was reasonable, and the interception was executed reasonably. Section 186(4)(d) of the *Criminal Code* requires the inclusion of terms and conditions that the issuing justice considers advisable in the public interest.

While the terms and conditions outlined in a Part VI Order may vary from case to case, most, if not all, include a comprehensive explanation of the manner with which solicitor communications must be dealt. It is trite to say that the protection of solicitor-client privilege is – both generally and specifically – in the public interest. Indeed, ss. 186(2) and (3) of the *Code* relate specifically to interceptions of communications with counsel in the context of Part VI authorizations.

Given that the administration of criminal justice depends on the sanctity of the solicitor-client relationship, the court in *R. v. McClure*[2] maintained that solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

The state must demonstrate that it is absolutely necessary to interfere with solicitor-client communication because of the possibility of privileged information therein. Solicitor-client privilege must be closely guarded and can only be intruded upon in exceptional circumstances as defined within the Order of the issuing Justice. When interference in solicitor-client communication is absolutely necessary, the intrusion upon the privilege must be as minimal as possible. The Part VI Order often circumscribes a minimization process as well as court ordered access to the communications in an attempt to maintain a fair, just and efficient law enforcement.

Solicitor-client privilege must be closely guarded and can only be intruded upon in exceptional circumstances as defined within the Order of the issuing Justice. When interference in solicitor-client communication is absolutely necessary, the intrusion upon the privilege must be as minimal as possible.

Therefore, it is important to scrutinize the Order for some of the following information pertaining to solicitor communications:

- Does the Order specify "solicitor-client privileged communications" or simply "solicitor communications"?
- Does the Order prescribe how live monitors are to handle such communications?
- Does the Order prescribe how automatic interceptions are to be handled?
- Is there a provision that prescribes how to access solicitor communications that are not deemed "privileged"?
- Does the Order prescribe the manner in which text messages and emails are to be dealt?
- Does the Order prescribe the manner in which documentation is handled?
- Are these communications the subject of a sealing Order?

In order to determine if there has been a violation of your client's intercepted communication with a solicitor, you will first need to request disclosure of your client's solicitor communications and the Session Histories for those calls[3]. This will require an Order of the Superior Court of Justice. Such disclosure will reveal both the communication and the details of the communication. This permits a high-level review of the extent of the communications intercepted, the phone numbers, the dates, the content and the manner in which the call was reviewed.

It is important to note that the Session Histories of the calls provide a significant amount of information including, *inter alia,* whether the call was identified as a solicitor communication and by whom; whether the call was classified as a solicitor communication, by whom, and when; whether the classification of the call was ever changed, if so, by whom and when; whether the call was appropriately minimized and otherwise handled in compliance with the Order; who reviewed the call before and/or after it was classified as a solicitor communication; and what synopsis of the call was drafted.

Session Histories are not routinely provided by way of disclosure, however they are imperative is assessing how Part VI Orders are implemented.

Before discussing the legal issues arising from any failures to comply with the Order that may reveal themselves in disclosure of your client's solicitor communications, it is important to confirm all the phone numbers with your client, and inquire as to whether there were multiple numbers associated to one lawyer, or whether there are multiple lawyers with which the client was communicating (criminal, real estate, personal injury, corporate, etc.) and if so, gather a list of those numbers as well.

Once you have developed a comprehensive list of the possible solicitor phone numbers, a search of Send-Receiver Information (SRIs) pertaining to your client's phone number(s) will reveal if any of the solicitor communications escaped the "watchful eyes" (or, ears) of the monitors. At that point, you should look into the call and confirm that it was in fact a solicitor communication that was not sealed but rather disclosed in the normal course of disclosure. If that occurs, the Crown must be notified immediately in order to claw back the disclosure and rectify the potential breach of privilege.

Again, a review of the Session Histories of these calls can also shed light on how the call escaped the classification of a solicitor communication. That information is important in understanding both extent of the breach of the client's privacy interest and the extent of the violation of the Order.

The authorization provisions of Part VI of the *Code* are designed to ensure effective limits on the powers of police to invade the privacy of citizens. Since wiretapping is highly intrusive, the statutory requirements of the legislative scheme must be vigilantly observed. Therefore, all efforts must be made to avoid the improper interception or review of solicitor-client communications during a wiretap authorization.

Since wiretapping is highly intrusive, the statutory requirements of the legislative scheme must be vigilantly observed. Therefore, all efforts must be made to avoid the improper interception or review of solicitor-client communications during a wiretap authorization.

A wiretap is a search and seizure under s. 8 of the *Charter* and attracts the same (and arguably a stricter) standard of scrutiny as a search of a physical location.

In *R. v. Telfer & Crossman*,[4] the Court of Queen's Bench of Manitoba considered the special circumstances surrounding the interception of solicitor-client privileged communications. The court found that while executing an otherwise valid authorization, the police had "tripped over" the benign communications with counsel. The court confirmed that the police – bound by limiting terms and conditions – were obligated to stop monitoring the calls when they realized that the accused was communicating with her lawyer's office (about matters clearly and inextricably linked to her retainer with her lawyer). In ultimately finding that the implementation of the search was unreasonable, the court in *Tefler* concluded that:

> ... It would be a slippery slope to allow police to monitor that type of communication and decide later whether it fell under the umbrella of genuine solicitor-client communications. The right to counsel is far too important and must be staunchly guarded.[5]

Since the nature of the invasion of privacy authorized by a wiretap order is so great, the failure to comply with the terms of a Part VI authorization with respect to the interception of the solicitor communications renders the search unlawful and a violation of s. 8 of the *Charter*. A breach of a term or condition that is aimed at protecting against the unlawful interception of solicitor-client communications will be particularly egregious because of the constitutionally-entrenched nature of solicitor-client privilege.

The Ontario Court of Appeal was clear in *R. v. Doroslovac*[6] that to be carried out in a reasonable manner pursuant to a conventional authorization issued under s. 186(1) of the *Criminal Code,* the interception of private communications must be carried out in accordance with the terms of a valid authorization, as required by s. 186(2)(b).

Violating a term or condition of the Part VI authorization therefore constitutes its own s. 8 breach. Intent and foreknowledge by investigators may have bearing on an ultimate s. 24(2) analysis but the breach can be clearly and succinctly established.

In Part 2 of "To Minimize or Not to Minimize", Laura Metcalfe and Wes Dutcher-Walls argue the failure to minimize relating to medical information and sexual activity can result in a breach of s. 8.

Marco Sciarra is criminal defence lawyer practicing in the Greater Toronto Area.

[1] *R. v. Garofoli*, 1990 CarswellOnt 1006, 1990 CarswellOnt 119, [1990] 2 S.C.R. 1421 (S.C.C.).

[2] *R. v. McClure*, 2001 CarswellOnt 496, 2001 CarswellOnt 497, 2001 SCC 14.

[3] For a comprehensive list of disclosure items, see "To Minimize or Not to Minimize: Part 2".

[4] *R. v. Telfer & Crossman*, 2019 CarswellMan 153, 2019 MBQB 12.

[5] *Ibid.*

[6] *R. v. Doroslovac*, 2012 CarswellOnt 12456, 2012 ONCA 680, leave to appeal allowed 2013 CarswellOnt 4874, 2013 CarswellOnt 4875 (S.C.C.).

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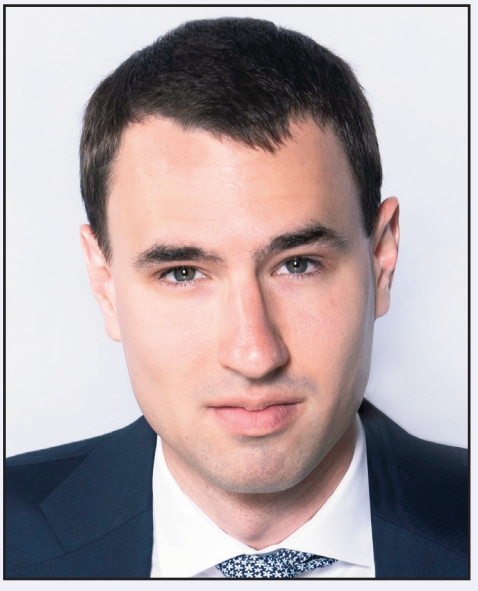
To Minimize or Not to Minimize Part 2: Expanding the rationale of minimization to sexual, medical, and religious communications

by Laura Metcalfe and Wes Dutcher-Walls



Laura Metcalfe photo courtesy of Jennifer Houghton. Wes Dutcher-Walls photo courtesy of John Narvali.

Counsel should advocate to expand the use of minimization conditions in Part VI Orders to protect a modern understanding of personal privacy beyond the protection of solicitor-client privilege. Many of the leading cases on minimization – including *Thompson* (1990) and *Finlay* (1985) – come from an era when it was possible to live one's private life without resort to a cellphone. Now, the law should change to reflect our increasing dependence on mobile technology. The pandemic made it inevitable that we conduct our lives online and through our phones, including calls with one's doctor.[1] Even before COVID-19, cellphones were "essential partners in daily life".[2] It is much more likely that a wiretap on a target's cell phone would pick up irrelevant and private information about sex, healthcare, or religion communication than the pay phones and landlines

considered in *Thompson* and *Finlay*.[3] The law on minimization should develop accordingly.

In Part 1, Marco Sciarra provides a helpful review of the law and practice tips for litigating minimization regarding solicitor-client privilege. In Part 2, we argue there other types of communications involving a heightened privacy interest where the failure to require minimization should constitute an unreasonable search when live monitoring is a condition of the authorization. We aim to give defence counsel some ideas on how to argue for expanding the rationale of minimization to interceptions capturing sexual activity, confidential medical information, or religious communications.

Counsel should focus their efforts on showing why Part VI orders should require minimization in new areas when live monitoring is a term of the authorization.

Background: the relevance of minimization and the need for clear rules to protect privacy

The concept of minimization is relevant in three ways in *Charter* litigation over a Part VI intercept:

1. Law enforcement compliance with minimization terms is crucial to the lawfulness of a wiretap. Section 184(2)(b) of the *Criminal Code* and the Ontario Court of Appeal make clear that the failure to follow a term or condition of a Part VI Order violates s. 8 of the *Charter*.[4]
2. The failure to include limiting terms and conditions in an authorization can affect the reasonableness of the warrant.[5] A search or seizure is only reasonable if it is authorized by a law or order that is itself reasonable.[6]
3. Evidence that the state has listened to calls containing sensitive and irrelevant content may help to demonstrate the unreasonableness of the authorizing judge's failure to require adequate minimization conditions.[7]

We argue that the second area - the failure to include limiting terms and conditions - offers the best chance for expanding the use of minimization to new areas of privacy. Courts remain hesitant to impose new minimization duties on wireroom monitors in the absence of terms in an order. In *Huang*, Justice Dambrot held that counsel are limited to challenging an authorizing judge's failure to include minimization terms in a warrant – and *not* the police's discretionary choices to listen to sensitive private calls. Justice Dambrot explained that the issue of minimization "can only arise if the warrant requires minimization in the particular circumstances, and the applicant alleges that the authorities failed to do what they were ordered to do".[8] The courts' "front-end" approach in *Huang* provides insufficient protection for privacy when intercepted communications stray into new types of sensitive or intimate information that the Part VI Order did not contemplate. Counsel should focus their efforts on showing why Part VI orders should require minimization in new areas when live monitoring is a term of the authorization.

Practical arguments for and against expanding minimization to new areas

Minimization conditions provide clear rules that alleviate the monitor's burden to exercise "judgement and sensitivity"[9] when listening to a target's private communications. Comprehensiveness and clarity in the terms of the Order benefits all parties.

Nonetheless, courts appear reluctant to expand the scope of minimization conditions in Part VI authorizations to new classes of privacy or types of communications. In *Finlay*, the Court held that it would be impractical to include a general minimization condition for calls that are irrelevant to the investigation. The evidence before the Court in *Finlay* demonstrated that it would be almost impossible to determine whether a conversation was irrelevant until the call was terminated. The Court held that monitors are not "gifted with prescience and cannot be expected to know in advance what direction the conversation will take".[10] The Court of Appeal for Ontario also recognized that minimization requires active monitoring, which forecloses automatic "indiscriminate" interceptions and therefore increases the cost and burden of investigations.[11]

... courts appear reluctant to expand the scope of minimization conditions in Part VI authorizations to new classes of privacy or types of communications.

There are at least three responses to the *Finlay* concern about the practicality of broader minimization requirements. First, counsel need to pick their battles wisely. Justice Martin is correct that there can be no meaningful minimization without live monitoring – which is not a constitutional requirement. Arguments about expanding the scope of minimization requirements in Part VI orders make sense only where live monitoring is already a condition of the warrant.

However, counsel should not let the Crown or trial judges overstate the practical difficulties for minimizing all irrelevant calls in relation to new areas of privacy like sexual activity or medical information. It should come as no surprise that a common Crown argument against additional minimization conditions is that monitors are laypeople who may not immediately recognize the beginning of a privileged or irrelevant conversation during an interception.[12] In *Finlay,* evidence was introduced by the Crown demonstrating the practical difficulties of implementing a minimization clause for all irrelevant calls. But some irrelevant topics are easier to recognize than others and thus minimization clauses targeting specific topics (e.g., sexual activity) are easier to implement than all irrelevant calls. Simply put, laypeople are in a better position to recognize the sounds of sexual activity or a conversation about intimate medical topics than they would be to recognize the broad category of irrelevant calls. Protecting privacy in those areas does not depend on asking a layperson to apply the legal concept of "relevance" in a vacuum. In the absence of case-specific evidence demonstrating the difficulty in recognizing irrelevant and sensitive conversations about medical information or sexual activity, defence counsel should challenge this Crown argument.

It should come as no surprise that a common Crown argument against additional minimization conditions is that monitors are laypeople who may not immediately recognize the beginning of a privileged or irrelevant conversation during an interception.

Finally, courts are long overdue to reconsider *Finlay* and *Thompson* in the 21st century when cell phones are ubiquitous and crucial for interacting with the rest of the world. Courts can depart from authoritative precedents where "there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate".[13] Courts must consider our dependence on technology when assessing the reasonableness of an authorizing judge's failure to include enhanced minimization clauses that protect irrelevant and sensitive personal information.

Courts must consider our dependence on technology when assessing the reasonableness of an authorizing judge's failure to include enhanced minimization clauses that protect irrelevant and sensitive personal information.

Current law on expanding minimization to other sensitive communications

There is scarce case law on minimization in new areas. The cases that exist are unhelpful to the defence. In *Telfer and Crossman,* Justice Martin considered whether intimate partner communications or sexual activity should have special protection through minimization. The Part VI Order in *Telfer* only included a standard limiting condition that required a monitor to discontinue monitoring as soon as they reasonably believed a target was not a party to the communication. Justice Martin found that the monitor's decision to listen to a few sensitive intercepts – including those capturing sexual activity – did not offend the "reasonableness of the search to such a material degree as to bring judicial condemnation on review." Justice Martin recognized the intimate nature of activities in a bedroom or bathroom but placed significant emphasis on the nature of the investigation and the fact that the purpose of the wiretap in a murder investigation was to capture "pillow talk" between the two targets. Justice Martin concluded that "presumably, the issuing judge was alive to all of these issues when he exercised his discretion in considering the terms and conditions requested to be part of the Authorization". The exercise of discretion in the circumstances of that investigation were reasonable.[14]

Similarly, in Project Sunder, Justice Porter considered whether it was unreasonable for a monitor to listen to and summarize several medical calls about a highly sensitive medical procedure.[15] Like Justice Dambrot in *Huang*, Justice Porter held that coun-

sel could challenge only the authorizing judge's failure to include minimization terms in a warrant and not the monitor's discretionary choices to listen to sensitive calls. Justice Porter found that nothing in the evidence identified special circumstances requiring the inclusion of a minimization condition for calls between a target and a medical office.

Under s. 186(4)(d) of the *Criminal Code*, an authorizing judge has the discretion to include terms and obligations in the authorization that are advisable in the public interest ... Counsel should argue that courts ought to use s. 186(4)(d) to preserve a modern concept of personal privacy that recognizes sexual, medical, and religious autonomy.

Making the argument for expanding the use of minimization terms in authorizations requiring live monitoring

Despite the limited and unhelpful jurisprudence, there is a statutory basis for expanding minimization requirements to new areas of privacy. Under s. 186(4)(d) of the *Criminal Code,* an authorizing judge has the discretion to include terms and obligations in the authorization that are advisable in the public interest. On its face, that provision goes beyond simply protecting solicitor-client privilege. Counsel should argue that courts ought to use s. 186(4)(d) to preserve a modern concept of personal privacy that recognizes sexual, medical, and religious autonomy.

There is also a doctrinal basis to challenge the failure to minimize calls in "new" areas of privacy that have not received significant judicial consideration. Medical communications may be the best candidate for protections through minimization terms. The law is unanimous about the sensitivity of health information. In other contexts, state intrusion upon a medical examination or conversation can be an unreasonable search on its own. In *Murphy*, a police officer remained in a hospital room while a doctor examined a person under arrest for impaired driving. The doctor drew a privacy curtain around herself and the patient but the officer could hear what they were saying and made notes on the conversation. Justice O'Flaherty of the Nova Scotia Supreme Court held that it constituted an unreasonable search for the officer to remain in the room and record the medical discussion.[16] If eavesdropping on a medical examination in person is an unreasonable search, then it is unreasonable for a Part VI authorization not to provide protection for this kind of communication.

Next, counsel should continue to challenge the lack of minimization requirements for sexual activity despite the outcome in *Telfer and Crossman*. First, the investigation narrowly focused on two targets in a relationship who were suspects in a homicide. Second, the existing case law confirming the intrusiveness of recording or disclosing sexual conduct provides a principled basis for arguing that a warrant is invalid if it fails to provide for minimization of intercepts capturing sexual content, particularly in large drug investigations where police expect to capture innocent third parties. The potential relevance of intimate sexual calls appears nil while the intrusion upon the innocent third parties' privacy is significant. As we know from the ss. 276 and 278 context, sexual communications touch on the most intimate and private areas of human life.[17] We also know from the Part VI context that intrusion upon sexual activity is a relevant consideration under s. 24(2) when assessing the seriousness of the police conduct or the impact on a person's *Charter*-protected interests.[18]

As alluded to, counsel should note that the cases considering the interception of sexual activity often involve a situation where the target's partner was named in the authorization or their communications were relevant to the investigation. In *Telfer and Crossman*, both were targets;[19] in *King*, the ITO alleged that King was supplying drugs to his girlfriend and their conversations could be relevant to the offences.[20] These Crown-friendly past precedents do not consider the failure to minimize sexual activity or intimate conversations between a target and a completely innocent or unrelated third party.

Medical communications may be the best candidate for protections through minimization terms. The law is unanimous about the sensitivity of health information.

Finally, the minimization of religious communications may be the most difficult to achieve. Religious privilege is not a class privilege and claimants must challenge the intrusion into religious communications on a

case-by-case basis.[21] Moreover, the archaic concept of "priest-penitent" privilege still carries the implication that religious communications may contain confessions and are therefore *highly* relevant. Nonetheless, in *Bonnell*, Ferguson J. of the New Brunswick Court of Queen's Bench left open the possibility that religious privilege could apply to an intercepted conversation with a spiritual leader if there was evidence about the role of that leader in the community and the relationship between the leader and someone speaking with them.[22] If counsel can establish that religious privilege applies according to the classic Wigmore criteria for case-specific privilege, these calls should enjoy the same level of protection as solicitor-client communications. Moreover, courts considering searches and intercepts already acknowledge that religious communications deserve special protection when police are implementing a search warrant or authorization. This includes cases where the religious communication was relevant to the investigation or even contained a confession.[23] Counsel should use those principles to argue that religious communications *unrelated* to the investigation should be left alone entirely.

If counsel can establish that religious privilege applies according to the classic Wigmore criteria for case-specific privilege, these calls should enjoy the same level of protection as solicitor-client communications. Moreover, courts considering searches and intercepts already acknowledge that religious communications deserve special protection when police are implementing a search warrant or authorization.

Practice Tips for Defence Counsel

Defence counsel would be wise to listen to all private intercepts while asking themselves the following questions:

- Was there a live monitoring condition?
- What was the nature of the investigation (e.g. narrow investigation targeting two suspects vs. a broad drug investigation targeting hundreds of individuals where intrusions on innocent third parties are likely)?
- Did the monitor listen to highly sensitive calls (e.g. communications about sexual activity, communications with a medical professional, or irrelevant communications with a religious leader)?
- If so, were there any terms or conditions in the Part VI Order that precluded the monitor from listening to these sensitive calls?
- If there were no terms or conditions in the Part VI Order precluding the monitor from listening to these calls, consider bringing a s. 8 *Charter* application to argue that the issuing Justice erred in failing to include such minimization conditions.

To make this assessment, defence counsel should make the following disclosure requests:

- A copy of all Part VI Orders, including any draft Orders.[24]
  - Review the Part VI Orders and draft Orders to determine: (1) whether there are live monitoring conditions, (2) whether there are any minimization conditions included; (3) whether police considered but did not include minimization conditions; and (4) whether the issuing Justice added any minimization conditions.
- All .WAV audio files for all intercepted communications relating to all targets, except those .WAV audio files which are classified as privileged.
  - The Crown typically only discloses audio of so-called "relevant calls". That decision is made by wireroom monitors, who do not know what is relevant to defence counsel. Counsel should seek disclosure of irrelevant calls to defend the client on the trial proper and to assess potential s. 8 violations.[25]
- All .WAV audio files and session histories in the JSI Explorer format.
  - In the ordinary disclosure package, counsel will receive a USB or CD containing the audio intercepts, along with a PDF of the session review history (which includes a summary of each audio intercept, prepared by the civilian monitor). The PDF is a useful tool to perform key words searches (a function that the JSI Package Explorer does not have). But for counsel that intend on reviewing all intercepts and their session history, a more efficient way to review the audio intercept and all other relevant information (e.g., session history and investigator's comments) is through the JSI Package Explorer.

- The JSI Package Explorer consists of columns and rows with categories, including the type of product (call or text message), authorization number, the audio or text content, session number, target number, telephone number being intercepted, time of interception, the number of the other telephone line intercepted, duration of the call and whether it was incoming or outgoing. You can also click on tabs across the top of the screen to access different fields, including the audio recording of the call, a synopsis of the call, the investigator's comments and a link to the session history for each call.
- The JSI Package Explorer does not permit the search of text messages or the summary of the content of the call prepared by the civilian monitors. As a result, defence counsel would be wise to ensure they have access to both. The JSI Package Explorer has been disclosed in at least two projects: Project Sindicato and Project Sunder.[26]

Counsel should draw trial judges' attention to the Catch-22 where reviewing courts refuse to consider the police's discretionary choices to listen to sensitive and irrelevant calls but also refuse to entertain challenges about the failure to include minimization terms to protect new areas of privacy.

Conclusion

The existing state of the law is discouraging, but counsel should continue to challenge authorizations where the police ultimately capture sexual, medical, or religious communications irrelevant to the investigation. Counsel should draw trial judges' attention to the Catch-22 where reviewing courts refuse to consider the police's discretionary choices to listen to sensitive and irrelevant calls but *also* refuse to entertain challenges about the failure to include minimization terms to protect new areas of privacy. If counsel cannot protect their clients' intimate communications at the "front end" through expanding the use of minimization terms in Part VI authorizations with live monitoring, courts are admitting that Part VI of the *Criminal Code* is unsuited to a modern concept of privacy. We should refuse to accept this state of affairs.

Laura Metcalfe and Wes Dutcher-Walls are associate lawyers at Addario Law Group LLP.

NOTES:

[1] *R. v. Mootoo*, 2022 CarswellOnt 385, 2022 ONSC 384 at para. 62; *R. v. S.C.W.*, 2020 CarswellBC 3389, 2020 BCCA 377 at para. 72.

[2] *R. v. McKay*, 2013 CarswellAlta 102, 2013 ABPC 13 at para. 10, reversed 2014 CarswellAlta 212 (Alta. Q.B.).

[3] *R. v. Finlay*, 1985 CarswellOnt 123, [1985] O.J. No. 2173, [1985] O.J. No. 2680 (Ont. C.A.), leave to appeal refused (1986), 50 C.R. (3d) xxv (S.C.C.); *R. v. Thompson*, 1990 CarswellBC 218, 1990 CarswellBC 760, [1990] 2 S.C.R. 1111 (S.C.C.).

[4] *R. v. Doroslovac*, 2012 CarswellOnt 12456, 2012 ONCA 680 at para. 30, leave to appeal allowed 2013 CarswellOnt 4874, 2013 CarswellOnt 4875 (S.C.C.), relying on s. 184(2)(b) of the *Criminal Code*.

[5] *R. v. Doroslovac*, 2012 CarswellOnt 12456, 2012 ONCA 680, leave to appeal allowed 2013 CarswellOnt 4874, 2013 CarswellOnt 4875 (S.C.C.).

[6] *R. v. Collins*, 1987 CarswellBC 699, 1987 CarswellBC 94, [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15 (S.C.C.) at 278 [S.C.R.].

[7] Evidence about the intrusiveness of interceptions can create a need for minimization clauses in subsequent authorizations in an ongoing investigation: see e.g. *R. v. Salituro*, 1992 CarswellBC 1982, 16 W.C.B. (2d) 248 (B.C. S.C.). The same could apply on a s. 8 challenge to an existing intercept.

[8] *R. v. Huang*, 2018 CarswellOnt 4351, 2018 ONSC 831 at paras. 51-56.

[9] *R. v. Telfer & Crossman*, 2019 CarswellMan 153, 2019 MBQB 12 at para. 80.

[10] *R. v. Finlay*, 1985 CarswellOnt 123, [1985] O.J. No. 2173, [1985] O.J. No. 2680 (Ont. C.A.), leave to appeal refused (1986), 50 C.R. (3d) xxv (S.C.C.).

[11] *Ibid*.

[12] See e.g. *R. v. Steel*, 1995 CarswellAlta 456, [1995] A.J. No. 992 (Alta. C.A.) at para. 11, leave to appeal refused (1996), 37 Alta. L.R. (3d) xxxvi (note) (S.C.C.); *R. v. Russell*, 2013 CarswellBC 4254, 2013 BCSC 670 at para. 68; *United States v. Mansoori*, 304 F.3d 635 (7th Cir., 2002).

[13] *Bedford v. Canada (Attorney General)*, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, 2013 SCC 72 at para. 42.

[14] *R. v. Telfer & Crossman*, 2019 CarswellMan 153, 2019 MBQB 12 at paras. 80-82.

[15] *R. v. Burke, Periera, Nguyen, Brown, Zaidi, Barnett, and McFarlane* (June 29, 2022), unreported (Ont. C.J.).

[16] *R. v. Murphy*, 2022 CarswellNfld 4, 2022 NLSC 2 at paras. 101-109. See also *R. v. Dhak*, 2012 CarswellBC 4408, 2012 BCSC 2199 at para. 35, considering whether minimization would be appropriate where police are aware that a psychotherapist predictably communicates with the target of an intercept.

[17] See e.g. *R. v. W.K.*, 2021 CarswellOnt 7997, 2021 ONSC 3757 at para. 20.

[18] *R. v. Spackman*, 2008 CarswellOnt 11337, [2008] O.J. No. 2722 (Ont. S.C.J.) at para. 104. See also *R. v. Riley*, 2018 CarswellOnt 20635, 2018 ONCA 998 at para. 38 (considering the absence of interceptions capturing intimate activity).

[19] *R. v. Telfer & Crossman*, 2019 CarswellMan 153, 2019 MBQB 12 at paras. 79, 81.

[20] *R. v. King*, 1993 CarswellNfld 155, 107 Nfld. & P.E.I.R. 297, 19 W.C.B. (2d) 222 (Nfld. T.D.) at para. 41.

[21] *Beam v. Attorney General of Canada*, 2021 CarswellMan 15, 2021 MBQB 7 at para. 31, citing *R. v. Fosty*, 1991 CarswellMan 206, 1991 CarswellMan 285, [1991] 3 S.C.R. 263 (S.C.C.).

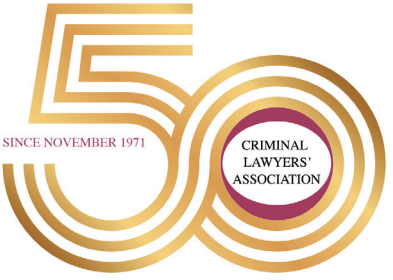
[22] *R. v. Bonnell*, 2012 CarswellNB 822, 2012 CarswellNB 823, 2012 NBQB 34 at paras. 54-61.

[23] See e.g. *Jones v. British Columbia (Attorney General)*, 2007 CarswellBC 2341, 2007 BCSC 1455 at para. 101; *R. v. Dhak*, 2012 CarswellBC 4408, 2012 BCSC 2199 at para. 35.

[24] Crowns are resistant to disclosing draft orders and this step requires litigation.

[25] Please contact the authors of this article if you require a copy of the Project Sunder transcript of proceedings.

[26] In Project Sunder, the Crown objected to disclosing the original JSI Package Explorer, claiming investigative privilege. The Crown called *in camera* evidence to establish that the modified JSI Package Explorer (which removed a security issue did not alter the digital evidence in any way, other than to prevent disclosure of the security issue).



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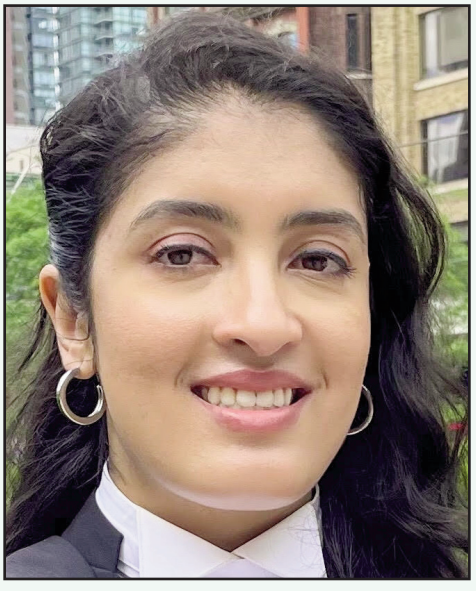
The Ideal Target: Resisting Police Social Media Reliance During *Garofoli* Applications

by Ramisha Farooq



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It is becoming more and more common for the police to rely on social media to generate grounds for a search warrant or Part VI authorization in large project investigations. Often police will rely on social media posts to draw connections between targets, YouTube videos to infer messaging from music lyrics, and dates and times of posts to develop an investigative theory. The seductiveness of this apparently "public information" can easily lead (or mislead) an issuing Justice into accepting that there are reasonable grounds to authorize the warrant. Social media information taken at face value can appear to be reliable enough for such investigative purposes because the standard is what the affiant reasonably knew or ought to have known and not necessarily the truthfulness of the information. As such, challenging the social media aspects of an Information to Obtain on review can be very difficult. . .but not impossible.

Often police will rely on social media posts to draw connections between targets, YouTube videos to infer messaging from music lyrics, and dates and times of posts to develop an investigative theory.

After having spent a large portion of my articles assisting my principal, Marco Sciarra, on a large project

Garofoli application, we realized that there is a significant disconnect between the common understanding of social media, its uses and purposes and the criminal justice system's understanding of social media. This is not the appropriate forum to launch into a legal treatise about the various ways one can challenge the social media evidence in an Information to Obtain and I do not profess to be the right person for that job. Rather, this article identifies some of the issues that were raised during the preparation of our *Garofoli* application and how some recent case law has assessed police use of social media. The goal is to identify the types of issues that future litigants should be aware of when looking to challenge an Information to Obtain that relies heavily on social media.

Given the high volume of digital content shared on social media platforms, it is incredibly important to discern an image or video's reliability. In the Garofoli context, officers that take images or videos at face value neglect to probe factors like image ownership, copyright or general authenticity ...

The following points are raised against the backdrop of information that the affiant "knew or ought to have known":

1) What is social media and what is its intended purpose?

The more ubiquitous the definition of social media and its purposes become, the more scrutiny an issuing Justice can apply to the content relied upon in authorizations. In its simplest form "social media" is a form of electronic communication through which users can create online communities to share information, ideas, personal messages, and other content.[1] On a deeper level, however, it speaks prominently to the users' most enviable qualities and identity. Popular platforms such as Instagram, Facebook and TikTok are therefore often used to project one's "ideal" self to others.[2]

In one way, the creation of socialized media has closed the gaps between nations, continents, and even the cosmos. In other ways, as described, social media is less about actual social interactions[3] and more about self-expression, influence and consumption.

2) Who is the user of the account?

The most obvious and concerning aspect of the investigative reliance on social media is that the "handle" for a registered account does not necessarily speak to its ownership. Dr. Rhonda McEwan, who acts as an expert in emerging media, explained that platforms like YouTube and Instagram are heavily used for marketing purposes, especially by entertainers. This could easily describe how targets involved in music use social media as a means to promote their musical ambitions. Followers of popular celebrity accounts also often create "fan accounts" that render depictions of individuals other than the account owner.[4] Consider, for example, that a person depicted holding a handful of money isn't necessarily rich, but simply wants their followers to believe they are as a means of drawing attention.

Social media platforms can also be used by multiple people across various devices despite a particular phone number or email attached to the originating account. While this is common, such information is not routinely provided to the issuing Justice, possibly because it would imply that further confirmatory information is necessary as to the user of the account at a particular time. This is particularly concerning where the commentary on the social media posts is relied upon in support of the grounds.

3) Are the images authentic photographs or stock internet photos?

Often social media influencers and even average users may post stock images on their profiles as a means of marketing projects or promoting certain social causes. These types of images are governed by various copyright, limitations and usage rules, which I won't explain at any length, except to mention that a user will generally have to purchase the right to use a particular image and, depending on the site, the image itself may be royalty-free or rights managed. This applies equally to stock videos. Given the high volume of digital content shared on social media platforms, it is incredibly important to discern an image or video's reliability. In the *Garofoli* context, officers that take images or videos at face value neglect to probe factors like image ownership, copyright or general authenticity, thereby potentially misleading a court when providing grounds for a warrant.

4) Is there a reasonable expectation of privacy by those who use social media?

In an investigation into Clearview AI, Inc,[5] the Privacy Commissioners of Canada, Quebec British Columbia and Alberta considered the privacy interests surrounding the company's collection of digital images to populate its facial recognition database. The facial recognition technology employed by Clearview collected data

in four steps. Prominently, the first of these steps gathered images of faces and associated data from publicly available online sources, including social media, and stored this information in its database. It then created biometric identifiers for each image, allowed users to upload images that were matched with the biometric identifiers, and finally, provided a list of results, containing all matching images and metadata.

Often officers engaged in an investigation will take advantage of Instagram's "recommendation algorithm" to develop connections with suspected individuals. Private accounts generally can only be accessed with the permission of the account owner. To bypass this requirement, officers will send "covert" follow requests to account holders seeking permission while concealing their identities as police officers ...

For the purposes of this article, I do not want to dive too deeply into the privacy commissioners' findings as their applicability to criminal courts may be limited, but I want to highlight a few important points. Notably, Clearview argued that it did not need the consent of relevant individuals to collect information from online sources (including social media) because it was "publicly available". The OPC, however, found that social media profiles did not fall under the Personal Information Protection and Electronic Documents Act (PIPEDA) or its provincial counterparts. Simply put, they were not listed as "prescribed sources of publicly available information under any of [the relevant] Acts." As such, consent to the collection of information would have been reasonable and appropriate. Specifically, the OPC noted the "dynamic" nature of social media content and an individual's direct control over their social media presence as the main elements differentiating it from PIPEDA identified sources. The OPC noted in its decision that "control is a fundamental component of privacy protection" and likening all publicly accessible content to some form of publication undermines the control individuals may maintain over their information.

While limited in its direct applicability in the *Garofoli* context, it adds valuable background to the use of the "open source" descriptor by police. Affiants routinely characterize applicable social media platforms as "open source" websites in order to justify the collection of information and identification of suspects. However, as Dr. McEwan notes,[6] while social media platforms are "networks or communities where people with similar interests share information using accessible and scalable publishing techniques", this does not rise to the level of an "open source" website. An "open source" website utilises a collaborative development model for software development based on a copyright limited access to code. In the context of social media, Dr. McEwan has explained this means that these various platforms are available for distribution, reproduction, and use by anyone viewing the material. Applying this model to a larger social media platform like Youtube is problematic. Users on social media must limit their use and content creation to the agreed-upon terms and conditions, thereby restricting full freedom and expression.

When the definition of "open source" is used to describe information that is believed to be "publicly available", the issuing Justice is led to believe that despite retaining control over their social media presence, the target has abandoned their privacy interest in the material posted. This is inconsistent with the finding in Clearview.

5) How do the police get access to private accounts?

Another problematic area of investigative techniques concerns the way in which police are able to access individual accounts and content. Often officers engaged in an investigation will take advantage of Instagram's "recommendation algorithm" to develop connections with suspected individuals. Private accounts generally can only be accessed with the permission of the account owner. To bypass this requirement, officers will send "covert" follow requests to account holders seeking permission while concealing their identities as police officers (e.g., creating a fake account of an attractive female of similar age to the target). These access requests are more likely accepted if a requestee is following lots of other related accounts. These other accounts are in turn often based solely on recommendations made by Instagram's algorithm. This is of course information sought without a warrant or any grounds to believe doing so will deduce evidence of criminality. It is unclear at this point whether this is widespread police practice, but is worth probing regardless.

6) Are the police social media experts actually experts in comparison to actual social media experts?

In the normal course of a trial, it is well known that expert evidence may only be admitted if it meets the threshold requirements of admissibility. The Supreme Court of Canada outlined this two-step assessment fully in *White Burgess Langille Inman v. Abbott and Haliburton Co.*[7] In the first step, logical relevance, necessity, absence of an exclusionary rule, and a properly qualified expert are considered. In the second step, a cost-benefit analysis is conducted by the trial judge to balance the potential risks and benefits of admitting the evidence. The purpose of this test is to ensure this type of evidence does not distort the fact-finding process.

No such requirements exist for noted police "social media experts" in the pursuit of a warrant or authorization. Officers may simply lack the appropriate training to adequately address these issues and conduct appropriate undercover investigations of social media accounts. When affiants describe an officer as a "social media expert" in the ITO, it may be worth exploring whether this description misleads the issuing Justice.

7) Are confidential sources garnering information from social media?

It is easy to see how a confidential source can be corroborated simply by relying on a target's social media accounts. Beyond the posts that have been archived by the user on their accounts, many platforms provide an opportunity to post short-term videos or live feeds which can provide information as to the location and behaviour of a target at a particular time. Any confidential source who follows the account can gather information from these non-archived files for police under the guise of first-hand knowledge.

The courts have similarly struggled to properly address some of the concerns raised here. Some examples are briefly outlined below.

Justice Bawden's decision in *R. v. Adan et al.*,[8] considered these very issues. The Court examined surrounding factors, such as alleged gang members flaunting the "monetary benefits of their organisation" in Youtube videos and social media, but failed to properly deconstruct the larger purposes and uses of such social media posts. Having knowledge of the grandiose nature of Instagram posts, one might easily posit that the types of images described by Bawden J. were meant to inflate a particular individual's exploits, rather than paint an authentic picture of one's life. His reasons did note, however, that expert evidence would be necessary to properly rule on the relevant issues.

In *R. v. Kalonji*,[9] the Court rightly noted that the depiction of a suspected individual in a social media post does not necessitate their committing a crime, but similarly falls into the pitfall of overreliance, preferring to overlook or slight the inherent deficiencies in social media identities and content. In that case, Justice Greene contemplated that the Youtube videos in question may just be the genre of "gangster rap'" but fell short of the necessary caution by allowing police to positively corroborate CI intel and identify and associate suspected individuals with Youtube content.

The Court in *R. v. Alakoozi*,[10] fell into a similar trap by magnifying the fact that two known individuals "openly broadcast their gang-related criminal activity in social media".[11] Similar to the Court in *Kalonji*, this type of content was heavily relied upon to "mutually corroborat[e]" CI intel. No substantive analysis was done, however, to consider the inherent limitations of social media content. Justice Porter even went so far as to justify police actions by noting that evidence was adduced from "open source" Instagram accounts,[12] which, as I've identified above, relies on a common misconception.

These types of comments and results are not surprising. The nature of social media evidence is simply outside the realm of common judicial experience. It is for these reasons that the reliance by police, Crowns and courts on social media as the basis for corroborating information in support of a judicial authorization of search warrants should be met with resistance. Appreciating that a successful challenge may require strong defence evidence (*viva voce* from the accused; expert evidence; etc.) prior to getting leave to cross-examine the affiant, the best challenge is likely to come when the circumstances of the case and the accused align for this attack. Until then, there will likely be more rulings upholding the use of social media as an effective investigative technique.

Ramisha Farooq is a recent call that completed her articles with the law office of Marco Sciarra. She is currently clerking at the Federal Court.

NOTES:

[1] "Social Media" (last accessed 1 July 2022), online: *Merriam Webster Dictionary* <www.merriam-webster.com/dictionary/social%20media>.

[2] Instagram Analysis Report provided by Dr. Rhonda McEwan (2021): Materials were provided as part of expert opinion sought in a largescale project matter [*Instagram Report*].

[3] Jeffrey A Hall, "When is social media use social interaction? Defining mediated social interaction" (2016) 20:1 New Media & Society 162.

[4] McEwan, Instagram Report, *supra*, note 2.

[5] Canada, Office of the Privacy Commissioner of Canada, Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia,

and the Information Privacy Commissioner of Alberta, (Report), PIPEDA Findings #2021-001, (Ottawa: OPC Communications Group, 2021).

[6] McEwan, Instagram Report, *supra*, note 2.

[7] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 313, 2015 CarswellNS 314, 67 C.P.C. (7th) 73, 18 C.R. (7th) 308, 2015 CSC 23, 2015 SCC 23, 360 N.S.R. (2d) 1, 383 D.L.R. (4th) 429, 1135 A.P.R. 1, 470 N.R. 324, [2015] 2 S.C.R. 182, [2015] S.C.J. No. 23 (S.C.C.).

[8] 2021 CarswellOnt 15299, 2021 ONSC 7150.

[9] [2018] O.J. No. 5465.

[10] 2020 CarswellOnt 11175, 2020 ONCJ 346.

[11] *Ibid.*, at para. 122.

[12] *Ibid.*, at para. 123.

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Search Solutions and Techno Tricks:

Disclosure Requests in Wiretap Cases

by Lynda Morgan

Photo courtesy of Jennifer Houghton.

Conventional wiretap cases are typically disclosure heavy cases. However, in addition to obtaining authorization to intercept private communications, police have also started to seek judicial authorization for new and invasive technologies that engage significant privacy concerns in omnibus wiretap applications. Disclosure in relation to those new technologies is not produced as a matter of course. Generally, the Crown produces the redacted ITO(s) and authorization. With some reluctance, the Crown will also disclose poorly organized source documents. But the Crown typically does not produce the key material that allows you to assess section 8 implementation issues, including session histories, the JSI manual, and internal wireroom documentation.

In this article I describe some of the standard wiretap disclosure to request and explain the reason to request specific pieces of disclosure when defending a wiretap case.

1. The Basic Disclosure Requests

My standard wiretap disclosure request includes the following:

1. Identification of the wire room used for the interceptions;
2. Identification of the version of the JSI software used to manage the interceptions;
3. All call logs and/or synopses created for each interception (not just those marked "pertinent");
4. Audios of all intercepted communications (not just those marked "pertinent");
5. Production of all intercepted SMS communications;
6. Session histories in relation to all intercepts on all of the target lines until the current date;

7. Identification of all user names in the session histories;
8. Production of all reports prepared during the investigation;
9. Disclosure of all "comments" entered in respect of intercepted communications;
10. Copies of all notebooks maintained by the monitors, civilian monitor project coordinator and supervisor;
11. Copies of all instructions provided to monitors;
12. Contents of the voice library;
13. Copies of any "lawyer lists" maintained by the wireroom or information relating to the identification of lawyers captured on intercepted communications;
14. Copies of all orders/instructions respecting the set-up, use or discontinuation of the JSI system for each intercepted phone or device, including any administrative action reports;
15. Copy of the JSI manual;
16. Copies of any daily wireroom reports;
17. Production of any other reports of intercepted communications prepared during the investigation; and
18. Where ODIT (On-Device Investigative Tool) has been used, request all information about the program, how many times it was deployed, what evidence was collected as a result, and any technical logs or databases respecting its usage.

2. Session Histories Provide An Audit Trail of All Activity in Relation to a Session

Session histories disclose an audit trail of every action taken in relation to an interception. Insist on their disclosure. Session histories can be a goldmine of information relevant to your *Garofoli* challenge.

Session histories disclose information including the time the communication was first intercepted, whether the communication was live monitored (and how long live-monitoring or spot-monitoring lasted), how the communication was classified (relevant, not-relevant, privileged, and so on), whether the classification was changed, and whether and how many other users or investigators reviewed the interception. A session history will also show you when a user starts listening to a call. However, unless live monitoring is used, the session history cannot tell you for how long a user accessed a particular interception. You may be able to infer the duration of the listening by looking at when the monitor took another step, such as preparing a synopsis. This can be relevant where you want to argue that a particular monitor or user should not have accessed a communication.

Session histories can be crucial for litigating *Charter* applications relating to breaches of solicitor-client privilege. All Part VI authorizations prohibit the interception of or access to communications involving a solicitor. Legal assistants and law clerks are captured by the prohibition.[1] Generally, the order will allow for spot monitoring to ensure that a solicitor is on the line. You should carefully review the session histories to understand how the wireroom monitors or police treated solicitor calls. If you discover that multiple users have accessed presumptively privileged calls, catalogue the frequency and type of access to determine whether you have a viable constitutional challenge relating to accessing solicitor calls. Crowns often dismiss or minimize solicitor related implementation errors on the mistaken belief that the limitation prohibits the interception or access to *privileged* communications. That is incorrect.[2] Calls between targets and solicitors are presumptively privileged. The police and Crown are not the arbiters of privilege.

3. The JSI Manual Discloses Available Functions That Could Have Been Used

The Crown usually refuses to produce the JSI manual even though the wireroom has access to (or should have access to) a copy. Although the manual has been produced in numerous projects going back at least a decade, the Crown will insist that you bring a third-party records application. In practice, JSI will likely provide you with a copy of the manual in response to a subpoena without requiring litigation.

The manual is particularly valuable after you have identified a particular implementation issue. For instance, if the wireroom continued to intercept and listen to communications between your client and his lawyer, look to see what JSI features were available that could have allowed the wireroom to auto-minimize those calls. You may be able to argue that a hypothetical *Charter* breach is more serious because police could have avoided it. For instance, you could argue that the wireroom should have flagged a lawyer's number so that it set off an alarm when a communication was intercepted, or that the wireroom should have used the JSI features so that such calls auto-minimized. Where the wireroom fails to use available functions, you can argue that breaches of the Order arising from wireroom/investigative access to solicitor calls were completely avoidable, and that any *Charter* breach is therefore more serious.

4. The Authorization of Other Technologies

Orders in some recent project cases have authorized the use of a program called ODIT. Crowns have asserted investigative privilege or public interest privilege over disclosure relating to ODIT functionality. However, in June 2022, the RCMP disclosed ODIT use in ten investigations. The RCMP confirmed that the spyware allowed police to ". . .remotely turn on the

camera and microphone of a suspect's phone or laptop".[3] The spyware also allows police to intercept messages and other data before they are encrypted or sent, meaning that otherwise protected communications through programs like Signal become accessible to law enforcement. Keep your eyes open for reference to technologies like ODIT in omnibus applications. When mentioned, seek as much disclosure as possible to understand the privacy implications at play to understand how to best challenge its use.

NOTES:

[1] *Descôteaux c. Mierzwinski*, 1982 CarswellQue 13, 1982 CarswellQue 291, 1982 CanLII 22 (S.C.C.); *Rizzuto c. R.*, 2018 CarswellQue 1194, 2018 CarswellQue 5035, 2018 QCCS 582 at paras. 201, 208,

[2] *R. v. Rutigliano*, 2015 CarswellOnt 9296, 2015 ONCA 452 at para. 16,

[3] https://www.politico.com/news/2022/06/29/canada-national-police-spyware-phones-00043092.

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WRENCHES FOR THE TRENCHES

The *Holloway*[1] to the Skeletons in the Closet

by Hussein Aly

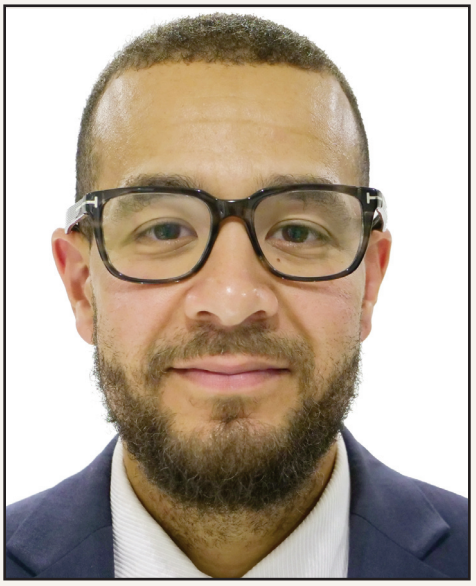

Photo courtesy of Albussein Abdelazim.

Credibility is at the heart of many criminal cases. An unreliable witness can still be found to be credible. In contrast, it is well established that "a witness whose evidence on a point is not credible cannot give reliable evidence on that point".[2] As a result, defence counsel have wide parameters when cross-examining a witness, so "a non-accused witness may be cross-examined on discreditable conduct, irrespective of whether that conduct amounts to an offence or has resulted in a conviction".[3] This applies to law enforcement since "in law, a police officer is an ordinary witness".[4]

Despite this, largely on the authority of *Ghorvei*,[5] police officers who have been called lairs in other judgments have been spared cross-examination on the negative findings of credibility. This has resulted in officers testifying in court without the presiding Judge knowing that another Justice has concluded that they are dishonest.

The reach of *Ghorvei*[6] has now been recalibrated in *Holloway*.[7] With the right case theory, facts, and preparation the door is no longer closed on prior negative findings of credibility being weaponized by defence counsel.

The Facts in Holloway

In *Holloway*, the accused brought an application to exclude a firearm found in his satchel based on violations of ss. 8, and 9 of the *Charter*; the accused also argued that his detention and search was influenced by racial profiling. The police had attended an apartment after the resident reported that he had observed, through his surveillance cameras, that his daughter had let some men into their apartment, and he added that she wanted them out of the apartment but was too

afraid to ask them to leave. Two officers knocked on the door and it was answered by a woman they correctly assumed was the daughter. There was no reliable evidence about what if any discussion the officers had with the woman, but they agreed they did not obtain permission before entering the apartment. As they entered, the officers heard loud music playing and observed four black males in the company of three non-white women who they believed were minors. Their attention quickly focussed on the accused as they both claimed he got up and walked towards the kitchen upon their entry. One of the officers added that he observed the accused conceal something in a satchel, the other did not make this observation. The accused was ordered to approach the police, he was detained, and the subsequent search of his satchel led to the discovery of a loaded firearm.

The Defence Position

The defence argued that there were no grounds to detain and search the accused. More specifically, the defence argued that the searching officer's claim that the accused concealed something in his satchel was an after-the-fact justification created to sanitise an unconstitutional search. To support his argument, the accused sought to cross-examine the searching officer regarding him having been found to have lied about grounds to detain and search in three other cases. The Crown objected citing *Ghorvei* and similar authority.

The Ruling

Justice Harris permitted cross-examination of the officer on all three prior negative findings of credibility. He ruled noted that "the conclusion that previous adverse judicial opinion cannot by itself and with nothing more be used to impugn the veracity of a police officer is often accepted with little discussion".[8] He noted that "a bare opinion of credibility without supporting reasons is of no assistance to a finder of fact".[9] However, his Honour stated "*Ghorvei* is not and was not intended to be the blanket prohibition it is sometimes believed to be"[10] and that it did not "impose a strict inflexible rule".[11] He found that "in some circumstances, however, where counsel elicit the foundation as well as the ultimate opinion, this concern is substantially alleviated particularly in a judge alone situation like the current one".[12] Moreover, he concluded that "cross-examination of a police officer on past conduct may well be proper because of its pertinence to credibility and propensity".[13] Ultimately, his Honour found several factors supporting allowing cross-examination on the prior negative findings of credibility:

1. A complete factual foundation was adduced: Unlike *Ghorvei*, "it was not the bare opinion of the three trial judges that carried the defence burden of relevance and admissibility",[14] rather, the defence "dug into the factual foundations of the previous judicial conclusions" so "this enabled the prior judges' ultimate opinions to be evaluated and weighed". This meant that "the foundation of the judicial opinions was laid bare".[15]
2. The prior judgments were clear: The prior judgments unequivocally found that the officer had lied and the reasons for the concluding so were sound.
3. The prior judgments were contextually similar: The prior judgments also involved claims of the officer conducing searches without grounds which "directly correlates with the theme advanced in this case: as defence counsel put it, search first, develop grounds later".[16]
4. The prior findings demonstrated a propensity: "In this case, the cross-examination bled into character and propensity to act contrary to the *Charter* and was therefore of substantive use going to a material issue on the application."[17]
5. The credibility of the officer was at the core of the application: "The case at hand is different because the credibility of P.C. Corona was the pivotal issue on the application."
6. The evidence also went beyond just credibility: "The evidence is highly probative to shed light both on P.C. Corona's conduct and his credibility."[18] (emphasis added)
7. The prior findings amounted to disreputable conduct, an area of cross-examination that is fair game for the defence : "The other judges' conclusions that P.C. Corona was not truthful on the witness stand amount to findings of discreditable conduct."[19]
8. The cross examination would not subvert the truth seeking function: "the cross-examination was not collateral nor was it an unnecessary or unjustified distraction".[20]

The result in Holloway was exclusion of the firearm based on a rejection of the officer's claim that the accused had concealed something in his satchel and a finding that racial profiling played a role in the officers' actions.

Final Thoughts

Holloway has finally placed defence counsel in a position to present powerful propensity evidence demonstrating ex post facto explanations for stops and searching. That said, it is not the case that the door to admissibility is wide open. Outside of Ontario, some courts have pushed back concluding "in my view, to follow the approach taken in Holloway would raise a legitimate concern about the re-litigation of matters already decided, the substance of which is unrelated to the issue before the Court".[21] Further, if some of the factors relied on in *Holloway* to sup-

port admissibility are absent there still is a real possibility cross-examination will be disallowed. This being the case, it is critical that defence counsel identify officers in their cases who have prior negative findings of credibility so time sensitive material like transcripts, audio of in court testimony, videos and court exhibits can be obtained/prepared. In addition, prior judgments should be carefully reviewed to flush out the similarities in the officer(s) conduct that supports the case theory and demonstrate a propensity to violate rights and lie about it. Overall, the door has been opened slightly but defence counsel still have some work to do before they open it wide enough to walk through it.

NOTES:

[1] *R. v. Holloway*, 2021 CarswellOnt 12890, 2021 ONSC 6136, [2021] O.J. No. 4741 [*Holloway*].

[2] *R. v. Morrissey*, 1995 CarswellOnt 18, 22 O.R. (3d) 514, [1995] O.J. No. 639, 1995 CanLII 3498 (Ont. C.A.) at 205 [O.R.].

[3] *R. v. John*, 2017 CarswellOnt 11451, 2017 ONCA 622, 350 C.C.C. (3d) 397, [2017] O.J. No. 3866, 140 W.C.B. (2d) 337 at para. 55.

[4] *Holloway, supra,* note 1, at para. 123.

[5] *R. v. Ghorvei*, 1999 CarswellOnt 2763, 46 O.R. (3d) 63, [1999] O.J. No. 3241 (Ont. C.A.).

[6] *Ibid.*

[7] *Holloway, supra,* note 1.

[8] *Ibid.,* at para. 83.

[9] *Ibid.,* at para. 94.

[10] *Ibid.,* at para. 91.

[11] *Ibid.,* at para. 93.

[12] *Ibid.,* at para. 98.

[13] *Ibid.,* at para. 101.

[14] *Ibid.,* at para. 122.

[15] *Ibid.,* at para. 122.

[16] *Ibid* at para. 122.

[17] *Ibid* at para. 122.

[18] *Ibid* at para. 122.

[19] *Ibid* at para. 122.

[20] *Ibid* at para. 122.

[21] *R. v. Pietz*, 2022 CarswellMan 181, 2022 MBQB 93 at para. 33.

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THE DOCKET

by Lauren Wilhelm

Sexual assault – forced intercourse – intimate partner or stranger/acquaintance – sentencing range

Appellant convicted of the sexual assault of an intimate partner involving forced intercourse – trial judge referred to a range of 4-7 years and then imposed a five year sentence – appellant argued that the range for a sexual assault involving forced vaginal intercourse on an intimate partner was 21 months to four years as per the decision in *R. v. Smith*, 2011 CarswellOnt 8623, 2011 ONCA 564 – so-called "*Smith* range" is out of sync with the higher sentencing range for forced intercourse of a stranger/acquaintance – there is no distinction to be drawn between the forced penetration of an intimate partner and that of a stranger/acquaintance – both are serious acts of violence with profound consequences for the victims – there is no justification for a lesser sentencing range for offences involving an intimate partner – indeed the relationship of trust in an intimate relationship is an aggravating factor and the assault of an intimate partner may actually attract a greater sentence - absent some highly mitigating factor, the forced penetration of another person will typically attract a sentence of at least three years in the penitentiary – the five year sentence was fit.

R. v. A.J.K., 2022 CarswellOnt 8788, 2022 ONCA 487; **Fairburn A.C.J.O.** (Gillese & Trotter JJ.A. concurring)

Impaired operation – canoe – vessel – definition – statutory interpretation

Appellant convicted of impaired operation of a vessel causing death – the vessel in question was a canoe – at issue was whether a canoe is a "vessel" under the *Criminal Code* – the term is not defined and therefore principles of statutory interpretation had to be applied – dictionary definitions of the term vary but include "boat" – the French version of the provision uses the word "boat" instead of "vessel" – "boat" and "vessel" are synonymous – moreover the object of the act is to protect the public from impaired conveyances on the road and water – the risk of impaired operation of a conveyance on water does not change according to whether a licence is required or the vessel is powered by muscle, wind or engine power – unlike the word "vehicle" which is qualified by "motor", there is no such qualifier before the word vessel – there is no ambiguity in the statute and a canoe is a vessel within the meaning of s. 254(2).

R. v. Sillars, 2022 CarswellOnt 9308, 2022 ONCA 510; **Benotto J.A.** (Miller & Thorburn JJ.A. concurring)

Search and seizure – reasonable expectation of privacy – rental unit – owner-occupant

Respondent rented his apartment to the complainant for a 10 day period through Airbnb – complainant discovered a covert camera hidden in an alarm clock and contacted police – with the complainant's consent, police entered the unit and seized the camera, which contained a memory card – a warrant was obtained to extract the contents of the memory card – the respondent was charged and acquitted of voyeurism – the issue was whether police violated his s. 8 rights by entering the apartment and seizing the device without his consent or a warrant – the court reversed the lower level decisions, finding no breach of the owner's s. 8 rights.

The concept of reasonable expectation of privacy is normative and fact specific – in this case, the question was not whether the respondent had a general reasonable expectation of privacy in the apartment, but whether he had such an expectation at the relevant time, that is, at the time the apartment was rented to the complainant – during the rental period, the complainant had exclusive control of the unit – even if there was a subjective expectation of privacy during this time, it was not objectively reasonable – during the rental period, the apartment was the complainant's home – a reasonable person would expect he'd be entitled to call police and invite them into the apartment to investigate a crime – the complainant was entitled to consent to have the police enter the apartment and investigate his concern – similarly police were entitled to seize the clock camera, which was an impersonal appliance left for the use of renters – the respondent had no reasonable expectation of privacy in the apartment while it was rented to the complainant and the search and seizure did not violate his rights.

R. v. Chow, 2022 CarswellOnt 10444, 2022 ONCA 555; **Huscroft J.A.** (Tulloch & Miller JJ.A. concurring)

Sexual assault – consent – condom use – sexual activity in question – actus reus – fraud vitiating consent

Complainant agreed to have sex with the appellant if he wore a condom – she learned after he ejaculated inside of her that he had not done so – the issue was whether the failure to wear a condom vitiated consent based on an agreement to do so, or whether it amounted to an absence of consent to the "sexual activity in question".

Consent requires agreement to the specific physical sex act – sexual intercourse without a condom involves direct skin-to-skin contact, which is a qualitatively different physical act than intercourse without a condom, where the sexual touching is indirect and mediated – this conclusion accords with a harmonious reading of s. 273.1 and the jurisprudence on subjective and affirmative consent.

There is no need to resort to the doctrine of fraud to address the failure to use a condom where it is a condition of consent to intercourse – fraud may arise in other cases where the accused attempted to or succeed in deceiving the complainant about condom use, such as sabotage cases - requiring proof of deception and deprivation is not appropriate where condom use is a condition of consent as it fails to recognize the subjective nature of consent and leaves gaps in the protection provided by the law - *Hutchinson* (or the doctrine of fraud) applies where the complainant learns after the fact that the accused used a knowingly sabotaged condom – if sabotage is discovered during intercourse, consent can be revoked and the offence is made out without the need to consider fraud.

R. v. Kirkpatrick, 2022 CarswellBC 2013, 2022 CarswellBC 2014, 2022 SCC 33; **Martin J.** (Moldaver, Karakatsanis, Kasirer & Jamal JJ. concurring); **Côté, Brown & Rowe JJ.** (Wagner C.J.C. concurring in the result)

Constructive first-degree murder – unlawful confinement – elements of offence – ongoing transaction

Appellant unlawfully confined the victim in a moving pickup truck and repeatedly assaulted him – when the victim jumped from the truck the appellant and two accomplices chased him on foot and shot him 3 times – as he lay wounded one of the accomplices shot and killed him – the issue was whether the victim continued to be unlawfully confined after he jumped from the truck and whether the confinement and the murder were part of the same transaction.

Unlawful confinement occurs where a person is coercively restrained or directed contrary to their wishes so that they can't move in accordance with their own inclination for any significant period of time – it does not require physical restraint – murder becomes first degree if it is done "while committing or attempting to commit" unlawful confinement – this does not require that the murder and confinement occur simultaneously but rather that they form part of a continuous sequence of events amounting to a single transaction or that they share a close temporal-causal connection.

The victim continued to be confined after he escaped the truck and indeed at the time he was killed – even though he was no longer physically restrained, he continued to be coercively restrained through acts of violence, fear and intimidation and could not move in accordance with his inclination – the murder and confinement were distinct criminal acts forming a single transaction, close in time and involving an ongoing domination of the victim.

R. v. Sundman, 2022 CarswellBC 1931, 2022 CarswellBC 1932, 2022 SCC 31; **Jamal J.** (Wagner C.J.C., Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin & Kasirer JJ. concurring)

MEMBER PROFILE

Reproduced with the permission of Jordana Goldlist.

Jordana Goldlist

by Craig Bottomley

City/Town: Toronto

Year of Call: 2008

Sometimes, I like to think I'm tough. Sometimes it happens in Hamilton in the middle of a homicide prelim while I'm kicking Crown witnesses around the courtroom. Then, we take a five-minute break to accommodate a quick matter. Jordana zooms in. Her face fills the 50-inch screen on the wall. She starts dissecting the Crown. The Crown tries to resist. I pass out. I wake up 5 minutes later. Jordana is gone. The Crown is pale. There is a small fire burning in the corner.

I'm not tough. Jordana . . . she's another story.

NOW ONTO THE QUESTIONS!

QUESTIONS

Finish the Sentence

1. If I never went to law school, I would have become . . . One of your clients. *OMG, my favourite client!!*

2. If I could change careers tomorrow, I would become . . . A writer (books and television). *I bet Leora that you would answer "bare-knuckle boxer". I owe your cousin $5.*

3. If I win 10 million dollars, I will . . . Establish a foundation to help kids from disadvantaged backgrounds pay for post-secondary education, and buy a Bugatti. *But first, the children. I see you.*

4. If I could appoint the next Chief Justice of Canada it would be . . . (not a lawyer or judge) Nicholas Ghesquiere (creative director for Louis Vuitton. We need someone to change courtroom fashion). *Finally, someone with the courage to tackle the real issues!!*

5. Megan Markle will play me in the movie based on my life.

6. ..... will play my love interest in the movie. There would be a rotation every 4-5 years. *This may be the best answer we've ever received.*

7. Prime Minister Trudeau is . . . hopefully on his way out of office. *Careful what you wish for . . .*

8. Canada's next Prime Minister is . . . anyone other than Trudeau. *You heard about that Trump fellow they had down south, right?*

9. If I could pick one injustice to undo it would be . . . the use of rap lyrics and videos as evidence at trial. *Your Honour, it seems the accused grew up surrounded by social problems and has expressed his feelings about these problems artistically. We'd like you to convict him for it.*

10. If I could solve one issue it would be . . . Gun violence.

11. If I could represent/defend a historical figure it would be . . . Bessie Starkman Perri. *Ah, the Hamilton bootlegger! She also would have liked to have solved gun violence.*

12. If I was to be executed, my last meal would be . . . Kobe steak, Caesar salad, and a Negroni. *Did we just become best friends?*

13. My greatest regret in life is . . . not spending enough time with my mom.

14. Boy I really screwed up when . . . How many pages is this publication? *It does drag on a bit!*

15. My hero is . . . Maya Angelou.

16. My favourite section of the *Criminal Code* is . . . Prize fighting. *It's this sort of propensity reasoning that made Leora an easy $5.*

17. If I could legalize an activity it would be . . . Carry concealed. *Good god. Just learn jiujitsu.*

18. If I could criminalize an activity it would be . . . Chewing gum. *What if they concealed the gum?*

19. Most people don't know that I . . . Have scholarships programs at two law schools, Osgoode and Lincoln Alexander, providing financial support to students who have come from situations of extreme personal adversity. *You're a good person. I like you.*

20. The strangest thing I have eaten is . . . I am not an adventurous eater.

21. I really embarrassed myself when I . . . In my first week of practice in criminal law with no experience whatsoever, I was sent to do a discovery in Brampton and the judge asked me how my client was electing to be tried. I asked what my options were. *It's good to be sure.*

22. My pet peeve is . . . People with a sense of entitlement.

23. The toughest challenge in my life has been . . . Getting sober in 2004 and staying that way after my mom died in 2021. *You're a superstar.*

24. If I could be reincarnated, I would come back as . . . a pit bull. *Seems repetitive.*

25. I am afraid of . . . Heights.

26. I believe in . . . the idea that nothing is a coincidence. *I also believe that! What a . . . oh . . . crap.*

27. In high school I was a . . . lost cause.

28. In undergrad I was a . . . a party girl with a plan.

29. In law school I was a . . . a shy girl with a vision.

30. If my dog could speak s/he would say . . . beware of owner. *Ha!!*

Choices

1. Guiness or Molson Canadian? Patron

2. Grilled Rib Eye or Grilled Tofu? Rib eye

3. Alfa Romeo or Mercedes Benz? Mercedes

4. Romantic or Hunter/Provider? Hunter/Provider

5. Out late and sleep in or in bed by 10 and up at 6? Out late and up at 6

6. Armani or Old Navy? Armani

7. James Bond or Lara Croft? Lara Croft

8. Hockey or Soccer? Basketball

9. Classical music or classic rock? Hip hop

10. Superman or Wonder Woman? Wonder Woman

11. Blended or Single Malt? Patron

12. Manolo or Crocs? Manolo

13. Mac or PC? Mac

14. Globe and Mail or The National Post? Globe and Mail

15. Starbucks or Tim Horton's? Starbucks

16. Yoga or Treadmill? Boxing and weights but yoga over treadmill. *I really feel like the concealed firearm is unnecessary.*

17. 30 days jail or two year conditional sentence? 30 days jail

18. Dog or Cat? Dog

19. Canoe or Speedboat? Speedboat

20. Muskoka cottage or condo in Florida? Condo in Florida

21. Star Wars or Star Trek? Is there a difference? *I take it back – you're going to need the gun.*

22. Prime Minister Doug Ford or 5 years of recession? Prime Minister Ford

23. Cash paying drunk driving case or legal aid murder? LAO Murder

24. Flowers or chocolate? Flowers, but I won't keep them alive

25. Pinot Noir or Chardonnay? Pinot Noir

26. Android or iPhone? iPhone

27. Drunk or stoned? Drunk

28. Naughty or nice? Naughty

Favourites:

1. Guitarist: Jimi Hendrix

2. Poet: Maya Angelou

3. Author (Fiction): Don Winslow

4. Author (Non-Fiction): Simone De Beauvoir

5. Prime Minister: I don't like politics enough to have a favourite

6. City: Miami

7. Lawyer: Harvey Specter (Suits). *I love that you don't know any real lawyers!*

8. Judge: Chamberlain Haller (My Cousin Vinny). *Or judges!!!!*

9. Journalist: Joe Rogan. *You'll grow out of it.*

10. Chef/Restaurant: Michaels on Simcoe

11. Hotel: Kimpton Seafire in the Cayman Islands

12. Theme park: its been at least 25 years since I've been to one.

13. Park: Does Park Avenue count? *For you, yes.*

14. Sports team: Lakers

15. Travel destination: Cayman Islands to relax, Miami to not relax

16. Thrill seeking activity: Jet skiing

17. Police force: That's like asking my favourite poison.

18. Movie: Boys N Tha Hood. *They'll pull your card.*

19. Actor: Angelina Jolie and Jason Statham

20. Musician: currently Kendrick Lamar

21. Song: Count Me Out (Kendrick Lamar)

22. Intoxicant: Tequila

23. Supreme Court of Canada decision - R. v. Le (2019). *I like it almost as much as I despise the trial decision.*

24. Hobby: Boxing and sport shooting

25. Political party: Conservative

26. Ontario Premier: They all lie

27. Historical figure: Bonnie Parker (of Bonnie and Clyde)

28. Attorney General: They are all the same

29. Crown Attorney: Richard Monette (St. Catharines)

In Memoriam

Markham Silver

by Rebecca Silver

Markham pictured during his time at Osgoode, sitting in the CLASP offices.

When I began preparing to write this tribute to my father, Markham Silver, I struggled with what to include. For those who knew my father personally, they will know he made a strong impression as an individual and as an advocate. He was passionate about his work, but he also cared deeply for his clients and his colleagues. In this article, I hope to show how the law was an integral part of my father's life, and how he used his love of the law to mentor and grow the future of our legal profession, including myself.

Thank you to those who I interviewed for this article – John Rosen, John Struthers and of course, the help of my mother, Lisa Silver. This article is also informed by the countless people that knew my father over the years, the conversations I have had with them, and the anecdotes they have shared with me. I could not have painted an accurate picture of my father without the help of those who studied and worked with him.

The Beginning of a Legal Career

Born and raised in Toronto, Markham was exposed to the world of criminal defence at a young age through his father, Louis D. Silver, QC. He was determined to follow in his father's footsteps and was accepted into Osgoode Hall Law School in 1980, after only two years of undergraduate studies.

Markham was in Section B at Osgoode and is remembered as an avid student. Although he did not see Markham in law school, his articling principal, John Rosen, speculates that my father would have been the first with his hand up to have a comment, ask a question or get involved in an argument. I agree with this assessment – my father was always open with his opinion and eager to share his ideas on legal issues.

Rebecca Silver and her father Markham Silver.

Once at Osgoode, Markham immediately became involved in the Community and Legal Aid Services Program (CLASP), eventually becoming criminal division leader and a member of the board. John Struthers, a fellow Section B classmate of Markham's, recalls he was "a master negotiator who eventually convinced you not just to see it his way but also that you should have seen it his way from the beginning". Even at this early stage, Markham exhibited skillful advocacy, a cornerstone of his long and fulfilling career as a criminal defence lawyer.

Although Markham was a litigator at heart, he was also involved in other extracurriculars in law school. He was the stage lighting director for "Mock Trial", where he also showcased his musical ability as a guitarist. This love for music continued throughout his life, where he could be heard playing guitar late into the night, or "jamming" in the basement with my brother, Josh, who was playing the drums.

Markham's passion for criminal defence led him to article for Rosen, Fleming in 1983. John Rosen recalls Markham did whatever it took to do his job well. He took direction and never complained about the workload, or the time spent on a file. Markham had that rare talent of being able to get along with everybody – this remained true his entire career.

In the summer of 1985, my father met my mother, Lisa. At the time, Markham was mentoring CLASP students, already exhibiting his life-long commitment to helping others in the profession. Lisa was a summer caseworker at CLASP and called Markham for advice. The two did *not* hit it off. A few months later, Markham was acting as duty counsel at the courthouse in North York when Lisa stood up to speak to sentence for a CLASP client. The clerk began writing a series of notes to Markham, suggesting he take Lisa out for lunch. Markham did so, and the next day the same clerk asked him how it went. He replied, "I am going to marry her." The rest they say was legal history as the two were married in the summer of 1987, just as Lisa began articling for the then firm of Greenspan, Arnup.

One of the cases Markham was most proud of during his time in Toronto was his representation of Laura Kononow, one of the accused on the Rowbotham drug conspiracy case, at both her sentencing and on appeal. The argument on appeal revolved around state funding of an accused facing serious charges when legal aid was not available to them. This argument was accepted and became known as the "Rowbotham Application". Markham strongly believed in the ability of the legal profession to provide those accused of crime a fighting chance. This kind of "resolute" advoca-

Lisa Silver and Markham Silver.

cy was embodied in Markham's work and in his mentorship.

In 1998, Markham and Lisa moved to Calgary together with myself and my older brother.

Advocate, Teacher, and Mentor

As soon as Markham arrived in Calgary, he became essential to the community. His practice began to expand outside the criminal law, into areas such as real estate, corporate commercial, bankruptcy, civil litigation, securities, and family law. By the end of his career, Markham had carriage of almost 2000 files, including his last appearance in *R. v. Morrow* at the Supreme Court of Canada, only seven months before he passed away from cancer.

Closest to Markham's heart, and most impactful for me, however, was his commitment to the next generation of lawyers. Markham loved to share his knowledge and experiences. He loved to help. He was always there for a junior lawyer, law student or colleague. He also loved to share stories – of his significant cases, of his time practicing in Toronto – and these stories showed not only his unique sense of humor but also the powerful nature of his storytelling.

Markham's love of mentorship drove him to teaching. He worked as a sessional instructor at the University of Calgary's Faculty of Law from 2018 until 2021, teaching evidence, advocacy, and criminal justice. He also generously provided advice to Student Legal Assistance, the student legal aid service at the faculty. His commitment to his students ran so strong that he was still teaching his evidence class up until two weeks before he passed away in December 2021.

Markham's passion for the law was rooted in his sensitivity and understanding of people; his commitment to justice; and deep fascination with the nuances of legal argument. His impact on the legal community was deeply meaningful and personal. He was a mentor and advisor to not only me, but to everyone he met.

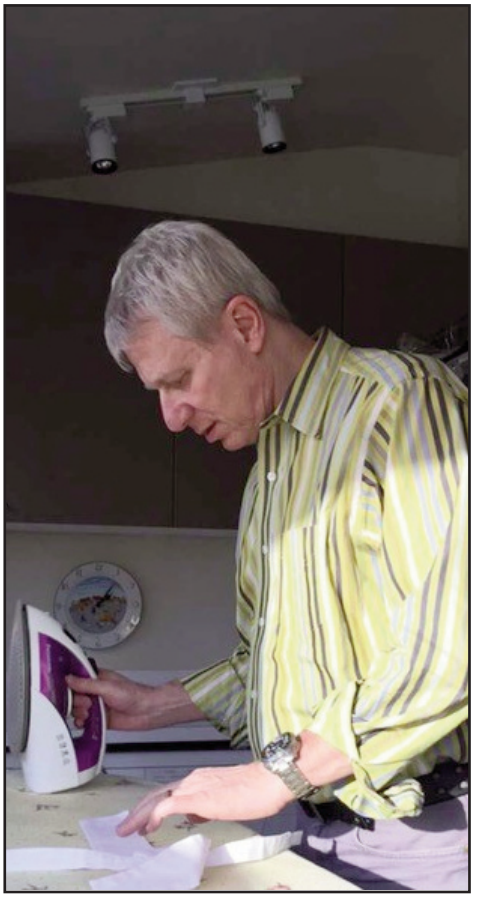
One of the most important lessons my father taught me, which I will bring into my future practice in criminal law, was that often a criminal defence lawyer is the only person supporting the client at the most vulnerable time of their lives. I can recall so many times when my father took a phone call on vacation or took a call from the jail because his clients were relying on him to answer. As Markham's former classmate, John Struthers, said of him, "Markham was personable, meaning he saw everyone as interesting and worthy of investigation." This personable quality was something that I took from every interaction I had with my father and every interaction I saw in a professional setting. My mother, Lisa, tells me that when he passed away, many of his clients reflected on the positive and lasting impact he had on their lives. His support and belief in them as valuable members of society, changed their lives for the better. That is truly the essence of a criminal lawyer.

When I was in Grade 11, I told my father to take on more "exciting" and meaningful files. After school was done, I would walk to his office and start on my homework while he finished work. As he had expanded his practice to more corporate commercial work, he had been working on drafting contracts, which, to my unpracticed eye, I found "boring". The next day, after school, he told me he received a call from Legal Aid Alberta asking him to accept a murder case. He told them he would take on the client because his daughter told him to accept.

The next year, I went to the client's sentencing. Seeing the work my father had put into the case, going above and beyond to make sure his client received proper representation, showing support to someone who had never received support before, showed me that being a criminal defence lawyer does not only require skills of advocacy, or skills of research and writing, all of which my father possessed in multitudes. It also required one to have a mixture of incredibly powerful human attributes – intelligence, charm, passion, respect, compassion for your clients, and the right amount of chutzpah. My father had these attributes in spades.

Markham will be greatly missed by all who knew him and loved him, but his legacy of mentoring and lawyering excellence will live on in every case he did, every person he helped, and every student he taught, including myself.

Rebecca Silver is an articling student with Greenspan Humphrey Weinstein LLP in Toronto.



Markham pictured ironing his tabs - he always made sure he was looking his best for his court appearances.