
CANADA / JUDGMENT

R. v. Hampton

2015 BCSC 1628

COURT

Supreme Court of British Columbia

DECIDED

22 July 2015

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2015 BCSC 1628 R. v. Hampton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hampton,

2015 BCSC 1628

Date: 20150722

Docket: 47641-2

Registry: Vernon

Regina

v.

Ryan David Victor Hampton

Before: The Honourable Mr. Justice Davies

Oral Ruling on Voir Dire

re: Admissibility of Statements by Accused R.C.M.P. Officer to

Senior R.C.M.P. Officer

Counsel for the Crown:

C. Ducluzeau

Counsel for Defence:

J. D. Tarnow

Place and Date of Hearing:

Kelowna, B.C.

July 14-17, 2015

July 20, 2015

Place and Date of Judgment:

Kelowna, B.C.

July 22, 2015

- [1] THE COURT: This ruling concerns the admissibility of statements allegedly made by the accused, Ryan Hampton, who was then a regular member of the R.C.M.P., to an R.C.M.P. officer senior in rank to him.
- [2] The admissibility of the statements is challenged by the accused on the bases that they were involuntarily made or, alternatively, that they are inadmissible because they were obtained in breach of his s. 10(a) and 10(b) rights under the Charter of Rights and Freedoms.
- [3] It is important to note at the outset that this ruling concerns only issues of the admissibility of the alleged statements as evidence at trial. It is not concerned with the truth or otherwise of the contents of the statements allegedly made by the accused, the making and the content of which were both substantively denied by him in his testimony on this voir dire.
- [4] The accused is charged with possession of child pornography, contrary to s. 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46, as well as accessing child pornography, contrary to s. 163.1(4.1) of the Criminal Code, between March 1, 2013, and May 5, 2013.
- [5] During the times alleged Mr. Hampton was a constable in the R.C.M.P. stationed at the R.C.M.P.'s Vernon, British Columbia, detachment. His then wife, Valerie Hampton (now Little) was also a constable in the R.C.M.P. stationed at the same detachment. She was on maternity leave at the time of the alleged commission of the alleged crimes charged against Mr. Hampton.
- [6] Constable Little reported the alleged crimes to Corporal Michael Buxton-Carr, her supervising officer at the Vernon R.C.M.P. detachment, in person on May 5, 2013. She did so approximately one month after she says she became aware of the existence of child pornography on a USB flash drive she claimed belonged to Mr. Hampton found by her in the basement of her home in early April of 2013 and which she viewed on April 7, 2013. She gave that flash drive to Corporal Buxton-Carr at the time she made her report.
- [7] It was immediately thereafter that the interactions between Mr. Hampton and Sergeant Buxton-Carr that are the subject of this voir dire took place. I say Sergeant rather than Corporal Buxton-Carr because he has since received a promotion, and I will, in this ruling, refer to him as Sergeant Buxton-Carr.

- [8] Mr. Hampton is also charged with six counts of breach of an undertaking given by him requiring no contact, direct or indirect, with Constable Little after her report to Sergeant Buxton-Carr. He is also charged with one count of attempting to obstruct justice relating to alleged contact with Constable Little on May 17, 2013.
- [9] The voluntariness and Charter issues that are subject of this voir dire relate only to the child pornography charges.

Evidence on the Voir Dire

- [10] Both Sergeant Buxton-Carr and Mr. Hampton testified on the voir dire about what transpired on May 5, 2013.
- [11] Sergeant Buxton-Carr testified that Constable Little came to the Vernon detachment of the R.C.M.P. on the afternoon of May 5, 2013, at about 3:30 p.m.
- [12] At that time Sergeant Buxton-Carr was the supervisor of the team to which Constable Little was assigned and that day was also acting as the watch commander for the "B" Watch General Duty Division of the Vernon detachment.
- [13] Sergeant Buxton-Carr testified that Constable Little was accompanied by her two young children and appeared to be distraught and asked to speak to him in private. He then left the watch commander's office where he was working and went with Constable Little and the children to his own office nearby.
- [14] Sergeant Buxton-Carr testified that Constable Little asked him whether, as a member of the R.C.M.P., she was obligated to disclose criminal activities committed by another member of the R.C.M.P. He told her that she was obligated to report any offences and she then produced a USB drive either from her purse or pocket and said she wanted to report that she had found that her then husband, Mr. Hampton, was in possession of what she believed was child pornography.
- [15] Sergeant Buxton-Carr then looked at relevant sections of the Criminal Code to refresh himself as to the elements of the child pornography offences which he then reviewed with Constable Little and asked, if knowing that, she still believed she was dealing with child pornography. He testified that she confirmed that it did and that it was "horrible stuff", including acts of intercourse with a child the age of her two-year-old child.
- [16] Sergeant Buxton-Carr testified that he was satisfied that the material allegedly on the flash drive was child pornography and that he then asked her what led her to believe that it was linked to Mr. Hampton. He testified that she provided details of observations and conversations with him that caused him to believe that she had placed the flash drive in Mr. Hampton's possession.

- [17] Sergeant Buxton-Carr testified that by subsequent questioning, he learned that she had acquired the flash drive or formed the belief on April 7 of that year and he then queried why there had been such a delay in reporting. He said she explained that she had taken other measures with living arrangements to protect her children and thought the matter was addressed but that she was no longer satisfied and believed she had to come forward.
- [18] Sergeant Buxton-Carr kept the USB drive in his pocket until later, placing it into an exhibit bag and then an exhibit locker later that evening.
- [19] Sergeant Buxton-Carr testified that Constable Little left the building shortly before 4 p.m. and he returned to the watch commander's office. He then said that literally within seconds, Mr. Hampton walked in from an opposite side of the building with two young boys, his eldest children from a previous marriage, and motioned to Sergeant Buxton-Carr with his arm.
- [20] Sergeant Buxton-Carr said he immediately stood up from his desk and observed that Mr. Hampton appeared quite upset. He testified that they walked immediately to an adjacent interview room which they entered, and he closed the door. The children did not go with them.
- [21] Sergeant Buxton-Carr testified that Mr. Hampton said, "Valerie has just been here. What did she say?" and that he replied that "she is making some serious allegations that you were in possession of child pornography."
- [22] He testified that Mr. Hampton then said, "We have been fighting about this for a while and going over this at home" and then asked, "Did she give you anything?" to which Sergeant Buxton-Carr replied that she had given him the USB or flash drive, "whatever term he used".
- [23] Sergeant Buxton-Carr then testified that Mr. Hampton said: "Oh, she told me she destroyed that. She's been holding it over me for a month," and then asked, "What happens now?"
- [24] Sergeant Buxton-Carr said he replied that, "You know this will be investigated," that he would be contacting his senior officer, and that he would expect that there would be a Criminal Code investigation and another investigation related to "our Organizational Code of Conduct."
- [25] Sergeant Buxton-Carr testified that Mr. Hampton at some point interrupted him and said he knew all that but wanted to know what was going to happen right now.
- [26] Sergeant Buxton-Carr said he replied, "I am not speaking to you necessarily as an investigator but to tell you this is what you can expect will happen. They will obviously want to look at this drive and see what imagery we are dealing with, and they will be interested in what device was used to obtain the material and specifically what search terms were entered to retrieve it."

- [27] Sergeant Buxton-Carr testified that he was not more specific than that and had not arrested or provided a warning to Mr. Hampton and had just told him he could expect an examination of the other material.
- [28] He testified that in that context, Mr. Hampton said, "Mike, they are going to find what they are looking for. What they are looking for they are going to find. They are going to find it," and that Mr. Hampton also said: "We've worked together for a few years. You have to know it isn't me. It's not what I was looking for. I was looking for young women. I got kids. It's sick stuff, sick shit, not what I was looking for."
- [29] Sergeant Buxton-Carr testified that without a caution he then asked Mr. Hampton, if he had this material and was looking for something allegedly legal and got something allegedly obviously illegal, why did he not destroy it or delete it or whatever else he would do to get rid of it.
- [30] He testified that Mr. Hampton replied that he did not know but thought that maybe he wanted her to find it. Sergeant Buxton-Carr believed Mr. Hampton was referring to his wife, Constable Little, when he said that.
- [31] Sergeant Buxton-Carr testified that he did not ask any other questions concerning the alleged pornography. He testified that after that exchange, he only told Mr. Hampton that he would not be working, that he would call his supervisor and that Mr. Hampton would be off-duty sick. He also testified that he told Mr. Hampton that he would need to have his firearm and that he would come and get it. He also testified that Mr. Hampton volunteered to go and get his firearm, but that he told him he would come and get it. He said he then told Mr. Hampton to go home and he would follow him to get the firearm.
- [32] Sergeant Buxton-Carr testified that Mr. Hampton then left the R.C.M.P. detachment and that he then drove to Mr. Hampton's home.
- [33] He testified that Mr. Hampton had arrived at his home before him and had taken his two boys into the home. Mr. Hampton then went back inside and brought out his gun and belt as per his word, and that he was also carrying a reddish-coloured laptop computer.
- [34] Sergeant Buxton-Carr said they then had a conversation about the computer in which he told Mr. Hampton that the investigators would want to look at what he used to access what was allegedly on the memory stick.
- [35] He testified that he told Mr. Hampton he did not have to give the computer to him saying "we will need a search warrant for that" and that Mr. Hampton said - "You might as well have it." Mr. Hampton then placed the gun and gun belt and the computer with a charging cord on the front passenger seat of Sergeant Buxton-Carr's vehicle through an open window.
- [36] Sergeant Buxton-Carr said that he and Mr. Hampton then had a conversation at the end of the driveway for about 10 minutes in which they discussed what they had already discussed at the detachment about what would now happen with an R.C.M.P. investigation.

- [37] He said he confirmed with Mr. Hampton that he would not be working that night and that he would talk to his supervisor. There was also a discussion about Mr. Hampton's former wife taking the boys with her as well as a discussion about help that might be available to Mr. Hampton for traumatic incidents as well as legal representation. He also learned that Mr. Hampton planned to check into a hotel that night.
- [38] At no time during his conversations with Constable Little or Mr. Hampton did Sergeant Buxton-Carr have his notebook with him, but he did make a report of his discussions with them before leaving his shift that night at 7 p.m. He also placed the laptop into a storage locker before turning it over to investigators the next day.
- [39] At no time did Sergeant Buxton-Carr provide Mr. Hampton with any Charter warnings and did not place him under arrest. When asked in cross-examination what he would have done if Mr. Hampton had said he was leaving the detachment after they went into the interview room and the door was closed, Sergeant Buxton-Carr said he would have let him leave but would still have required him to surrender his firearm due to his concerns with safety in all of the circumstances.
- [40] Mr. Hampton's testimony was in most respects consistent with that of Sergeant Buxton-Carr except with regard to the allegedly interrogative nature of the conversation in the interview room.
- [41] Mr. Hampton testified that he followed Constable Little to the R.C.M.P. detachment that morning and saw her in conversation with Sergeant Buxton-Carr in his office.
- [42] When Mr. Hampton saw her leave, he went towards the watch commander's office to which Sergeant Buxton-Carr had then returned and motioned for him to come to meet him. He said they met in the doorway and that when Sergeant Buxton-Carr came to the doorway, he told Sergeant Buxton-Carr that he had just seen Constable Little leave and asked if she had given him anything.
- [43] He said Sergeant Buxton-Carr confirmed that she had and said, "Ryan, we should do this in private."
- [44] Mr. Hampton testified that he then ushered his children to his own work area in the bullpen area of the detachment nearby, and that Sergeant Buxton-Carr then directed him to the interview room which they entered and that Sergeant Buxton-Carr then closed the door and told him to sit down.
- [45] Mr. Hampton testified that as a subordinate officer having been given a direction by a senior office, he had to comply or face a suspension or other consequence. He said, "You do what you're told or you face the consequences."

- [46] Mr. Hampton testified that Sergeant Buxton-Carr told him that Constable Little had made some serious allegations against him that were going to result in a criminal investigation and an internal investigation and had produced a thumb drive that she alleged contained images of child pornography.
- [47] Mr. Hampton testified that Sergeant Buxton-Carr went into the elements of the offence and asked him if he knew what he was talking about and that he replied, "Yes, we have been arguing about this for about a month."
- [48] He was then asked by his counsel what he thought when he went into the interview room and Sergeant Buxton-Carr closed the door. Mr. Hampton testified that he thought he was going to be arrested and was scared and fearful for his children and did not want to be arrested for something he believed he had not committed but that he knew that Constable Little had made the allegation and Sergeant Buxton-Carr had said there was going to be a Criminal Code investigation and he thought he was going to be arrested.
- [49] Mr. Hampton also testified that the interview room was equipped with audio and visual recording equipment, with no windows, and a deadbolt, with a single table and chairs on both sides. He called it a "hard" interrogation room as opposed to a "soft" interview room.
- [50] Mr. Hampton testified that Sergeant Buxton-Carr went into detail about where the thumb drive had been located in a common area in his residence in plain sight and that he said, yes, he believed that he had left it on a bookshelf. He said that Sergeant Buxton-Carr told him that Constable Little had also described an image of sexual intercourse between a juvenile female "close to the age of my daughters and an adult," to which he replied : "That's sick shit."
- [51] Mr. Hampton next testified that Sergeant Buxton-Carr started to go into elements of the offence and what they would be looking for, and in an investigatory role, he started to ask him about what kind of search terms had been used and typed into the computer.
- [52] He testified that he then said, "Look, I didn't type in anything to do with child porn. Whatever is on the computer is what they are going to find. It's on the computer."
- [53] When asked by his counsel what he thought was going through his mind during the interview, Mr. Hampton testified that he was waiting to be arrested and given his s. 10(a) and 10(b) rights. He added that he was actually surprised that s. 10(b) had not been given to him at the outset when he walked into the interview room.
- [54] Mr. Hampton next testified that he was never told that he was free to leave and that in his opinion as a police officer, had the roles been reversed, Sergeant Buxton-Carr "would not have been allowed to leave."
- [55] Mr. Hampton testified that after the discussion of search terms, Sergeant Buxton-Carr said the elements of the offence were met and there would be a criminal and statutory internal investigation and then sat down and leaned forward and said, "Why didn't you destroy it? If

you knew these images were on it, Ryan, why didn't you burn it, destroy it, get rid of it?" and after first acknowledging that the question had been asked in that way Mr. Hampton subsequently denied saying "I don't know" and then asserted that he had said "I did not know."

- [56] Mr. Hampton next testified that the discussion then turned to his firearm and use of force option and that Sergeant Buxton-Carr told him, "I have to seize your gun," at which point he believed that he would be arrested and detained, so he reached into his pocket and withdrew his identification and badge and said, "You will need that as well."
- [57] He said that Sergeant Buxton-Carr did not immediately take those and eventually slid them back to him, but that that did not change his belief about being arrested because Sergeant Buxton-Carr said, "Just hold on to them for now."
- [58] Mr. Hampton then testified that Sergeant Buxton-Carr next mentioned his kids and whether arrangements had been made for them and whether someone could look after them.
- [59] He said he told Sergeant Buxton-Carr he could contact his ex-wife to get them. He also said he would go and get his pistol but that Sergeant Buxton-Carr said, "No, we will go get it. You can go and I will follow."
- [60] Mr. Hampton testified that he then left the detachment and drove to his home and that he believed he would be taken into custody once the children had been taken care of.
- [61] He testified that when he arrived at his home, he went inside with his children and went to get his pistol to bring it out in its holster to the driveway where Sergeant Buxton-Carr's vehicle was parked. He also got the Samsung computer, which has been marked as Exhibit 2 in this proceeding, and unplugged it and headed downstairs to meet Sergeant Buxton-Carr.
- [62] He testified that in the driveway, he put the gun and holster on the passenger seat as well as the computer and said, "You guys might as well take this." He said he did that because he believed Constable Little might tamper with it and wanted the police to have it. He also said he thought he was going to be arrested.
- [63] Under cross-examination, Mr. Hampton acknowledged telling Sergeant Buxton-Carr that they had been fighting about the flash drive at home but did not recall saying he had said Constable Little had said she had destroyed it.
- [64] Mr. Hampton also acknowledged Sergeant Buxton-Carr had said there was going to be a criminal investigation and a statutory investigation and testified that he knew he had the right to remain silent and that anything he said could be used in evidence against him.

- [65] He also admitted that Sergeant Buxton-Carr did not make any threats or offer any inducements. He testified that even though he was not told by Sergeant Buxton-Carr that he was embarking on a code of conduct investigation, he also said he knew that by reason of the "RCMP Act" he had a duty to account and that he believed that Sergeant Buxton-Carr was carrying out an investigation.
- [66] Mr. Hampton denied the suggestion that what he said was "what they are looking for they will find" and reiterated that he had said that "I had never looked for any type of child porn, and any searches I had made would still be on the computer." He also denied saying he had been "looking for a young woman and I ended up getting kids." He said that he had looked for young women in the past but that is not who he was and that he said, "I've got kids" or "I have kids" in reference to his own children sitting in the bullpen.
- [67] Mr. Hampton also denied Sergeant Buxton-Carr's evidence that when they were discussing search terms he said that what he had searched for was "sick shit." He said that he had said "that's sick shit" in response to what Constable Little had described seeing on an image.
- [68] Mr. Hampton acknowledged but later denied that Sergeant Buxton-Carr had said to him, "If you knew you had material on the jump drive that should not have been there, you should have destroyed it. Why didn't you destroy it?"
- [69] When denying the question when asked why it would have been asked if he had not said he knew what was on it, he suggested that the only question that had been asked was: "Why did you not destroy it?" without reference to his knowing what was on the drive, and that his response was, "I did not know". He further denied saying "I wanted her to find it."
- [70] During further cross-examination, Mr. Hampton continued to assert that Sergeant Buxton-Carr had been carrying out an investigation by asking questions about what he had done, including what search terms he had used and why he had not destroyed the evidence.
- [71] Unfortunately, those assertions and many others made by Mr. Hampton both in his direct examination and cross-examination had never been put to Sergeant Buxton-Carr in serious contravention of the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).
- [72] As a consequence of that and in order to ensure fairness to both the accused and the witness, I allowed Sergeant Buxton-Carr to be recalled so that defence counsel could properly put those questions upon which he sought to rely in challenging the credibility of Sergeant Buxton-Carr's testimony.
- [73] I need not review that further cross-examination in detail because I am satisfied that concerning the specific issues I must decide on this voir dire, Sergeant Buxton-Carr only questioned Mr. Hampton on the issue of whether if Mr. Hampton knew the material was on the flash drive and had not intended that it be there why did he not destroy it, or burn it, or get rid of it.

- [74] After reviewing the totality of the evidence in the context not only of Sergeant Buxton-Carr's testimony but also his actions in not arresting Mr. Hampton and allowing him to leave the detachment and only later reporting events to a supervisor for investigation, I am led to conclude that on the central issue of whether he conducted an investigation, I can safely find that other than with respect to that one question concerning not destroying the material on the flash drive, Sergeant Buxton-Carr did not cross the line into an investigation into the allegations made by Constable Little.
- [75] I also find that Mr. Hampton was less than forthright in his testimony on this voir dire.
- [76] Mr. Hampton was not only evasive at times but also inconsistent in the answers he gave as exemplified by his attempt to deny his initial admission that Sergeant Buxton-Carr had asked him why, if he knew what was on the drive and did not intend it to be there, did he not destroy it.
- [77] I also find his Mr. Hampton's evidence about being compelled to answer questions because of duties imposed upon him by the "RCMP Act" to be self-serving, unconvincing, and entirely at odds not only in relation to the actual discussion with Sergeant Buxton-Carr but in the context of his seeking of information from Sergeant Buxton-Carr about what Constable Little had said to and given him.
- [78] Mr. Hampton's assertions that he was being interrogated are simply not credible when it was he who initiated the discussions by following Constable Little to the detachment and his then engaging Sergeant Buxton-Carr in discussions about that in privacy.

Analysis and Discussion

- [79] As I noted at the outset, two issues arise for determination in this case.
- [80] The first issue is whether the Crown has proven beyond a reasonable doubt that any statements made by Mr. Hampton to Sergeant Buxton-Carr on May 5, 2013, were made voluntarily.
- [81] If so, the second issue that arises is whether Mr. Hampton has proven on a balance of probabilities that any statements made by him to Sergeant Buxton-Carr were obtained in breach of his s. 10(a) or s. 10(b) rights.

Voluntariness

- [82] The leading case on voluntariness is *R. v. Oickle*, 2000 SCC 38 [Oickle]. After reviewing the existing jurisprudence on the topic of voluntariness and confessions, Justice Iacobucci, for the majority, in Oickle stated at paragraph 68 to 71 that:

68 While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness.

Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

69 The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in Rothman, supra, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

70 Wigmore perhaps summed up the point best when he said that voluntariness is "shorthand for a complex of values": Wigmore on Evidence (Chadbourn rev. 1970), vol. 3, § 826, at p. 351. I also agree with Warren C.J. of the United States Supreme Court, who made a similar point in *Blackburn v. Alabama*, 361 U.S. 199 (1960), at p. 207:

[N]either the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." . . . Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

See Hebert, supra. While the "complex of values" relevant to voluntariness in Canada is obviously not identical to that in the United States, I agree with Warren C.J. that "voluntariness" is a useful term to describe the various rationales underlying the confessions rule that I have addressed above.

71 Again, I would also like to emphasize that the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow Ibrahim formulation. Both results are incorrect. Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness,

taking into account all the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation: see Hoilett, *supra*. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts" . . . (emphasis in Schwartz).

- [83] Counsel for Mr. Hampton submits that notwithstanding that no threats, promises, or inducements were made to Mr. Hampton by Sergeant Buxton-Carr, and there was no over-oppression of him during what was approximately a 10-minute interview at the detachment, his statements are inadmissible because Mr. Hampton was compelled by s. 40 of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10 to answer questions put to him by a senior officer.
- [84] Counsel for Mr. Hampton submits that the situation is akin to that in which statutorily compelled statements obtained for regulatory purposes are not admissible in subsequent criminal prosecutions, as in *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Powers*, 2006 BCCA 454; and *R. v. Soules*, 2011 ONCA 429.
- [85] Leaving aside the fact that those cases were not voluntariness cases but, rather, cases founded upon breaches of s. 7 Charter rights to silence, I am satisfied that there is no merit to Mr. Hampton's argument by application of s. 40 of the Royal Canadian Mounted Police Act or by reference to the Provincial Court decision in *R. v. Etienne*, 2005 BCPC 98 [Etienne], the one case in support of that specific argument upon which he relies.
- [86] Section 40 of the Royal Canadian Mounted Police Act states:
40. (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to enable the conduct authority to determine whether the member has contravened or is contravening the provision.
- (2) In any investigation under subsection (1), no member shall be excused from answering any question relating to the matter being investigated when required to do so by the person conducting the investigation on the grounds that the answer to the question may tend to criminate the member or subject the member to any criminal, civil or administrative action or proceeding.

- (3) No answer or statement made in response to a question described in subsection (2) shall be used or receivable in any criminal, civil or administrative action or proceeding, other than a proceeding under this Part regarding an allegation that with intent to mislead the member gave the answer or statement knowing it to be false.
- [87] Counsel for Mr. Hampton does correctly submit that s. 40(3) limits the use of statements obtained from a member of the R.C.M.P. during a code of conduct investigation to the investigation itself and prohibits their use in criminal proceedings other than for those alleging perjury.
- [88] The difficulty with Mr. Hampton's submissions concerning the application of the prohibitions against the use of statements that are subject to s. 40 of the Royal Canadian Mounted Police Act is that the section does not apply to the circumstances in which the discussions between Mr. Hampton and Sergeant Buxton-Carr occurred on May 5, 2013.
- [89] That is so because s. 2 of that Act defines "conduct authority" as "in respect of a member, means a person designated under subsection (3) in respect of the member." Subsection (3), which that definition invokes, provides:

The Commissioner may designate any person to be a conduct authority in respect of a member either for the purposes of this Act generally or for the purposes of any particular provision of this Act.

- [90] There is no evidence that Sergeant Buxton-Carr was ever appointed as a conduct authority in respect of Mr. Hampton, and indeed, in the circumstances of this case and the immediacy of the interaction between Mr. Hampton and Sergeant Buxton-Carr, any such appointment could never have been made by the commissioner before the discussions that are the subject of this voir dire occurred.
- [91] Also, to the extent that Etienne considered s. 40 (2) of the Act applied to the interviews in that case, I note that the interviews arose after an investigation of the complaints against the officer, consideration within the detachment by senior officers of that complaint, and a referral to internal affairs.
- [92] None of those circumstances exist in this case. I find that there was no code of conduct investigation underway at the time the discussions between the accused and Sergeant Buxton-Carr occurred. As Sergeant Buxton-Carr said and as Mr. Hampton acknowledged, there was going to be a statutory investigation.
- [93] I am accordingly satisfied that s. 40 of the Royal Canadian Mounted Police Act has no application in this case and that no statements made by Mr. Hampton to Sergeant Buxton-Carr were statutorily compelled.

- [94] I am also not satisfied that any lack of audio or video recording of the interaction renders any statements made by Mr. Hampton inadmissible. The interaction was short, and there is no suggestion that any lack of recording was intentional. The reason why the interaction was not recorded is simple: the meeting was a spur of the moment one that was initiated by Mr. Hampton, not by Sergeant Buxton-Carr.
- [95] I am additionally satisfied that Mr. Hampton's assertion that he was bound to answer Sergeant Buxton-Carr's question because he was asked them by a senior officer does not render any statements made by him involuntary.
- [96] I have found that only one issue was addressed by Sergeant Buxton-Carr by way of any questioning of Mr. Hampton.
- [97] I also find that no indicia of lack of voluntariness as addressed in Oickle arose with respect to that short exchange near the end of their discussion. Mr. Hampton admitted that he knew he had a Charter right to remain silent and had himself initiated the discussions with Sergeant Buxton-Carr by seeking to learn what he had been told by Constable Little and what she had given him.
- [98] Further, in his testimony on this voir dire, Mr. Hampton not only denied making the statement attributed to him by Sergeant Buxton-Carr about not destroying images he had not intended to receive, but also asserted that he did not know what was on the flash drive.
- [99] After considering the totality of the evidence adduced on this voir dire, the submissions of counsel, and the authorities to which I was referred, I am satisfied the Crown has proven beyond a reasonable doubt that all statements made by the accused to Sergeant Buxton-Carr on May 5, 2013, were made voluntarily.

Alleged Charter Breaches

- [100] Mr. Hampton submits that all statements made by him to Sergeant Buxton-Carr at the R.C.M.P. detachment in Vernon were obtained in breach of his s. 10(a) and 10(b) Charter rights which provide that:
10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right.
- [101] Mr. Hampton asserts that those rights were breached when Sergeant Buxton-Carr directed him into the interview room at the Vernon R.C.M.P. detachment, closed the door to the room, and began to interview him.
- [102] He submits that at that time he was detained, so that his s. 10(a) and (b) rights required that he be advised by Sergeant Buxton-Carr as to the charges for which he was under investigation and also be advised as to his right to retain counsel.

- [103] To establish any breach of the s. 10 Charter rights he alleges, Mr. Hampton must establish on a balance of probabilities that he was detained by Sergeant Buxton-Carr on May 5, 2013, either at the beginning of or at some point during their interaction at the Vernon detachment that day.
- [104] On that issue of detention, in *R. v. Seagull*, 2015 BCCA 164 [Seagull] Neilson J.A. very recently, wrote for the Court at paras. 34 through 36:
- [34] There is no dispute over the legal principles that govern when a detention occurs. The Supreme Court of Canada discussed them extensively in *Grant*, and I summarize those relevant to this appeal as follows.
- [35] Detention identifies the point at which the authorities are obliged to immediately inform a suspect of the right to counsel under s. 10(b) of the Charter. This recognizes the vulnerability of individuals who are taken under effective state control, and ensures that they have the opportunity to seek legal advice, and understand that they have a choice as to whether to cooperate with and speak to the authorities. Detention may be physical or psychological. Psychological detention occurs when a reasonable person in the subject's position would conclude by reason of the state's conduct that he or she has no choice but to comply with authorities. It may be difficult to determine when a person is psychologically detained. In addressing this issue, the court should consider the entire interaction as it developed (*Grant* at paras. 22, 32, 44).
- [36] At para. 41 of *Grant*, the majority describes the complexities arising from the broad spectrum of potential interactions between peace officers and citizens:

As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in[to] a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.

- [105] While directed specifically at s.10(b) rights in *Seagull*, those same principles apply to alleged breaches of s.10(a) which also require a finding that a person had been either physically or psychologically detained.
- [106] I also refer to the decision of the Supreme Court of Canada in *R. v. Suberu*, 2009 SCC 33 [Suberu], decided at the same time as *R. v. Grant*, 2009 SCC 32, to which Neilson J.A. referred in *Seagull*.

[107] At paras. 21 to 25 of Suberu the majority wrote:

- [21] In Grant, we adopted a purposive approach to the definition of "detention" and held that a "detention" for the purposes of the Charter refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state. The recognition that detention can manifest in both physical and psychological form is consistent with our acceptance that police actions short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the Charter.
- [22] While a detention is clearly indicated by the existence of physical restraint or a legal obligation to comply with a police demand, a detention can also be grounded when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police. As discussed more fully in Grant, this is an objective determination, made in light of the circumstances of an encounter as a whole.
- [23] However, this latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. This Court's conclusion in Mann that there was an "investigative detention" does not mean that a detention is necessarily grounded the moment the police engage an individual for investigative purposes. Indeed, Iacobucci J., writing for the majority, explained as follows:

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so. [Emphasis added; at para. 19.]

- [24] As explained in Grant, the meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the Charter right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust Charter rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the Charter.

[25] For convenience, we repeat the summary set out in Grant, at para. 44:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:
 - (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
 - (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
 - (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[108] Also important to my consideration of the issue of detention is the Court's observation in Suberu at paragraph 28 that:

[28] As discussed more fully in Grant, in a situation where the police believe a crime has recently been committed, the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the Charter. Despite a police request for information or assistance, a bystander is under no legal obligation to comply. This legal proposition must inform the perspective of the reasonable person in the circumstances of the person being questioned. The onus is on the applicant to show that in the circumstances he or she was effectively deprived of his or her liberty of choice. The test is an objective one and the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application. However, the applicant's contention that the police by their conduct effected a significant deprivation of his or her liberty must find support in the evidence.

[109] Mr. Hampton submits he was physically detained when Sergeant Buxton-Carr closed the door to the interview room behind him to which he had directed Mr. Hampton. Mr. Hampton submits that he was also psychologically detained because of the provisions of s. 40 of the Royal Canadian Mounted Police Act and his obligation to comply with the directions of a superior officer which deprived him of his liberty of choice.

[110] Mr. Hampton also submits that when he was directed into the interview room, Sergeant Buxton-Carr had reasonable cause to believe that Mr. Hampton had committed the crime alleged by Constable Little and was then obligated to immediately inform Mr. Hampton of that and advise him of his right to silence and right to obtain counsel. Mr. Hampton further relies on the fact that he was not told at any time that he was free to leave.

[111] Mr. Hampton's counsel asserted that Sergeant Buxton-Carr took the interaction with Mr. Hampton "far beyond the general inquiry" and that Mr. Hampton was "zeroed in on and that his movements and choice of liberty were controlled." His counsel further submitted in his written argument that:

For Sgt. Buxton-Carr to suggest to this Court that he took Mr. Hampton into an interview room and closed the door out of concern for his privacy, and that Hampton would have been permitted to leave, is an outrageous assertion. Cst. Buxton-Carr knew the crime, knew the person believed to have committed it, and as an experienced senior member of the RCMP - and the highest ranking member on shift at that time - knew, or ought to have known, of his legal obligations, in respect to informing Hampton of his Charter rights.

The defence submits that the evidence overwhelmingly supports a physical detention being affected.

[Quoted as written.]

[112] As to the question of psychological detention, Mr. Tarnow wrote in his written submissions:

[T]he evidence is overwhelming that Mr. Hampton was psychologically detained when he was forced to comply with the direction Sgt. Buxton-Carr was steering him in, because of rank and the RCMP Act. When the door was closed to the interview room in the Vernon RCMP detachment, it is reasonable for him to conclude that his liberty was restrained, that he couldn't leave, and they were under investigation.

[Quoted as written.]

Decision

[113] I am satisfied that the evidence does not establish to the requisite balance of probabilities that Mr. Hampton was either physically or psychologically detained by Sergeant Buxton-Carr at the Vernon R.C.M.P. detachment on May 5, 2013 as asserted by his counsel.

[114] I reach that conclusion for the following reasons:

1. I accept Sergeant Buxton-Carr's evidence that the interview room was used for privacy purposes. Significantly, it was the closest room to the direction from which Mr. Hampton had approached the very non-private watch commander's office that was occupied by Sergeant Buxton-Carr when Mr. Hampton gestured to him.

2. In his testimony Mr. Hampton acknowledged that Sergeant Buxton-Carr said, "Ryan, we should probably do this in private," before they entered the interview room.
3. The interaction lasted less than 10 minutes and was initiated by Mr. Hampton's asking of questions about what Constable Little had alleged and whether she had given Sergeant Buxton-Carr anything.
4. Mr. Hampton acknowledged that Sergeant Buxton-Carr told him there were going to be Criminal Code and statutory investigations.
5. I accept Sergeant Buxton-Carr's evidence that he was interrupted by Mr. Hampton, who then said, "I know that, but I want to know what's going to happen now," which satisfies me that Mr. Hampton knew that Sergeant Buxton-Carr was not engaged in a detention of him or an interrogation. It further satisfies me that it was Mr. Hampton himself controlling the progress of the interaction.
6. Mr. Hampton's assertions that Sergeant Buxton-Carr was carrying out a detained investigation of him in breach of his Charter rights is inconsistent with Sergeant Buxton-Carr not taking Mr. Hampton's badge when it was offered to him and his specific advice to Mr. Hampton later that he need not provide the laptop computer without a warrant.
7. The door to the interview room was never locked to prevent Mr. Hampton from leaving and because of the genesis and dynamics of the interaction the question of whether Mr. Hampton was free to go never arose.
8. I also accept Sergeant Buxton-Carr's evidence on cross-examination in answer to the hypothetical question as to what he would have done if Mr. Hampton had said he was leaving the detachment after they went into the interview room and the door was closed. In responding to that question, Sergeant Buxton-Carr said he would have let Mr. Hampton leave but would have still required him to surrender his firearm due to his concerns with safety in all of the circumstances.
9. While counsel for Mr. Hampton has submitted that his answer was "calculated" and that "there is no way he would have let Mr. Hampton leave the interview room," that submission ignores the not contradicted evidence that at the end of the interaction, Mr. Hampton was permitted to leave the detachment with his children without Sergeant Buxton-Carr taking any steps other than to retrieve Mr. Hampton's firearm from his home and inquire about steps taken to ensure Mr. Hampton's children were cared for.
10. As I have previously found, s. 40 of the Royal Canadian Mounted Police Act is of no application, either legally or factually in respect of any compelling of a statement from Mr. Hampton since no Code of Conduct inquiry was undertaken by Sergeant Buxton-Carr. Mr. Hampton had no legally compelled obligation to respond to the only question that was posed of him, that being why, if he had material on the jump drive that should not have been there, did he not destroy it.

11. Mr. Hampton's assertion of being compelled to answer questions because of his inferior rank to that of Sergeant Buxton-Carr is not also reasonable and not supported by any evidence other than his own subjective assertions. Those assertions are self-serving, highly inconsistent with him having initiated the discussions, his own questioning of Sergeant Buxton-Carr as to what Valerie Little had said to him and what she had given to him, and his own redirecting of the interview to the issue of what was going to happen now.
- [115] In result, the totality of the evidence convinces me that in respect of all of his interactions with Sergeant Buxton-Carr on May 5, 2013, and the statements he made, including his response to the one question that was asked by Sergeant Buxton-Carr, Mr. Hampton has failed to satisfy the onus upon him to show that he was effectively deprived by physical or psychological detention of his liberty of choice.
- [116] I accordingly find that all of the statements he allegedly made to Sergeant Buxton-Carr were made voluntarily and were not obtained as a consequence of any breach of his s. 10(a) or 10(b) Charter rights.
- [117] The statements are accordingly admissible at trial.
- [118] I must reiterate that on this voir dire, in reaching that conclusion, I have determined only the issue of admissibility in my role as a gatekeeper. I have not ruled upon the content of any alleged admissions by Mr. Hampton or the credibility or content of his denials concerning the specific admissions alleged by the Crown to have been made by him during his discussions with Sergeant Buxton-Carr on May 5, 2013.
- [119] Those are issues for determination at the conclusion of all of the evidence in this trial.
- [120] I reserve the right to edit those reasons for grammar and readability. Nothing that will be done by way of editing will affect the outcome.

"Davies J."

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Prepared on 29 October 2026 · Esheria