SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garnier*, 2017 NSSC 340

Date: 2017 11 14
Docket: Hfx No. 454738
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Garnier

DECISION: *VOIR DIRE* 2
Voluntariness of Statement 3

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	July 31; August 1, 2, 3, 4, 8, 9, 10, 11; September 15; October 5 and 24, 2017, in Halifax, Nova Scotia
Written Decision:	April 12, 2018
Counsel:	Carla Ball and Christine Driscoll, for the Crown Joel Pink, Q.C., Vanessa Christie, Nicola Watson, for the Defence

By the Court:

Overview

[1] This decision deals with the last of three statements made by Christopher Garnier to the police during a missing person investigation and subsequent homicide investigation, relating to Catherine Campbell. In this statement the police used an undercover officer posing as a jailed offender or "cell plant" in an effort to elicit a statement from Mr. Garnier.

[2] Various *voir dires* regarding the admissibility of evidence in Christopher Garnier's trial were held on July 31; August 1, 2, 3, 4, 8, 9, 10, 11; September 5, 7, 8, 15; and October 4, 5, 24, 25, and 26, 2017. The five week trial started on November 20, 2017. In the meantime I was involved in other time sensitive criminal matters. Therefore, in keeping with the principles outlined in *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, I determined that it was more efficient to provide counsel with bottom-line decisions in relation to certain admissibility issues, with detailed reasons to follow. On November 14, 2017, I provided counsel with my bottom-line decisions relating to the admissibility of the three statements provided by Mr. Garnier. These are my detailed reasons.

Introduction

[3] Catherine Campbell was a member of the Truro Police Service. The Crown alleges that on September 11, 2015, while off-duty, Ms. Campbell had been drinking and socializing with Christopher Garnier in a downtown Halifax bar shortly before he murdered her.

[4] Ms. Campbell was the subject of a significant missing persons investigation. Her body was discovered by the Halifax Regional Police Service at approximately 12:10 AM on September 16, 2015, near the Macdonald Bridge. Mr. Garnier became suspect early in the investigation. Over the course of September 15 and 16, 2015, the police took three statements from Mr. Garnier. The defence says that none of these three statements are admissible. This decision will deal only with the third statement.

[5] At 9:56 AM on September 15, 2015, prior to the discovery of Ms. Campbell's body on September 16, the police took a statement from Mr. Garnier without providing him with a police caution or his *Charter* rights. Mr. Garnier was

aware the statement was being audio recorded. I ruled that the first statement is inadmissible (see *R. v. Garnier*, 2017 NSSC 338).

[6] At approximately 1:19 AM on September 16, 2015, Mr. Garnier was arrested for the murder of Ms. Campbell.

[7] Commencing at 1:02 PM on September 16, 2015, and continuing for the next nine-and-a-half hours, Mr. Garnier was interviewed by the police. He provided a statement admitting to killing Ms. Campbell. That statement was video and audio recorded with the knowledge of Mr. Garnier. I ruled that the second statement is admissible (see *R. v. Garnier*, 2017 NSSC 339).

[8] Finally, on September 16, 2015, at 11:02 PM, immediately after he provided the second statement, while still in cells at the R.C.M.P. detachment in Lower Sackville, Mr. Garnier spoke to an undercover police officer who was posing as another prisoner being held in cells. That conversation was surreptitiously audio-recorded. That is the statement at issue in this decision. For the reasons that follow, this third statement is not admissible.

Statement Three

[9] Mr. Garnier argues that the third statement is not admissible because it: 1) violates the "Derived Confessions Rule"; and 2) violates the rules that govern cell plant conduct.

[10] Because I ruled the second statement to be admissible the argument regarding the derived confessions rule is effectively moot. However, the rules that govern cell plant conduct are applicable.

Facts

[11] Mr. Garnier was arrested at 1:19 AM on September 16, 2015. He was taken to the Halifax Regional Police Station on Gottingen Street in Halifax. He was provided his right to counsel and spoke with his lawyer between 3:16 AM and 4:12 AM He was then transported to the Lower Sackville R.C.M.P. Detachment leaving at 5:21 AM. During the drive to Lower Sackville, the police contrived an undercover operation whereby they made it appear that a man (a police undercover operator) was being arrested at the roadside. The vehicle transporting Mr. Garnier slowed as they passed the "takedown" and Mr. Garnier watched as the undercover operator appeared to be arrested.

[12] Mr. Garnier arrived at the Lower Sackville R.C.M.P. Detachment at 5:44 AM and was given an opportunity to sleep from 7:05 AM until his interview with Corporal Allison at 1:02 PM. He was then interviewed until 10:27 PM. During that second interview Mr. Garnier was fed, given water, given bathroom breaks when requested, and was treated respectfully throughout.

[13] At the conclusion of the second interview, due to the sexual undertones surrounding the death of Catherine Campbell, while in a room with Corporal Jody Allison and Detective Constable Tony Croft, the police had Mr. Garnier remove all of his clothing and took full frontal photographs of him, including photographs of his genitals. No injuries to his genitals were observed.

[14] Following this procedure, Mr. Garnier was placed in the Lower Sackville R.C.M.P. Detachment cells while awaiting a remand hearing with a Justice of the Peace and transport to the Central Nova Scotia Correctional Facility in Burnside. The undercover operator who Mr. Garnier observed "being arrested" at the roadside as he was being transported to the Lower Sackville R.C.M.P Detachment was also in those cells, now posing as another prisoner.

[15] The undercover operator took on the role of a seasoned and hardened criminal who had previously spent time in prison and who had just been arrested with a loaded handgun in his vehicle. A conversation ensued between Mr. Garnier and the undercover operator during which Mr. Garnier made several inculpatory comments.

Cell Plant Cases

[16] The Supreme Court of Canada set out guidelines for the use of cell plant operations in three cases: *R. v. Hebert*, [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64; *R. v. Broyles*, [1991] 3 S.C.R. 595, [1991] S.C.J. No. 95; and *R. v. Liew*, [1999] 3 S.C.R. 227, [1999] S.C.J. No. 51.

[17] In *Hebert*, McLachlin J. (as she then was) stated for the majority:

> 69. The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective element. But this established, the focus under the *Charter* shifts to the conduct of the authorities *vis-à-vis* the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?

[18] Justice McLachlin went on to explain the boundaries of the right to silence:

> 71. Finally, the change proposed arguably strikes a proper and justifiable balance between the interest of the state in law enforcement and the interest of the suspect. The alternative -- the strict post-*Wray* application of the confessions rule -- leaves courts powerless to correct abuses of power by the state against the individual, so long as the objective formalities of the "threat-promise" formula are filled and the statement is reliable. Drawing the balance where I have suggested the *Charter* draws it permits the courts to correct abuses of power against the individual, while allowing them to nevertheless admit evidence under s. 24(2) where, despite a *Charter* violation, the admission would not bring the administration of justice into disrepute.
>
> 72. This approach may be distinguished from an approach which assumes an absolute right to silence in the accused, capable of being discharged only by waiver. On that approach, all statements made by a suspect to the authorities after detention would be excluded unless the accused waived his right to silence. Waiver, as defined in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, is a subjective concept dependent, among other things, on the accused's knowing that he is speaking to the authorities. On this approach, all statements made by a person in detention which were not knowingly made to a police officer would be excluded because, absent knowledge that the suspect is speaking to a police officer, the Crown cannot establish waiver. This would include statements made to undercover agents (regardless of whether the officer is merely passive or has elicited the statement) as well as conversations with fellow prisoners overheard by the police and statements overheard through mechanical listening devices on the wall. There is nothing in the rules underpinning the s. 7 right to silence or other provisions of the *Charter* that suggests that the scope of the right to silence should be extended this far. By contrast, the approach I advocate retains the objective approach to confessions which has always prevailed in our law and would permit the rule to be subject to the following limits.
>
> 73. First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the *Charter*. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.
>
> 74. Second, it applies only after detention. Undercover operations prior to detention do not raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the *Charter* extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an

> undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected.
>
> 75. Third, the right to silence predicated on the suspect's right to choose freely whether to speak to the police or to remain silent does not affect voluntary statements made to fellow cell mates. The violation of the suspect's rights occurs only when the Crown acts to subvert the suspect's constitutional right to choose not to make a statement to the authorities. This would be the case regardless of whether the agent used to subvert the accused's right was a cell mate, acting at the time as a police informant, or an undercover police officer.
>
> 76. Fourth, a distinction must be made between the use of undercover agents to observe the suspect, and the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent. When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.

[19] In *Broyles*, Iacobucci J. spoke for the unanimous court and discussed the application of the s. 7 *Charter* right to silence in the context of statements to the police:

> 17. In *R. v. Hebert*, [1990] 2 S.C.R. 151, this Court found that s. 7 of the *Charter* includes a right to silence which includes the right to choose whether or not to make a statement to the authorities. In *Hebert*, Justice McLachlin described the right as follows, at p. 186:
>
> > The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose – the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other.
>
> The question before us here is therefore: did the authorities obtain evidence of the appellant’s conversation with Ritter in a manner that violated the appellant’s right to silence, including his right to choose whether or not to speak to the authorities?

(1) *R. v. Hebert*

18. At issue in *Hebert*, *supra*, was the admissibility of evidence obtained by an undercover police officer posing as a fellow cell mate of the appellant Hebert. McLachlin J. held that, where an undercover police officer does more than passively observe the suspect, but goes so far as to elicit information from him or her, s. 7 of the *Charter* will be infringed. On the facts of *Hebert*, it was evident that the authorities had used a trick to undercut Hebert's clearly asserted choice to remain silent.

19. It is clear from *Hebert* that the right to silence is triggered when the accused is subjected to the coercive powers of the state through his or her detention. The question of what right to silence, if any, remains after a detainee is released is a question not raised by the facts of this case.

20. This case requires this Court to answer two questions which were not raised in *Hebe*r*t*. In *Hebert* it was indisputable that the undercover officer was an agent of the state. In this case, Ritter was not a police officer. He was a friend of the appellant who was asked to visit the accused by the authorities, and whose visit was facilitated by them. We must therefore decide if Ritter was an agent of the state for the purposes of s. 7. Moreover, it is not self-evident, in light of *Hebert*, whether the manner in which Ritter conducted his conversation with the appellant did or did not infringe the appellant's s. 7 rights. On the facts of *Hebert*, it was unnecessary to define "elicitation" precisely, whereas such a definition is required to reach a conclusion in this case.

(2) The Two-Part Test for the Right to Silence in s. 7

21. It is clear from *Hebert*, *supra*, that the purpose of the right to silence is to prevent the use of state power to subvert the right of an accused to choose whether or not to speak to the authorities. Where the informer who allegedly acted to subvert the right to silence of the accused is not obviously a state agent, the analysis will necessarily focus not only on the relationship between the informer and the accused, but also on the relationship between the informer and the state. The right to silence will only be infringed where it was the informer who caused the accused to make the statement, and where the informer was acting as an agent of the state at the time the accused made the statement. Accordingly, two distinct inquiries are required. First, as a threshold question, was the evidence obtained by an agent of the state? Second, was the evidence elicited? Only if the answer to both questions is in the affirmative will there be a violation of the right to silence in s. 7.

[20] In *Liew*, Major J., for the majority, interpreted *Herbert* and *Broyles*, and spoke about the meaning of “elicitation”. He said, variously:

37. We agree that the appeal should be dismissed, though with some variation of the majority reasons of the Court of Appeal. We respectfully disagree with the majority of the Court of Appeal that an atmosphere of oppression (typically but not exclusively thought of as persistent questioning, a harsh tone of voice, or explicit psychological pressure on the part of the state agent) is required to ground a finding that a detainee's right to silence was violated. In this regard, it suffices to recall that this Court found a violation of the right to silence in both *Hebert* and *Broyles*, where there was no atmosphere of oppression.

38. The breadth with which McLachlin J. in *Hebert* defines the right to silence is inconsistent with the proposition that an atmosphere of oppression is required for its violation. See pp. 181 and 186:

> *Charter* provisions related to the right to silence of a detained person under s. 7 suggest that the right must be interpreted in a manner which secures to the detained person the right to make a free and meaningful choice as to whether to speak to the authorities or to remain silent.
>
> ...
>
> The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose -- the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other.

39. At the same time, *Hebert*, at p. 183, carefully distinguishes its formulation of the right to silence from that which assumes an "absolute right to silence" in the accused, capable of being discharged only by waiver…

41. *Hebert* does not rule out the use of undercover police officers. Its concern is not with subterfuge per se, but with subterfuge that, in actively eliciting information, violates the accused's right to silence by depriving her of her choice whether to speak to the police. Precisely because the detainee retains her freedom in that respect, not all of her speech can be immediately deemed involuntary merely by virtue of her being detained. *Hebert* expressly allows for situations where, though speaking to an undercover officer, the detainee's speech is voluntary, in the sense that she must be taken to have freely accepted the risk of her own actions. No other view is consistent with the enshrinement of her right to choose whether to speak or to remain silent.

42. In *Broyles*, at p. 611, Iacobucci J. provided the following instruction with respect to the meaning of elicitation:

> In my view, it is difficult to give a short and precise meaning of elicitation but rather one should look to a series of factors to decide the issue. These factors test the relationship between the state agent and the accused so as to answer this question: considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused?

> For convenience, I arrange these factors into two groups. This list of factors is not exhaustive, nor will the answer to any one question necessarily be dispositive.
>
> The first set of factors concerns the nature of the exchange between the accused and the state agent. Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.
>
> The second set of factors concerns the nature of the relationship between the state agent and the accused. Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?

43. At p. 613 of his reasons, he continued:

> Turning to the first set of factors relating to the nature of the conversation, did Ritter [i.e. the state agent] allow the conversation to flow naturally, or did he direct the conversation to those areas where he knew the police needed information?

44. The Crown argued that the *Hebert* doctrine applies only where the accused has made a declaration that she does not wish to speak to the authorities. Thus the Crown submitted that the *Hebert* doctrine is not applicable to this appeal because the appellant did not make such declaration. We disagree. The Crown's submission confuses the facts in *Hebert* with the fundamental principle formulated in that case: that the accused in *Hebert* happened to have declared that he did not wish to speak to the authorities does not mean that an assertion of the right to silence on the part of the accused is a condition precedent to the application of the *Hebert* doctrine. It would be absurd to impose on the accused an obligation to speak in order to activate her right to silence.

45. In following the authority of *Hebert* and *Broyles*, we find nothing in the facts of this appeal to support the proposition that the exchange between the appellant and the undercover officer was the functional equivalent of an interrogation. It is of no consequence that the police officer was engaged in a subterfuge, permitted himself to be misidentified, or lied, so long as the responses by the appellant were not actively elicited or the result of interrogation. In a more perfect world, police officers may not have to resort to subterfuge, but equally, in that more perfect world, there would be no crime. For the moment, in this space and time, the

> police can, within the limits imposed by law, engage in limited acts of subterfuge. In our opinion, that is the case in this appeal.

[21] In this case, Mr. Garnier chose to speak to the police when he gave the second statement. He was then placed in cells with the undercover operator. Mr. Garnier has a right to silence in accordance with s. 7 of the *Charter*. He was clearly aware of his right to silence during the second statement. The taking of the third statement was a new and different situation. Mr. Garnier did not need to re-assert his right to silence when he was placed in cells with the undercover operator in order for the s. 7 *Charter* right to silence to offer him protection. Just because Mr. Garnier chose to speak to the police during the second statement does not mean that his right to silence was then waived forever or that he had to again assert his right to silence when placed in cells with the undercover operator for that right to apply or that it was open season for obtaining statements.

Analysis

[22] Mr. Garnier and the undercover operator were in cells together from 11:02 PM on September 16 to 1:20 AM on September 17, 2015. During cross-examination on this *voir dire,* the undercover operator agreed that during his time with Mr. Garnier he did most of the talking, when Mr. Garnier was quiet he initiated conversation and that he was not concerned with the possibility that he was eliciting information. During that time a number of exchanges occurred between the undercover operator and the cell guard in Mr. Garnier's presence, and also directly between the undercover operator and Mr. Garnier. The operator engaged the guard in a long exchange about when he would be moved to the jail, repeatedly expressing the concern that his arrival would wake, and anger, the inmates. He engaged Mr. Garnier in a discussion about the value of legal counsel, and asked where he was from:

> U/C OPERATOR: Yeah. Yeah. A shitty fucking situation, bud. You don't look too fucking stressed out for your fucking first time, bud. I know my first time I was fucking in here, I was fucking pissing my pants, bud, I was fucking frightened, terrified.
>
> MR. GARNIER: Oh, I am. At the end of the day I got to own up for my mistakes and deal with it.
>
> …
>
> U/C OPERATOR: Good to have a good fucking lawyer, bud.
>
> MR. GARNIER: What was that?

U/C OPERATOR: It's good to have a good fucking lawyer.

MR. GARNIER: Yeah.

U/C OPERATOR: Yeah. Worth their weight in fucking gold. Absolutely. I know they got me out of some fucking sticky situations before, right?

MR. GARNIER: Yeah.

U/C OPERATOR: Yeah. Where are you from, dude?

MR. GARNIER: Cape Breton.

U/C OPERATOR: Cape Breton? Right on. I'm from Newfoundland.

[23] The undercover operator went on to tell Mr. Garnier about the process of transfer to the jail:

MR. GARNIER: So are they supposed to move me tonight?

U/C OPERATOR: Yeah, yeah, that's what they fucking told me. I'm fucking waiting here ever fucking since, right? I want to get down there and lie down. Fuck, you get there at night, the lights are out, right?

MR. GARNIER: Oh, really?

U/C OPERATOR: Yeah, the lights -- and fucking everyone's gone down for the night, and the next -- the last thing you want to do is come there, right, fucking making a fucking racket, waking the fucking boys up, pissing everyone fucking off, right?

MR. GARNIER: Yeah.

U/C OPERATOR: So that's why I'm fucking asking, being a half prick to buddy there, because, you know, I don't want to be that fucking guy going in there, right?

MR. GARNIER: Yeah, really.

U/C OPERATOR: You know what I mean?

MR. GARNIER: Yeah.

U/C OPERATOR: You're in there fucking ten minutes and fucking people fucking hating you already.

MR. GARNIER: Yeah.

U/C OPERATOR: You know what I mean?

MR. GARNIER: Shit. Yeah, that's the last thing I'd want to be doing down there.

U/C OPERATOR: Yeah. I got some buddies in there, though, too, so it's fucking good, right? It's good to have some fucking friends in there, right?

MR. GARNIER: Yeah.

U/C OPERATOR: About fucking taking off, like, they said they won't be fucking not be long over there tonight. By the time we get over there and shit like that, probably take off between 7 and fucking 8 tomorrow morning.

MR. GARNIER: Oh yeah?

U/C OPERATOR: To fucking court, right? They'll cart me over to court in the morning, so -- yeah. Still never fucking told me if I'm going to fucking Dartmouth or Halifax yet. I don't know.

MR. GARNIER: Yeah, neither do I. I'm just -- I'mgoing where they take me.

U/C OPERATOR: Yeah. Like a bull's dick, man, go where you're fucking shoved, right?

MR. GARNIER: Yeah.

U/C OPERATOR: Yeah. Fuck sakes.

MR. GARNIER: So what are the cells like over in Burnside?

U/C OPERATOR: It depends where you are, man. If you're in fucking PC, right, your own fucking cell. It's, like, for fucking (unintelligible) and shit like that and fucking rats. Then they got the fucking pods, right? So it all depends where they fucking put you. Who knows, they might fucking, just where we're fucking coming in late they might fucking put me somewhere fucking so I won't fucking disturb anyone, right? So I don't know, we'll fucking see. Time will tell, right? Yeah. It's no fucking, ah, it's no fucking Westin, I guarantee you that.

MR. GARNIER: Yeah, that's for sure.

[24] Mr. Garnier and the undercover operator discussed the events surrounding Mr. Garnier's arrest, and Mr. Garnier made reference to his belief that he was facing significant prison time:

MR. GARNIER: Actually, you know what, I think I drove by you when you were stopped.

U/C OPERATOR: Serious?

MR. GARNIER: Yeah. I was in the back of an SUV with a cop and -- when I was driving they pulled over to see if you guys were...

U/C OPERATOR: Yeah.

MR. GARNIER: ...or if you guys were okay.

U/C OPERATOR: Didn't even fucking notice, bud. So much going through my fucking head out there, I was, like, fucking, what the fuck's going on, right?

MR. GARNIER: Yeah.

U/C OPERATOR: Yeah, there was fucking two cars, man, and two fucking cops there with me, right?

MR. GARNIER: Yeah.

U/C OPERATOR: You had fucking six?

MR. GARNIER: Six cars.

U/C OPERATOR: Six fucking cars? You serious?

MR. GARNIER: Yeah.

U/C OPERATOR: Bud, that's big time.

MR. GARNIER: Yeah. They tailed me for a while.

U/C OPERATOR: Yeah?

MR. GARNIER: I -- I noticed them after a bit. I just pulled off into a parking lot and they passed with the lights on.

U/C OPERATOR: Yeah.

MR. GARNIER: That was it.

U/C OPERATOR: Rough you up?

MR. GARNIER: No.

U/C OPERATOR: No?

MR. GARNIER: No, they were pretty good to me. But I knew it was done.

U/C OPERATOR: Oh yeah?

MR. GARNIER: Yeah.

U/C OPERATOR: How?

MR. GARNIER: What?

U/C OPERATOR: How?

MR. GARNIER: Ah, just the fucking shitty series of events.

U/C OPERATOR: Yeah, that's what usually fucking gets you, man, you know what I mean?

MR. GARNIER: Yeah. Yeah, just fucking I'll regret it for the rest of my life. But I can't change it.

U/C OPERATOR: Dead to rights?

MR. GARNIER: What was that?

U/C OPERATOR: Dead to rights or what? Yeah? Good lawyer, bud.

MR. GARNIER: Huh?

U/C OPERATOR: Good lawyer might be able to you fucking out.

MR. GARNIER: Yeah. Well, I don't think I'll be getting out (unintelligible) it'll be, you know, best if, you know, I take the poison, sort of thing.

U/C OPERATOR: Oh yeah? What do you mean by that?

MR. GARNIER: (Unintelligible) ten years, it could be fifteen years.

U/C OPERATOR: Fifteen years, bud? That's serious fucking shit, bud. I had some friends that did fucking major time like that.

MR. GARNIER: Yeah.

U/C OPERATOR: Hopefully you covered your fucking tracks, bud, that's all I got to say, you know what I mean? Hopefully you fucking took care of some things.

MR. GARNIER: As long as my parents are acting...

U/C OPERATOR: Yeah. Yeah. We've all done fucking stupid shit, bud. Do them every weekend usually when I go down fucking town, pick up some fucking broad. But like I said, if you're looking at some fucking major time like that...

MR. GARNIER: A split second...

U/C OPERATOR: Yeah?

MR. GARNIER: ...changes everything.

[25] The undercover operator continued building rapport with Mr. Garnier:

U/C OPERATOR: You know what I mean? Having a fucking shitty day and it just gets compounded, fucking shitty fucking situation, a shitty situation, and then fucking just (snaps fingers), you fucking snap, right, and just can't fucking help it sometimes, right?

MR. GARNIER: Yeah. It builds up faster than you know too.

U/C OPERATOR: Ah, that's the thing, right?

MR. GARNIER: It doesn't take much.

U/C OPERATOR: I'm from fucking Newfoundland, you're from fucking Cape Breton, right? You probably still have the fucking trigger fucking temper on you too, do you?

MR. GARNIER: I was always pretty level headed, I thought.

…

MR. GARNIER: Fuck, I -- I had no idea what to do. I've never been...

U/C OPERATOR: Yeah.

MR. GARNIER: ...arrested before, so -- I think my dad was here today. But ah, he wasn't going to come see me because I was in the interrogation room.

U/C OPERATOR: Yeah.

MR. GARNIER: And ah, he didn't give a statement or anything like that. My mom is in Cape Breton still. My girlfriend, she was in. They showed me video of her talking with one of the officers.

U/C OPERATOR: You fucking serious? Playing it against you, like?

MR. GARNIER: No. They -- they just wanted to show me that she was in and that she was upset.

U/C OPERATOR: That must have sucked, bud.

MR. GARNIER: Yeah. It broke me down when I seen that.

U/C OPERATOR: Yeah, just fucking with your brain, eh. Yeah. You're cool now, bud?

MR. GARNIER: Yeah.

U/C OPERATOR: Yeah?

MR. GARNIER: Yeah. Well, as cool as I can be.

U/C OPERATOR: Yeah.

MR. GARNIER: I've accepted it. I know by now I'm probably all over the fucking news.

U/C OPERATOR: You ser -- news? Bud, news? You serious?

MR. GARNIER: Yeah.

U/C OPERATOR: Hope you didn't fucking, ah, molest some fucking kid, bud, that's all I got to say.

MR. GARNIER: Yeah, there's no fucking way.

U/C OPERATOR: That's all I got to say to you, man.

MR. GARNIER: No, I wouldn't touch a kid. That's fucking...

U/C OPERATOR: That's not fucking, ah, fucking, ah, smiled upon, right?

MR. GARNIER: No.

U/C OPERATOR: By any means.

MR. GARNIER: Nothing like that. Like I said, a stupid mistake that fucking can change the rest of your life.

U/C OPERATOR: Yeah. You're fucking famous, man.

MR. GARNIER: Yeah. The wrong kind.

[26] The undercover operator went on to give Mr. Garnier advice about how to deal with the prison environment. He told him repeatedly to "[k]eep your fucking chin up":

U/C OPERATOR: Just fucking stick with me when you're over there, man, seriously, like, if you need a fucking – a fucking ear or anything like that, right?

MR. GARNIER: Yeah, thank you.

U/C OPERATOR: You seem like a fucking solid guy, man. I worked Cape Bretoners, man, they're basically the fucking same as Newfoundlanders, right?

MR. GARNIER: Yeah, exactly.

U/C OPERATOR: Kind of thing, you know? But a fucking word of advice, man, like I said, I've been around and fucking, that's what I've been told too, and it seemed to work out fucking in my favour, right? Just fucking keep your fucking chin up, you know, and just fucking go with it.

MR. GARNIER: Yeah.

U/C OPERATOR: Know what I mean? You got guys over there, fucking, first guys coming in, they think they're fucking hood smart, shit like that, running their fucking mouth, and then the next thing they're fucked.

…

U/C OPERATOR: Yeah, the fucking lights will be out, fuck, for sure.

MR. GARNIER: Yeah.

U/C OPERATOR: It sucks. Hopefully they'll put me somewhere fucking close to the door, kind of thing, like that. Yeah. So I don't fucking wake too many fucking people up, right? Don't want to get (unintelligible) with the fucking bat.

MR. GARNIER: Yeah.

U/C OPERATOR: Yeah. Yeah. The food sucks, though.

MR. GARNIER: Yeah?

[27] The undercover operator talked about how time was passed in jail, and described it as "cliquish over there," emphasizing that "it's good to have buddies over there" and reiterating, "just keep your fucking head up, bud, that's all, your fucking chin up."

[28] The undercover operator further warned Mr. Garnier not to appear too friendly with the guards by thanking them and giving the appearance of "fucking brown-nosing."

[29] Another rapport-building session ensued, and the undercover operator offered to phone someone if Mr. Garnier had anyone he needed called, and told Mr. Garnier he would try to be placed in his block in the jail:

> U/C OPERATOR: I'll tell you, man, what I'll do, you go first and I'll see if I can -- when I go in I'll see if I can get the same fucking block as you, I'll ask the boys if fucking -- we want the fucking same block.
>
> MR. GARNIER: Yeah, thank you.
>
> U/C OPERATOR: See what they'll do, yeah. They might be fucking pricks, though, you never know, right?
>
> MR. GARNIER: Hopefully not.
>
> U/C OPERATOR: There's a few of them in there that are fucking big-time pricks.
>
> MR. GARNIER: Oh yeah?
>
> U/C OPERATOR: Oh yeah.
>
> MR. GARNIER: I guess they all have (unintelligible).
>
> U/C OPERATOR: Yeah. Take those fucking tips I gave you, bud. Just fucking chin up, right?
>
> MR. GARNIER: Yeah.

[30] When Mr. Garnier was placed in cells with the police undercover operator it must be kept in mind that: 1) he had no prior involvement with the criminal justice system; 2) he had just finished a nine-and-a-half hour interview during which he confessed to punching and choking a female off-duty police officer to death, putting her body in a green bin, moving the green bin through the city to hide her and hiding her body in a brushy area in the middle of the city; 3) at the direction of the police, Mr. Garnier then removed his clothes while they took photographs of his genitals; 4) he was just told by the police that he was being charged with murder; and 5) he was told by the police that he would be remanded and sent to a jail imminently. This was Mr. Garnier's first experience being in jail.

[31] The undercover operator took on the role of an experienced and hardened criminal who had done "bad stuff", had just been caught by the police with a loaded handgun in his vehicle and had been in and out of jail many times. He told Mr. Garnier that the other inmates would be "pissed off" with them as soon as they arrived at the jail for waking them up and said that would be bad because, "You're in there ten minutes and fucking people fucking hating you already." The undercover operator told him that the first time he went to jail he "was fucking pissing my pants bud, I was fucking frightened, terrified." He suggested that Mr. Garnier needed to keep his "fucking head up", keep his "fucking chin up" and made much about the fact that it was Mr. Garnier's first trip into a jail. He told Mr. Garnier "I got buddies inside" which he said "helps" and later said, "It's good to

have some fucking friends in there, right?" He asked Mr. Garnier where he was from to which Mr. Garnier said Cape Breton. He told Mr. Garnier that he was from Newfoundland and later said, "I'm from fucking Newfoundland, you're from Cape Breton, right? You probably still have the fucking trigger fucking temper on you too, do you?"

[32] Later the following exchange occured between the cell plant and Mr. Garnier:

> MR. GARNIER: Yeah, thank you.
>
> U/C OPERATOR: You seem like a fucking solid guy, man. I worked Cape Bretoners, man, they're basically the fucking same as Newfoundlanders, right?
>
> MR. GARNIER: Yeah, exactly.
>
> U/C OPERATOR: Kind of thing, you know? But a fucking word of advice, man, like I said, I've been around and fucking, that's what I've been told too, and it seemed to work out fucking in my favour, right? Just fucking keep your fucking chin up, you know, and just fucking go with it.
>
> MR. GARNIER: Yeah.
>
> U/C OPERATOR: Know what I mean? You got guys over there, fucking, first guys coming in, they think they're fucking hood smart, shit like that, running their fucking mouth, and then the next thing they're fucked. It's fucking, you know, (unintelligible) fucking happen to him, right? He's going to fucking run his mouth with the fucking wrong person.
>
> MR. GARNIER: Yeah.
>
> U/C OPERATOR: That's it. You learn the fucking hard way. At least it's fucking good, like, I had someone fucking telling me, right, like, you know.
>
> MR. GARNIER: Yeah.
>
> U/C OPERATOR: But like I said, we all make fucking mistakes, right, and you learn the fucking hard way a lot of fucking times too, right?
>
> MR. GARNIER: Yeah. Well, that's the last thing I want to do over there is fucking run my mouth.
>
> …
>
> U/C OPERATOR: It all depends who's sitting around, right, if you want to sit next to them. Yeah. It's cliquish over there, right?
>
> MR. GARNIER: Oh yeah?
>
> U/C OPERATOR: Yeah, big time. Like I said, it's good to have buddies over there, right?

MR. GARNIER: Yeah, you got to pick the right one.

…

U/C OPERATOR: Yeah, that's right. Just stick to the Newfs, bud. Some Cape Bretoners, right?

GARNIER: Yeah.

U/C OPERATOR: They stick together. Yeah, fucking breakfast there, a fucking newspaper in the morning.

GARNIER: Yeah.

…

U/C OPERATOR: I'll tell you, man, what I'll do, you go first and I'll see if I can -- when I go in I'll see if I can get the same fucking block as you, I'll ask the boys if fucking -- we want the fucking same block.

MR. GARNIER: Yeah, thank you.

[33] The undercover operator was clearly trying to scare Mr. Garnier into quickly bonding with him. He was trying to use this fear tactic to intimidate Mr. Garnier into speaking with him.

[34] While the undercover operator did not interrogate Mr. Garnier, he did do the majority of the talking. When Mr. Garnier was quiet, the undercover operator would initiate conversation with him. The undercover operator played on Mr. Garnier's vulnerability and used fear to prod Mr. Garnier into making certain inculpatory comments. If this occurred in the "real world", without a state agent being the catalyst, then those comments would likely be admissible. However, the undercover operator was a full time police officer merely posing as a criminal.

[35] But for the activity of the undercover operator, Mr. Garnier would not have made certain potentially inculpatory comments. Mr. Garnier's comments were caused by the cell plant's prompting, coaxing and insidiously intimidating him. Mr. Garnier was completely inexperienced with regard to jail, was vulnerable and, in a very short time, the undercover operator created an atmosphere where Mr. Garnier would have felt obligated to respond to him in order to ensure his own safety. The undercover operator manipulated Mr. Garnier with fear to bring about a mental state where Mr. Garnier was more likely to talk.

[36] While the conversation was not the functional equivalent of an interrogation, the undercover operator did prod the conversation along, often with questions.

[37] The Crown should not be allowed to rely on statements obtained by creating fear in an accused being held in custody. Mr. Garnier's s. 7 *Charter* right to silence was breached by the methodology of the undercover operator. His freedom to choose to speak was taken away by the state agent. Mr. Garnier cannot be said to have voluntarily provided a statement, when his responses were made out of fear created by, or enhanced by, the actions of the state.

Section 24(2)

[38] The basic analysis under s. 24(2) of the *Charter* is summarized in *R. v. Letourneau*, 2010 ONSC 2027, [2010] O.J. No. 2635, where Maranger J. said:

> 17 Once a breach of a *Charter* right has been found the inquiry as to the exclusion of evidence does not end there. The court must then engage upon an analysis under s. 24(2) which indicates:
>
> > 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 of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
>
> 18 The s. 24(2) analysis has recently undergone significant review by the Supreme Court of Canada in the case of *R. v. Grant*, [2009] 2 S.C.R. 353. In *Grant*, *supra*, the Supreme Court of Canada instructs the trial court that when faced with applications for exclusion under s. 24(2), a trial 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, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

[39] The *Charter*-infringing conduct here was serious, and it had a serious impact on Mr. Garnier's *Charter*-protected section 7 rights. The Crown and the police cannot be permitted to use fear to prey on a vulnerable individual who is under state control, in order to force him to supply self-incriminating evidence. There is of course, a significant societal interest in seeing murder charges adjudicated on their merits. Nonetheless, the breach and its impact on Mr. Garnier's *Charter*-protected interests was serious enough to justify exclusion.

Conclusion

[40] The third statement, obtained through the use of an undercover operator "cell plant" is not admissible. The state cannot rely on a statement given out of fear created by an agent of the state explicitly to elicit a a statement from an accused person who is under the complete control of the state.

Arnold, J.