SUPREME COURT OF NOVA SCOTIA
Citation: ***R. v. Calder***, 2010 NSSC 136

Date: 20100407
Docket: CRH 316393
Registry: Halifax

Between:

Her Majesty the Queen

v.

Anne Calder

DECISION ON VOIR DIRE

Judge:	The Honourable Justice Peter Bryson
Heard:	April 6, 2010, in Halifax, Nova Scotia
Decision:	April 7, 2010 **(Orally)**
Written Release:	April 14, 2010
Counsel:	Paul Adams, for the Crown Craig Garson, Q.C., for the Defendant

By the Court:

[1] This *voir dire* was held to determine the admissibility of certain verbal utterances made by the accused, Anne Calder, at the Central Nova Scotia Correctional Facility on July 14, 2009. Admissibility is challenged on the basis of voluntariness and constitutionality.

[2] The *voir dire* was held at the opening of a trial. Ms. Calder faces a three count Indictment, including possession and possession for the purposes of trafficking in contravention of ss. 5(1) and (2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. At the time Ms. Calder was a practising barrister who was meeting with her client, Mr. Thomas Izzard, an inmate of the correctional facility.

[3] The Crown led evidence of two correctional officers, a videotape of the interview room in which Ms. Calder met with Mr. Izzard and photographs of contraband seized from Mr. Izzard after he was removed from the interview room and searched. Ms. Calder did not testify or lead evidence on the *voir dire*.

[4] For the purposes of the *voir dire* Ms. Calder acknowledged that she had been a practising lawyer for fifteen years. For nine of those years she was a Crown Prosecutor employed by the Public Prosecution Service in New Glasgow, Truro and Halifax. It was also agreed that she was a practising defence counsel at the time of the incident.

[5] The Crown led evidence from Captain Tracey Dominix, and Acting Deputy Superintendent Greg McCamon. Captain Dominix was the Security Risk Manager at the correctional facility on July 14, 2009. Her duties included the gathering of intelligence with respect to inmates, the review of video recordings of the facility and liaising with outside agencies like police.

[6] On July 14, Captain Dominix was asked by one of her officers to view some of the video of the Calder – Izzard interview, which was ongoing. After doing so she contacted her immediate superior, Mr. McCamon, who also viewed the video. Both Captain Dominix and Acting Deputy Superintendent McCamon were satisfied that they saw Ms. Calder pass an item to Mr. Izzard. They decided to interrupt the interview and remove Mr. Izzard from the room and have him searched. This was done. A “prisoner package” was found in Mr. Izzard’s

underwear. This was a tightly wrapped cellophane package. They opened the package and found tobacco and a second package within the first containing capsules, which they assumed to be drugs. Captain Dominix took photographs.

[7] Captain Dominix and Deputy Superintendent McCamon returned to the interview room and in McCamon's words "confronted" Ms. Calder. This encounter lasted approximately 5 minutes, although Mr. McCamon was only present for about 3 minutes. When they reentered the interview room Mr. McCamon told Ms. Calder what they had observed on the video. She was told what they had found following the search of Mr. Izzard. She was informed that she would have to leave immediately and that she would not be permitted to return to the facility pending investigation. She was advised that the police would be contacted. Ms. Dominix referred Ms. Calder to the envelope which she had seen Ms. Calder pass to Mr. Izzard. Ms. Calder asked Ms. Calder what was in the envelope. Ms. Calder denied knowing what was in the envelope other than to say that it had been sent to her by Priority Post for Mr. Izzard, with no return address. She asked how she could see another client that she had scheduled for an interview that day. Ms. Calder was told that she would not be seeing any further clients for the time being. Ms. Calder explained that she had documents to give to another client and Captain Dominix agreed to deliver them. The video shows documents being given to Captain Dominix by Ms. Calder. Ms. Calder then packed up and left.

[8] In her direct testimony, Captain Dominix initially said that Ms. Calder denied knowing what was in the package. Later in her direct testimony she repeated that Ms. Calder denied any knowledge of the contents of the package "other than she said it was tobacco." During cross-examination she conceded that this allusion to "tobacco" was not in her post-interview note of the encounter. She said that Ms. Calder addressed this comment to Mr. McCamon.

[9] Captain Dominix testified that there was no discussion about detaining Ms. Calder and that she had no intention of detaining her. She said that correctional officers are not trained in investigation and do not undertake investigations. Those are for the police. Captain Dominix characterized her exchange with Ms. Calder as professional. She described Ms. Calder as cooperative. At the end, Ms. Calder only expressed concern about her subsequently scheduled inmate interview which would not be taking place.

[10] Captain Dominix did not ask Ms. Calder for a statement. She did not discuss a statement with her. She does not know what the consequences to Ms. Calder would be of making or not making a statement. At no time did Ms. Calder seem shocked or surprised.

[11] During cross-examination Captain Dominix agreed that when she removed Mr. Izzard from the room she directed Ms. Calder to remain. She said she asked politely. She could not recall her exact words, but did not order Ms. Calder to stay. The video does show her leaving the room, making a gesture to Ms. Calder with her left hand. Captain Dominix claimed that Ms. Calder could have left at any time. There was an intercom which Ms. Calder could have used to ask to leave. She did not do so. Although she did not say this to Ms. Calder, Captain Dominix conceded that she intended that Ms. Calder stay in the interview room until Mr. Izzard was searched. From the time that Mr. Izzard was removed from the interview room until the time that Captain Dominix and Deputy Superintendent McCamon returned was approximately 25 minutes. During this period of time Ms. Calder appears to be working at the desk with various papers. She remains in the chair. Her demeanour and posture do not project distress or concern. She appears composed.

[12] Captain Dominix also conceded in cross-examination that during the exchange with Ms. Calder, a uniformed corrections officer was standing behind the open door of the interview room. He would have had to move aside for her to leave.

[13] There was no electronic audio recording of what transpired in the interview room. The only records made by Captain Dominix and Deputy Superintendent McCamon were reports they prepared for institutional purposes later that day on their respective computers. They also later gave statements to the police. They both acknowledged that their recollection at the time would have been better than in court. They acknowledged that they could not produce a verbatim account of what occurred. There were some discrepancies between reports and police interviews and their evidence. The most notable was that of Captain Dominix when she admitted an error in the timing of Ms. Calder's utterances. In a statement to police on November 30, 2009, she said that Ms. Calder's comments on the contents of the envelope occurred when she first interrupted the interview to remove Mr. Izzard. She said Mr. McCamon was with her. At the *voir dire*, she conceded that the timing was wrong and that the Calder comments came after the

Izzard search. What Captain Dominix acknowledged in cross-examination was that the timing of what was said was incorrect, but not the substance of what was said.

[14] Captain Dominix also admitted that her post-incident report did not record Ms. Calder's comment that she thought the package only contained tobacco. She explained that this was not said to her, but to Mr. McCamon.

[15] Deputy Superintendent McCamon also testified. Although now retired, he was Acting Deputy Superintendent of the correctional facility on July 14, 2009. He told Ms. Calder that she was seen passing an envelope to Mr. Izzard on the video and that the Izzard search revealed a package with tobacco plus drugs. He said that the first thing she responded was "I don't know what was in the package." She was advised that her visiting privileges at the facility were suspended. She was then asked where the package came from and she said it had come in the mail by Purolator, (Ms. Dominix had said Priority Post). Ms. Calder did tell Mr. McCamon that she had other clients to see. He told her that she wouldn't be seeing them on that day. She was told she would have to leave and that the police would be called. He left the interview room before Captain Dominix.

[16] Mr. McCamon described the interview as professional in tone on both sides. Ms. Calder appeared calm and unsurprised. He said she looked him right in the eyes when she said she did not know what was in the package. Mr. McCamon alleged it was not his intention to detain Ms. Calder. Corrections personnel do not become involved in investigations but turn them over to the police. He denied that Ms. Calder was interrogated in any way. He said it was not part of their training. There was no conversation about having Ms. Calder give a statement or of the consequences of failing to do so. Like Captain Dominix, Mr. McCamon admitted that he could not recount what was said verbatim. He conceded that he used the word "confront" when describing his exchange with Ms. Calder. His evidence differed from Captain Dominix in that he did not recall Ms. Calder saying she thought the package just contained tobacco, although it may have been said. He characterized the exchange with Ms. Calder as "amicable."

Position of Parties

[17] Ms. Calder challenges the admissibility of what she is alleged to have said on July 14, 2009 on common law and constitutional grounds. She asserts that what

she said was not voluntary and that she was not given a caution or an opportunity to exercise her rights under s. 10(b) of the *Charter*. In reply, the Crown argues that Captain Dominix and Deputy Superintendent McCamon were not persons in authority in the context of the conversation with Ms. Calder on July 14, 2009. Ms. Calder's statements were voluntary. While it was conceded that no constitutional caution was given to her, there was no obligation to provide one, because Ms. Calder was not detained.

Were Statements Voluntary?

[18] In *R. v. Gauthier*, [1977] 1 S.C.R. 441, the Supreme Court held that when considering an utterance made to a person in authority, a court must decide:

1. Whether the utterance was voluntary; and

2. Whether there was some evidence that it was made.

> Proof beyond a reasonable doubt that the accused made the statement is an issue for the trial proper. But the trial judge must be satisfied beyond a reasonable doubt that the statement was voluntary.

Persons in Authority

[19] Were the correctional officers persons in authority during the Calder interview? If not, the "confession" rule has no application. The Crown argued that the correctional officers were not persons in authority regarding Ms. Calder on July 14, 2009. The Crown cites *R. v. Grandinetti*, [2005] 1 S.C.R. 27; and *R. v. Hodgson*, [1998] 2 S.C.R. 449. I certainly agree with the Crown that for most purposes correctional officers are not "persons in authority" other than in a generic way with respect to a lawyer visiting a client at the correctional facility. Correctional officers do have a right and a duty to determine whether something inappropriate has occurred at the facility, such as what was observed by Ms. Dominix and Mr. McCamon on July 14, 2009. However, having discovered the contents of the package following the Izzard search, their exchange with Ms. Calder took a different turn. They told Ms. Calder what they found, that she would have to leave, that her visiting privileges had been suspended and that the police

would be called. These are all things that as correctional officers, one would expect them to do. But once they started to ask about the contents of the envelope, their status and her jeopardy changed. At that point they potentially became agents of the police.

[20] In *Grandinetti*, supra, Justice Abella, writing for the court discussed "person in authority" as follows:

> 37 In *Hodgson*, the Court delineated the process for assessing whether a confession should be admitted. First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. A "person in authority" is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused. The burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. The question of voluntariness is not relevant unless the threshold determination has been made that the confession was made to a "person in authority".
>
> 38 The test of who is a "person in authority" is largely subjective, focusing on the accused's perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.
>
> 39 There is also an objective element, namely, the reasonableness of the accused's belief that he or she is speaking to a person in authority. It is not enough, however, that an accused reasonably believe that a person can influence the course of the investigation or prosecution. As the trial judge correctly concluded:
>
> > [R]eason and common sense dictates that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of someone who is involved in the investigation, the apprehension and prosecution of a criminal offence resulting in a conviction, *an agent of the police or someone working in collaboration with the police*. It does not include someone who seeks to sabotage the

> investigation or steer the investigation away from a suspect that the state is investigating. [Emphasis added]

[21] While we have no evidence from Ms. Calder about her subjective belief, in all these circumstances, a reasonable person would likely consider that correctional officers would at least assist the police or collaborate with them. To that extent – and at that time – the correctional officers became "persons in authority."

[22] Accordingly, I am satisfied that prior to her making the statements in question, Ms. Calder was speaking to "persons in authority."

Statements Voluntary?

[23] The next issue is whether the statements made were voluntary. A useful history of this question is supplied by the Supreme Court in *R. v. Oickle*, [2000] 2 S.C.R. 3. *Oickle* summarizes the development of the law with respect to voluntary statements beginning with the fundamental principle established in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), in which voluntariness was characterized as freedom from fear of prejudice or hope of advantage held out by someone in authority, to broader considerations of oppression generally and the protection of an accused's rights and fairness in the criminal process. Nevertheless, for most practical purposes, the application of the rule will focus on whether the statement is unreliable because of the circumstances under which it was obtained.

[24] Ms. Calder argued strenuously that her statements were involuntary and cited *R. v. Moore-McFarlane*, 47 C.R. (5th) 203, (Ont. C.A.) for the proposition that statements given by an accused should be recorded by videotape or at least audiotaped. But the key to voluntariness is not whether the statements are recorded. Rather, it is contextual, *Oickle*, (¶ 47). In *Moore-McFarlane* the facts surrounding the giving of the alleged statements were hotly contested. Both accused testified at the *voir dire*. There was much evidence suggesting oppressive circumstances. There were substantial discrepancies in the facts. In the context, it is understandable why the court found the evidence at the *voir dire* too unreliable to determine whether the statements were made voluntarily.

[25] I do not read *Moore-McFarlane* to say that in every case a statement is not admissible if there is no verbatim record. *Oickle* expressly does not say that, nor have other courts of appeal: *R. v. Crockett*, 2002 BCCA 658; *R. v. Ducharme*, 2004

MBCA 29. If the burden on the Crown was to produce a verbatim record of every statement which it was sought to adduce, the burden could often never be met. Moreover, it would have been an impossible standard in a pre-electronic age. This is why context is important. It is one thing for a suspect under close police scrutiny to be interviewed with the benefit of a contemporary recording. It is quite another to demand this standard in other circumstances and settings such as occurred in this case. The correctional officers were not trained investigators. They did not intend to conduct an interview of Ms. Calder and would have had to improvise the facilities to do so, had they so intended.

[26] *Oickle* enjoins the Court to look at the particular circumstances of an individual suspect:

> 42 From this discussion, several themes emerge. One is the need to be sensitive to the particularities of the individual suspect. For example, *White, supra*, at p. 120, notes the following:
>
> > False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.
>
> And indeed, this is consistent with the reasons of Rand J. in *Fitton, supra*, at p. 962:
>
> > The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.
>
> *Ward, supra*, and *Horvath, supra*, similarly recognized the particular circumstances of the suspects that rendered them unable to confess voluntarily: in Ward, the accused's state of shock, and in *Horvath*, the psychological fragility that precipitated his hypnosis and "complete emotional disintegration" (p. 400). [Emphasis added]

The application of the test is necessarily "contextual" (*Oickle, ¶ 47, approved in R. v. Spencer*, [2007] 1 S.C.R. 500, at ¶ 13).

[27] So what were Ms. Calder's circumstances? She was a former Crown Prosecutor. She was a practising defence counsel on July 14, 2009. By training, experience, education and professional status, she was better equipped than the vast majority of suspects to withstand any encounter with the correctional officers on that day. Moreover, she had the benefit of a 25 minute delay to reflect on what had transpired, how she might be challenged and how to respond.

[28] It is immediately obvious that the facts in this case are quite different from the ones usually encountered by the courts when considering whether to receive a statement on the basis that it was voluntary. While the environment in which the statement made by Ms. Calder was necessarily confined, it was one with which she was familiar and indeed in which she may have been comfortable. She certainly looks it on the videotape. The uncontradicted evidence of the correctional officers is that the exchange with Ms. Calder was professional and courteous. Although we do not have the benefit of an audio record, the video is consistent with that evidence. Ms. Calder looks and behaves with composure, before, during and after the interview. Her reported reaction to what she was told did not portray surprise, fear or anxiety. Her principal concern was about seeing another client with whom she had a scheduled appointment later that day.

[29] The uncontradicted evidence of the officers is that they did not intend to take any statement from Ms. Calder and did not discuss one, let alone raise the advantages or disadvantages of her giving one. Nothing in the evidence regarding the verbal exchange or the surrounding circumstances suggests oppression or compromise of Ms. Calder's "operating mind." There is no evidence of any *quid pro quo*. There is no evidence that she was treated aggressively, was intimidated or otherwise had her will "overborne."

[30] It was not the purpose of the correctional officers to elicit a confession from Ms. Calder and other than her brief response to "what was in the envelope," they did not do so. She was not questioned at any length.

[31] In summary, I am satisfied beyond a reasonable doubt that Ms. Calder's statements to the correctional officers on July 14, 2009 were voluntary.

[32] This brings me to the *Charter* application.

Charter – s. 10(b)

[33] Section 10(b) of the *Charter* provides that everyone has the right, on arrest or detention to retain and instruct counsel without delay and be informed of that right.

Was There Detention?

[34] It is common ground that Ms. Calder was not given a s. 10(b) caution. Accordingly, the first question is whether or not she was detained when she was speaking with Captain Dominix and Deputy Superintendent McCamon.

[35] Ms. Calder argues that it is obvious that she was detained the moment that Mr. Izzard was removed from the interview room and she was told to remain. She was in a locked room in a secure facility with three locked doors between her and freedom. There was simply no other way to characterize her situation than to say that she was detained at that point.

[36] The question of detention in this case is not simple because the circumstances in which Ms. Calder found herself on July 14, 2009, would be common to all lawyers visiting clients at the correctional facility. It is not enough to say that she was detained simply because she was sitting in a locked room, behind three locked doors.

[37] The courts recognize that detention for the purposes of s. 10(b) of the *Charter* can be a matter of some subtlety. Detention may involve not simply a physical interference with one's liberty, but can include psychological submission or acquiescence in the deprivation of liberty, where the individual reasonably believes that she has no choice to do otherwise (*R. v. Therens*, [1985] 1 S.C.R. 613, at 644).

[38] In *R. v. Grant*, [2009] 2 S.C.R. 353, the Supreme Court reviewed the meaning of detention as follows:

> [44] In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

   (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation

   (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

   (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[39] Detention does not refer to every interference with liberty. People can be delayed or kept waiting but not detained within the meaning of the *Charter*, (*R. v. Mann*, [2004] 3 S.C.R. 59, at ¶ 19).

[40] Moreover, the detention should be connected with potential legal consequences for the detainee (*Grant,* ¶ 29). Whether one has been detained is something that should be determined on an objective test. Would a reasonable person conclude that he or she was not free to go and must comply with police direction or demand? (*Grant,* ¶ 31). An individual's perception may have some relevance to the assessment (*Ibid* ¶ 32).

[41] There are cases where police may be investigating an accident or a crime and unknown to them, may be asking questions of a person who is implicated in the event who therefore bears some risk of self-incrimination. This would not trigger

an obligation to caution that individual until the police had specific grounds to connect that individual to the commission of a crime, (*Grant,* ¶ 38). Also see *R. v. Anthony,* 2007 O.N.C.A. at ¶ 609. Similarly, explanatory questions designed to elicit background information, as opposed to questioning focussed on an individual, does not constitute detention, triggering an obligation to provide a s. 10(b) caution: *R. v. Suberu,* 209 S.C.C. 33, ¶ 28-30.

[42] In the context of this case, I am not satisfied that Ms. Calder was detained when Mr. Izzard was taken from the interview room to be searched. To the extent that she was asked or directed to stay, this was incidental to the Izzard search. At that point, correctional authorities had seen something suspicious – the surreptitious passing of an envelope to Mr. Izzard by Ms. Calder. But they did not know what was in the envelope. They would be entitled to investigate the circumstance to determine whether or not something inappropriate had occurred because that may determine whether Ms. Calder's privileges to attend at the correctional facility would continue. She was not at specific legal risk: *Grant,* ¶ 29.

[43] However, once Mr. Izzard was searched and it was established that he had contraband which apparently included some type of drugs, it must have been obvious to the correctional officers that Ms. Calder could have been party to an offence. They returned to the interview room, and although the door was kept open, they admitted that there was a uniformed corrections officer out of sight beyond the open door way. In the words of Deputy Superintendent McCamon, they wished to confront Ms. Calder with what they knew and they did so. Their evidence is that they did not detain Ms. Calder and did not intend to do so, but freedom of movement was physically constrained when they reattended in the room and Ms. Calder undoubtedly felt some psychological compulsion to remain at least until she had heard them out. The factors set out in *Grant,* including the physical circumstances, the officers present and the interaction that occurred, all tend to a finding of detention, fleeting though it was. On the other hand, Ms. Calder's personal characteristics – her professional status and training, tend against a finding of "psychological" detention. While the matter is not free from doubt, I find that on a balance of probabilities, Ms. Calder was detained during the brief exchange with correctional officers when they returned to the interview room following the Izzard search. This would trigger an obligation to provide Ms. Calder with a s. 10(b) caution.

Charter – s. 24(2)

[44] Having found that Ms. Calder was entitled to a s. 10(b) caution and that she did not receive one, the court must next consider whether the statements provided by Ms. Calder should be excluded under s. 24(2) of the *Charter*.

[45] The entirety of s. 24 reads as follows:

> 24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under s-s. (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.

[46] It is plain from a review of the extensive jurisprudence that courts have struggled with the appropriate test for exclusion under s-s. (2) of s. 24 and in particular with the phrase "... having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[47] In *Grant*, the Supreme Court set out three categories of inquiry that should be addressed when deciding whether or not evidence should be excluded. Courts must consider:

(a) the seriousness of the *Charter*-infringing state conduct;

(b) the impact on the *Charter* - protected interests of the accused;

(c) society's interest in an adjudication on the merits.

Seriousness of Conduct

[48] Under the first heading the court is obliged to consider the seriousness of the impugned conduct that led to the breach. In *Grant* the Court referred to a spectrum

from inadvertent or minor violations of the *Charte*r to willful or flagrant disregard of *Charter* rights. The former would favour admission of evidence and the latter, exclusion. Extenuating circumstances might diminish the serousness of police conduct, depending on the context. This is sometimes considered in the context of whether or not the court should disassociate itself from police conduct.

[49] I accept the evidence of the correctional officers that they did not intend to obtain a statement from Ms. Calder and did not intend to detain her for that purpose. Until Captain Dominix asked Ms. Calder what was in the envelope, she was not at jeopardy. I accept the evidence of the correctional officers that they did not think that they were investigating a crime during the brief encounter and did not intend to do so.

[50] In the circumstances of this case, I consider the breach of Ms. Calder's rights by the correctional officers to have been inadvertent and relatively minor. They had legitimate reasons to talk to her about what they had found. They were entitled to exclude her from the correctional facility and tell her why. They did not intend to investigate what had occurred. They were acting in good faith. To the extent that their questions went beyond their own legitimate institutional interests, it was inadvertent. They were not pressing or persistent. They did not follow-up their initial questions about the envelope and they did not detain Ms. Calder at that point for more than a minute or so beyond what they were entitled to speak to her about.

Impact

[51] Next, the court must consider the impact of the *Charter* breach on Ms. Calder's *Charter*-protected interest. The court must evaluate the extent to which the breach actually undermined the protected interests in question.

[52] As a matter of principle, obtaining a statement from an accused in breach of a *Charter* right can be very serious. It goes to the presumption of innocence and the right against self-incrimination. Citizens are entitled to the benefit of the caution so that they may make an informed decision about whether to seek legal advice and whether or not to say anything to authorities. They are entitled to obtain advice about how to exercise their rights, (*R. v. Manninen*, [1987] 1 S.C.R. 1233).

[53] On the other hand, the particular circumstances of a given *Charter* breach must be taken into account. In *Grant*, (¶ 96) the Supreme Court gives the example of an individual whose caution is technically defective in the informational or implemental stage. In such a case, the adverse impact on the accused may be diminished. The failure to caution Ms. Calder must be considered in the context that she is an experienced criminal lawyer. She certainly may be taken to know what her *Charter* rights were and to have acted on that knowledge. As indicated in ¶ 27 above, she was more than equal to a confrontation with correctional officers. She had no obligation to respond to Captain Dominix' question about the contents of the envelope. She had ample time to reflect on her situation. Certainly she was capable of recognizing that answering the question could potentially place her in jeopardy.

[54] In the circumstances of this particular case, owing to her professional status and specific practice, Ms. Calder already enjoyed the benefits which a s. 10(b) caution is intended to confer.

Adjudication on the Merits

[55] The final category that the court must consider is society's interest in an adjudication on the merits. Society generally expects that all cases will be determined on their merits. On this basis reliable evidence should be admitted. Although the utterances here are filtered through the correctional officers, they are not thereby unreliable. They are not verbatim, but they emanate from Ms. Calder. The weight to be ascribed to them is for the trial proper. What Ms. Calder said is specifically linked to what the officers observed and what the video discloses. But the reliability of the evidence is not the only factor.

[56] The importance of the evidence for the prosecution's case is a factor that may be considered under this heading. During argument, counsel for the Crown frankly acknowledged that the evidence here was not so vital to the Crown's case that it would collapse if the evidence were excluded.

[57] The seriousness of the offence may also be considered under his heading, although it can be a "double edged sword." The public obviously have an interest in serious cases being adjudicated on their merits. I consider the charges in this case to be serious. In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court held that courts should consider not only the negative effect of admission of the

evidence on the reputation of the administration of justice, but the impact of failing to admit that evidence. On the other hand, the concerns embodied in s. 24(2) go beyond individual cases and short term results.

[58] Once the court has considered all three factors identified by the Supreme Court in *Grant*, a decision must be made on the basis of all the circumstances. There is no "overarching rule." There is no "mathematical precision." But in this case, I consider the first and second factors favour admission, while the third is relatively neutral.

[59] Taking all of the circumstances into account, on balance I find that the admission of the statements made by Ms. Calder to correctional officers would not bring the administration of justice into disrepute. Indeed, I am inclined to the opposite view that not doing so may well bring the administration of justice into disrepute in the particular circumstances of this case.

Bryson, J.