
CANADA / JUDGMENT

R. v. Newman

2012 BCSC 1899

COURT

Supreme Court of British Columbia

DECIDED

15 October 2012

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2012 BCSC 1899 R. v. Newman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Newman,

2012 BCSC 1899

Date: 20121015

Docket: 25031

Registry: Vancouver

Regina

v.

Michael Bruce Newman

Before: The Honourable Mr. Justice Ehrcke

Oral Ruling on Voir Dire

Counsel for the Crown:

G.C. Proulx

E. Leno

Counsel for the Accused:

J.M. Peter

M. Vis-Dunbar

Place and Date of Hearing:

Vancouver, B.C.

September 10-14, 17-19, 25-28, 2012

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2012

INTRODUCTION

- [1] THE COURT: Michael Bruce Newman is charged with the first degree murder of Marc Rozen on January 6, 2004, in Vancouver, British Columbia.
- [2] The Crown seeks to rely on certain statements Mr. Newman made to police in Ontario following his arrest on drug charges in 2007. The Crown therefore seeks a ruling on the voluntariness of those statements. As well, the accused seeks a ruling that the statements are inadmissible on the basis of alleged breaches of his rights under ss. 9, 10(a), and 10(b) of the Charter of Rights.
- [3] At the request of both Crown and defence, the evidence relevant to both the issue of voluntariness and the alleged Charter breaches was led on a single "blended" voir dire. It is understood by all parties that on the issue of voluntariness, the Crown bears the onus of proving the statements voluntary and admissible beyond a reasonable doubt. On the Charter issues, the onus is on the defence on a balance of probabilities.

FACTS

- [4] Thirteen witnesses were called on the voir dire, including 12 members of the York Regional Police Department in Ontario: Constable Ford, Constable Mendoza, Sergeant Shaw, Constable Blenkhorn, Constable Coombs, Constable Grenier, Constable Sylvester, Detective Bedford, Detective Cardwell, Staff Sergeant Harris, Constable Joseph, and Detective Constable Truong. As well, a retired member of the Vancouver Police Department, Detective Nixon, was also called. The accused did not testify on the voir dire. A number of exhibits were also filed on the voir dire, including a three-page Admissions of Fact, which covers the other personnel in Ontario who dealt with Mr. Newman. The defence admits that the involvement of those other personnel had no effect on the voluntariness of any statements made by the accused to York Regional Police members.
- [5] Based on that evidence, I make the following findings of fact.

THE ARREST

- [6] On the afternoon of Thursday, March 29, 2007, four members of the York Regional Police, Sergeant Shaw, Constable Ford, Constable Mendoza, and Constable Blenkhorn, were conducting surveillance at a parking lot in Vaughan, Ontario, where there had been frequent thefts from parked vehicles. The parking lot serviced numerous shops, restaurants, and a movie theatre. The officers were in plain clothes and unmarked vehicles. Sergeant Shaw was in charge.
- [7] At 3:15 p.m., Sergeant Shaw saw a silver SUV arrive and park in the lot. A red SUV then arrived and parked back-to-back with the silver SUV. The rear-hatch tailgates of both vehicles went up. The driver of the silver SUV exited his vehicle and two men exited the red SUV. Sergeant Shaw observed the three men greet each other, after which they transferred large heavy suitcases from the red SUV to the silver SUV. It appeared to Detective Shaw that the suitcases were quite heavy and that all three men were needed to lift them. A few minutes later, Sergeant Shaw saw the driver of the silver SUV transfer a silver-coloured briefcase to the driver of the red SUV, who put it in the front-passenger footwell of the red SUV.
- [8] Sergeant Shaw testified that he believed he had witnessed a drug transfer. He said it looked like something from the TV show *Miami Vice*. Constable Ford, who had been watching the same events, also testified that at this point he believed it was a drug transaction. Sergeant Shaw radioed to the other officers. They approached the three men and identified themselves as police officers.
- [9] The three men were Heinze Goertzen, who was the driver of the red SUV; Michael Rouch, who was the other man from the red SUV; and the accused, who identified himself as Zsolt Rozgics and who was the driver of the silver SUV. All three men were dressed in business clothes, but with baseball hats and sunglasses. The three men were separated from each other when the police spoke to them, but it appeared that each was trying to listen to what the others were saying.
- [10] Sergeant Shaw spoke with Mr. Goertzen, who produced a B.C. driver's licence. Sergeant Shaw asked what he was doing there and Goertzen said he was visiting a friend, but he did not know the friend's name. When asked why he was meeting his friend there, he replied, "You will have to ask my friend." He said he was staying in a hotel, but when asked which one, he said he was staying at a friend's house. When asked what he was loading in the silver SUV, he hesitated for a long time and then said "Just suitcases." When asked what was in them, he said, "I dunno, it's not mine, I was just helping." Sergeant Shaw asked if he put anything in his vehicle and he replied, "No", but then said, "A briefcase". He opened the front passenger door of the red SUV and showed the silver briefcase to Sergeant Shaw, who asked what was in it. Mr. Goertzen said, "I dunno; the guy gave it to me." Sergeant Shaw said, "Don't you want to see," and Mr. Goertzen tried to open the briefcase, but the combination lock was engaged. Sergeant Shaw said, "What is this, a bomb", at which point Mr. Goertzen said, "I dunno" and

started backing away. At that point, out of a concern for officer safety, Sergeant Shaw ordered all three men to be handcuffed.

- [11] Meanwhile, Constable Mendoza had been speaking with the accused, who had identified himself with an Ontario driver's licence in the name of Zsolt Rozgics. Constable Mendoza told him that they were looking for people breaking into vehicles and asked him what he was doing in the parking lot. The accused said, "Waiting for friends."
- [12] Constable Ford, who had been dealing briefly with Mr. Rouch, turned him over to Constable Blenkhorn and then started talking to the accused. Constable Ford testified that the accused seemed extremely nervous and that, in fact, the accused's mouth had turned dry from nervousness.
- [13] Constable Ford asked the accused where he was going, and the accused replied, "Boarding." Constable Ford asked, "Do you mean Camp Borden," and the accused said, "No, snowboarding." Constable Ford asked, "Where's your snowboard," but the accused did not respond. Constable Ford then asked, "Where are you going?" The accused answered, "Moonstone." Constable Ford understood Moonstone to be a ski-area, but there was no snow and the temperature was nine degrees. Constable Ford testified that he had a reasonable suspicion the accused was up to criminal activity. It was at this point that he heard Constable Shaw yell, "Handcuff; officer safety."
- [14] Constable Ford told the accused to turn around and that he was under arrest. He placed one hand in a handcuff, but the accused then started to run. After running about four strides, Constable Ford tackled him and he fell to the ground. The accused continued to resist, and Constable Ford struck his shoulder with his elbow. With the help of Constable Mendoza, he then secured the other handcuff. This was at about 3:33 p.m.
- [15] At the direction of Sergeant Shaw, Constable Ford told the accused he was under arrest for possession of narcotics. About a minute later, at 3:34 p.m., he told him he was under arrest for possession for the purpose of trafficking. He did not at this time caution the accused or advise him of his right to counsel under s. 10(b) of the Charter.
- [16] Constable Ford then opened one of the suitcases, which felt like it weighed 100 pounds, and saw that it contained pink or red pills that he believed to be the drug, ecstasy. Constable Ford testified that he did not open the suitcase until after he had arrested the accused. He considered the search to be incidental to arrest.
- [17] Sergeant Shaw radioed for backup.
- [18] Constable Joseph took custody of the accused at 3:36 p.m. The accused, who was still using the name, Zsolt Rozgics, told him his address was 51 Grenadier Crescent. At 3:42 p.m., Constable Joseph told the accused he was under arrest for possession of a controlled substance for the purpose of trafficking and cautioned him that he was not obliged to say anything but anything he did say could be used against him. Constable Joseph read the accused his s. 10(b) Charter rights from his notebook and informed him of Legal Aid and

duty counsel. He asked the accused if he wished to call a lawyer and the accused said that he wished to contact duty counsel as soon as possible.

- [19] Constable Joseph searched the accused and found \$7,108 in his wallet. He drove the accused to District Number 4 police headquarters, arriving at 4:07 p.m. The accused was booked in and searched, but nothing further was found. At no time did the accused complain to Constable Joseph about pain to his head.

THE HOSPITAL

- [20] At 6:02 p.m., Constable Coombs arranged for the accused to be transported to hospital, as he was complaining of a sore arm. Constable Pandolfi followed the ambulance to the hospital. They arrived at the hospital at 6:17 p.m. The accused again gave his name as Zsolt Rozgics with an address of 51 Grenadier Crescent, Thornhill. He said he was born in Hungary. Constable Coombs again told him he was under arrest for possession for the purpose of trafficking and advised him of his right to counsel, including duty counsel. The accused told him that he would like his own lawyer, but he did not have his phone number, so they decided to wait until they were back at police headquarters. Constable Coombs had not expected that they would be very long at the hospital, but in fact, it turned out to be over five hours. The accused indicated that a piece of identification in his wallet was fraudulent. This was not in response to any questioning from the police. At 7:20 p.m., the accused was placed in a private room to wait for a doctor. Constable Coombs was reading a book on lock picking. The accused said he had taken a course. The accused told Constable Coombs he had three rules, number 1, do not ask questions; number 2, have no attachments or girlfriends; number 3, you talk, you die. Again, these remarks were not in response to any police questioning.
- [21] The accused said, "I'm just a courier. I didn't know what I had. I thought maybe marijuana." Constable Coombs asked for the code for the Blackberry. The accused said, "I can't give that to you; if I do I'm dead."
- [22] Constable Grenier also attended the hospital. He noticed that the accused had a scrape on his left forehead and a splint on his forearm, but he did not seem to be in pain. In addition to the conversation recounted by Constable Coombs, Constable Grenier recalls that the accused also said he could not identify his boss because if he did, he would get him.
- [23] Constable Grenier testified that it was not possible to provide access to counsel at the hospital because there was no phone that was both secure and private.
- [24] A CT scan was done at the hospital. The accused had a broken wrist and thumb, which was put in a cast. He was given a prescription for painkillers. Constable Coombs said there was no diagnosis of a concussion.

- [25] At 11:55 p.m., they left the hospital and arrived back at police headquarters at 12:05 a.m. on March 30. The accused was then lodged in cells by Sergeant McHardy. Constable Sheldon provided a meal to him at 1:00 a.m.
- [26] Around 1:00 a.m., the suitcases and the briefcase were searched pursuant to a search warrant. The suitcases, each of which weighed 150 to 200 pounds, were full of ecstasy pills and cocaine. The briefcase contained \$220,000 in cash.
- [27] At 1:27 a.m., Sergeant McHardy brought the accused from his cell to the interview area for the purpose of facilitating a phone call to counsel.
- [28] At 1:39 a.m., Constable Ford placed telephone calls to the accused's lawyer, Bruce Olmstead, and left voicemail messages for him at the two phone numbers the accused had provided. Constable Ford then asked the accused if he wanted to contact duty counsel, and he said, "No".
- [29] Sergeant McHardy returned the accused to his cell at 2:01 a.m.

THE MARCH 30 MORNING INTERVIEW

- [30] At 3:17 a.m. on Friday, March 30, 2007, Detective Constable Truong of the York Regional Police began an interview with the accused in an interview room at police headquarters. The interview was audio and video recorded. A DVD of the recording was marked as Exhibit K on the voir dire and a transcript was marked as Exhibit L. At the beginning of the interview, Detective Constable Truong advised the accused he was under arrest for possession for the purpose of trafficking. He gave him the standard statement caution and the secondary caution as well as his rights under s. 10(b) of the Charter. The form confirming these rights was marked as Exhibit M on the voir dire. Detective Constable Truong mistakenly believed from speaking with other officers that the accused had spoken with counsel before the interview, so when the accused told him during the interview that he had not spoken to counsel, Detective Constable Truong thought he was only playing games, and therefore, he made no attempt to put the accused in contact with counsel.
- [31] The Crown concedes that the accused's s. 10(b) Charter right to counsel was infringed when Detective Constable Truong persisted in trying to interview and elicit statements from the accused before he had had a reasonable opportunity to speak with counsel.
- [32] During the interview with Detective Constable Truong, the accused spoke about the circumstances of the drug offence for which he had been arrested and said he was just a courier. He mentioned having broken bones and a concussion.
- [33] The interview ended at about 4:37 a.m.

- [34] Later the same day, the accused appeared in court under the name Zsolt Rozgics on a charge of possession of ecstasy for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The notation of appearances on the Information indicated that "B. Olmstead" appeared for him, and the matter was adjourned to Monday, April 2, 2007.
- [35] Members of the Special Investigation Unit, a civilian body that investigates incidents involving the police that have resulted in injury, met with the accused in cells at the Newmarket Courthouse between 11:41 a.m. and 1:15 p.m. on March 30.
- [36] Following court, the accused was transported to the Central East Correctional Centre in Lindsay, Ontario, which is also referred to as the Lindsay jail.

ARREST OF ALBERT WIZMAN AT THE 25 ZOLA GATE RESIDENCE

- [37] At about 6:00 p.m. on March 30, Constable Ford and Sergeant Shaw received information that other members of the York Regional Police had responded to an alarm call of a break and enter at 25 Zola Gate in Vaughan. The police had found a male there named Albert Wizman and had taken him into custody. They were informed that Mr. Wizman was the registered owner of the silver SUV that had been involved in the drug transaction at the parking lot the day before. Mr. Wizman had about \$90,000 stuffed into his pants and jacket when he was arrested.
- [38] Constable Ford and Sergeant Shaw attended the residence at 25 Zola Gate at 6:45 p.m. The two-level townhouse was in disarray. Constable Ford noticed some ID in the front foyer, but he did not deal with it until a search warrant had been obtained.
- [39] At about 9:54 p.m., Sergeant Harris attended 51 Grenadier, the address which the accused had supplied, and spoke to the residents there, who said they had never heard of the name Rozgics.

THE MARCH 30 EVENING INTERVIEW

- [40] Around 7:00 p.m. on Friday March 30, Detectives Bedford and Cardwell were advised about the circumstances of the drug seizure. They were also advised that Albert Wizman had been arrested exiting 25 Zola Gate with about \$90,000 and that Wizman claimed he had been instructed to remove the money from the residence by Mr. Olmstead, the lawyer for Zsolt Rozgics. The two detectives were assigned the task of taking a witness interview of Mr. Rozgics to determine if Albert Wizman's story was true, namely, that Mr. Rozgics had, though his lawyer, given Mr. Wizman permission to take the money from the residence.
- [41] At around 10:35 p.m., the detectives attended the Lindsay jail to speak with the accused about the incident at 25 Zola Gate. They met with him in the supervisor's office because there was no interview room. Detective Cardwell requested audio recording equipment, but none was available. The detectives were in plain clothes and had no firearms. The interview

started at 10:48 p.m. The two detectives introduced themselves as York Regional Police Drug Enforcement officers. The officers were unaware that any other officer had previously interviewed the accused. Detective Cardwell began the interview and wrote down the questions and answers as the conversation was occurring on a written interview/witness report that has now been marked as Exhibit C.

[42] Detective Cardwell testified that the conversation began as a witness interview because the purpose was to determine if the accused would corroborate Mr. Wizman's claim that he had permission to remove the money from 25 Zola Gate. As the police considered this to be a witness interview, they did not give a caution or a s. 10(b) warning at the beginning of the interview.

[43] Detective Cardwell asked the following questions, and the accused gave the following answers:

Q: Zsolt, I'm investigating an incident where a Albert Wizman was arrested leaving a residence with \$90,000 cash concealed in his pants. What can you tell me about this.

A: I gave him permission.

Q: Can you elaborate.

A: I gave him permission through my lawyer to get the money.

Q: Where is the home?

A: 25 Zola Gate.

Q: Is this your house?

A: No. My friend Josh's. I rent the house. He rented it so I could sublease it from him

Q: What's Josh's last name.

A: Josh Finewax.

Q: How do you know Josh.

A: Friends over the years.

Q: Does he live there.

A: No.

Q: Where did you tell Albert to go to get the money. Where was it in the house.

A: Living and kitchen.

Q: Was it hidden?

A: No.

Q: Was it out in the open.

A: Yes.

Q: How did he access the house.

A: Through the garage. He has the code to the key pad.

Q: Was the door open leading to the house.

A: Yes.

Q: Was the money yours.

A: Yes.

Q: Where did you get the money.

A Here and there.

Q: So you can't tell me.

A: No not really.

[44] At that point, at 10:58 p.m., the accused was arrested on a charge of possession of proceeds of crime and cautioned that anything further that he said could be used against him. Detective Bedford testified that the accused was given an opportunity to speak with counsel, but he declined. The accused said that Mr. Olmstead probably would not want to act for him now that the police had seized the cash.

[45] Detective Bedford stepped out of the room to receive a cell phone call from Sergeant Harris. The reception was poor, and the only information that Detective Bedford could understand from that call was that Rozgics may not be the accused's true identity. He did not learn at this time that the accused's real name was Newman or that he was a homicide suspect. Meanwhile, Detective Cardwell continued the interview as follows:

Q: You know Albert will also be charged.

A: Why - he doesn't know anything. He has two kids/wife. He shouldn't get charged.

Q: Were you removing the cash to prevent the police from seizing it or for bail.

A: It was for bail

Q: Is there anything else you want to tell me.

A: What more can I tell you so that he won't get charged.

Q: When you were arrested yesterday you gave an address of Grenadier.

A: It's a mailing address.

Q: You didn't tell the officers you were living at Zola?

A: No.

Q: You didn't give that address because you didn't want us doing a warrant there?

A: Yes.

Q: What's in the house?

A: I want Albert released if I tell you the truth - he's on his second heart attack. I gave a false name to police and my lawyer. I'll give you.

[46] From this point on, Detective Bedford took over writing on the interview form. According to the written notes, the accused said:

A: My name is Michael Newman. I used this name because I have an atrocious record. There's a small quantity of coke in the kitchen cupboard. Cereal box in cupboard with ecstasy in it. My ID in kitchen cupboard. Some alternate ID in a jewellery box in closet. There's a fake amount of cocaine in a [bag] in the kitchen cupboard. There's a 9mm handgun in the couch just stuck in the couch.

Q: Is it yours?

A: No. It's there, ya it's mine, it's no one else's. Josh knows nothing about this too.

Q: I can tell you have a lot on your plate.

A: I just don't want these other guys to get charged. They know nothing. There's a Rolex beside the fridge and it is Albert's. There's a 380 semi automatic with a silencer upstairs in the couch.

Q: Whose is that?

A: It's all mine. Can you make sure he's let go.

Q: Have these guns been used.

A: I am sure they have history. I don't know the history.

Q: What's your history?

A: It's a long story. If I had a different upbringing. I was a Crown ward but I know it was wrong. I just don't want him or Josh involved.

Q: Want to tell me who you're dealing with. What type of organization.

A: Not unless you are going to take me outta here into protection.

Q: Have you ever worked for police before?

A: Updated them on current events, acted as a witness.

Q: You may want to talk to your lawyer.

A: I don't want to talk to a lawyer. There's no need. I can go into things like homicides.

Q: Have you witnessed a homicide?

A: Yes. Asian linked.

Q: Do you know where the drugs are made?

A: I made them. It's my ecstasy.

Q: Made in Ontario?

A: No. In B.C.

Q: Did you hire the pilots?

A: Yes.

Q: How much have you paid them?

A: I haven't paid them. It never went anywhere. These guys don't know what they are shipping. They really don't.

[47] In addition to the written notes that are Exhibit C, Detective Cardwell testified that during the interview he told the accused that if Albert Wizman was not involved, he would be released. As well, Detective Bedford testified that Detective Cardwell told the accused that the police were getting a search warrant for 25 Zola Gate.

[48] Both Detective Cardwell and Detective Bedford testified that they did not offer any promises or make any threats to the accused during this interview. Detective Bedford testified that the accused clearly had a genuine concern about his friends. They told him that they would relay the information he had given them to the investigators, and if what he said was true, namely, that he had given permission to Albert Wizman to take the money from the residence, then Wizman might be released.

[49] The accused was concerned about his own safety if his true identity was known. The detectives said they would leave him under the name Rozgics during the weekend and would wait to deal with his true identity until his court appearance on Monday morning, April 2.

[50] After the interview, which lasted 30 to 40 minutes, the police checked the name Michael Newman on CPIC and learned that he was flagged as a homicide suspect on case number SRP04-004454. Detectives Nixon and Phillips were listed as the Vancouver Police contacts for that file.

THE SEARCH OF 25 ZOLA GATE

[51] On March 31 at 6:00 a.m., the police searched 25 Zola Gate with a warrant. Constable Ford seized a wallet containing identification in the name of Samuel Brian Burns, which he turned over to the exhibit officer, Constable Blenkhorn. Sergeant Shaw searched for handguns in the main floor couch, but did not find any in that location despite a thorough search. Constable Mendoza found a black hand stun-gun in the living room. In the kitchen,

he found two guns and a silencer in a kitchen cabinet under the counter next to the refrigerator. They were taped with duct tape and were in a plastic Ziploc bag in a cardboard box stuffed with newspaper. The guns and silencer were turned over to Constable Blenkhorn at 6:51 a.m.

- [52] As well, Sergeant Harris found various utility bills in the name of Joshua Finewax. He subsequently spoke on the phone to Joshua Finewax and learned that he rented 25 Zola Gate in April 2006 and sublet it to Michael Newman in June 2006.

CONTACT WITH VANCOUVER POLICE

- [53] At 12:50 a.m. on Saturday, March 31, 2007, Sergeant Harris of the York Regional Police left a message for Detective Nixon of the Vancouver Police. Detective Nixon returned the call a half-hour later at 1:20 a.m. Detective Nixon told Sergeant Harris that Michael Newman was a member of the UN gang, and that he could possibly be involved in a murder. Detective Nixon said that they had DNA from the Vancouver crime scene and would like to obtain cast-off DNA from Mr. Newman. Sergeant Harris said this was not possible, as Mr. Newman was in custody.
- [54] Sergeant Harris next spoke with Detective Nixon on Monday April 2, 2007, at 11:36 a.m., when Detective Nixon called him. Sergeant Harris told him that they had seized a nine millimetre and a .380 handgun. Detective Nixon said there was a nine millimetre and a .380 involved in his case. Detective Nixon said that the suspect in his case was injured and might possibly have scars on his neck. He told Sergeant Harris that the Vancouver homicide occurred in January 2004, when the victim was selling a diamond ring.
- [55] At 12:39 p.m., Sergeant Harris received an email from Detective Nixon requesting that the results of forensic test firings of the guns seized in Ontario be sent to the Vancouver Police forensic firearms unit. Sergeant Harris passed that request on to Detective Egan.
- [56] At 2:45 p.m., Sergeant Harris phoned Detective Nixon to tell him that the York Regional Police were going to interview Mr. Newman. Sergeant Harris asked Detective Nixon if he wanted them to caution Mr. Newman in connection with the Vancouver homicide. Detective Nixon advised that he did not want Mr. Newman to be cautioned, as the Vancouver Police did not feel that they had reasonable and probable grounds to arrest at that point and they did not want Mr. Newman to be aware of their interest in him.

THE APRIL 2 INTERVIEW

- [57] The accused appeared in court on Monday morning, April 2, 2007, under the name Michael Newman. Mr. Olmstead appeared as his counsel. Detective Caldwell spoke with Mr. Olmstead and told him that they were going to interview the accused.

- [58] The accused signed a form, now marked as Exhibit D, consenting to his transfer to police headquarters for the interview. The police also obtained a court order, now marked as Exhibit E, permitting the transfer. Detective Caldwell spoke with Sergeant Harris and was advised that the interview should be in respect of the current offences only and should not go into the homicide. He was advised to give the s. 10(b) caution only with respect to the current offences and not to the homicide.
- [59] Constable Sylvester of the York Regional Police was the officer who transported the accused. He testified that he received instructions from his commanding officer, Sergeant Rathman, at 3:32 p.m. on April 2, 2007, to attend the Newmarket courthouse and pick up a male who was in custody for transport to police headquarters. Apparently, there was a miscommunication, because Constable Sylvester came to understand that the male was arrestable for homicide. Constable Sylvester attended the courthouse in uniform with another officer. The accused was brought to him by court officers, who said he was Michael Newman. Constable Sylvester identified himself to the accused and then cuffed only one hand because of the cast on his right hand. At 3:50 p.m., Constable Sylvester told the accused, "You're under arrest for homicide. Do you understand the reason for your arrest?" The accused replied, "Yes, homicide." Constable Sylvester did not caution him or advise him of his right to counsel. He then transported him to police headquarters about two kilometres away and turned him over to Detective Cardwell.
- [60] Detective Cardwell testified that he had been instructed not to interview the accused about the homicide and that he had no information about the details of the homicide. Detective Cardwell said his intention was to confine the interview to the current charges related to possession of drugs, using a false name, and possession of firearms.
- [61] Detective Cardwell began the interview with the accused at 4:05 p.m. on August 2, 2007. Detective Bedford acted as the monitor. The interview was video and audio recorded. The recording has been marked as Exhibit F, and a transcript was marked as Exhibit G.
- [62] Detective Cardwell removed the accused's handcuffs and provided him with a drink of water. The accused told Detective Cardwell that he seemed nervous. Detective Cardwell said he was not nervous, and then asked the accused if he was feeling better. The accused then said that he had been told he was under arrest for homicide. Detective Cardwell told the accused that that was not true. The conversation went like this, with C being questions asked by Detective Cardwell and N being the accused's answers:

C: You feel any better or you still feelin' a bit sick?

N: After what I've just been told?

C: What were you told?

N: I'm wanted for homicide.

C: Who said that?

N: The guys downstairs.

C: The uniformed coppers told you that?

N: I'm under arrest for homicide.

C: No that's not the case. I'll tell you wha, what you're under arrest for. Okay? You know that, just from the additional charges the stuff that was found in the house on Zola. Okay, you're under arrest for obstruct police for giving the fa, false name. This is nothing new to you 'cause you basically told me everything I'd find in the house anyways, right, so. What I'm telling you is nothing new. Careless storage of a firearm times two. Unauthorized possession of a firearm. Possession of a restricted firearm and ammunition. Possession of a prohibited device, which is basically the silencer on the one gun. Possession of a prohibited weapon. There was a taser found in the house. You, you're aware of that or?...

N: I forgot about that yeah.

C: Okay. And possession of cocaine for the purpose of trafficking. Possession of Ecstasy for the purpose of trafficking. And possession of property obtained by crime. That's 95, uh, thousand dollars, right, that was found on Albert when he left the house, okay? And that's basically what we're going to discuss today. Before I do that these are all new charges, so I have to go through the whole rigamarole again about rights and caution, okay? Do you understand that?

[63] Detective Cardwell proceeded to review the Statement of Accused form with Mr. Newman. He gave him the standard warning that he was not obliged to say anything, but anything he said could be given in evidence. He gave the secondary caution that if the accused has spoken previously to police officers that should not influence him in making a statement. He informed him of his right to counsel under s. 10(b) of the Charter and informed him of the availability of Legal Aid and duty counsel for free legal advice.

[64] He referred to the fact that the accused had spoken to his lawyer Mr. Olmstead earlier that day and asked him if he wished to have Mr. Olmstead present now. The accused said "No" and confirmed this by signing the form, which has been marked Exhibit H.

[65] Detective Cardwell mentioned that one of the reasons for the interview was to discuss what Albert Wizman had done at 25 Zola Gate. The accused said he had asked his lawyer to call Albert Wizman, give him the code to the house, and have him pick of some of the accused's belongings. The accused said Albert Wizman was his best friend and he did not want him affiliated with any criminal activity. He described how he came to sublease 25 Zola Gate from Josh Finewax.

[66] Then, at page 8 of the 75-page transcript, the accused again brought up the homicide. He said:

N: Who's gonna interview me about the homicide?

C: What's that?

N: (No verbal response)

C: Th-... Do you wanna, uh, you said you witnessed a homicide, right?

N: I said who's going to interview me about it?

C: We can talk about that later. Uh, if you witnessed, you told Thai Truong and you told me that you witnessed and homicide as well.

N: No, I'm talking about what the police downstairs said to me.

C: They don't know any of that facts of the case. I don't know where they got that information from. Okay? I wanna, I just wanna clarify the stuff with Albert and the, and the stuff that was found at the house, which we've already gone over Friday, right? It was a small ...

N: And that if you can help me when I get out?

C: Yeah.

N: Well, from the looks of it, uh, you'll be pretty uh, senior when I get out. Uh, I'll be pretty old when I get out too.

[67] The accused then talked about Albert Wizman again, saying that he deserves to be treated fairly and he would "throw my freedom away in two seconds for him." Detective Cardwell said he is not going to promise anything.

[68] At page 13, Detective Cardwell brought up the topic of the two guns that were found in the house, the .380 and the nine millimetre. He asked why they were not in the couch as the accused had told him. Detective Cardwell said, "They were in the kitchen, right?", and the accused said he did not know. He said he had been living in the house since June.

[69] He mentioned the Independent Soldiers and the Bacon brothers and that is why he came to Ontario. He said, "Yeah, there's contracts out on all of us."

[70] Detective Cardwell then reviewed with the accused the statement he had taken on Friday night.

[71] Several times during the interview, the accused complained that he was cold. Eventually, he was given a blanket.

[72] At page 21, the accused again asked about the homicide, and Detective Cardwell again told him he was not under arrest for homicide. The accused said that if he was under arrest for homicide, then he wanted his lawyer to be present. He said:

N: So why was I arrested for homicide then?

C: And that's something I want to get into. I just talked to the uniform officers to find out where they got that information from. Detective Harris had called the front desk here to arrange for a transport and, and through the communications uh, you're not under arrest for homicide. Do you understand that?

N: No.

C: Okay. I'm telling you right now you ...

N: Arrest means (unintelligible).

C: Okay.

N: He said, "You're under arrest for homicide. Do you understand your rights?"

C: You're not. You're under arrest for the...

N: Do I need to call a lawyer then?

C: I'm just explaining to you, you're not under arrest for homicide. You're under arrest for the uh, the stuff we found in the house and for the drugs last week. If you want to talk about a homicide, we can talk about it. But you're not under arrest for homicide.

N: No, but I'm saying if he said that and I need a lawyer, I need to know.

C: No. If you want to talk about a homicide or a witness to a homicide or something, you want a lawyer here, then, then uh, we can get Mr. Olmstead here, but you're not under arrest for homicide.

N: He even told the other cops outside that I'm under arrest for homicide from out west when we pulled up, and the people at the jail.

C: The people at the jail said that?

N: Yeah.

C: Nobody at the jail was told anything in regards to your history, right? I told them, basically, that you were being transported for additional charge, right?

N: I'm just telling you.

C: so who told you that at the ...

N: The, the guards downstairs.

C: Ok, you're aware that you're not under arrest? That you're under arrest for (unintelligible).

N: I just wanna know if I need a lawyer or not.

C: Well, that's your call, right?

N: If I'm under arrest for homicide, then I'd like a lawyer for sure.

C: No, you're not under arrest. You're under arrest for these offences I read out to you, right? And that's from the stuff that was found in the house. That's nothing new to you, right? If you need an explanation on those, I'll explain it to you.

[73] The accused brought up the topic of homicide again at page 24:

N: The cop said that (unintelligible) homicide (unintelligible). Do you understand what I just told you?

C: Have I asked you any questions about a homicide?

N: No, but ...

C: (Unintelligible).

N: but I, I don't see cops making mistakes like that, right?

C: Well, they, they said it there's, and they told me out in the hallways that they said it and it was miscommunication between a detective in our office to the front desk clerk here to the uniformed officers. All they were told to do was to pick you up and transport you. That was my direction. You ever play that phone, that phone tag game where you, by the time it goes around in a circle (unintelligible).

N: That they're aware, that's pretty um, exact. Not homicide. Homicide is ...

C: 'Cause they're aware. Everybody knows

N: (Unintelligible).

C: ... everybody knows, everybody knows about this case. This is a huge case, right? Th-, they know the fact that guns were found and the whole bit. In fact, they're, they're doing a press release down at (unintelligible). Everybody in the department knows about it. They know that two guns were found, one with a silencer. So phone tag, by the time it gets back to the uniforms coppers. Now you're a homicide suspect, right? But they weren't given direction to read you your rights 'cause there was no need to charge you or arrest you 'cause it, the reason why you were being transported today is, basically, for me to read you the additional charges. right? That's what I told you and to clarify the facts with Albert. That's the direction they were given from me to Detective Harris, Detective Harris called the front desk, by the time it got back to the uniform officers ...

N: Well, why am I a homicide suspect?

C: You're not, I'm not asking you questions about homicide.

N: No, but you just said you're a homicide suspect, right?

C: I didn't. I said that's what they relayed to you.

N: No, that's what you just said, they were having a press release about, that everybody knows about this case...

C: No.

N: ... and that you're a homicide suspect.

C: This is a drug case. The fact that you ...

N: I know it's being taped. If you played it back, you would s-, hear yourself say that, "You're known as a homicide suspect. Everybody knows this case." That's what you just said.

C: No, no, everybody knows about this case and the drugs that were seized.

N: And the guns.

C: Right? And the guns.

N: Any you said, holding a press release about me, right now and that you're a homicide suspect, but not charged with anything. I'm just telling you what you said.

C: Does that bother you?

N: Yeah, because you keep saying ...

C: You think I'm anxious because ...

N: You wanna talk to me about me being a homicide suspect.

C: Yeah, I told you the reason why you're being arrested is for these drug charges and the stuff that was found ...

N: I understand that.

C: Yeah. And on Friday you s-, you, you said that you've witnessed things in the past that you wanna talk about and you can, right? But if you want, want your lawyer present here, Mr. Olmstead, at any point, you can have him present, you know that. I clearly stated that on Friday and I'll say it again. I don't want to put you in any position without having the proper legal advice. You've talked to Mr. Olmstead today. If you want to talk to him now and have him present, then you know at any time we can stop the interview and give him a call. Okay?

[74] Detective Cardwell then told the accused that Albert Wizman had been released, and that the reason they were there was to talk about his charges being pulled.

[75] The topic of homicide came up again on page 27:

C: Yeah. You understand why I'm here for these charges?

N: Mmhmm.

C: Right? To clarify with Albert? To read the additional charges in? Do you have something you wanna tell me? You seem concer-, concerned about. Do you wanna tell me something?

N: Well, there's nothing to tell you. I, I just, I've always been told if I'm ever going to be. Um, told, "You're arrested for homicide to have your lawyer."

C: So if you're arrested for 49 kilos you don't need a lawyer here, but if it's a homicide, you do need a lawyer.

N: Hundred percent.

C: Okay. You're only being charged ...

N: 'Cause ...

C: ... with this stuff now. Okay? And I, and I'll be honest with you, I have my suspicions about the gun and the, remember I talked about the history of the gun?

N: Mmhmm.

C: And I, I've never s-, uh, located a silencer before, so as soon as you told me there's two guns and there's, and in fact, when you said there's a silencer, I asked you right off the bat...

N: Mmhmm.

C: ... the history, right?

N: Mmhmm.

C: I, obviously, have suspicion towards or I wouldn't have asked you that. As soon as someone carries a silencer around ... Most drug dealers I get just have a nine millimetre tucked in their pants. There's usually a, a piece of, for intimidation. But a silencer is a different thing, right?

N: Mmhmm.

C: So, when I asked you about the history, you, basically, said that all his-, "All guns have history," right? But the reason why I was asking you that, said all the guns will be sent to forensic science and I'm suspect that they, they may come back from something, right? Any police officer would ask you the same thing, you know that.

N: Oh, a hundred percent.

C: (Unintelligible) if I didn't ask you that. Is there going to be more when it comes back from s-, CFS?

N: Is what?

C: Is there gonna be a history on those guns from CFS that you're aware of?

N: Not that I'm aware of, no.

[76] For the next several pages, the interview dealt with the drug investigation and the incidents at 25 Zola Gate. From time to time, the accused asked about the witness protection program. He also talked about his role as a "firefighter" with respect to Vancouver gangs, resolving differences.

[77] At pages 63-69, Detective Cardwell allowed the accused to use his cell phone to call Albert Wizman.

[78] Near the end of the interview, Detective Cardwell steered the conversation back to the topic of the guns found at 25 Zola Gate. He asked if the accused brought them to Ontario from British Columbia and why they were packaged as they were. At page 70, Detective Cardwell asked:

C: Yeah. Now, the, the guns that you had, were, were they for protection or what?

N: (No verbal response)

C: Did you bring them from out west to here?

N: (No verbal response)

C: No? You got them here?

N: You never know what you might run up against.

C: Yeah? And, and you, obviously, fear the gangs from out west and stuff. That's right?

N: Canada period. I mean nothing to do with out west, Canada's Canada.

C: So, what did you (unintelligible)?

N: I had friends that were, I had friends that were here that said they were at clubs and saw people that are their archenemies from B.C. when they were visiting out here. They're like, "Holy shit, that's too close for comfort," so. Happens all the time. I don't club and you can't walk around with a gun in a club anyway, so. (Unintelligible).

C: Well, it happens here.

N: Yeah, it sure does. Everywhere.

C: Yeah. So you, you bought them here?

N: Yeah.

C: In, in Ontario?

N: (No verbal response)

C: When you got here in June or ...?

N: Yeah.

C: But when you mentioned to Thai Truong there that you, you might have witnessed a homicide involving a .380, there's two 380's out there? Like, I had never even heard of a .380 semi. Is it pretty common out west or ...?

N: Thousands.

C: Yeah?

N: Everywhere. Every, every, .380's are everywhere.

C: Are you concerned about these guns going in for testing, to Centre for Forensic Science?

N: (No verbal response)

C: No.

N: .380's are just a .38. There's nothing uncommon about them.

C: I've never come across one.

N: Mm.

C: Nine mil's, yeah, 40 cal's yeah, but .380 semis? And why would, why were they packaged the way they were in bags and duct tape and stuff.

N: Uh, I mean, uh ...

C: If you're gonna use 'em, they're kind of hard to access when they're in a Ziploc bag and taped with duct tape, right? If there for protection.

N: Well

C: Or were they shipped like that?

N: (No verbal response)

C: No?

N: You don't, like nine, ten months you're here, you don't, uh, you don't think after that long that if there hasn't been an incident that you need one so. You, you, you think right away that you need one when you probably didn't anyways, but you can't put 'em away after a while, you know?

C: What would you pay for a .380? Like, what would that cost?

N: Well, anywhere from a thousand to two thousand.

C: And the clean guns, my understanding is the clean guns, they're a lot less in the street, right? The one's without history, the one's with history uh, are a lot cheaper 'cause ...

N: I don't know.

C: ... if you want some, right?

N: I don't know, I don't, I don't think anybody knows, you know, what they're selling if, unless they bought it in the box themselves, right?

C: The gangs in the city, they know whether it's clean or it's a dirty gun, right? When they're selling 'em, like, they talk about that.

N: Possibly.

C: So your personal one, you weren't considered whether it had history or whether it was clean or not...when you bought it? That was something you weren't worried about?

N: Um ...

C: That's something you didn't think about?

N: You always worry, but you know, you're asking a question that might not be answerable. You know, they might not be able to give you uh, a thorough answer. So you're, you might be asking for nothing anyways. Um, nobody's gonna be selling guns with history's on them. 'Cause you're just gonna say uh, if I get caught with something and it's not mine, I'm just gonna tell them that I bought it from you and, obviously, you're gonna think twice, right? So, that's the kind of disclaimer I think anybody gives anybody when they're buying.

C: I don't know, I was on a project there with the uh, (unintelligible) gangster killers and they were talking about people wanting to buy guns from him and he goes, "Well, a clean gun will cost you this much, a dirty gun will cost you this much," right? So. They, they knew which ones had been used so they were getting'... It's a fire sale if it's a used gun, right? They'll basically give the thing away. So they make the blood be known so what you're saying is ...

N: Mmhmm.

C: ... it's different? It's different, right? But why were they packaged in Ziploc bags? I don't understand that. Any why weren't you carrying it when you're dealing the type of drugs you do. If I was dealing in a quantity of cash I'd want... Or you just have that much trust (unintelligible).

N: No, like, like I said, I mean, initially when I first got here, you know, I wanted to make sure that they were very easily accessible, but after a while I put everything away. The taser I used to keep in the car, now I put it in the house. You know, you just get lax. Yeah, and you realize you didn't need to be that worried to begin with. So you just put everything away.

C: In Vancouver did you carry one all the time?

N: Um ...

C: I'm thinkin' if you're p-, a peace keeper going from gang to gang then...

N: I didn't carry it all the time, but I had a .45 that I would carry.

C: You're being truthful with me, right? You haven't lied to me yet, so I ...

N: No.

C: You're honest with me?

N: Yeah. I have a .45 that I always carry.

C: Okay.

N: If you're gonna have a firearm it should be a .40 or a .45.

C: .40 or .45. Do you know what we carry?

N: .40's.

C: Yeah. How'd you know that?

N: Guys usually carry .40's or 10 mm. One or the other, they're about the same pretty much.

[79] The interview ended at about 6:55 p.m. with Detective Cardwell asking the accused if he now felt better about Albert Wizman and inviting him to talk to him again if he wanted to know more about the witness protection program.

[80] On April 4, 2007, Sergeant Harris spoke to Detective Nixon of the Vancouver Police and updated him on what had occurred during the April 2, 2007 interview of Mr. Newman. Detective Nixon told Sergeant Harris that if the ballistics tests were positive, they would apply for a DNA warrant.

ISSUES

[81] The issues for determination on this voir dire are:

1. whether the various statements of the accused are voluntary and admissible at common law;
2. whether the arrest of the accused on March 29, 2007, amounted to a breach of his right under s. 9 of the Charter to be free from arbitrary detention;
3. whether there was an infringement of the accused's rights under ss. 10(a) and (b) of the Charter to be informed of the reason for his detention and to retain and instruct counsel;
4. if there was an infringement of the accused's Charter rights, whether any of his statements should be excluded from evidence under s. 24(2) of the Charter.

[82] On the first issue, the onus of proof is on the Crown beyond a reasonable doubt. On the remaining issues, the onus is on the defence on a balance of probabilities.

[83] The Crown concedes that the March 30 morning statement is inadmissible because of an infringement of Mr. Newman's s. 10(b) Charter rights.

[84] The parties seek a ruling on the admissibility of the March 30 evening statement and the April 2 statement.

VOLUNTARINESS

[85] The classic statement of the common law test for the admissibility of statements made by an accused to a person in authority is found in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

[86] The *Ibrahim* test was accepted in Canada in *Boudreau v. The King*, [1949] S.C.R. 262.

[87] More recently, in *R. v. Oickle*, [2000] 2 S.C.R. 3, the Supreme Court of Canada reviewed the principles underlying the common law confessions rule. The Court noted at para. 33 the importance of bearing in mind the twin goals of protecting the rights of an accused while acknowledging the need to investigate and solve crimes:

33 In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. Martin J.A. accurately delineated this tension in *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.), at p. 721:

Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation ... On the other hand, statements made as the result of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession are inadmissible ...

All who are involved in the administration of justice, but particularly courts applying the confessions rule, must never lose sight of either of these objectives.

[88] The Court in *Oickle* held that a trial judge must consider all the relevant factors when reviewing a confession, including any threats or promises held out by a person in authority, whether there were oppressive circumstances, whether the accused had an operating mind, and whether there was police trickery of a kind that would shock the community.

[89] In relation to threats and promises, the Court at para. 57 emphasized the importance of looking to see if the police have offered a quid pro quo or something in return:

57 In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about

whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:

Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.

The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

- [90] Applying these principles to the circumstances of the present case, I am satisfied beyond a reasonable doubt that the statements made by Mr. Newman to the police in Ontario were not the result of promises or threats, were not the result of oppressive circumstances or police trickery, and that Mr. Newman had an operating mind.
- [91] It is clear from the content of the interviews that Mr. Newman at all times had an operating mind and that he was not subjected to oppressive circumstances. Although he had a broken wrist and had been prescribed painkillers, his injuries were the result of his own attempt to flee at the time of his arrest and did not deprive him of an operating mind.
- [92] During the March 30 morning interview with Detective Constable Truong, the accused asked at page 23 of the transcript, Exhibit L, whether he would be "better off talking to you about the facts of today ... and helping myself." The officer replied, "I never said helping yourself. I never said one thing about helping yourself." There was some discussion of possible sentences that the accused might be facing, but at no time did Detective Constable Truong offer Mr. Newman something in return for making a statement.
- [93] The March 30 evening interview concerned the circumstances of Albert Wizman's arrest following what appeared to be a break and enter at 25 Zola Gate. This began as a witness interview as the police needed to determine if the story told by Albert Wizman about having Mr. Newman's permission to enter the residence was true. There was no police trickery involved. Counsel for the accused submits that the police knew at the beginning of the interview that the money found on Mr. Wizman was likely the proceeds of crime. It must be recalled, however, that at the beginning of this interview, the accused was still going under the name Zsolt Rozgics. He had told the police that his residence was 51 Grenadier Crescent. There was no reason for the police to assume, therefore, that his residence was really 25 Zola Gate or that the money found on Mr. Wizman likely belonged to the accused. It was not

until 10 minutes into the interview that the accused disclosed that Zola Gate was his correct address and that the money was his. At that point, the police informed him that he was under arrest for possession of proceeds of crime and cautioned him that anything he said further could be used against him. He was then given an opportunity to speak with counsel but he declined. There was no trickery or oppression involved in the taking of this statement.

- [94] During the interview, the accused was obviously concerned about Mr. Wizman. He wanted him to be released and did not want him to be charged. He expressed his desires in that regard to the police. Because of the circumstances, there was obviously a relationship between what Mr. Newman said about Mr. Wizman's permission to enter the residence and take the money and whether Mr. Wizman would be released and whether he would be charged. This, however, did not amount to an improper promise or threat to induce Mr. Newman to make a statement. This was a situation that the police had not created. They were simply confronted with the fact that Mr. Wizman had been caught exiting a residence where an alarm had been set off while carrying a large amount of money on his person. The police were obliged to investigate Mr. Wizman's apparent offence in order to determine whether he should be released or whether he should be charged. Given that Mr. Wizman told an exonerating story that involved Mr. Newman, the police had no choice but to interview Mr. Newman as a witness to either confirm or disconfirm what Mr. Wizman said. The police conduct during this interview involved no improper inducements.
- [95] The fact that the March 30 evening interview was not electronically recorded does not render it inadmissible. While having an electronic recording can greatly assist the Court in determining the factual issues that arise on a voluntariness voir dire, the absence of an electronic recording does not automatically render the statement suspect: *R. v. Richards* (1997), 87 B.C.A.C. 21; *R. v. Crockett*, 2002 BCCA 658; Oickle, para. 46. In the present case, the police explained that they would have made an electronic recording of the interview, but the facilities were not available. I accept that explanation, and I find that the lack of an electronic recording does not, in the circumstances of this case, prevent me from finding the facts necessary to conclude that the Crown has proven the statement voluntary according to the common law test beyond a reasonable doubt.
- [96] With respect to the April 2 statement, the defence submits that the accused should have been cautioned in relation to a charge of murder. I will consider that submission in detail when I come to the issue of compliance with the requirements of s. 10 of the Charter of Rights. I do not find that it is a circumstance rendering the statement involuntary.
- [97] The other issue raised by the defence in relation to the April 2 statement is the allegation that Detective Cardwell offered an improper inducement by saying that the charges against Albert Wizman might be "pulled." At pages 25-26 of the transcript, Exhibit G, Detective Cardwell said:

I wouldn't put you in a position that, you know. Nor would I want to put Albert. Once I found the facts out with Albert, he was released uh, you know, within hours of getting back here, right? I told you I'd do that. And the reason why we came in here today is to talk about Albert's, Albert's uh, the charges being pulled with Albert, right? But the facts have to come out of, about your case, right? I don't want people like Albert wearing it 'cause the circumstances were uh, suspicious, right?

[98] The law is clear that an inducement need not be with respect to a hope of advantage for the accused himself; it can also be with respect to a family member or a friend. However, the relationship between the accused and the other person must be such that the alleged inducement was the actual cause of the confession. This was explained in *Oickle* at para. 51-52

51 Threats or promises need not be aimed directly at the suspect for them to have a coercive effect. For example, in *R. v. Jackson* (1977), 34 C.C.C. (2d) 35 (B.C.C.A.), McIntyre J.A., as he then was, addressed a confession obtained in a case where the accused and his friend Winn had robbed and murdered a hitchhiker. The police suspected the murder was Jackson's doing, and urged him to confess, lest his friend Winn be unjustly convicted of murder. The trial judge had concluded that:

[The police] were exerting a subtle form of pressure on Jackson, they were appealing to his concept of right and wrong ... They indicated that unless they got to the truth of the matter, it might be necessary to charge both, and this too was a very likely possibility. The officers were completely frank with him. The officers hoped that when Jackson was faced with what they had, and what might transpire if he didn't speak up, that he would take Winn off the hook and confess. That is exactly what he did. I can see nothing in what they said or in what they did that can be construed by Jackson as holding out the possibility of any benefit to him should he confess.

McIntyre J.A. agreed that no hope of advantage that would render a confession inadmissible had been held out to the accused. He then presented the following very helpful analysis of the law (at p. 38):

[Cases] must be considered in relation to their own facts. It is my opinion that for a promised benefit to a person other than the accused to vitiate a confession, the benefit must be of such a nature that when considered in the light of the relationship between the person and the accused, and all the surrounding circumstances of the confession, it would tend to induce the accused to make an untrue statement, for it is the danger that a person may be induced by promises to make such a statement which lies at the root of this exclusionary rule.

52 McIntyre J.A. offered, as examples of improper inducements, telling a mother that her daughter would not be charged with shoplifting if the mother confessed to a similar offence (see *Commissioners of Customs and Excise v. Harz*, [1967] 1 A.C. 760 (H.L.), at p. 821), or a sergeant-major keeping a company on parade until he learned who was responsible for a stabbing (see *R. v. Smith*, [1959] 2 Q.B. 35). In *Jackson*, by contrast, the accused had merely known Winn for a year in prison. The offence occurred a few days after their release. Neither testified to a relationship

such that "the immunity of one was of such vital concern to the other that he would untruthfully confess to preserve it" (p. 39). The confession was therefore admissible.

[99] In *R. v. Spencer*, 2007 SCC 11, the Supreme Court of Canada observed at paras. 14 to 15 that the strength of an alleged inducement must be considered to determine if it was, in fact, the cause of the accused's statement:

14 To the extent that any distinction in law may be asserted between the traditional "confessions rule" in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609, per Lord Sumner, and this Court's decision in *Oickle*, the latter must prevail. In my view, however, Lord Sumner's formulation of the "narrow" rule does not mean that any quid pro quo will automatically render a statement involuntary. Indeed, Lord Sumner required that in order for a statement to be admissible, it must not have been "obtained from [the accused] either by fear of prejudice or hope of advantage". In the subsequent case of *Director of Public Prosecutions v. Ping Lin*, [1976] A.C. 574 (H.L.), at p. 595, Lord Morris asked: "was it as a result of something said or done by a person in authority that an accused was caused or led to make a statement".

15 Therefore, while a quid pro quo is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.

[100] Considering all the circumstances of the present case, I am satisfied beyond a reasonable doubt that the accused's statements were not, in fact, caused or induced by Detective Cardwell's remarks concerning Albert Wizman. As the Court of Appeal noted in *R. v. Schur* (1993), 27 B.C.A.C. 164, at para. 7:

There must be a causal connection between the hope of advantage or fear of prejudice held out in the giving of the statement before the statement can be said to have been "obtained" thereby.

[101] Accordingly, I find that the Crown has satisfied its burden of proving the voluntariness of all the statements of the accused to the York Regional Police beyond a reasonable doubt.

SECTION 9 OF THE CHARTER

[102] The defence submits that the police lacked reasonable and probable grounds to arrest the accused on March 29, 2007, and his arrest therefore amounted to a breach of his right under s. 9 of the Charter to be free from arbitrary detention.

[103] Section 9 of the Charter provides:

9. Everyone has the right not to be arbitrarily detained or imprisoned.

[104] A detention that is not authorized by law is arbitrary and violates s. 9: *R. v. Grant*, 2009 SCC 32, at para. 54.

[105] The initial dealings of the police with the accused and the two other men at the parking lot in Vaughan, Ontario, on March 29, 2007 did not constitute a detention within the meaning of ss. 9 and 10 of the Charter. The Supreme Court of Canada held in *R. v. Suberu*, 2009 SCC 33, at para. 3:

3 However, as this Court held in *Mann*, not every interaction between the police and members of the public, even for investigative purposes, constitutes a detention within the meaning of the Charter. Section 9 of the Charter does not dictate that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Likewise, not every police encounter, even with a suspect, will trigger an individual's right to counsel under s. 10(b). As Iacobucci J. aptly observed, 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" (para. 19).

[106] Thus, when the accused initially identified himself to Constable Mendoza as Zsolt Rozgics and said the reason he was in the parking lot was to wait for friends, this was not a detention triggering s. 9 or s. 10 Charter scrutiny. The same is true for his initial conversation with Constable Ford where he said he was going snowboarding at Moonstone.

[107] What happened next was prompted by Mr. Goertzen's conversation with Sergeant Shaw regarding the contents of the briefcase. Mr. Goertzen said he did not know if the briefcase contained a bomb and started backing away. This led Sergeant Shaw to direct that the men be handcuffed for officer safety. As a result of that direction, Constable Ford attempted to handcuff the accused, who then tried to run away. At that point, the accused was detained, but his detention was clearly justified by the circumstances, namely, Sergeant Shaw's concern for officer safety.

[108] When Constable Ford apprehended the accused after his attempt to flee, he placed him under arrest for possession of narcotics. It is that detention that the accused now submits was arbitrary and in breach of his rights under s. 9 of the Charter. He submits that the police did not have reasonable and probable grounds to arrest for a narcotics offence until after one of the suitcases was opened and the police saw what appeared to be drugs.

[109] The power of a peace officer to arrest a person without a warrant is set out in s. 495(1) of the Criminal Code. The clause that is relevant here is s. 495(1)(a), which provides:

495(1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

[110] In *R. v. Storrey*, [1990] 1 S.C.R. 241, Cory J., delivering the judgment of the Court, explained what is required for a lawful arrest under s. 495(1)(a). The officer must subjectively have reasonable and probable grounds on which to base the arrest. As well, those grounds must be objectively justifiable. The officer is not required to establish a *prima facie* case for conviction. As Cory J. wrote at pp. 249-251:

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

- [111] In the present case, the subjective requirement is satisfied both by the testimony of Sergeant Shaw and by that of Constable Ford. Sergeant Shaw gave the direction for the arrest. Constable Ford carried out the arrest. Both officers believed they had reasonable and probable grounds to arrest based on the events they witnessed in the parking lot, including the initial reactions of the three men when confronted by the officers.
- [112] Considering all of the circumstances that were apparent to those officers, I am satisfied that the objective component is also satisfied; a reasonable person, standing in the shoes of the officers, would have believed that reasonable and probable grounds existed to make the arrest.
- [113] The officers observed the two vehicles drive into the parking lot and park back to back, after which, the rear hatches of both vehicles went up. The three young men in the two vehicles, who were dressed in business clothing along with baseball caps and sunglasses, got out of the vehicles and greeted each other. They then proceeded to transfer suitcases from one vehicle to the other. What was particularly unusual was that the suitcases were quite heavy, so heavy, indeed, that it took all three men to lift them from the red vehicle to the silver vehicle. This is something that one would not expect if the suitcases contained clothing. The officers then observed the accused transfer a silver-coloured briefcase from the silver SUV he had been driving, to the driver of the red SUV from which the suitcases had originated. It was objectively reasonable for the officers to infer that what they had witnessed was a transaction in which the contents of the suitcases was exchanged for the contents of the briefcase. Because of the unusual weight of the suitcases, it was objectively reasonable to believe that the contents of the suitcases was not what one would usually find in a suitcase, namely, clothing. The transfer objectively looked more like a transfer of drugs for money, especially to police officers with many years of experience. Sergeant Shaw has been a police officer for 25 years. Constable Ford had been a police officer since 2003.
- [114] Sergeant Shaw then spoke to Mr. Goertzen and his responses were unusual. He said he was visiting a friend, but did not know his name. When asked why he was meeting his friend there, he said, "You will have to ask my friend." He said he did not know what was in the suitcases. He initially denied putting anything into his vehicle until Sergeant Shaw said that he had been watching. At that point, he showed Sergeant Shaw the briefcase which he had put into his vehicle, but he was unable to open it because the combination lock was engaged. He then professed not to know if it contained a bomb, while backing away.
- [115] When Constable Ford spoke to the accused, his responses were equally unusual. He said he was going snowboarding at Moonstone, but there was no snow and the temperature was nine degrees. He gave no answer when asked where his snowboard was. Constable Ford testified that he appeared extremely nervous and indeed that his mouth had turned dry from nervousness.

[116] Based on all of those circumstances, the officers objectively had reasonable and probable grounds to arrest. Their grounds were reinforced when the accused attempted to flee the scene.

[117] There was no infringement of the accused's right under s. 9 of the Charter not to be arbitrarily detained or imprisoned.

SECTION 10(a) AND (b) OF THE CHARTER

[118] Sections 10 (a) and (b) of the Charter provide:

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

[119] In *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 192, the Court explained that s. 10(b) of the Charter imposes three duties on the police with respect to someone whom they arrest or detain, namely:

- (i) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
- (ii) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (iii) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[120] In the present case, Constable Ford informed the accused immediately upon arrest at about 3:33 p.m. that he was under arrest for possession of narcotics and then for possession for the purpose of trafficking. This was in compliance with s. 10(a) of the Charter.

[121] Constable Joseph took custody of the accused, who told him that his name was Zsolt Rozgics and that his address was 51 Grenadier Crescent. Within a few minutes, at 3:42 p.m., Constable Joseph gave the accused a warning that he was not obliged to say anything, but anything he said could be used against him. He read the accused his rights under s. 10(b) of the Charter and informed him of Legal Aid and duty counsel. This was satisfactory compliance with the informational component of s. 10(b). I am satisfied that up to this point, there was no infringement of the accused's rights and that what he said to the various officers up to this point is admissible in evidence.

[122] The accused told Constable Joseph he wished to contact duty counsel as soon as possible. This did not happen. From this point on, the police had a duty to facilitate the accused's exercise of his right to counsel. They failed to do so. None of the officers made any attempt to facilitate the accused's contact with counsel until Constable Ford left voice messages for Mr. Olmstead at 1:39 a.m., more than 10 hours after his arrest. This was an infringement of

the implementational component of the accused's right under s. 10(b) to retain and instruct counsel without delay.

[123] The accused had some conversation with various officers at the hospital. He was later interviewed by Detective Constable Truong from 3:17 to 4:37 a.m. on March 30, 2007. The Crown concedes that this statement was obtained in a manner that infringed the accused's rights under s. 10(b) of the Charter and should be excluded from evidence under s. 24(2). I agree with that concession. As well, the statements made by the accused while in the hospital before being interviewed by Detective Constable Truong must also be excluded from evidence.

[124] Later in the morning of March 30, 2007, the accused appeared in court and had the opportunity of speaking with his lawyer, Mr. Olmstead. At that point, both the informational and the implementational components of s. 10(b) had been complied with and there was no longer any requirement for the police to hold off from eliciting evidence from the accused.

ADMISSIBILITY OF THE MARCH 30 EVENING STATEMENT

[125] At around 6:00 p.m. on March 30, 2007, Constable Ford and Sergeant Shaw were informed of the apparent break and enter by Albert Wizman at 25 Zola Gate. As part of the investigation of that apparent offence by Mr. Wizman, the police needed to conduct the witness interview of Mr. Newman. Detectives Cardwell and Bedford commenced that interview around 10:35 p.m.

[126] At the beginning of the interview, they did not re-warn Mr. Newman. There was no requirement for them to do so, as this was a witness interview concerning Mr. Wizman's culpability, not Mr. Newman's. In any event, Mr. Newman had already been informed of his right to counsel and had exercised that right in relation to the drug transaction.

[127] The York Regional Police at this point were still unaware of Mr. Newman's true identity. They did not know that he resided at 25 Zola Gate, as he had told them his residence was 51 Grenadier Crescent. Because he was still going under the name Zsolt Rozgics, the police did not know of his criminal antecedents, and in particular, they did not know that he was suspected by the Vancouver Police in relation to a homicide. When, about 10 minutes into the interview, he revealed that he sublet 25 Zola Gate and said that he was the owner of the \$90,000 found on Albert Wizman, the police promptly arrested him for possession of proceeds of crime and offered him the opportunity to consult with counsel. The accused declined that offer. In these circumstances, there was no infringement of the accused's rights under ss. 10(a) and (b) of the Charter. As I have already found that this statement was voluntary, it is admissible in evidence.

ADMISSIBILITY OF THE APRIL 2 STATEMENT

[128] Following the discovery of the accused's true identity, the police searched 25 Zola Gate and found various items, including firearms. There was communication between the York Regional Police and the Vancouver Police. It became clear that the Vancouver Police were interested in Mr. Newman for his possible involvement in the homicide of Marc Rozen, and in particular, they were interested in the results of forensic testing of the firearms found at 25 Zola Gate.

[129] A detained accused is entitled to know the extent of his jeopardy when deciding whether and how to exercise his right to counsel. In *R. v. Black*, [1989] 2 S.C.R. 138, Wilson J., delivering the judgment of the Court, observed at pp. 152-153:

An individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy.

[130] In the present case, at the outset of the April 2 interview Mr. Newman explicitly told the police that if he was arrested for homicide, he wanted to speak to his lawyer before continuing with the interview.

[131] In fact, he had been arrested for homicide by Constable Sylvester and he had not thereafter been given an opportunity to speak to counsel in relation to the detention for homicide. Detective Cardwell, however, repeatedly told Mr. Newman that he was not arrested for homicide. Indeed, at one point Detective Cardwell went further and told him he was not even a suspect in a homicide, as demonstrated in this exchange on page 24 of the transcript:

N: Well, why am I a homicide suspect?

C: You're not; I'm not asking you questions about homicide.

[132] Even if what Detective Cardwell said was in some sense technically correct, because the Vancouver Police did not believe they had sufficient grounds to arrest Mr. Newman for homicide and the arrest by Constable Sylvester was a mistake, nevertheless, the accused's repeated inquiries on the subject were clearly aimed at ascertaining whether he was in some jeopardy during the interview with respect to a homicide investigation.

[133] Even though Detective Cardwell may have had the intention of keeping the interview away from the topic of the homicide, that is not what actually occurred. In particular, he questioned the accused about the history of the .380 and nine millimetre guns and the silencer that were found at 25 Zola Gate, and he must have known that the answers to such questions could have an important bearing on the investigation of the Vancouver homicide

[134] Before this interview began, Detective Nixon of the Vancouver Police had informed Sergeant Harris of the York Regional Police that the Rozen homicide involved guns of the same calibre as the guns found at 25 Zola Gate and that the Vancouver Police were interested in the results of forensic testing of those guns. On the evidence before me, it is unclear whether Detective Cardwell was aware of these details, but even if he was not, he

knew at least that Mr. Newman was suspected by the Vancouver Police of being involved in a Vancouver homicide.

[135] Therefore, when Detective Cardwell asked Mr. Newman, "Is there gonna be a history on those guns from CFS that you're aware of," he must have known that this was a question potentially bearing on the Vancouver homicide investigation.

[136] Detective Cardwell deliberately tried to make Mr. Newman believe that by participating in this interview, he was not in jeopardy for homicide. He knew that Mr. Newman did not want to participate in the interview in the absence of consultation with his lawyer if he was in jeopardy with respect to homicide. In these circumstances, Detective Cardwell was obliged either to give a straightforward answer to Mr. Newman and divulge to him that the Vancouver Police were interested in him as a possible suspect in a Vancouver homicide and thereafter facilitate his request to speak to counsel before carrying on with the interview, or to ensure that the interview did not touch on topics that could be related to the homicide investigation.

[137] Instead, Detective Cardwell deliberately misled Mr. Newman by implying that he was not in jeopardy with respect to a homicide. He carried on with the interview and asked questions that he must have known would be relevant to the homicide investigation. In doing so, he infringed Mr. Newman's rights under s. 10 of the Charter.

[138] Near the end of the interview, Detective Cardwell returned to the topic of the guns, and his questions explored how those guns might be connected with the accused's activities in Vancouver. Detective Cardwell's questions seem to be aimed at getting the accused to admit that the guns came from Vancouver. When, after repeated questions suggesting the guns came from "out west," the accused said he bought the guns in Ontario, Detective Cardwell effectively cross-examined him on that answer by asking why they were packaged in Ziploc bags with duct tape. He said, "Were they shipped like that?" After further questioning, Detective Cardwell got the accused to admit that he frequently carried a gun when he was in Vancouver. This entire line of questioning was clearly relevant to the homicide investigation in Vancouver, but had little direct bearing on the proof of the Ontario charges, which related not to the use of the firearms, but rather to their careless storage or possession without a licence.

[139] In *R. v. Evans*, [1991] 1 S.C.R. 869, the Court held at p. 892:

A second violation of the appellant's s. 10(b) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. This Court's judgment in *R. v. Black*, *supra*, per Wilson J., makes it clear that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one

requiring reconsideration of an initial waiver of the right to counsel. On this point I prefer the judgment of *R. v. Nelson* (1982), 32 C.R. (3d) 256 (Man. Q.B.), to the decision in *R. v. Broyles* (1987), 82 A.R. 238 (C.A.). I add that to hold otherwise leaves open the possibility of police manipulation, whereby the police - hoping to question a suspect in a serious crime without the suspect's lawyer present - bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on the more serious crime. [Underline added.]

[140] In my view, the danger alluded to in the underlined passage above is similar to what occurred during the April 2 interview. Although Detective Cardwell offered Mr. Newman the opportunity of speaking with his counsel during the April 2 interview, he deprived him of the information he needed to make an informed choice whether to do so. Mr. Newman explicitly told Detective Cardwell that his decision about whether to continue the interview without speaking further to counsel depended on whether he was in jeopardy with respect to a homicide. Detective Cardwell deliberately misled him into believing that he was not in such jeopardy and then proceeded to ask questions that were highly relevant to the Vancouver homicide investigation. This was a serious infringement of Mr. Newman's rights under s. 10(b).

[141] The defence applies for the exclusion of the April 2 statement from evidence under s. 24(2) of the Charter, which provides:

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[142] As explained in *R. v. Grant*, at para. 71, the application of s. 24(2) of the Charter requires a consideration of three broad factors.

A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent

jurisprudence.

[143] In the present case, I am satisfied that the breach of s. 10(b) that occurred during the taking of the statement on April 2, 2007 was serious. It involved a deliberate and considered decision by the police to mislead Mr. Newman about the extent of his jeopardy. The police considered whether to inform him of his Charter rights in connection with the Vancouver homicide, and they decided they would not. The Vancouver Police did not want Mr. Newman to be aware of their interest in him, and the York Regional Police did what they could to persuade him that their interview would have no bearing on any homicide. Mr. Newman explicitly requested accurate information about the extent of his jeopardy, and Detective Cardwell falsely told him that he was not a homicide suspect. After Mr. Newman then acquiesced in the continuation of the interview without re-consulting his counsel, Detective Cardwell then went on to ask questions that were highly relevant to the homicide investigation, and seemingly had little bearing on the Ontario charges of careless storage of firearms and possession of firearms without a permit.

[144] The breach had a serious impact on Mr. Newman's Charter-protected interests. Mr. Newman had a right to make an informed decision about how to exercise his right to counsel. He clearly expressed his desire not to continue with the interview without consulting counsel if he was in jeopardy for homicide. The conduct of the police deprived him of the opportunity of making an informed choice. This resulted in his making statements that would likely be to his detriment with respect to the murder charge he now faces.

[145] The third factor I must consider is society's interest in the adjudication of the case before me on its merits. The seriousness of the charge against Mr. Newman is obvious. Society clearly has a very high and legitimate interest in having that charge determined correctly on its merits. From what I understand of the Crown's case against Mr. Newman, it will depend on the combined effect of many pieces of circumstantial evidence as well as various types of expert testimony. The exclusion of the April 2 statement is unlikely to eviscerate the Crown's case.

[146] Considering all the circumstances, I am satisfied that the admission into evidence of the April 2, 2007, statement would bring the administration of justice into disrepute, and it is therefore excluded.

SUMMARY AND CONCLUSION

[147] I have found that the Crown has proven beyond a reasonable doubt that all of the accused's statements are voluntary and admissible at common law.

[148] I have concluded that the police had reasonable and probable grounds to arrest the accused for the drug transaction on March 29, 2007. There was no infringement of his rights under s. 9 of the Charter.

- [149] At the time of arrest, the police complied with the informational components of ss. 10(a) and (b) of the Charter. What the accused said to the police in the parking lot prior to and at the time of his arrest is admissible in evidence. This includes his providing the name Zolt Rozgics and the address of 51 Grenadier Crescent.
- [150] What the accused said to the police at the hospital and what he said to Detective Constable Truong is excluded from evidence under s. 24(2) of the Charter because of the infringement of his right to retain and instruct counsel under s. 10(b).
- [151] The infringement of his s. 10(b) rights was remedied when he spoke to his lawyer, Mr. Olmstead, later in the morning of March 30, 2007. The interview conducted by the police in the evening of March 30, 2007, involved no infringement of his rights and is admissible in evidence.
- [152] When the police conducted the April 2, 2007, interview they infringed the accused's rights under s. 10 of the Charter by giving him misleading information in response to his statement that he wanted to consult a lawyer if he was a homicide suspect and then carrying on with an interview that touched on topics relevant to the Vancouver homicide investigation. This interview is excluded from evidence pursuant to s. 24(2) of the Charter.

The Honourable Mr. Justice W.F. Ehrcke

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Prepared on 26 October 2026 · Esheria