SUPERIOR COURT OF JUSTICE
(Toronto Region)

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

BYRON SONNE

Applicant

APPLICANT'S FACTUM
(Re: *Charter* ss. 8, 9, 10(a), 10(b), 24(2))

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PART I – STATEMENT OF THE CASE

1. The Applicant was arrested on June 22, 2010 in the days leading up to the G20 Economic Summit in Toronto. After a preliminary inquiry, he now stands charged on an indictment charging him with four counts of possession of an explosive substance and one count of counselling the commission of the offence of mischief not committed.

2. As part of the investigation in this matter, the Applicant was detained and questioned by the police as he was walking the in the area of the financial district in downtown Toronto on June 15, 2010.

3. In the following weeks, the police obtained a number of warrants to search the Applicant's home, his family cottage, his wife's family cottage and to seize a number of his personal possessions. The police also obtained production orders to compel the production of banking and credit card records.

4. Upon the Applicant's arrest, he was denied access to a lawyer for 12 hours and interviewed by intelligence officers at length. A number of subsequent statements were obtained from the Applicant during the course of his detention.

5. The Applicant now brings this application to exclude evidence from the Applicant's trial on the basis that it was obtained in the course of violations of his rights protected by sections 8, 9, 10(a) and 10(b) of the *Charter* and that the admission of such evidence would bring the administration of justice into disrepute.

PART II - SUMMARY OF THE FACTS

A. Overview

6. The Applicant came to the attention of the Toronto Police Service on June 15, 2010 when he was observed by security guards photographing the security perimeter that was being erected in advance of the G20 Economic Summit. He was detained and questioned by police officers. Although the Applicant asserted his right to silence, the officers threatened him with a provincial offence as a ruse to compel him to identify himself. The Applicant ultimately complied and produced his identification.

7. An investigation by G20 intelligence officers uncovered internet postings associated with the Applicant including a "Twitter" website, a "Flickr" website and a personal blog containing items of interest. Searches also revealed that the Applicant was a security professional holding a Certified Information Systems Security Professional (CISSP) license as

well as a number of other professional designations. Of note, the Flickr site associated with the Applicant contained a number of recent photographs of police officers, photographs of the security fence and photographs of temporary security cameras. Older photographs, dating from 2009, included photographs of various and sundry items including several photos that appeared to depict a makeshift projectile launcher, a device that appeared to be a modified microwave oven and other miscellany such as blue crystals and humour-related photos.

8. The Twitter site revealed posts dating to the spring of 2009. Some of the more recent posts related to the G20 summit and included comments about documenting the locations of temporary security cameras. One post described a possible means of damaging or climbing the security fence. Another post asked for a photograph of the security pass that was being used to gain access to fenced-off areas.

9. The Applicant was put under surveillance for a number of days. During that time he was seen lounging around his home and doing various household chores. He was also observed attending a Home Depot store, a plastic supply store and a pottery store.

10. Detective Chris French, an officer with a special G20 "Joint Intelligence Group" (JIG) prepared an information to obtain in support of an application for a warrant to search the Applicant's home located at 58 Elderwood Drive, Toronto. On June 22, 2010 that warrant was issued by Justice Marshall. The search revealed an amateur laboratory and workshop in the basement with a collection of various chemicals stored in individually-labelled containers. Some of those chemicals were potential ingredients in the making of home-made explosives.

There was also an active chemical procedure underway for the synthesis of potassium chlorate, a compound that may be used in the production of fireworks, model rocket engines and other combustibles.

11. The following day, on June 23, 2010 detective Chris French applied for, and was issued, a further warrant to extend the search of the Applicant's home and also to search the Applicant's cottage located in Midland as well as the Applicant's wife's family cottage located in Lake of Bays, Ontario. The search of the Applicant's cottage revealed a number of improvised projectile launchers, more colloquially known as "potato cannons" or "spud guns".

12. The Applicant was arrested while riding the bus on Bathurst Street on June 22, 2010. He was held for 12 hours without access to counsel. During that time, he was interviewed at length by two intelligence officers, Detectives Shane Hill and Pat Garrow. The following morning he was interviewed again at length by Detective Tam Bui, who also conducted a further interview with the Applicant on June 26, 2010.

13. On July 20, 2010 the police obtained warrants and production orders to obtain personal property held by the police as well as records of the Applicant's cell phone use and records of his Visa credit card transactions.

B. June 15, 2010 Detention

14. On June 15, 2010 the Applicant was in the area of the Metro Toronto Convention Centre. Constable Duane Simon of the Toronto Police testified at the preliminary inquiry that he received a call from dispatch advising of a "suspicious male" photographing areas of the security fence that was being erected in advance of the G20 summit. Constable Simon agreed that he had no further information about this male. He drove around the area until he located the Applicant, who matched the description of the male as provided by dispatch.

- Duane Simon, *Preliminary Inquiry*, January 27, 2011, p.184, l.7 – p.186, l.6; p.194, l.21 – p.206, l.8

15. Constable Simon activated the emergency lights on his vehicle, instructed the Applicant to stop and directed him to a side-street for the purpose of speaking to him. Constable Simon positioned the Applicant in front of his vehicle so that the in-car camera would capture the Applicant for the purpose of identification. He asked the Applicant for his identification but the Applicant refused, citing his right to silence. Constable Simon agreed that the Applicant was polite and agreeable during this encounter but simply wished not to speak to the police.

- Duane Simon, *Preliminary Inquiry*, January 27, 2011, p.186, l.10 – p.188, l.20

16. Constables Phil Coffin and Michael Wong were riding police bicycles on June 15, 2010 and also responded to the radio call concerning a "suspicious male". They attended at the scene where Constable Simon had the Applicant detained. They positioned their bicycles so as form form a barrier, enclosing the Applicant within a space bordered on all four sides by a building, Constable Simon's police vehicle, the bicycles and the officers themselves. Constable

Wong testified that he asked the Applicant for his identification but also encountered the polite refusal received by Constable Simon.

- Evidence of Michael Wong, *Proceedings*, January 26, 2010, p.26, l.13– p.56, l.19
- In-Car Video, *Application Record*, Tab_____

17. Constable Wong then informed the Applicant that he intended to charge him with an offence under the *Highway Traffic Act* and that his continued refusal to provide his identification would be grounds for an arrest. Constable Simon admitted that he had no grounds to believe that the Applicant had committed an *HTA* offence. Instead, he made this statement to the Applicant as a ruse to compel the Applicant to provide his identification. In his examination in-chief, Constable Wong stated:

Q. Did you in fact charge him with jaywalking?

A. No. It was just so that I'd get his identification. It was a ruse.

The Applicant complied and produced his identification as well as a slip of paper with information about his legal rights and a number to contact a lawyer. After recording this information, the officers told the Applicant that he was free to go and departed the scene.

- Evidence of Michael Wong, *Proceedings*, January 26, 2010, p.31, l.6 – p.37; p.57, l.19 – p.61, l.25

C. Pre-Arrest Investigation

18. Ms Louise Knight was a Canada Border Security Agency Intelligence Analyst assigned to work as an analyst with the G20 Joint Intelligence Group. She located a variety of information on the internet associated with the Applicant and prepared two reports documenting her findings. The report described a profile associated to the Applicant on a website called "Flickr",

which allows users to share photographs with the public. A number of photographs had been uploaded including photographs of the G20 security fence, police officers, security cameras, various electrical devices, blue crystals, goats, comedy-related photos and other miscellany. The photos were uploaded on various dates going back to January 2009. Ms Knight speculated that some of the objects could be used as projectiles.

- Chris French, *Preliminary Inquiry*, January 28, 2010, p.6, l.20 – p.13, l.12
- Complete Flickr, *Application Record*

19. Ms Knight also located an account on "Twitter" – a site that allows a user to publicly publish brief comments for others to read. An account associated to the Applicant, entitled "Toronto Goat" revealed a number of "tweets" dating back to 2009. Most of the tweets related to general gossip, sports and various computer-related issues. A number of tweets in the weeks leading up to his arrest related to the G20. In particular, a comment posted on June 18, 2010 stated,

> these would be handy for scaling G20 fences; the ones I have at home would fit the smaller grid fence [followed by a hyperlink] #g20report
>
> Could probably be fabricated cheap and quickly out of bolts from HomeDepot or Rona or something too #g20report
>
> not to mention they'd help people get a good grip on the fence for bringing it down #g20report

And the following day additional comments were posted as follows:

> don't forget design flaw in most G20 fence: holes are small enough to thread big bolts for extra leverage and grip #g20report
>
> [a hyperlink] see what I mean? Tiny holes

- Complete Twitter, *Application Record*

D. Surveillance of the Applicant

20. Constable Manoharan was a member of the Toronto Police Service and testified at the preliminary inquiry that, during the week of June 16 to June 22, 2010 he was part of a team conducting surveillance on the Applicant. During that time, they observed him lying in a hammock and walking about the house. The Applicant left the house on several occasions travelling by transit. On June 18, 2010, the Applicant travelled to two retail stores, one identified as "Tucker's Pottery Supply" and one called "Plastic World". He emerged from each carrying a plastic bag. The surveillance team was unable to determine what the Applicant purchased at these locations and they did not attend inside the stores to determine the nature of the items for sale or the nature of the businesses. One June 21, 2010, the Applicant was observed attending two Home Depot stores purchasing BBQ and gardening supplies. He was observed later that day in the backyard of 58 Elderwood gardening with two others.

- Ravi Manoharan, *Preliminary Inquiry,* January 28, 2010, p.5, l.20 – p.17, l.18; p.32, l.24 – p.46, l.9

E. June 22, 2010 Search Warrant

21. Detective French testified at the preliminary inquiry that he was an investigator assigned to the G20 Joint Intelligence Group and was assigned to prepare search warrant applications in the Applicant's matter. He began working on this investigation on June 17, 2010 when he received the two intelligence reports drafted by Ms Knight. He completed an Information to Obtain (hereinafter "ITO") on the morning of June 22, 2010. A warrant was subsequently issued by Justice Marshall for the search of the Applicant's home on the basis of Detective French's ITO.

- Chris French, *Preliminary Inquiry*, January 28, 2010, p.35, l.26 – p.45, l.28

22. Detective French's ITO began with a summary of the information gleaned as a result of the Applicant's detention and questioning on June 15, 2010. He agreed on cross-examination that he omitted certain information about a third officer being present and omitted that part of his information came third-hand through an email from a superior officer, rather than directly from the notes of the police officers involved.

- *Information to Obtain,* June 22, 2010, Application Record
- Chris French, *Preliminary Inquiry*, January 28, 2010, p.54, l.3 – p.58, l.25

23. Detective French's ITO then referred to the reports authored by Ms Knight in relation to the online postings associated with the Applicant. Detective French stated that he personally reviewed each of the websites mentioned in the report and had an opportunity to view the online content himself. On the Twitter site, Detective French noted a tweet that stated "could someone who is a resident or works in the G20 zone post a picture of the pass that will get them behind the line". Detective French agreed that the request appeared to relate to the "outer" security zone that was being prepared for the summit – the zone accessible by residents and employees working near the summit. The request did not appear to relate to a security pass used for the "inner" security zone accessible by delegates and those involved in the summit itself. The request was for a photo of the pass, and not the pass itself. Detective French also agreed that, at the time, there was a great deal of public interest in the security measures being taken for the summit and the public expenditure that was going into it. In cross-examination, he agreed:

Q. Okay. Nowhere does he say he's attempting to obtain a security pass, right?

A. He's trying to obtain a photo of a security pass.

Q. Okay. And there could be a variety of reasons why someone wants to see what a G20 security pass looks like, would you agree with that?

A. I don't understand why you'd want to see one if you didn't need one.

Q. How about curiosity? Someone's curious, "Gee, I wonder what a security pass for the G20 looks like?" Do you agree that curiosity might be a reason?

A. It's possible, yes.

Q. You've had people ask to see your police badge, right?

A. Yes.

Q. Okay. What if someone has an interest in issues related to security and policing and the like and high-tech gadgetry relating to security? Might that not be also a reason why they want to see what one of these passes looked like?

A. It's possible.

- Chris French, *Preliminary Inquiry*, January 28, 2010, p.58, l.26 – p.69, l.15
- Chris French, *Preliminary Inquiry*, January 31, 2010, p.30, l.30 – p.32, l.27
- Information to Obtain, June 22, 2010, *Application Record*

24. Detective French's ITO referred to tweets that made reference to photographs of the temporary security cameras that had been installed in advance of the G20 Summit. Detective French agreed that there was a very legitimate public debate about the necessity of these security cameras and that a community of people were concerned about whether these "temporary" cameras would actually stay up following the summit. Indeed, one of the Tweets stated, "now we have a record of most of the surveillance cameras just in case the Gestapo forget to take them down." Nonetheless, in his ITO, Detective French stated that "these photos are believed to be for intelligence gathering because of the specific nature and focus of the photos." He also stated in his ITO, "I believe that Mr. SONNE had specific plans on destroying

these cameras or disabling them as he has discussed on Twitter. He has gone so far as to post photographs depicting the locations of these cameras."

- Chris French, *Preliminary Inquiry*, January 28, 2010, p.67, l.29 – p.74, l.30
- Information to Obtain, June 22, 2010, *Application Record*

25. Detective French included in his ITO a list of tweets from the Toronto Goat Twitter account. The list was not comprehensive but, rather, was a selection of the tweets that he personally assembled. Detective French omitted from his ITO two tweets which made reference to a map, published by the Toronto Star, detailing the locations of all the temporary security cameras installed by the Toronto Police:

> Q. But you don't tell Justice Marshall, right, by the way Justice Marshall, while you're assessing the impact and the import of Mr. Sonne taking pictures and posting them you should know that the Toronto Star is doing the exact same thing in publishing a map, you don't tell her that, do you?
>
> A. I didn't put in there no. [sic]

Detective French did include, however, a tweet stating "still, fuck the Tamils, get off my fucking streets." He agreed that this tweet had nothing to do with any of the offences being investigated. Instead, he reasoned,

> A. It just shows that his ... his distaste for people for you know, people of an ethnic origin as well it's just ...
>
> Q. Okay, so please...
>
> A. ...speaks to little bit to like possible anger or so ... that's why I put it.

Detective French omitted from his ITO the date of the tweet which was May 10, 2009 – the date on which a group of Tamil protesters occupied the Gardiner Expressway.

- Chris French, *Preliminary Inquiry*, January 28, 2010, p.74, l.31 – p.85, l.15; January 31, 2010, p.60, l.19 – p.61, l.15
- Information to Obtain, June 22, 2010, *Application Record*

26. Detective French's ITO also made reference to photographs posted on a Flickr website associated with the Applicant that appeared to depict a projectile launcher or potato cannon. The ITO ultimately requested a warrant to search the Applicant's home to locate and seize this specific device. However, Detective French agreed that:

- The photo was posted many months prior to the investigation
- There was no way to tell where the item in the photo was located
- There was no way to know precisely what the device was or how it worked
- There was no way to tell if the device was operational
- There was no way to tell if the Applicant was in possession of the item

- Chris French, *Preliminary Inquiry*, January 30, 2010, p.85, l.16 – p.95, l.25
- Chris French, *Preliminary Inquiry*, January 31, 2010, p.17, l.2 – p.20, l.24
- Information to Obtain, June 22, 2010, *Application Record*

27. Detective French's ITO also made reference to three additional photographs posted on Flickr depicting unidentifiable metal objects. Detective French agreed that he did no investigation to determine the nature or identity of these objects. There were no captions associated with the photos to assist in their identification. The dates associated with the photographs indicated they were uploaded several months after the photographs depicting the potato cannon. Nonetheless, in his ITO, Detective French stated,

> Three photos were added to the account on May 2010 are believed to be projectiles that could be fired from this improvised weapon. The photos are of steel or metal objects that are sharp in nature and another is a bolt with a nut thread onto it. Based on SONNE's twitter account postings I am concerned with these photos. I believe that the improvised launcher is capable of firing these projectiles. If these objects were to be fired out of this improvised weapon they would be capable of causing grievous bodily harm or even possible death.

- Chris French, *Preliminary Inquiry*, January 28, 2010, p.91, l.1531 – p.96, l.21
- Chris French, *Preliminary Inquiry*, January 31, 2010, p.3, l.29 – p.15, l.24

- Information to Obtain, June 22, 2010, *Application Record*

28. The ITO also referred to four photographs posted on Flickr depicting police officers in and around the area of downtown Toronto. Detective French agreed that there was nothing improper about photographing the police in public. Indeed, he agreed that many newspapers at the time were publishing photographs of the police because there was an unusually high police presence in downtown Toronto because of the G20. Nonetheless, he wrote in his ITO:

> Mr. SONNE has made every attempt and succeeded in several instances in taking photographs of peace officers at their divisions and at their assigned posts. He has then placed pictures of these officers at their workplace on a website know [sic] as "Flickr" which can be literally viewed by anyone. In addition as per his twitter account, he is attempting to obtain security passes and use tactics to break through security lines. These tactics are designed in my belief to gain access to restricted areas enabling him and those working with him to break into secure areas to intimidate police, the public and international delegates by putting them in harms way.
>
> There is no other lawful reason Mr. SONNE would have to release photos of the police, post weapons and details on how to get through secure fence lines using instruments to destroy the fences unless for an unlawful purpose. I can think of no lawful purpose to disable communications and destroy video surveillance unless to disguise yourself from committing criminal offences and disable police from being able to communicate to get the necessary assistance they may require, putting both them and the public in imminent danger.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.20, l.25 – p.32, l.24
- Information to Obtain, June 22, 2010, *Application Record*

29. Detective French was aware that the Applicant was licensed as a Certified Information Systems Security Professional, owned a business called Halvdan Solutions and held a private investigators license. He agreed that there may have been a community of people who were interested in security systems, however, he made no effort to investigate this culture or determine what might have been the subjects of their discussion at the time. He did not

include in his ITO any information about the Applicant's professional credentials or business involvements.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.36, l.14 – p.40, l.10; p.42, l.20 – p.44, l.10

30. The ITO described how surveillance officers observed the Applicant attend a store called "Tucker's Pottery Supplies" and another store called "Plastic World." Detective French had no information about what, if anything, the Applicant purchased at these locations and no information about what these locations had for sale. Nonetheless, Detective French wrote in his ITO:

> [these locations] are concerning to the affiant because they are stores that carry some of the necessary supplies in the affiants opinion, to create a forged security pass. This forged security pass would then be used to gain unauthorized access to the security zone at the G20 Summits in downtown Toronto.

- Information to Obtain, June 22, 2010, *Application Record*

31. On cross-examination, the affiant agreed that he had no basis to believe that either of these stores sold items used in the making of a false pass:

> Q. Okay. And do you have knowledge on what it takes to create a forged security pass? Do you know what the techniques are? How to make one?
>
> A. Not in great ... not in great detail, no.
>
> Q. No. And when you tell Justice Marshall that you're worried... you're concerned that Mr. Sonne has gone to this plastic store, you tell Justice Marshall that these stores, that they are stores that carry some of the necessary supplies. Well, how do you know what the necessary supplies are to create a forged security pass?
>
> A. Just judging from what I know about the pass at the time.
>
> Q. Well, tell us. What are the necessary supplies to make a forged G20 pass?
>
> A. I don't know what the exact necessary supplies are, but I believe they're to be like, a piece of plastic.

Q. Okay. And so the mere fact that he goes to a store, one store called Tucker's Pottery, and then he goes to another store called Plastic World, is that how you draw the inference that these are stores that carry materials that you could use to make fake passes?

A. I believe that you could obtain some of necessary supplies there.

Q. Okay. What are the necessary supplies for forging a G20 pass that you would buy at Tucker's Pottery Supplies?

A. I don't ... I don't know exactly what they have in there.

Q. So what are you telling Justice Marshall, in a sworn affidavit, that you're concerned because the stores carry some of the necessary supplies that, in your opinion, to create a forged security pass?

A. Well, because in those stores they have supplies like plastic and knives and uh.

Q. Knives?

A. Well, cutting instruments to...

Q. Have you been inside Plastic World?

A. No, I haven't.

Q. Do you know if they sell knives?

A. I don't know if they sell knives in Plastic World itself.

Q. Okay. Sure. Have you been inside Tucker's Pottery Supplies?

A. Nope.

Q. Do you know if they sell knives?

A. I don't know for a fact, no.

Q. All right. So let's try this again. That sentence is entirely false and misleading because you have no idea what the necessary supplies are to create a forged security pass, would you agree with that?

A. No.

Q. All right. You can't list for us, apart from saying plastics, what the necessary supplies are for creating a forged security pass, right?

A. Well, you need some sort of text to.

Q. Some sort of which, sorry?

A. Text.

Q. Text?

A. That you could ... use on the plastic to make a forged pass.

Q. Okay.

A. then you'd need some sort of coating. I'm not sure what sort of coating you would use.

Q. Okay. Do you know whether text is available at either Tucker's Pottery Supplies or Plastic World?

A. I can't say one hundred percent, no. But I ... I'd assume it'd be at one of the two.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.45, l.7 – p.48, l.31

32. The ITO also made reference to a number of photographs found on the Flickr site that appeared to depict a home-made device made from a disassembled microwave oven. The photos showed the device through its various stages of production and assembly. There were no captions describing the device. The photographs were dated from February and March of 2009 – approximately 16 months prior to the investigation. In his ITO, Detective French alleged that this device was a "herf" weapon, capable of conducting "attacks" on electronic devices. Detective's French stated at the preliminary inquiry that his source of this information was a website of unknown reliability. In fact, his information came from one website quoting another website. Detective French copied this information directly from the internet into his ITO without checking its accuracy or reliability:

Q. You see how the word "their" is spelled wrong? Do you see that? Not in your affidavit, but if you look on the sheet you'll see that the word "their" is spelled wrong, it's spelled t-h-I-e-r. You transcribed it exactly,

A. Yeah.

Q. ...because in your affidavit it actually has t-h-l-e-r...

A. yep.

Q. ... and then corrected. So you cut and paste exactly from this website, correct?

A. Yes, it's possible I cut and paste or just typed it directly and made the same mistake, yeah.

Q. Okay, you don't put it in quotes, right?

A. No, I just sourced it.

Q. Right. You don't indicate that, that's a quote, and in fact, it's actually sort of double hearsay, in the sense that it's not the Topsight people telling you this. It's the Topsight people telling you that the author of another website called SVXLabs tells you this information, right?

A. Yes, the author of the Topsight refers ... refers to this, the author of SVBXLabs ... excuse me.

Q. Did you go on to the SVBXLabs.com website?

A. I don't remember, I don't believe so but...

Q. No.

A. I don't.

Q. Do you know if it was even an active website?

A. No.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.54, l.5 - p.60, l.18

33. Detective French agreed that he read a blog authored by the Applicant in which he documented, in detail, his efforts to build a home-made waveguide using a disassembled microwave oven. The blog outlined some of the theoretical questions the Applicant had in mind when embarking on the project and the difficulties he encountered along the way. The blog explains how, in the result, the experiment was a failure as it was unable to direct the

energy from the microwave in any meaningful way. A post, dated June 21, 2009 – one year prior to the investigation – was entitled "No Magnetron Death Ray" and read as follows:

> I waited for the lady of the house to spend some time out the other day.
>
> I cleaned the garage, set up the test medium – thermal fax paper – and fired up the rig. Both with and without the horn on it.
>
> Nothing. Maybe a little warmth.
>
> I know thermal fax paper will detect microwaves, or rather, it will turn black when exposed to the ones in my kitchen microwave. But it's just not working with the rig in the garage. And, inexorably, I have arrived at this conclusion: it is no a simple matter to turn a microwave into a 'death ray' or something that will mess things up. Duh.
>
> I'll store the rig away if any other ideas come up in the future, but this idea is flatlined for now. Might be good for causing interference in the ~2.4 GHz area, but that's about it.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.62, l.10 – p.75, l.23
- Toronto Goat Blog, *Application Record*

34. The blog, dated one year prior, was the most recent information available to Detective French about the status of the wave guide. Yet he did not include any information about the Blog in his ITO. He testified that he read the blog, yet his ITO made no mention of the blog or its contents. He included no information in the ITO that would indicate that the waveguide was ever located inside the Applicant's home or that it was in his possession at the time of the investigation. Instead, he simply wrote in his ITO:

> Byron SONNE has posted photographs on his Flickr web page depicting a wave guide. This is used to send out sound waves that disrupts communication channels and can destroy them permanently.
>
> It is essential for police and security to be able to communicate not only for the protection themselves [sic] but for the protection of the public and the delegates attending Toronto.
>
> I believe there is compelling and corroborating evidence that Byron SONNE will have the wave guide at his home address of 58 Elderwood Drive, in the City of Toronto, Ontario.

He openly talks about the disruption of communication and video devices and posts a photograph of it on his Flickr page.

- Information to Obtain, June 22, 2010, *Application Record*

35. In a section of his ITO in which Detective French summed up the grounds in support of the warrant Application, he wrote:

> Items relating to co-conspirator's [sic]
>
> For the operation Mr. SONNE is planning which includes the destruction and damage of municipal fences and telecommunications he requires a network of people to assist him. Mr. SONNE has being "tweeting" [sic] these people enlisting their assistance and advising them on how to destroy the said property allowing for violent confrontations that otherwise would not occur. In addition he is putting the safety of officers and the public in grave danger. Mr. SONNE has been using his computer system and phones to pass messages onto his co-conspirators. Surveillance has confirmed that he is at home while these tweets are occurring. Mr. SONNE's computer(s) and phone will provide valuable information in regards to detailed information on his plans and his fellow co-conspirators.

Detective French agreed that he had no information about "co-conspirators" or anyone else associated with the Applicant except for the fact that he was a user of Twitter. The ITO contained no information about how the Twitter system works and, in particular, no information about whether a "tweet" was a communication with any particular person or group. Importantly, it contained no information about whether trace evidence relating a tweet was likely to be found on a home computer after the fact. In any event, Detective French had no grounds to believe that the Applicant had formulated a plan in collaboration with any other person.

- Information to Obtain, June 22, 2010, *Application Record*
- Chris French, *Preliminary Inquiry*, January 31, 2010, p.77, l.18 – p.84, l.16

36. The ITO stated that investigators wished to search the Applicant's home for: a) evidence of "dealers"; b) items linked to ownership and living arrangements of 58 Elderwood; and c)

evidence relating to "proceeds of crime". Detective French agreed that the Applicant was not being investigated for a drug-related offence. Nonetheless, Detective French disagreed with the suggestion that this language was used in a boilerplate manner or taken from a precedent drug-related search warrant application.

- Chris French, *Preliminary Inquiry*, January 30, 2010, p48, l.22 – p.51, l.30
- Chris French, *Preliminary Inquiry*, January 31, 2010, p.77, l.17 – p.88, l.13

37. On the morning of June 22, 2010 Detective French's ITO was brought before Justice Marshall and a warrant issued for the search of the Applicant's home.

F. Arrest and Interview of the Applicant

38. On the morning of June 22, 2010, the Applicant departed his residence and walked to Bathurst street where he got on the bus. The bus was intercepted by police and the Applicant was placed under arrest at approximated 12:00 noon. He expressed his desire to speak to counsel immediately upon his arrest. He was brought to police custody at 13 Division but was not provided an opportunity to speak to a lawyer.

- Agreed Statement of Fact, *Application Record*

39. At approximately 4:00 p.m. two G20 intelligence officers, Shane Hill and Pat Garrow commenced an interview with the Applicant. The purpose of the interview was originally to assess his potential as a source of intelligence for G20-related protest activity. The detectives did not caution the Applicant or advise him of his right to counsel. He made no inquiries about whether the Applicant had exercised his right to counsel prior to the interview. Further, Detective Hill gave the Applicant his assurance that they were not investigating him or his

criminal charges but simply wanted to know whether he had information about other protest-related activity. In his examination in-chief at the preliminary inquiry he stated:

> I made it very clear to Mr. Sonne that I was not there to investigate the current charges that he was facing, that we weren't the enforcement arm nor do we have any interest in any information pertaining to the investigation on hand.

- Shane Hill, *Preliminary Inquiry*, January 31, 2011, p.8, l.25 – l.32; p.14, l.7 – p.18, l.25

40. Despite these assurances, Detective Hill interrogated the Applicant about the items on the internet and the items inside his home. He asked questions about the Applicant's personal background and interests. He asked whether he was in possession anything dangerous which caused the Applicant to tell Detective Hill about his potato cannons located at his cottage in Midland. Detective Hill immediately passed this information on to Detective French and the other criminal investigators.

- Shane Hill, *Preliminary Inquiry*, January 31, 2011, p.14, l.7 – p.18, l.25

41. Counsel for the Applicant began attempting to contact him at approximately 8:00 p.m. but was rebuked by officers at 13 Division. After several further phone calls, the Applicant was finally permitted to speak to counsel at approximately 12:00 midnight.

- Tam Bui, *Preliminary Inquiry*, February 9, 2011, p.140, l.15 – p.144, l.10
- Agreed Statement of Fact, *Application Record*

G. Search of 58 Elderwood and June 23, 2010 Search Warrant

42. Shortly after the Applicant's arrest on June 22, 2010 members of the Toronto Police's Emergency Task Force entered the Applicant's home at 58 Elderwood Drive. They conducted a search through the premises, opening cupboards, drawers, closets and storage units. In the basement of the home, they located a workshop with two work benches and a number of

storage shelves containing neatly organized bins filled with various and sundry electronics devices such as motors, LEDs, powers supplies and circuit boards of various kinds. Inside a cupboard associated with one of the work benches was a small chemistry supply cabinet containing a variety of beakers, tubes and instruments. One shelf had a number of chemicals in individually-labelled containers.

- Irv Albrecht, *Preliminary Inquiry*, January 26, 2011, p.77, l.8 – p.93, l.13; January 27, 2011, p.16, l.24 – p.152, l.3
- Photos and Videos, *Application Record*

43. On the evening of June 22, 2010 Detective French began preparing a second ITO for a warrant to continue the search at 58 Elderwood and also to search the Applicant's two cottages.

44. Detective Shane Hill spoke to Detective Chris French and relayed the information about the Applicant's cottages and the fact that a potato cannon was located there. Detective French made no inquiries of Detective Hill as to whether the Applicant had been provided his right to counsel prior to giving the statement.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.101, l.5 – p.103, l.23

45. Detective French also spoke with Sergeant Roger Gibson of the Emergency Task Force who advised him of some of the items located inside the Applicant's home. Detective French stated at the preliminary inquiry that Sergeant Gibson advised him that they had found ingredients to make a number of home-made explosives. Sergeant Gibson also advised that they had found HTMD – an explosive substance – as well as a home-made detonator. In fact, neither of these latter two items were located in the home. No completed explosive

substances were found and the device identified as a "detonator" was actually a benign electronics instrument. Detective French had no information about Sergeant Gibson's expertise in the area of identifying explosives and made no inquiries of him to determine how it was that he was able to determine the identity of these items.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.103, l.24 – p.105, l.14; p.106, l.15 – p.110, l.28
- John Anderson, *Preliminary Inquiry*, February 9, 2011, p.60, l.26 – p.61, l.6; p.97, l.4 – l.32;

46. Detective French also spoke with Detective Rajeev Sukumuran who advised him that the police had located the "wave gun" as well as books relating to chemicals and computers as well as security passes. In fact, the waveguide was not located. Instead, a bin was found containing a number of components that appeared to once have been involved in the waveguide experiment. They were disassembled, and stored in a shelf in the corner of the workshop. Detective French made no inquiries of Detective Sukumuran about the condition of the device when it was located.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.112, l.10 – p.113, l.7
- Irv Albrecht, *Preliminary Inquiry*, January 27, 2011, p.62, l.28 – p.67, l.20
- Photos and Video from Search, *Application Record*

47. Detective French agreed on cross-examination that he did not know the condition of the waveguide when it was located, he did not know what kinds of security passes were located and he did not know the contents of the chemistry-related books. However, in his second ITO he wrote:

> The chemical books, computers, security passes and the wavegun are items that have been used in Byron SONNE's operation of making chemicals, posing pictures [sic] and blogs and attempting to access secured zones of the G8/G20 areas.
>
> The wavegun is the primary piece of evidence to support the charges.

> The projectile launcher is the essential piece of evidence for the charge of Possession of a weapon for a dangerous purpose and it proves that Byron SONNE was actively preparing to commit acts of mischief and damage property. [sic]

When cross-examined about this passage at the preliminary inquiry, he stated:

> Q. ...But do you have any basis in evidence to suggest that he's using these chemical books for his operation of making chemicals, posing pictures, blogs and attempting to access secured zones of the G8/G20 areas?
>
> A. That's statement's just in regards to all the ... like it says, making chemicals, posing pictures, and the blogs and the...
>
> Q. It also says security passes.
>
> A. Yes, access secured zones of the G8 and G20 areas.
>
> Q. The security passes, I take it this is a reference to the security passes found during the execution of the search warrant. Do you have any evidence, whatsoever, to suggest that he's using those security passes as part of his operation?
>
> A. I don't ... I don't know.
>
> Q. No. The wave gun. A wave gun was found. Did you ask anyone, what condition the wave gun was in when it was found?
>
> A. No, my understanding was they weren't in there for ... Detective Sukaraman wasn't in there for very long because of the safety issue.
>
> Q. Would it surprise you to know the wave gun was dismantled when it was found.
>
> A. I didn't know that at the time.
>
> Q. Do you think that would have been important to let Justice Marshall know that this wave gun was dismantled when it was found in the house?
>
> A. If I had known that at the time, I would have included that.
>
> Q. Right. Did you ask anyone?
>
> A. No, I just went from what was told to me.
>
> Q. Right. Instead you typed the next sentence. And the next sentence is; "the wave gun is the primary piece of evidence to support the charges." That's the very next sentence in your affidavit, right?
>
> A. Yes, it is.

Q. Right. It's one of the last things that you leave Justice Marshall with is that the wave gun is the primary piece of evidence. You don't even ask what shape this wave gun is in when they go into the house right?

A. No, I wasn't told what shape it was in.

Q. Right. And then the next sentence you say, "the projectile launcher is the essential piece of evidence for the charge of possession of a weapon for a dangerous purpose. And it proves that Byron Sonne was actively preparing to commit acts of mischief and damage to property." Let me ask you this, was there a completed projectile launcher found at the residence that was searched?

A. I'm not aware if one was ever found there.

Q. Right. And the only bit that you have to go on is that Mr. Sonne tells you that at his... or tells you through Detective Hill, that at his cottage in Tiny Township, he has a potato cannon.

A. Yes. And the fact that we believed that he had one before from all the pictures and post.

- Chris French, *Preliminary Inquiry*, January 31, 2010, p.110, l.32 – p.113, l.23

H. Execution of the July 23, 2010 Warrants

48. On June 23, 2010, members of the Forensic Identification Service searched the home, photographing and searching through all areas of the house. The police seized over 150 items from the house including the chemicals in the basement, all of the Applicant's computers and computer accessories, documents, movies, books, and various gadgets. They photographed and video-taped the entirety of the house including underwear drawers, art supplies and kitchen cupboards.

- Irv Albrecht, *Proceedings*, January 26, 2010, p.77 – p.94
- Exhibit List, *Application Record*
- Photos and Video from Search, *Application Record*

49. The Applicant's computers and computer accessories were examined by Corporal Ian Lee and Mr. Geoff Letch of the RCMP. They conducted a thorough search through the Applicant's computers and produced a report which revealed personal details about the Applicant stored in emails, internet chats, movie and music downloads, and financial records.

- David Ouellette, *Proceedings*, February 17, 2011, p.42, l.28 – p.44, l.22

50. One June 23, 2010 the police attended the Applicant's cottage at 6 Karen Rd, Tiny Township near Midland. The cottage was unoccupied and had no signs of recent activity. The cottage was still winterized. The police seized a number of home-made projectile launchers, or potato cannons, from within.

- Rick Plume, *Proceedings*, January 28, 2011, p.80, l.2 – p.84, l.1

I. Subsequent Investigation

51. On the morning of June 23, 2010 the Applicant was transported to court for the purpose of a bail hearing. When he arrived, Detective Tam Bui of the Toronto Police Service began an interview with the Applicant. Detective Bui did not caution the Applicant, did not permit him to speak to a lawyer prior to the interview and did not give a secondary caution, requesting that he disregard anything said by him or to him by any previous police officers. The Applicant ultimately gave an exculpatory statement.

- Statement of Byron Sonne, June 23, 2010, *Application Record*

52. On June 23, 2010 police arrested the Applicant's wife, Kristen Peterson. One June 26, 2010 the Detective Bui met the Applicant in the cell area of the provincial courthouse at 2201 Finch Avenue west to conduct another interview. The interview was not cautioned, the

Applicant was not given his right to counsel or given a secondary caution. The Applicant gave another exculpatory statement.

- Statement of Byron Sonne, June 26, 2010, *Application Record*

J. July 20, 2010 Warrants

53. On July 20, 2010 the police obtained two further sets of judicial authorizations: one set included search warrants authorizing the seizure of certain property belonging to the Applicant held at the Maplehurst Detention Centre and at the Toronto Police property bureau. Another set included production orders for the Applicant's telephone records associated with his mobile phone as well as records of transactions on his Visa credit card.

- Warrants and Information to Obtain, July 20, 2010, *Application Record*
- Production Order and Affidavit, July 20, 2010, *Application Record*

54. The applications for search warrants and production orders were accompanied by affidavits sworn by Constable Darryl Waruk of the RCMP. Constable Waruk's affidavits relied on the same grounds included in Detective French's two ITOs and items located from the search of the home and cottage. He also included information gleaned from the Applicants interviews with Detective Bui as well as information concerning the analysis of the Applicant's potato cannons. Constable Waruk included, as an appendix to his affidavits, the ITOs of Detective Chris French.

- Warrants and Information to Obtain, July 20, 2010, *Application Record*
- Production Order and Affidavit, July 20, 2010, *Application Record*

K. Procedural History

55. On January 26, 2010 the Applicant was arraigned before Justice Bassel of the Ontario Court of Justice on two counts of intimidation of a justice participant, mischief, attempted mischief, possession of an explosive substance and possession of a weapon for purposes dangerous to the public. The Crown elected to proceed by indictment and the Applicant elected to proceed before a judge and jury of the Superior Court of Justice with a preliminary inquiry.

- *Proceedings,* January 26, 2011, p.14, l.5 – p.17, l.30

56. Mid-way through the preliminary inquiry, the Crown indicated that it would not be seeking committal on the charges of intimidation of a justice participant, mischief or attempted mischief. At the conclusion of the proceedings, the Crown requested that the Applicant also be committed to stand trial on the additional offence of possession of an unregistered firearm as well as the offence of counselling the commission of an offence not committed. Notably, the Crown did not seek committal on any of the charges listed in the original search warrant application.

57. In oral reasons delivered on February 22, 2011 Justice Bassel discharged the Applicant on the charges of intimidation of a justice participant, mischief, attempted mischief and weapons dangerous. He declined to commit the Applicant on the additional offence of possession of an unregistered firearm, finding that there was no evidence that the potato cannons were designed or intended to be used to cause bodily harm. The Applicant was

committed to stand trial on charges of possession of an explosive substance and counselling the commission of an offence not committed.

- *Proceedings*, February 22, 2011

58. Following the conclusion of the preliminary inquiry, the Applicant re-elected, in writing, to have a trial before a judge alone.

PART III – ISSUES AND THE LAW

59. The Applicant's interaction with the police, from the very onset of the investigation, was marred by flagrant breaches of his constitutional rights. From his first contact with the police on June 15, 2010, the police demonstrated a cavalier recklessness towards constitutional limitations imposed on their powers and the *Charter*-protected civil liberties of the Applicant. The bulk of the evidence in this case was obtained through infractions of the Canadian constitution such that the admission of such evidence in the Applicant's criminal trial would bring the administration of justice into disrepute.

60. In particular, the Applicant submits that his rights to be free from arbitrary detention, as well as his rights to be informed of the reasons of his detention and his right to counsel, protected by section 9, 10(a) and 10(b) were violated in the court of his interaction with the police in downtown Toronto on June 15, 2010.

61. Further, the Applicant submits that the ITOs prepared by Detective Chris French contained information that was false and misleading, relied on information obtained

unlawfully, contained boilerplate language, relied on speculation, relied on exaggeration and omitted important exculpatory information. It is submitted that once the misleading, false and erroneous information is excised from the ITO, there are insufficient grounds on which the warrants could have issued. Consequently, it is submitted that the search of the Applicant's home and cottage were done in violation of section 8 of the *Charter.*

62. It is also submitted that the subsequent warrants and production orders, issued on the basis of the affidavits of Corporal Waruk, should not have issued. Once the false, misleading, erroneous and unlawfully obtained information is excised from those affidavits, insufficient grounds remain for the issuance of the authorizations.

63. Further, it is submitted that the interrogation of the Applicant by the police after his arrest and the lengthy delay in receiving his right to counsel constituted a violation of section 10(b) of the *Charter.*

64. In light of the foregoing, it is submitted that the following evidence was obtained in the course of breaches of the *Charter*:

- Information obtained during the Applicant's detention on June 15, 2010
- Evidence seized during the search of the Applicant's home at 58 Elderwood, including the contents of his computers and computer accessories
- Evidence seized during the search of the Applicant's cottage at 6 Karen Rd, Tiny Township
- The Applicant's personal property, seized from Maplehurst Correctional Complex and the Toronto Police property bureau

- The Applicant's credit card and telephone records
- The statements made by the Applicant to detectives Shane Hill and Pat Garrow following his arrest on June 22, 2010
- The statements made by the Applicant to detective Tam Bui on June 23, 2010 and June 26, 2010

A. June 15, 2010 Detention

65. The constitutional requirements and limitations governing the police powers to stop and question for investigative purposes have been well-defined since the Supreme Court decisions of *R. v. Mann, R. v. Grant* and *R. v. Suberu*. A "detention", for the purposes of section 9 and 10 of the *Charter*, will be established when a person either a) is required by law to comply with a demand made by a peace officer or, b) a reasonable person in the circumstances of the detainee would believe that he or she has no choice but to comply. In determining whether a detention has been made out under the second ground, the court should look to all the circumstances, including any words uttered by the officers, the positioning of the officers, the physical location of the stop, and the duration of the encounter. In *Grant*, for example, the Supreme Court of Canada found that a detention had been made out on the basis that the police asked Mr. Grant to keep his hands in front of him, the three officers positioned themselves in tactical positions surrounding him and asked pointed questions concerning his potential involvement in criminal activities.

- *R. v. Grant*, [2009] 2 S.C.R. 353 at paras. 25 – 44
- *R. v. Suberu*, [2009] 2 S.C.R. 460
- *R. v. Mann*, [2004] 3 S.C.R. 59
- In-Car Video footage, *Application Record,*

66. An investigative detention will be justified and compliant with section 9 of the *Charter* so long as the police possess sufficient grounds, rising to the level of "reasonable suspicion", that the individual is involved in criminal activity. Short of reasonable suspicion, persons in Canada are free to go about their business free of intervention from the state. A detention based on anything short of reasonable suspicion is arbitrary and unconstitutional under the *Charter*.

67. "Reasonable suspicion" has been defined variously in the following language:

> a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation (*R. v. Simpson*)
>
> an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence (*R. v. Mann*)
>
> the fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit independent judicial assessment. (*R. v. Kang-Brown*, per Binnie J.)

- *R. v Simpson*, [1993] O.J. No. 308 (C.A.) per Doherty JA.
- *R. v. Mann, supra*
- *R. v. Kang-Brown*, [2008] 1 S.C.R. 456 per Binnie J.

68. A number of additional *Charter* rights are engaged immediately upon the commencement of a detention. Notably, the detainee is entitled to be informed of the reasons for the detention and, additionally, to be informed of his or her right to counsel and be provided the informational and implementational components thereof. The majority of Supreme Court of Canada in *Suberu* noted that this duty arises immediately:

> A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

- *R. v. Suberu, supra,* at paras. 37-42
- *R. v. Grant, supra*, at para 58

69. Turning to the facts of this case, it is clear that the Applicant was detained by Constables Simon, Wong and Coffin on June 15, 2010. The Applicant was instructed by Constable Simon to position himself in front of the police vehicle. Constable Simon took up a position on the opposite side of the Applicant so as to assume a position of control over the Applicant. The arrival of Constables Wong and Coffin furthered the detention. They positioned their bicycles to create a barricade preventing the Applicant's departure and took up tactical positions around him. The nature of the questioning related to the Applicant's activities in and around the security perimeter. It was directed at gathering intelligence which could ultimately be used against him.

70. Constables Simon, Wong and Coffin had no reasonable grounds on which to justify the detention. The only information they had was a radio call indicating a "suspicious male" photographing portions of the security perimeter. No further information was provided about what made the Applicant "suspicious". Indeed, the officers candidly admitted that the security perimeter was an item of innocent interest to many Torontonians at the time.

71. Despite the initiation of a detention, the Applicant was not provided an honest reason for his detention. Although the officers began asking questions about why he was photographing the perimeter, Constable Wong deliberately lied to the Applicant, indicating that he would be charged with an *HTA* offence. The lie was, in his own words, a "ruse" designed to compel the Applicant to incriminate himself by divulging his identity and personal information.

72. Likewise, the Applicant was not provided with his right to counsel. He was detained at the roadside for a considerable period and asked probing questions about his activities without the benefit of legal counsel. In the result, he provided information which formed the basis for a criminal investigation without ever having the opportunity to receive advice about his rights.

73. The actions of Constables Simon, Wong and Coffin went well beyond that of a technical oversight or recklessness. The detention was a deliberate and calculated investigative step designed to compel the Applicant to divulge personal information and done with no regard for the bright lines drawn by the Supreme Court around duties and limitations on police powers in such circumstances. Worse, Constable Wong went so far as to lie to the Applicant about the nature of the detention, threatening him with an unlawful arrest. These activities constitute a clear abuse of the position of power and trust enjoyed by street-level police officers – precisely the sort of activity that tends to bring the administration of justice into ill-repute.

B. The Search Warrants

74. It is submitted that Detective French's two ITOs for warrants to search the Applicant's home and cottage grossly departed from the requirements set down by the Supreme Court of

Canada in *R. v. Garofoli, R. v. Araujo* and *R. v. Morelli*. They were false and misleading in a number of material respects, relied on unlawfully obtained information, exaggerated the facts, editorialized and omitted important exculpatory details. In the result, the warrant should not have issued and the search, therefore, was conducted in the absence of lawful authorization and in breach of section 8 of the *Charter*.

75. It is also submitted that the search warrants and production orders, issued on July 20, 2010 suffer the same fate. They relied, in many ways, on the same grounds articulated in Detective French's ITOs. Indeed, they included Detective French's ITOs as appendixes. Furthermore, they relied on evidence obtained as a result of the search of the Applicant's home and cottages. In the event that those searches are found to have been unlawful, it follows that the production orders and search warrants from July 20, 2010 were invalid as well.

i) The Governing Principles

76. The review of a judicial authorization at trial is governed by the principles set out first in *R. v. Garofoli*. The object of the exercise is to determine whether the warrant should have issued, once a review is undertaken as to the nature and substance of the grounds supporting it. The question is not whether the reviewing judge would have come to the same or different conclusion about the validity of the warrant but, rather, whether there was any basis on which the warrant could have issued. This "*Garofoli* test" has been re-articulated a number of times in subsequent decisions. Most recently, Justice Fish articulated the approach for a majority of the Supreme Court in *R. v. Morelli* as follows:

> In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo,* 2000 SCC 65, [2000] 2 S.C.R. 992, at para 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place.

- *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.)
- *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 (SCC)

77. Upon reviewing the grounds in support of the warrant, any false, misleading or erroneous grounds are to be excised from the ITO. Additionally, the reviewing court must excise any unlawfully obtained information such as information which itself was obtained through a breach of the accused's *Charter* rights. This point has been made in two different ways by the Supreme Court. In both *R. v. Kokesch* and *R. v. Plant*, information obtained from an unlawful perimeter search was used in an ITO for a search warrant. In *Kokesch,* the Court held that the evidence obtained from the final search was itself obtained in a manner that violated that *Charter* in light of the unlawful perimeter search, so as to trigger exclusion of the evidence under 24(2). In *Plant,* the Court held that it would be unfair to allow police officers to rely on unlawfully obtained information in a subsequent search application. In either event, the result is the same: in reviewing the validity of the warrant, any unlawfully obtained information must be excluded from the analysis of whether there are sufficient grounds for the issuance of the warrant.

- *R. v. Kokesch,* [1990] 3 S.C.R. 3, at para. 22
- *R. v. Plant*, [1993] 3 S.C.R. 281 at para 26-27

78. In addition, the court should take into account any information found to have been deliberately omitted from the ITO in assessing whether the affiant/informant provided the issuing justice with a fair presentation of the grounds. In *R. v. Araujo,* LeBel J., for an unanimous court, recounted the case law and held:

> In Bisson, supra, at p. 1098, our Court gave very short reasons but also affirmed the reasons of Proulx J.A. in the Quebec Court of Appeal, [1994] R.J.Q. 308, 87 C.C.C. (3d) 440. In his judgment, Proulx J.A. was clear that a court must look at non-disclosure of any material fact [TRANSLATION] "with respect to the affidavit considered as a whole, or even with respect to the remaining parts of it" (p. 455 C.C.C.). He quoted at p. 457 C.C.C. from the Ontario Court of Appeal in Church of Scientology, supra, at pp. 528-29: "[T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue" (emphasis added) also affirmed in Morris, supra, at p. 558. Again, erroneous information is properly excised. In Bisson, supra, of course, the recanted information obviously had to be excised entirely and the remaining information then assessed in the totality of the circumstances. [emphasis added].
>
> - *R. v. Araujo*, [2000] 2 S.C.R. 992 at para 57

79. In light of the above, an affiant submitting an application for a search warrant is required to lay out the grounds for the search in a manner that is "full, frank and fair." The ITO should be clear, concise and should not try to trick its reader. The purpose of the document is to provide the issuing justice with the objective facts gleaned from the investigation to permit an independent decision on the merits of the application. In light of the *ex parte* nature of the Applicant, a heightened duty rests on the affiant to present the facts of the case fairly and accurately and not a fall into the temptation to overstate the case for the application either by embellishing the facts or omitting harmful information. The Supreme Court of Canada in *Araujo* made this point clear with the following passage:

> A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong -- and much right -- with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions. [emphasis added]

- *R. v. Araujo, supra* at para. 47

See also:

- *R. v. Land*, [1990] O.J. No. 624 (H.C.J.) per Watt J.
- *R. v. B.G.*, [2003] O.J. No. 3335 (S.C.J.) at paras. 9 – 14
- *R. v. Spackman*, [2008] O.J. No. 2722 (S.C.J.) at paras. 13 - 22

ii) The June 22, 2010 ITO

80. It is plain from a reading of the transcript of Detective French's cross-examination at the preliminary inquiry, in conjunction with the search warrant application, that the ITO contained a number of false and misleading statements. It employed language that embellished the facts beyond what an objective presentation could reasonably support and relied on unlawfully obtained information. Attached as Appendix "A" to this Factum is a copy of the June 22, 2010 ITO, highlighted to indicate those portions of the ITO that, in the Applicant's submission, ought to be excised.

81. First, the information obtained as a result of the Applicant's illegal stop and detention on June 15, 2010 should be excised. Following the Supreme Court of Canada's decision in *R. v. Plant*, the police ought not to be able to benefit from their own illegal conduct by bootstrapping illegally obtained information into a judicial authorization.

82. In a number of places throughout the ITO, Detective French made statements about the significance of certain evidence that are highly speculative. For example, at paragraph 11, he described three photographs of unknown metal objects on Flickr and concluded that these were projectiles that could be fired from the potato cannon. On cross-examination, Detective French agreed that he did not know what these items were and conducted no investigation to determine their identity. The claim that they were projectiles that could cause bodily harm was wildly speculative and would likely have mislead the issuing justice to believe that there was some solid basis to believe that these items were linked to some criminal intent when, in fact, there was not.

83. At paragraphs 7, 8, 13 and 15, Detective French drew conclusions about a criminal plot to destroy surveillance cameras and breach security zones. These conclusions are wildly speculative and unreasonable based on the evidence. For example, he described photographs of the temporary security cameras and concluded that their purpose was to gather intelligence for a criminal plot. Likewise, he described a tweet asking for a photograph of the security passes and concluded that it was a step towards creating a forged pass. These conclusions do not flow from the evidence but, rather, are conjured through speculation and the paranoid assumption that the worst possible explanation must be the correct one.

84. It is of absolutely no assistance to the issuing justice to read the officer's speculations about the significance of the evidence. The question for the issuing justice is not whether the officer requesting the warrant believes that evidence of an offence will be found at the location

to be searched. Rather, the issuing justice is charged with assessing whether there are reasonable grounds, viewed objectively, to believe that the search will yield evidence of an offence. The addition of editorializing comments and speculation is of no assistance, and worse, is misleading to the issuing justice who may come to the conclusion that the evidence bears more weight that it logically should.

85. In a similar vein, the use of boilerplate language in an ITO offers nothing but confusion for an issuing justice who may be misled about the nature of the investigation. In this case, Detective French used language about "dealers and associates", "proceeds of crime" and "evidence of living arrangements" that bore no relationship to the investigation. It is clear from a reading of the ITO that this language was copied from either a standard template or a previous warrant used as a precedent. Detective French denied this suggestion during his cross-examination at the preliminary inquiry and turned down multiple opportunities to explain how and why this language appeared in his affidavit. He insisted that he wrote those words specifically for this investigation and yet agreed that there was nothing in the case that supported a search for these items. His failure to offer a reasonable explanation for the presence of this language is damning to Detective French's credibility. Not only was he prepared to submit language in a search warrant application that had no basis in evidence but he lacked candour and truthfulness when testifying in court.

86. Importantly, Detective French omitted from his ITO what was perhaps the most detailed and significant information about the microwave "wave guide": the information from the

"Toronto Goat blog". Detective French testified that he read the blog while he was preparing his ITO, and yet he failed to include any information about it. He was aware that the author of the blog described, in detail, the amateur experiment into redirecting microwave energy. That project, conducted over a year prior to the investigation, was ultimately a failure and unable to even melt chocolate within a few inches. Instead of adding this information to his ITO, Detective French omitted the blog all together and instead relied on information from a website of unknown reliability suggesting that a microwave can be turned into a "herf" gun used to destroy cameras. He then immediately concluded that this was precisely what was depicted in the photographs on Flickr. From there, he drew the speculative conclusion that the Applicant intended to use this "herf" weapon to stage an attack against the G20.

87. The omission of this information from Detective French's ITO signalled a grave departure from the guidelines for drafting an ITO set out by the Supreme Court of Canada. Worse, Detective French's reliance on a random website should cause this Honourable Court to have great concerns about the repute of the administration of justice. Detective French deliberately mislead the issuing justice by omitting the Toronto Goat blog and, instead, suggested that the Applicant was in the midst of preparing an attack against G20 infrastructure. Not only was this suggestion unfounded on the evidence, but was significantly undermined by information that Detective French had in his possession and yet chose to hide from the issuing justice.

88. In the result, it is submitted that very large portions of Detective French's June 22, 2010 ITO should be excised for being unlawfully obtained, misleading, false or amounting to speculation and editorializing. The remaining grounds are wholly insufficient to support the issuance of a warrant. There is nothing in the ITO (before or after excision) linking the Applicant to the postings either on Flickr or on Twitter except the somewhat cryptic assertion that he is the author. The ITO does not set out what grounds existed to support this claim. Instead, the ITO simply refers to a report authored by an intelligence analyst as follows: "This document identifies the suspect of the 'torontogoat' Twitter account is Byron Leon Sonne, born August 8, 1972" [sic]. There is no elaboration on what grounds, if any, support this claim nor is there any discussion of what investigative steps led the author to this conclusion. Likewise, there is nothing indicating that the objects in the photographs would be located at 58 Elderwood. There is nothing indicating that the Applicant was ever in possession of the items in the photographs and, in any event, many of the photographs were posted many months prior to the investigation and lacked the currency to support a search. Although some of the comments on twitter indicate an interest with the G20 security apparatus, there is nothing indicative of criminal activity that would arouse anything more than mere suspicion.

- *R. v. Chen,* [2007] O.J. No. 1572 (O.C.J.) per Trotter J.

iii) The June 23, 2010 ITO

89. The ITO sworn on June 23, 2010 included the ITO from the June 22, 2010 warrant. As such, the same comments apply to the second warrant in addition to the following.

90. As will be discussed below, the June 23, 2010 ITO relied on information obtained from the Applicant in violation of his right to counsel under section 10(b) of the *Charter*. Importantly, the only information about the Applicant's cottage and the existence of the potato cannon was elicited from him unlawfully. Detective French testified at the preliminary inquiry that he made no inquiries about whether the Applicant was properly cautioned and given his rights prior to the interview. Consequently, it is submitted that the information about the existence and locations of the cottages should be excised from the ITO. Attached as Appendix "B" to this factum is a copy of the June 23, 2010 ITO highlighted to indicate the portions that should be excised.

91. Removing the information about the existence of the cottages is fatal to the validity of the warrants to search the two cottages. Since the Applicant submits that the first warrant should not have issued, it is also submitted that the continuation warrant should not have issued and that the search of the Applicant's home constituted an ongoing breach of his rights under section 8 of the *Charter*. The severity of that breach, however, is further compounded by the additional false and misleading information that was included in the June 23, 2010 ITO.

92. In particular, Detective French stated that he believed there would be additional evidence located at the cottages in light of the chemicals found in the Applicant's home. This statement is entirely speculative – there were simply no grounds to believe that anything aside from the potato cannons would be located at the cottage. Furthermore, Detective French wrote that investigators located HTMD as well as a home-made detonator inside the home.

Both of these assertions are false. No assembled explosives were located; rather, chemicals were located that could theoretically be assembled into explosives. The "detonator" turned out to be an electrical thermometer. Detective French wrote that he was informed of these claims from a Sergeant Gibson of the Emergency Task Force but Detective French made no inquiries of his expertise in identifying explosive materials. Instead, he repeated these false allegations in his ITO without scrutiny or caveat.

iv) The Search of the Applicant's Computers

93. It is submitted that the warrant to search the Applicant's home should not have issued and therefore, the seizure and search through the Applicant's computer was itself a separate breach of section 8 of the *Charter.* However, it is further submitted that the *seizure* of the computer occasioned yet another distinct breach of section 8 since such a seizure was not authorized on the face of the warrant.

94. There were two clauses in the warrants that purported to authorize a search of computers. Neither of those authorized seizure of the computers. The clauses read as follows:

> Records of the names and phone numbers of dealers whether associates, or friends are stored through photographs film, written data, electro-magnetic data storage units (computer, pager, cellular phones), written telephone documents, telephone bill records and/or personal address or phone books. [sic]
>
> [...]
>
> Records relating to the production of explosives that retained through files, books, reports, notes, copies, memoranda, correspondence, applications, agreements, information, which can be stored electronically (computers, phones), or on paper [sic]

95. First, no grounds were articulated to support the belief that the Applicant was engaged with "co-conspirators" or that such information would be stored on his computer. The only connection to computers articulated in the ITOs is the fact that the Applicant was a user of Twitter; however, no information was adduced concerning the operation of the Twitter system to suggest that his tweets were communications intended for a specific person or group. Indeed, the fact of them having been located using an "open source", public search of the internet would seem to contradict this claim. Further, there were no grounds to suggest that further information relating to his use of Twitter would be stored locally on his home computer. Likewise, there were no grounds advanced to indicate that records relating to the production of explosives would be found on the computer. There was nothing found in the first day of the search to connect the computer to the chemicals in the basement and, in any event, nothing was specified in the ITO to that effect. As such, the warrant should not have authorized the search for digital media at all.

96. Setting aside the fact that no grounds were articulated to support a search for these items, the face of the warrant itself only authorized a *search for* certain types of electronic records stored on digital media; it did not authorize a seizure of the computers. Section 487 (2.1) sets out the procedure for conducting a search of a computer located inside a building or place as follow:

> (2.1) a person authorized under this section to search a computer system in a building or place for data may
>
> > (a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(c) seize the print-out or other output for copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the data.

97. In the event that the records sought in the warrant were located during the search, the police would have been authorized, pursuant to subsection 487(2.1)(d) to copy the data. Nothing authorized them to remove the computers from the home. There were no records of "dealers" located and no "records relating to explosives" and yet the police seized three computers, five external hard drives and a collection of wireless networking equipment. The items were all handed over to the RCMP and, over the following months, a detailed search was executed which revealed a host of the Applicant's personal information, all without judicial authorization or reasonable grounds to believe that anything relevant would be found.

98. The significance of this breach cannot be overstated. Not only were there no grounds advanced for the search and seizure of computers but the face of the warrant itself did not purport to authorize such a seizure. In the result, the Applicant's privacy was violated in one of the worst ways possible. To quote the Supreme Court of Canada in the recent decision of *R. v. Morelli:*

> It is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer.
>
> - *R. v. Morelli*, [2010] 1 S.C.R. 253, at para. 2

99. Even if the seizure of the computer could be said to have been authorized, the manner of execution went well beyond that reasonably permitted by the search. The officers made no

effort to limit the extent of their search to only evidence of "dealers" or "plans relating to the manufacture of explosives" and instead conducted a wholesale search of the media for potentially incriminating information. In *R. v. Little,* Justice Fuerst considered a case where, like the present, the police created an index of the entire hard drive and "bookmarked" files or folders that might be relevant to the investigation. Justice Fuerst wrote of this approach at paragraph 171-172:

> Section 489(1) did not authorize the police to approach the computer search as the officers did in this case. Section 489(1) permits the seizure of incidental items found by officers executing a valid search warrant. It does not provide police officers armed with a warrant for specific items carte blanche to embark on a search for whatever they wish, regardless of the limitations imposed by that judicial authorization. Nor did the inclusion of the word "data" in this search warrant authorize a wide-ranging review of the contents of the computer for anything of relevance, given the specific wording of Appendix A.
>
> The search of the computer was not carried out in accordance with the search warrant. Mr. Little's rights under s. 8 were violated.

- *R. v. Little,* [2009] O.J. No. 3278 (S.C.J.) at paras. 166 – 173
- *R. v. Jones,* 2011 ONCA 632

iv) The July 20, 2010 Warrants and Production Orders

100. Corporal Waruk's affidavit and ITO uncritically repeated much of the information sworn in Detective French's ITOs. Although he set out the investigation in language that was more polished and than that of Detective French, the affidavit and ITO nonetheless rely on much the same misleading, erroneous and unlawfully obtained information contained in the earlier ITOs. Further, Corporal Waruk's ITO and affidavit relied on the items found inside the Applicant's home which, should this Honourable Court find was itself done in breach of section 8, ought to be excised from the application. Attached as Appendixes "C" and "D" are the ITO for the search

warrants and affidavit for production orders, respectively, prepared by Corporal Waruk, highlighted with those sections that, in the Applicant's submission, ought to be excised.

101. By this stage of the investigation, much of the false and misleading information contained in Detective French's ITOs should have been easily acknowledged and corrected. For example, Corporal Waruk repeated the erroneous claim that HMTD and a home-made detonator were located inside the Applicant's home. There was ample time to take complete stock of the items found in the Applicant's home and determine their true identity. Repeating the false information at the point of Corporal Waruk's application was quite simply inexcusable.

102. Indeed, Corporal Waruk attached Detective French's ITO as an appendix to his own ITO and affidavit without commenting on the accuracy of the information contained within. One very clear example is mention of the wave guide. Certainly investigators were well aware of the fact that the wave guide was not actually located – instead its components were found disassembled in a bin in the basement. Further, the details of the Toronto Goat blog, in which the production of the device was meticulously recorded, was well known. Yet Corporal Waruk did nothing to include this information in his affidavit and ITO. Instead, he uncritically included Detective French's ITOs, leaving the issuing justice with the false impression that a dangerous "herf weapon" was found in the Applicant's possession.

103. Another example concerns the purchases at Plastic World and Tucker's Pottery supply. Again, Corporal Waruk made no effort to correct the erroneous claim that these stores carried the necessary supplies to make a forged security pass. Instead, he uncritically repeated this

false and misleading information to the issuing justice, making himself a party to an effort to mislead the court.

v) Leave to Cross-Examine the Affiant

104. The Applicant requests leave to cross-examine the affiant and sub-affiants on the ITOs in this case. Although Detective French was cross-examined at the preliminary inquiry, there are a number of issues that have arisen since that time. In particular, further disclosure is expected in relation to Detective French's use of the phrase "dealers" and "proceeds of crime" in his ITOs.

- *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343

C. The Applicant's Statements

105. The Applicant gave three statements to the police: a) an interview with intelligence officers Detectives Shane Hill and Pat Garrow on the afternoon of June 22, 2010; b) an interview with Detective Tam Bui on June 23, 2010; and c) an interview with Detective Tam Bui on June 26, 2010. It is respectfully submitted that the interview with Detectives Hill and Garrow was obtained in violation of the Applicant's right to counsel. It is submitted that this breach also tainted the interview on the morning of June 23, 2010. It is also submitted that the both the interview on June 23, 2010 and June 26, 2010 were conducted as a consequence of the unlawful search of the Applicant's home and cottage. As a result, it is submitted that each of these statements was obtained in the course of one or more breaches of the Applicant's *Charter*-protected rights.

i) Governing Principles

106. It is now axiomatic that the police must hold off on questioning a person under detention until he or she has had an opportunity to speak to counsel. Equally fundamental is the rule that a detained person is entitled to speak to a lawyer "without delay". Neither of those requirements was met in this case. Instead, the Applicant was held for over 12 hours without access to counsel and subjected to a lengthy interview that ultimately formed the basis for a search of his home and cottages.

107. The Supreme Court of Canada in *R. v. Manninen* specified that the police may not delay access to counsel unreasonably. Once the detainee has asserted the right to counsel, the police must make efforts to facilitate contact in a timely manner. An unreasonable delay in facilitating access to counsel may constitute a breach of section 10(b). At the same time, the police are required to hold off on questioning the detainee until he or she has spoken to a lawyer.

- *R. v. Manninen,* [1987] 1 S.C.R. 1233
- *R. v. Papadopoulos*, [2006] O.J. No. 5404 (S.C.J.) per Dawson J. at paras 83 - 89
- *R. v. Bartle,* [19944] 3 S.C.R. 173

108. In this case, the Applicant provided three different statements, one of which was done before he was allowed to speak to a lawyer and two were conducted after. There is no question that the interview conducted prior to his access to counsel was done in breach of the duty to "hold off", contained in section 10(b) of the *Charter*. With respect to the two subsequent statements, however, the question is whether they were tainted by the initial breach of section 10(b) so as to render them obtained in a manner that violated the *Charter* as well. This scenario has been the subject of significant jurisprudence. Should the police conduct

an interview of a detainee in breach of the right to counsel, simply providing the detainee his or her right to counsel may not immunize any subsequent interviews from the taint of the *Charter* breach. As always, the question is whether the subsequent statement was "obtained in a manner" that violated the right to counsel. Depending on the circumstances, the subsequent statement may still be obtained as a result of the initial *Charter* breach, despite the provision of the right to counsel in the intervening period. The analysis focuses on the temporal, contextual and causal connection between the breach and the statement. Justice Doherty, in the case of *R. v. Plaha*, explained:

> The determination of whether statement no. 4 was obtained in a manner that infringed the appellant's right to counsel required a consideration of the temporal, contextual and causal connections between statement no. 4 and the earlier statements taken in violation of the appellant's s. 10(b) rights. The entire chain of events from the arrest of the appellant to the end of his interrogation, some 15 hours later, must be considered in deciding whether statement no. 4 was obtained in a manner that infringed the appellant's right to counsel.
>
> The appellant's consultation with counsel was part of that chain of events. A consultation with counsel can sometimes have the effect of severing a subsequent statement from an earlier breach of the right to counsel. It does not, however, automatically immunize the subsequent statements from that earlier Charter breach. The effect of that consultation on the question of whether the subsequent statement was obtained in a manner that infringed the accused's right to counsel must be a case-specific inquiry.

- *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.) at paras. 46-47
- *R. v. Lewis*, [2007] O.J. No. 1784 (Ont. C.A.)

109. The inquiry to determine whether the subsequent statement is tainted by an earlier breach focuses on the connection between the two statements. In *R. v. I.(L.R.) and T.(E.)*, the Supreme Court of Canada ruled inadmissible a subsequent statement made a day after one that was obtained in breach of section 10(b) on the basis that the subsequent statement was temporally connected to the first statement. In *R. v. Lewis*, the second interview was

conducted immediately after and by the same officers as who conducted the first interview. In *Wittwer*, the officer conducting the second interview made mention of a statement made during the first interview. In both of those cases, the subsequent statement was found to have been obtained in a manner that flowed from the initial *Charter* breach.

- *R. v. I.(L.R.) and T.(E.)*, [1993] 4 S.C.R. 504
- *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235
- *R. v. Lewis,* 2007 ONCA 349, [2007] O.J. No. 1784 (C.A.)

See Also:

- *R. v. Ricketts* (2000), 144 C.C.C. (3d) 152, [2000] O.J. No. 1369 (C.A.)
- *R. v. Caputo*, [1997] O.J. No. 857 (Ont. C.A.)

ii) The Statement to Detectives Shane Hill and Pat Garrow

110. The police handling of Mr. Sonne's arrest and the provision of his right to counsel fell far below constitutional requirements. The Applicant asserted his right to counsel immediately upon arrest. He was not given an opportunity to contact counsel. Instead, he was held in custody for four hours, after which Detectives Shane Hill and Pat Garrow began interviewing him, with false assurances that their interview would not be used in relation to his own criminal charges. At no point was he asked if he had spoken to a lawyer or if he wished to speak to one. Once the interview was completed, the Applicant was detained for several more hours, still without access to counsel. It was not until approximately 12:00 midnight when the Applicant continued to assert his right to counsel and a lawyer began calling with a request to speak to him. After speaking with counsel, the Applicant asserted his right to silence and declined to speak with investigators.

- Agreed Statement of Fact, *Application Record*
- Evidence of Tam Bui, *Proceedings,* February 9, 2010, p. 140, l.15 – p.144, l.3

iii) The Interview with Detective Bui on June 23, 2010

111. The Applicant submits that the statement made to Detective Bui on the morning of June 23, 2010 was tainted by earlier *Charter* infringements in two ways: a) the statement was connected to the prior interview with Detectives Hill and Garrow; and b) the statement was obtained as a result of the unlawful search of the Applicant's home. In both cases, there are temporal, contextual and causal factors linking the June 23, 2010 statements to the prior breaches of the *Charter*.

112. The interview on the morning of June 23, 2010 did not commence with any form of caution – the Applicant was not informed of his right to silence, was not offered an opportunity to contact counsel and, importantly, was not instructed that he should disregard anything said by or to him previously. Instead, it is clear from a reading of the interview that the Applicant was aware of and influenced by his previous conversation with Detectives Hill and Garrow. Indeed, very early on in the conversation, the Applicant complained that he had been asked these same questions by the two officers previously and later in the interview he stated, "you know, and you guys are asking me these same questions fifteen different times, you know, two or three groups of people." The connection between the two interviews could not be clearer – the interviews involved the same subject matter and were closely connected in time – the second interview was done about 12 hours after he was given his right to counsel – approximately the same amount of time that elapsed from his arrest until the provision of his right to counsel.

- Statement of Byron Sonne, June 23, 2010, *Application Record*

113. Even if there is an insufficient connection between the two interviews so as to taint the June 23, 2010 interview with the violation of 10(b) of the *Charter*, it is nonetheless submitted that the interview ought to be excluded on the basis that it was obtained as a result of the breach of the Applicant's section 8 rights. That is, the interview was predicated on information obtained during a search of the Applicant's house – which was still ongoing at the time of the interview. In light of the discussion outlined above, that search was done on the basis of a warrant that should not have issued. Absent the information obtained from that search, Detective Tam Bui could not have asked the Applicant the questions that he did and thus, the statement would not have been obtained.

114. A number of cases address the situation where testimonial evidence is said to be obtained as a result of an unlawful search. It is submitted that an analogous approach should be taken in a situation where a statement is obtained from the accused as a result of an unlawful search. The Supreme Court of Canada in *R. v. Goldhart* held that the question of whether a witness' testimony is obtained in the course of a previous *Charter* breach is determined by an analysis that considers a number of factors including a causal ("but-for") link as well as the general temporal and contextual proximity to the breach. In that case, the trial judge ruled the evidence from a search of a marijuana production house was inadmissible due to an unlawful search, but allowed the statement of a co-accused to be admissible, even though the co-accused would not have been arrested or charged, but for the unlawful search. The Supreme Court of Canada agreed, noting that several months had passed since the unlawful

search and the statement was brought on primarily by the co-accused's "religious conversion" and a desire to "get something out of [his] heart".

- *R. v. Goldhart,* [1996] 2 S.C.R. 463

115. The link between the *Charter* breach and the Applicant's statement in this case is much stronger than in *Goldhart*. Indeed, the interview was intricately connected to the search of the house, taking place *while the search was ongoing*, touching on items located inside the house and before the full significance of the search had been ascertained. The link between the unlawful search and the statement was temporal, causal and contextual. The Applicant's interview was very much part of the same transaction, taking place in the course of a breach of his rights under section 8 of the *Charter*.

iv) The Interview with Detective Bui on June 26, 2010

116. It is submitted that the Applicant's interview with Detective Bui on June 26, 2010 was also conducted in the course of the unlawful search of his house. The search of the house took place over the course of several days with the police ultimately concluding their search on the evening of June 25, 2010. Quite simply, the interview on the morning of June 26, 2010 was the first opportunity Detective Bui had to speak with the Applicant once the search was completed. The interview focused primarily on issues associated with the search of the house – issues which could not have been raised but for the unlawful search.

117. As with the June 23, 2010 interview discussed above, it is submitted that the interview on June 26, 2010 was sufficiently proximate to the search of the house in terms of time, context

and causation that it was "obtained in a manner" that violated section 8, for the purposes of section 24(2) of the *Charter*.

D. Section 24(2) – Exclusion of Evidence

118. The framework for assessing whether evidence obtained in a manner that infringed the *Charter* should be admissible focuses on the long-term integrity of the justice system. The Supreme Court of Canada in *R. v. Grant* explained:

> The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
>
> - *R. v. Grant, supra* at para 68

119. More specifically, the 24(2) analysis breaks down into three broad categories: a) the seriousness of the *Charter*-infringing state conduct, b) the impact of the breach on the *Charter*-protected interests of the accused, and c) society's interest in the adjudication of the case on its merits.

120. In the present case it is submitted that the state conduct was reprehensible and, indeed, rises to a level that would shock the community. From his very first moment of contact with the police on June 15, 2010, the Applicant's rights were repeatedly ignored and violated. The pattern of breaches, caused by officers from different ranks, department and investigative

units, demonstrates a pattern of disregard for the *Charter* implicating a broad cross-section of law enforcement agencies in the province. The negligent and reckless manner in which Detective French drafted his information to obtain, and the careless way in which items from the home were analysed and reported to other investigative agencies, raises questions about the degree to which investigators in this case took seriously their duty to respect the *Charter*.

121. The impact on the Applicant's interests cannot be overstated. His fundamental right to be free of state interference was disregarded at the moment of his first contact with the police who threatened him with a false arrest to coerce him into abandoning his right to silence. What ensued in the following weeks was a series of breaches of his basic rights including the denial of his right to counsel. He was exposed to further dishonesty when he was assured that his statements would not be used against him. Instead, his words were in fact turned over to investigators to further an unlawful search of his house. The search of his home and cottage invaded his privacy and constituted an affront to his basic human dignity, exposing corners of his private life in a brutal and abrupt manner. The search of his computers furthered that violation into areas that attract a heightened expectation of privacy.

- *R. v. Côté*, 2011 SCC 46

122. The exclusion of the evidence in this case would certainly damage the Crown's case but would not end it. The evidence from Twitter, said to support the charge of counselling the commission of an offence, would remain. While the exclusion would certainly put an end to the prosecution for the offences of possession of an explosive substance those considerations must

be balanced against the other factors. As the Supreme Court recently noted in its decision of *Côté*:

> Under this branch, relevant, reliable evidence that is crucial to the prosecution's case will often point towards admission, though these considerations will have to be balanced against other relevant factors. The seriousness of the offence, however, has the potential to "cut both ways" and will not always weigh in favour of admission (Grant, at para. 84). <u>While society has a greater interest in seeing a serious offence prosecuted, it has an equivalent interest in ensuring that the judicial system is above reproach, particularly when the stakes are high for the accused person</u> [emphasis added].
>
> - *R. v. Côté, supra* at para. 53

123. In the result, it is submitted that the inclusion of the evidence, obtained as it was in a manner that seriously infringed the Applicant's *Charter* rights, would bring the administration of justice into disrepute and therefore the evidence should be excluded from the Applicant's trial.

124. **ALL OF WHICH** is respectfully submitted this 26th day of October, 2011.

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