



Criminal Law News

Robert Gee

Section 24(2) – Alive and Kicking, In Hamilton at Least

When we last met on these here pages, we were examining how the cases of *Grant* and *Harrison* had re-calibrated the Charter s. 24(2) analysis. You will recall that I was fretting a bit, as I'm wont to do, about how the new rules would be applied in the trial courts where, as the old saying goes, the rubber hits the road. Well, my concerns have been allayed, to a certain degree at least, by a case decided right here in Hamilton by Justice Richard Jennis of the Ontario Court of Justice in the case of *R. v. Phillip Smith*, released October 29, 2009.

Mr. Smith had the good fortune to be represented by local legal luminary Dean Paquette. Since this case involved both drug and gun charges, Her Majesty was represented by two Crowns, one from our local Crown Attorney's office and the other being one of our local drug Prosecutors. They shall remain nameless, in order to protect the embarrassed.

The facts are relatively straightforward. Officer Frank Miscione of the Hamilton Police Services received information about Mr. Smith from a previously untested informant. "Untested" in the sense that the informer had not previously provided information to the police. The informer had a lengthy criminal

record, was "deeply entrenched in the criminal culture" (read, he was also a bad guy) and it appeared his motivation for supplying the police with information was in the hope of getting favourable assistance on outstanding charges he had at the time.

The information he supplied to the police was that Mr. Smith was a seller of cocaine in the Hamilton area. He told the police that Mr. Smith kept his cocaine in his black Nissan and his house, and that he had a firearm, but he didn't say where it was kept. The only part of the information the police were able to confirm was that Mr. Smith drove the black Nissan.

The police then set up surveillance on Mr. Smith's house one day at about 4:30 p.m. At about 5:00 p.m. they observed him leave the residence and drive to a townhouse complex where a male entered his car. The car proceeded slowly for about 10 metres and stopped, at which point the unknown male exited the vehicle and walked back toward the townhouse complex. The unknown male was not detained and not seen carrying anything from the car. Nor was anything observed between Mr. Smith and the unknown male while they were together in the car as the windows were tinted.

Mr. Smith then drove away, followed cunningly by the police. He then parked in a lot close to a bank and

entered the bank for less than five minutes. Oh my. That was apparently enough sleuthing for the Hamilton Police because when Mr. Smith returned to his car, they arrested him. At that time both he and the car were searched and he eventually made some incriminating statements to another member of the Hamilton Police, Officer Rob Hersics. In the car was found some cocaine. On Mr. Smith was found some cash and cell phones. All of these details were then incorporated into an information to obtain a search warrant which was ultimately granted, resulting in a search of Mr. Smith's home. The search of the home turned up more cocaine, more cash, other drug paraphernalia, a firearm and some ammunition.

When he was arrested at the bank, Mr. Smith was advised of his s. 10(b) rights to counsel by Officer Hersics who advised Mr. Smith he could speak to counsel at the police station. However, Officer Hersics continued to question Mr. Smith at the scene knowing he had not had the opportunity to speak with counsel and, as stated above, Mr. Smith made incriminating statements at that time. Later, apparently much later, Officer Hersics did arrange for Mr. Smith to speak with counsel. His explanation for delaying Mr. Smith's access to counsel was that that they didn't want Mr. Smith making any phone calls until the search warrant had been obtained and executed since they were concerned a gun was involved and for reasons of evidence preservation.

Judge Jennis found that delaying Mr. Smith's access to the phone to call counsel was, in the circumstances, reasonable and consistent with the law. However, continuing to question Mr. Smith after advising him of his

rights to counsel in circumstances where he wasn't afforded the opportunity to exercise them or where they hadn't been waived, was contrary to the Charter.

Recall what the police did here. They arrest Mr. Smith, advise him he has the right to contact a lawyer, but then make a conscious decision to prevent him from exercising that right for a significant period of time. And then after making that decision, and knowing he hasn't spoken to a lawyer, they continue to question him until they get incriminating admissions from him which are later used as a basis for obtaining a search warrant and gathering even more evidence against him.

When questioned by Dean Paquette, Officer Hersics testified that once he advised Mr. Smith of his rights to counsel and cautioned him, he was unaware of any legal obligation on him to hold off his questioning until Mr. Smith had spoken with counsel. This, to say the least, perplexed Judge Jennis and he commented as follows:

11. . . Ever since the decision of *R. v. Manninen*, some 22 years ago, the law has settled that the police must hold off questioning an accused person until he or she has had the opportunity to consult counsel after that right has been asserted or has not been waived. The law recognizes that there are exigent circumstances where contact with counsel cannot be facilitated immediately; however, in those circumstances, because the police retain control of the accused person, it is more important that the principles in *Manninen* be observed. It

is extremely disconcerting when the senior supervising officer in these circumstances did not appear to know or understand those obligations. Whether through ignorance or wilful blindness, that breach must be categorized as flagrant and serious.

So the issues that needed to be resolved in this case were whether the arrest of Mr. Smith was itself unlawful and arbitrary, and if so, whether the evidence obtained in the search of Mr. Smith and the vehicle, should be excluded both as original direct evidence against Mr. Smith and as evidence used as a basis for obtaining the search warrant.

The Crowns conceded that given the breach of Mr. Smith's 10(b) rights by Officer Hersics, any statements he made to him should be excluded as a basis for obtaining the search warrant. They also conceded that if the evidence obtained from the search of the vehicle and Mr. Smith was also excluded as a basis for obtaining the search warrant, then there was insufficient information remaining for the search warrant to be granted.

Judge Jennis concluded that the arrest of Mr. Smith was unlawful and arbitrary. The information provided to Officer Miscione from an informant neck-deep in the criminal underworld was hardly compelling. The source of the informant's knowledge was not known and he had never before provided information to the police, so he had no history of providing reliable information on previous occasions. The officers testified though that their observations of Mr. Smith having a brief meeting with the unknown male was indicative of drug trafficking. Judge Jennis concluded the officers

had a subjective belief that all this provided reasonable grounds to make an arrest but the law required there to be an objective basis for such a belief. That objective basis was lacking here. The lack of compelling information from the informer and one observation by the police that was equally capable of innocent explanation is not sufficient to form the basis for an arrest.

So what do you do with the gun and all that crack? The Crowns argued on the s. 24(2) analysis that its admission would not bring the administration of justice into disrepute. Dean Paquette of course argued the opposite. Judge Jennis found that the admission of the evidence would bring the administration of justice into disrepute and accordingly, he excluded it, which resulted in Mr. Smith's acquittal.

As part of his analysis of the issue he found that given Officer Hersics questioning of Mr. Smith contrary to his s. 10(b) rights and given the unlawful arrest that ". . . the progression of breaches can only lead to a finding that the conduct was a flagrant disregard for the accused's Charter rights. That places it at the serious end of the scale." (par. 22)

Judge Jennis was also cognizant of the seriousness of the offences and society's interest in seeing criminal wrongdoing punished but in this regard he stated the following:

25. . . .As stated in the *Harrison* case, the need to disassociate the justice system from the flagrant breaches of Charter rights and the importance of maintaining Charter standards outweighs the need to admit the evidence in order to obtain a

conviction. This is not about sympathy for the accused - he is, no doubt, guilty of serious offences - but, rather, as the Supreme Court of Canada stated, the price to be paid in order that everyone's Charter rights be respected. For reasons given, I find the admission of the evidence as set out in paragraph 1 would bring the administration of justice into disrepute and, accordingly, it is excluded.

So there you have it. As near as I can figure it is probably the first significant case that has been decided in Hamilton since *Grant* and *Harrison* were released earlier in the summer. It is a courageous and well-reasoned decision, and it is especially comforting to see that the seriousness of the offence no longer seems to trump Charter rights. Hopefully this trend will continue. ■

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