1 Pre-Charge Considerations

I. Introduction

This is perhaps the only chapter of our book where we feel the considerations are unique enough from the perspectives of the Crown and defence that we must clearly delineate our thoughts into two categories.

First and foremost, the Crown is concerned with ensuring that there is a case and that the proof required is already at hand so that a section 11(b)[1] delay application does not result in an early stay of the case. Frauds are unique because they need to be grounded in documentation for the proof of deprivation; therefore, the need for a pre-charge assessment of the case is perhaps the only time such a stringent pre-charge review is required on the part of the Crown and perhaps even a forensic expert. It is well known that banks and brokerage houses in the securities industry often respond to production orders and search warrants in a tardy fashion. With the new, firmly fixed post-*Jordan*[2] concerns serving as yet another matter for the Crown to consider in its busy regime, time cannot be wasted post-charge waiting for replies.

Frauds are also unique in that the individual who may be the subject of a charge will often have advance notice of an investigation and frequent contact with the authorities. From this standpoint, defence counsel can enjoy the luxury of pre-charge meetings and interviews with the client, which will ultimately lead to a more focused defence, a more streamlined analysis of the case, and a better appreciation of the jeopardy that the client may be facing.

II. Pre-Charge Considerations from a Crown's Perspective

A. Review of the Police Investigation

The Crown will want to review a police investigation of a fraud prior to the laying of charges. This is because once the Information is sworn, the section 11(b) clock begins to tick. If there are any issues with disclosure or hidden evidentiary concerns within the investigation, it is imperative that these issues be resolved before the laying of charges, or the time spent fixing them afterward could lead to a successful Charter challenge because of delay. Furthermore, the Crown may find itself explaining the right to a speedy trial to a group of unhappy fraud complainants. A thorough review of the file will allow the Crown to ensure that the file is ready to prosecute and that more important issues, such as the form of release that will be appropriate for the accused or the question of whether they should be detained, can be addressed.

The following is a short recitation of the kinds of issues that need to be reviewed once a police investigation comes to the Crown's attention.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

2 *R v Jordan*, 2016 SCC 27.

1. Is There a Fraud?

As strange as it may seem, there have been a few occasions where the police were convinced that a fraud had occurred without having proved it through their investigation. This can be a tricky situation, to say the least. Having read through the investigation, the Crown must be convinced that there was a dishonest deprivation and that it can be proven by means of the flow of funds, by *viva voce* evidence, or a combination of both. If the Crown is of the opinion that either there has not been a fraud or the police have not proved it, it might be beneficial to the Crown to meet with the lead investigator as soon as possible. It might also be beneficial to the Crown to prepare a written and dated memorandum laying out its concerns. If the Crown is of the opinion that the investigation did not prove the fraud, the Crown would be well-advised to suggest options that could be pursued that may assist in the proof, if there are any. One must always be mindful of the fact that there are often groups of individuals who may one day file complaints against the authorities for not assisting in the recovery of their lost funds. Detailed notes and diligent efforts to assist will ensure that the Crown will not be viewed as a party that did not care.

If Crown counsel disagrees as to whether there is even a fraud, not only should counsel explain the written and dated memorandum to the lead investigator, but counsel should raise this issue with the deputy Crown attorney as well. A meeting with a senior Crown counsel may assist in clarifying the issues, but the bottom line is that Crown counsel's supervisor should be made aware, as soon as possible, that the Crown's opinion differs from that of the police so that they can discuss strategies to either pursue the investigation or shut it down if there is no reasonable prospect of a conviction.

2. Parallel Investigations

Assuming that it is clear a fraud was committed and that the investigation has followed the proper path, another reason to review the police file is to ensure that all the evidence to make out the material elements of fraud are in place. It is common for police forces to rely very heavily on in-house investigations when the victim of the fraud is a large institution, such as a bank or a brokerage house. In many cases, such investigations will be thorough and carefully prepared. In other cases, however, the police will just adopt this work and swear out a criminal Information that lays out the *Criminal Code*[3] charges, and that will be where the investigation ends. The police are overworked, and, like many of us, they do not want to reinvent the wheel. However, there are often many considerations when a bank investigation or a regulatory investigation is absorbed into a criminal prosecution. The rest of this section will deal with some of the precautions that must be taken in such situations.

3 *Criminal Code*, RSC 1985, c C-46.

a. Compelled Statements

Investigations carried out under the authority of the provincial securities legislation and most regulatory and professional bodies[4] allow for compelled statements from individuals who are the target of their investigation. Not surprisingly, such individuals may face criminal charges later. Similarly, parallel civil proceedings that pre-date criminal charges may result in discovery transcripts being included in the Crown's file. These sometimes include a cross-examination under oath of an individual that is now an accused before the court. The Crown should immediately be concerned that this evidence may contravene provisions of the Charter, such as the right to silence and the right to a fair trial.

Needless to say, great care must be exercised when one is faced with a prior compelled statement of an accused person. In a criminal setting, the Crown must carefully honour an accused person's rights. However, there are situations in which such statements can be of use to the Crown in a fraud trial. The majority decision in *R v Nedelcu*[5] established three key principles. The first was that section 13 of the Charter[6] is triggered as a prohibitory bar only if the evidence that is the subject of the proposed cross-examination is properly construed as "incriminating" and obtained under compulsion.[7] It follows from this that a determination of what constitutes "incriminating evidence" is paramount. *Nedelcu* confirmed that the definition of incriminating evidence is evidence that goes to the proof of any of the essential elements of the offence.

The second principle is that one who attends for the purposes of giving evidence at a civil discovery, pursuant to Rule 31.04 of the Ontario *Rules of Civil Procedure*,[8] is a compellable witness at subsequent proceedings within the context of section 13 of the Charter.

The third principle involves a reading of the references in *R v Henry*[9] to "prior compelled" and "incriminating evidence," even though that exact definition was not specifically stated by Binnie J in 2005. In *Henry*, the Supreme Court of Canada

4 Consider the provincial securities commission investigations and the national Canadian Investment Regulatory Organization (CIRO) that explains the nature of its investigations and requests for information: <https://www.ciro.ca/rules-and-enforcement/enforcement/guide-enforcement-process>. In Chapter 12, we discuss the details of *R v Nedelcu* and the duty to report within the framework of other regulatory agencies as well.

5 2012 SCC 59.

6 Section 13 of the Charter states, "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

7 See also *R v White*, [1999] 2 SCR 417, 1999 CanLII 689, which stands for the principle that an incriminating statement compelled by a government body is not admissible in subsequent criminal proceedings on the grounds that it is self-incriminating.

8 RRO 1990, Reg 194.

9 2005 SCC 76 (emphasis added).

affirmed *R v White*[10] and restated the principle that compelled and incriminating evidence from one hearing cannot be admissible in a subsequent hearing against the same individual. However, in this particular case, the Court concluded that an accused's prior testimony in the first proceeding could be used to impeach that same accused in a subsequent retrial for the same charge because compulsion was not an issue. The accused freely decided to testify in his own defence at the first trial and also decided to testify at the retrial. In *Henry*, Binnie J focused almost exclusively on the issue of compulsion in setting out the test for whether there can be cross-examination on prior testimony:

> [50] Accordingly, by parity of reasoning, I conclude that the prior *compelled* evidence should, under s. 13 as under s. 5(2),[11] be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to "a prosecution for perjury or for the giving of contradictory evidence."[12]

With reference to this sentence in *Henry*, Moldaver J added the following in *Nedelcu*:

> [29] While Justice Binnie speaks only of "prior compelled evidence," s. 13 is concerned with prior "incriminating evidence" that has been compelled. It should not be interpreted as referring to "compelled" evidence of *any* kind—and certainly not compelled evidence that was neither incriminating at the time it was given nor incriminating at the witness's subsequent trial. Using Justice Binnie's definition of "incriminating evidence" as "something 'from which a trier of fact may infer that an accused is guilty of the crime charged'" (*Henry*, para. 25), Mr. Nedelcu's discovery evidence fails to meet that test.[13]

Thus, for the Supreme Court of Canada today, the focus is on whether the evidence is incriminating, and the issue of compulsion is an essential but secondary concern. If the Crown wishes the option of cross-examining an accused person on any potentially incriminating evidence stemming from a prior compelled statement, the onus is on the Crown to inform the defence and the judge as soon as possible. While it is true that an accused person may never testify in their defence, nonetheless, the defence cannot be taken by surprise. When the decision to testify is made, defence counsel must make this decision with their client and with all the variables at hand; otherwise, a compelling argument may be made that the trial was unfair in a later

10 *Supra* note 7.

11 This is a reference to s 5(2) of the *Canada Evidence Act*, RSC 1985, c C-5, as amended, which prohibits the subsequent use of incriminating evidence given at a proceeding where the witness is compelled and the evidence is incriminating. However, this section contains the same exception as s 13 of the Charter, which allows the introduction of this evidence for the purposes of testing evidence that is contradictory.

12 *Henry*, *supra* note 9 at para 50.

13 *Nedelcu*, *supra* note 5 at para 29.

appeal. Having announced the intention to pursue this route well in advance, the Crown must prepare an application for use *if* and when the accused person takes the stand and *if* the evidence provides fodder for cross-examination. Such an application can only be brought after the accused person has testified because there may be nothing that comes of the evidence in chief. If, however, the Crown feels that there is evidence sufficient to warrant a challenge to the credibility of the accused person, then this application must be brought prior to cross-examination or after a preliminary cross-examination to nail down the inconsistencies.[14] The Crown should indicate that it has a point of evidence to discuss and ask for the jury to be excused. At this point, the Crown would be wise to table a written application that would involve an explanation and a transcript of the prior evidence on which it wishes to cross-examine, the statutory means by which this evidence was compelled, and the Crown's position on how the evidence is non-incriminating. It is advised that the application include a clear reference to the use the trier of fact may attach to the proposed evidence. Careful Crown counsel would include a draft jury instruction to assist the trial judge if this is a jury trial. The test for the determination of whether the proposed evidence is incriminating is simple enough: "Is it any evidence that could go to a direct verdict of guilt?" Moldaver J clarified this test to involve a consideration of the evidence given with respect to the elements of the offence that is before the Court as framed in the indictment.

This being the case, wise defence counsel should work very carefully with civil counsel so that the client is prepared to give evidence at civil discoveries in a manner that provides the client with maximum assistance while being mindful of the two material elements of fraud: deprivation and dishonesty. If any of the discovery evidence falls upon either of these two pillars of fraud, a convincing argument may be made that the evidence is not available for cross-examination by the Crown in the criminal trial citing section 13 of the Charter.

If the Crown receives approval to cross-examine on past non-incriminating compelled evidence, it must also take great care not to convert non-incriminating evidence into incriminating evidence by virtue of ill-planned questioning or lazy suggestions during the cross-examination. Moldaver J warned that hasty questions suggesting the witness concocted the prior evidence or deliberately feigned lack of memory to obstruct the authorities could easily render the evidence inadmissible. Such questions may result in answers that provide defence counsel with an argument that what is now before the Court is evidence of consciousness of guilt, which factors directly into the issue of guilt. Clients who face compelled questioning in discoveries pursuant to a civil lawsuit when criminal charges hover in the background must proceed cautiously

14 Crown counsel in *Nedelcu* brought the application after she had finished her cross-examination of the substantive issues and once it was completely clear that there were inconsistencies between the two sets of evidence. See *Nedelcu*, *supra* note 5 at para 54.

with the assistance of counsel, as must a Crown who wishes to take advantage of *Nedelcu* and cross-examine on this evidence in a later criminal trial.

At the end of the day, if the Crown is successful and is permitted to cross-examine an accused person on inconsistent, non-incriminating evidence, the simple finding of inconsistency will not lead to a direct finding of guilt. A trier of fact may be disturbed by inconsistent evidence, and may even reject the evidence, but we still have the assurance of *R v W(D)*,[15] which allows for the consideration of reasonable doubt and, as a final resort, an overall consideration of whether or not the Crown has proved its case beyond a reasonable doubt.

B. Ex Parte Orders

1. Production Orders

General production orders obtained pursuant to section 487.014 of the *Criminal Code* are the lifeblood of a fraud investigation and a prosecution. Section 487.014 reads as follows:

> **General Production Order**
>
> 487.014(1) Subject to sections 487.015 to 487.018, on *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.
>
> (2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that
>
> (a) an offence has been or will be committed under this or any other Act of Parliament; and
>
> (b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.
>
> (3) The order is to be in Form 5.005.
>
> (4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

While general production orders have not generally been challenged by defence counsel in the past, the trend toward greater scrutiny has been growing in the hopes of obtaining an exclusion of evidence under sections 8 and 24(2) of the Charter. In order to anticipate challenges of this crucial investigative tool, Crown counsel will want to read the Information to Obtain (ITO) carefully to ensure that the grounds delineated by the police actually make out reasonable grounds that an offence has occurred, and that this has been explained to the best of the officer's knowledge to

15 [1991] 1 SCR 742, 1991 CanLII 93.

the issuing justice. The reasonable and probable grounds for obtaining a production order involve three pillars pursuant to section 487.014(2):

1. The officer has reasonable grounds to believe that an offence has been or will be committed.
2. The officer has reasonable grounds to believe that documents or data in the hands of a third party will afford evidence with respect to the offence.
3. The documents or data in the hands of the third party will afford evidence of the offence that has been or will be committed.

The affidavit to obtain a production order must be made out in Form 5.004. The grounds should read like a synopsis of the fraud—that is, they should be clear, simple to understand, and the officer's honest belief at the time. The police officer must be able to explain their reasonable and probable grounds that the offence has been or will be committed and that evidence of the offence will be found at the specified time and place. The following are some suggestions for Crown counsel's review of the ITO that will assist in future section 8 challenges to the affidavit on both facial and sub-facial grounds. Remember that the Crown attorney is entitled by section 11 of the *Crown Attorneys Act*[16] to review applications for production orders and search warrants and to cause further investigation to be conducted and further charges to be laid if necessary:

> 11. The Crown Attorney shall aid in the local administration of justice and perform the duties that are assigned to Crown Attorneys under the laws in force in Ontario, and, without restricting the generality of the foregoing, every Crown Attorney shall,
>
> (a) examine informations, examinations, depositions, recognizances, inquisitions and papers connected with offences against the laws in force in Ontario that the provincial judges, justices of the peace and coroners are required to transmit to him or her, and, where necessary, cause such charges to be further investigated, and additional evidence to be collected, and sue out process to compel the attendance of witnesses and the production of papers, so that prosecutions may not be delayed unnecessarily or fail through want of proof.

a. Is Disclosure Full, Fair, and Frank—or a Recitation of Hearsay?

In cases where the police inherit a third-party or in-house investigation that concludes there was a fraud, it should always be the prime goal of the police investigator to review the third-party report and ensure that they can satisfy there are reasonable

16 RSO 1990, c C.49, as amended. The Crown's duty to review and assess ITOs for production orders (among other items) was specifically approved of by Rose J in *R v Allison*, 2018 ONCJ 33. See similar provisions in the *Crown Counsel Act*, RSBC 1996, c 87, s 4; *The Crown Attorneys Act*, CCSM c C330, s 5(1); and *An Act Respecting the Role of the Attorney General*, RSNB 2011, c 116, s 2.

grounds to a criminal standard. This is because the same investigating officer will have to lay out reasonable and probable grounds in an affidavit to obtain a production order or a search warrant, so if they are not present in the third-party report, an investigation must be engaged to ensure the criminal standard is met. In *R v Clarke*,[17] the fact that a police officer relied too heavily on a third-party investigation resulted in the Court setting aside a production order for a crucial bank account that made up part of the Crown's case. In *Clarke*, the female accused was employed by a company in the payroll department. She had embezzled money from her employer by opening up six bank accounts in the names of terminated employees. She made payments into these accounts and then withdrew the money herself. One account was in the name of her husband, but none of the other six accounts were in her name. The police officer committed a common mistake when inheriting a third-party investigation. He trusted the accuracy of the investigation because it was completed by a very respected audit and consulting firm. However, the third-party report contained a section on "Limitations in Scope," where it noted several gaps in the investigation, and while the report ultimately concluded fraud, it stated plainly that the authors could not guarantee that their report met either the civil or criminal standards of proof. Another significant issue that arose from the police officer's complete adoption of the third-party report with no further investigation was that he relayed nothing more than third- or fourth-hand hearsay to the issuing justice when he went to obtain production orders for the seven bank accounts. In several instances, he relayed the facts incorrectly. Therefore, the production order was put aside and the evidence excluded. A careful and thoughtful cross-examination of the police affiant who drafted the application for the production order (APO) revealed the following details that highlighted the officer's neglect:

- In its investigation, Deloitte Consulting LLP recovered a cached webpage from the female accused's laptop. This webpage showed payments of interest from the female accused's laptop to an account held in the name of a third party. In the ITO, the officer stated that the account had received payments from the female accused, but he omitted to name the account holder. As a result, the issuing justice could have concluded that the account was in the name of the female accused. Once obtained, however, the production order revealed that this account was actually in the name of the male accused, who was the female accused's spouse. The defence was successful in arguing that the police officer had not been full, frank, and fair in his disclosure of this aspect of the case to the issuing justice because he wanted to obfuscate the connection between the account and the female accused.
- There were seven bank accounts that formed the subject matter of seven production orders. The female accused was not named on any of the accounts,

17 2016 ONSC 351.

and the male accused was named on only one of the seven accounts discussed above. In spite of this, in the APO for the subject account, the police officer carelessly stated that members of the Deloitte team uncovered several deposits that had been made to "bank accounts belonging to [the two accused]."[18] Once again, the reviewing justice ruled that inaccurate information had been put before the issuing justice that could have unfairly affected her decision to issue the order.

- Perhaps the greatest concern with the APO was the fact that the officer did not clearly convey that the female accused's work in payroll overlapped or coincided with the work of an accountant in her department. As a result, there was a concern that the issuing justice could have concluded that the female accused was the only person who had dealt with payroll registers during the material time. A close examination of the Deloitte report revealed that the investigator's notes did not clearly outline the full responsibilities of the other employee, and the police investigator never followed up to resolve this gap in the report. It was clearly reasonable to assume that the issuing justice may have concluded that the female accused was the only person doing payroll registry and, therefore, the only person who could have created all seven accounts with the terminated employees' information and so must have made the impugned bank transfers.

The fraud departments of many police detachments are overworked and have a backlog of files to investigate. It is common for a large corporate complainant to commission a report from an auditor or other investigatory body. It is also common that the police adopt these reports in their entirety and do no further investigation. This can result in allegations that the APO or the ITO[19] is nothing more than a callous recitation of hearsay. If there is a section in the report where the auditor notes certain limitations, and if these have not been scrutinized by the criminal investigatory body, the defence will have ample fuel to challenge the search as unlawful and issue an application under section 8.

b. Mistakes and Negligence in Drafting: Is Disclosure Full, Fair, and Frank?

Another delicate issue common to the drafting of an ITO is the difficulty that can occur when police make mistakes describing the complicated nature of an investigation to an issuing justice. In *R v Owen*,[20] a police officer encountered numerous

18 *Ibid* at para 66.

19 *Clarke* speaks of an application for a production order (APO) which is synonymous with an information to obtain (ITO). For the rest of the book when we refer to production orders or search warrants, we will use the same acronym for that same drafting document: ITO.

20 2017 ONCJ 729.

problems in his attempt to outline the facts behind the investigation and the documents he sought. The reviewing justice found no bad faith whatsoever, but he did conclude at the end of the review that "[n]egligence, carelessness, or inattention to constitutional standards in obtaining the warrant can 'tip the scales in favour of exclusion' even where there is no impropriety or bad faith."[21] This case involved service of a production order on an Internet service provider (ISP) to obtain a suspect Internet Protocol (IP) address that police believed was used to download child pornography. The ITO was attacked at numerous points in the drafting, but the biggest issue with the ITO was the incorrect description of the software that allowed users to download and upload files. The police description of "Freenet" in the ITO failed to note that this software was purposely created to obscure the identity of the user. The failure to correctly describe this feature, and to provide an explanation that would link the suspect user to the actual file download, caused the reviewing judge to conclude that the ITO did not arm the issuing justice with sufficient information to conclude that the IP address being sought from the service provider was the exact same IP address of the user that downloaded the child pornography. The production order that revealed the user's home address was set aside, as was the search warrant that flowed from it, because the drafting error in the production order went to the heart of the matter and was not excisable or correctable in any way.

In *R v Allison*,[22] it was not until the Crown received an application alleging an abuse of process and requesting a stay of the charges that it realized the police had applied for two general production orders under the wrong section of the *Criminal Code*. The officer had drafted his first two ITOs pursuant to section 487.013 as it was at that time, rather than section 487.014. A third production order was applied for, identical to the first two, but this time under the proper section, section 487.014, a week before the trial began. The material produced by the bank was also identical to the material that had been produced by virtue of the erroneous applications. The first defence challenge of this matter was framed as an application to stay the charges for an abuse of process on the part of the Crown. This was summarily dismissed by Rose J, who found that the Crown's conduct was not in breach of its duty as a quasi-minister of justice and that there was no need for the Crown to present for the purposes of cross-examination:

> [16] I have not been provided with any authority which stands for the proposition that a Crown Attorney prosecuting a given case cannot act on a *Charter* Application to recalibrate the case. Nor could there be. *Charter* Applications such as the one filed by Mr. Allison's counsel in October of 2017 before his trial are part of the public record as pleadings in the case. In order for the within Application to succeed on the allegations summarized above in paragraph 5(iv) the Applicant must establish that the Crown must,

21 *Ibid* at para 165.

22 *Supra* note 16.

> in law, ignore the *Charter* Application which is a public document by virtue of being filed with the Court. It must also show that the Crown falls into a breach of the Accused *Charter* rights by fulfilling his duty in acquiring further information or papers. I find that such an argument is frivolous. The test for Crown misconduct is extremely high, namely conduct which is "egregious and seriously compromises trial fairness and/or integrity of the justice system," see *R. v. Anderson*, 2014 SCC 41. At its highest there is no allegation of Crown conduct which rises to that level. It is dismissed without the need for calling on the Crown.[23]

The second half of the defence application for a stay of proceedings continued with an application to cross-examine the officer who had drafted the first two ITOs under the wrong section of the *Criminal Code*. By that point in time, Crown counsel had stayed 6 of the 11 fraud charges against Mr Allison. These six charges could only be proven through reliance on the records disclosed by the impugned production orders. In refusing the defence application to cross-examine and in dismissing the application for a stay, Rose J noted that the application to cross-examine was not grounded in an allegation of a violation of the Charter. The Crown had removed this concern by staying the charges:

> [16] Part of the problem with this Application for leave to cross-examine is what the test is in the circumstances. *Garofoli* and its progeny provide an established roadmap for the test to be applied when there is a s. 8 Application, namely, that "*cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as, for example, the existence of reasonable and probable grounds*." That is inapplicable when the Application does not originate in s. 8 of the *Charter* because the validity of the warrant, in this case a Production Order, is not in dispute. Again, there are no charges which rely on any of the documents obtained from any of the Production Orders. I would describe the three Production Orders as only distantly related to the charges before me, if not complete strangers.[24]

The Crown removed all need for concern by staying the charges linked to the questionable production orders. It was a safe and smart move performed by a fair Crown. However, one wonders whether the results would have been any different had the application been rooted in a section 8 challenge, since Rose J made it clear that he did not believe the third production order was obtained out of a lack of good faith or an ulterior or oblique motive. Rose J made no secret of the fact that he did not think it was wrong to correct a procedural mistake. All the same, officers should always apply for general production orders under the proper section of the *Criminal Code*.

23 *Ibid* at para 16.

24 *R v Allison*, 2018 ONCJ 94 at para 16 (emphasis in original); and *R v Green*, 2015 ONCA 579 at para 31.

c. Has There Been a Breach of Reasonable Expectation of Privacy?

R v Merritt[25] is an interesting case that involved an allegation of first-degree homicide. In this case, the Crown found itself defending an ITO, a production order that was drafted to obtain a banking record to support the simple purchase of a pair of running shoes from a Walmart store. On August 23, 2013, a father of two young children was discovered murdered in his bedroom, and, in investigating the murder scene, the police found unique footprints beside the dwelling where the murder had been committed. Through a complex and impressive investigation, the police obtained a video of the accused buying a pair of running shoes at Walmart that had the same foot markings as those discovered at the murder scene. Walmart also gave the police a copy of the receipt for the shoes, which showed that the shoes had been paid for through a debit transaction. The last four numbers of the account that paid for the shoes was all that was displayed on the receipt. A police officer was assigned to make random calls to several banks to determine the bank to which this account belonged. He discovered that the Canadian Imperial Bank of Commerce (CIBC) had an account under the accused's name that matched the last four digits on the receipt. Without any prior judicial authorization, the bank supplied the full account number to the police, along with the transit number and the branch number of the branch in Nova Scotia where the account originated. A production order was obtained on the basis of this "free" information, and a bank statement was produced for trial. The bank statement clearly showed that the accused had purchased the shoes the day before the murder from the local Walmart store.

The defence challenged the admissibility of the Walmart video that showed the accused purchasing the shoes, the receipt given to the police by Walmart that showed the last four digits of the account, and the bank statement. The defence argued that the accused had an expectation of privacy in the video, the receipt, and certainly the "free" bank information. Dawson J of the Ontario Superior Court of Justice engaged in a lengthy discussion of the totality of circumstances test, as it is the chief test for the determination of whether an expectation of privacy exists. He found that the accused had no expectation of privacy with respect to the video or the Walmart receipt, which had been legitimately handed over to the police in the course of their investigation. When it came to bank accounts and bank records, Dawson J distinguished between the information contained within a bank account[26] and a bare account number linked to a name. He struggled with this concept and ultimately noted that—because the simple account number did not reveal intimate details of the accused's lifestyle or information of a core biographical nature—there could be no reasonable expectation of privacy:

25 2017 ONSC 366.

26 That is, the banking records and biographical core information held by a bank when one initiates an account, such as one's social insurance number, phone number, and address.

> [144] In the case I am dealing with the transaction record was generated by Walmart from the information provided by Mr. Fattore to purchase shoes. As I have already said, it did not contain core biographical information or information about intimate details of Mr. Fattore's lifestyle. It did not reveal the full details of his debit card number or banking arrangements. It also seems to me that it does not fall within the purview of what Binnie J. had in mind in *A.M.* as protected information falling outside of the category of biographical core information.
>
> [145] The information obtained by the police from the CIBC is not so easily dealt with. I say this for a number of reasons. First, in *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, [1998] S.C.J. No. 42 (*Schreiber*), at para. 22, Lamer C.J. said that it was clear that the "personal financial records" at issue in that case, which had been obtained from a bank, fell within the "biographical core" category described by Sopinka J. in *Plant*. However, it is a fair inference from the facts in *Schreiber* that what was obtained without a warrant in that case were detailed records of banking transactions and not just account numbers and identifiers. In *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 47-48, the court again held that private financial records constituted biographical core information. However, in *Royal Bank of Canada v. Trang*, at para. 36, the court said that "the degree of sensitivity of specific financial information is a contextual determination."[27]

It will be remembered that, in the *Schreiber v Canada (Attorney General)*[28] case, the federal Canadian authorities requested Mr Schreiber's Swiss bank accounts from the Swiss authorities under a "letter of request," which was not backed up by a Canadian production order or search warrant. The Swiss authorities complied with this simple request, obtained an order for the information, and duly conveyed the bank accounts to the Department of Justice. The admissibility of the banking records was at issue in the trial. While the Supreme Court of Canada found a distinct reasonable expectation of privacy in the core biographical information within a bank account, the Court found that a search carried out by a foreign sovereign entity receives no such protection. Still, the Court confirmed the expectation of privacy in banking records. In the end, Dawson J found that the law, as stated in *R v Lillico*,[29] was still good, reasoning that, while banks have a general duty to protect the confidentiality of financial records, disclosure to the police of limited general information does not threaten the biographical core of personal information as described in *R v Plant*.[30]

In *Lillico*, a bank employee confirmed to a police investigator that a large cheque had been deposited into a suspect's account and that there had been subsequent disbursements out of the account. Once in receipt of that information, the investigator applied for a production order to obtain the account details. McCombs J struggled

27 *Merritt*, *supra* note 25 at paras 144-45.

28 1998 CanLII 828 (SCC).

29 92 CCC (3d) 90, 1994 CanLII 7548 (ONSC), aff'd 1999 CanLII 2836 (ONCA).

30 [1993] 3 SCR 281, 1993 CanLII 70.

with the same issues as Dawson J. He finally reasoned that preliminary investigative steps did not violate a Charter right to be free from unreasonable search and seizure, and the Court of Appeal upheld his decision. McCombs J spelled out the competing issues in the following paragraphs, which are recognized in many Canadian provinces to this day:

> [14] Although Canadian law does not recognize any privilege in relation to banking information (see, for example, *R. v. Spencer* (1983), 2 C.C.C. (3d) 526 at p. 535, 145 D.L.R. (3d) 344, 31 C.P.C. 162, *per* MacKinnon A.C.J.O.), the bank nevertheless has an obligation to keep the information confidential. It is an implied term of the contract between a bank and its customer that the bank will not divulge information about the state of the customer's account or any of the transactions, or any information relating to the customer acquired through the keeping of the account, unless the bank is either compelled by a court order to do it, or the circumstances give rise to a public duty of disclosure: see *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.).
>
> [15] I conclude that financial institutions have a general duty to protect the confidentiality of banking records. On the other hand, a balance must be struck between the customer's right to confidentiality and the public's right to effective law enforcement. In my opinion, disclosure of only the most general information by confirming only that a particular cheque was deposited into the customer's account, and that there was subsequent activity in the account, does not threaten the "biographical core of personal information" which is inherent in the meaning of the phrase "private and confidential." Therefore, it does not constitute an infringement of the privacy of the individual so as to attract the protection of s. 8 of the *Charter*.[31]

In 2004, Parliament enacted section 487.013 of the *Criminal Code*, which codified a reasonable expectation of privacy in limited financial information, or "pre-cursor" bank information, such that any future phone calls to the bank on the part of police officers ran the risk of the information being excluded if it made its way into the evidentiary foundation of the case. Section 487.013 is now section 487.018 of the *Criminal Code*, and it is discussed in some detail in Section II.B.2, "Financial Data Production Orders—Section 487.018," below.

It is always important to review an ITO to ascertain the exact nature of the request and to identify whether or not there is any reasonable expectation of privacy at issue in terms of an applicant. In *R v Scholz*,[32] the applicant sought to exclude evidence

31 *Lillico* (ONSC), *supra* note 29 at paras 14, 15. *Lillico* has been cited favourably in British Columbia: *R v Quinn*, 2006 BCCA 255; Alberta: *R v Haskell*, 2004 ABQB 474; and Saskatchewan: *R v Rawlake*, 2000 SKQB 92. The only other province in which this issue has surfaced is the province of Newfoundland, where a decision from 1994 would appear to be in conflict: *R v Eddy (T)*, 119 Nfld & PEIR 91, 1994 CanLII 5274 (SCTD). See the discussion following in Section II.B.2, "Financial Data Production Orders—Section 487.018" and s 487.018, which now provides a statutory basis for the provision of this preliminary information.

32 2019 ONSC 573.

by means of a section 8 application. The evidence that formed the basis of the production orders involved documents from various investment firms, banks, and corporations, along with records from the applicant's residence. The application was dismissed largely because the key banking and business records did not belong to the applicant. What was at issue were company accounts and files of client investors and the business records of an innocent trust company that was used by the applicant for his own fraudulent purposes. The fact that the applicant commingled his personal affairs with these accounts could not be seen to have created a reasonable expectation of privacy in the records. Goodman J rejected the argument that the records held by the banks and the third-party financial and trust entities involved a reasonable expectation of privacy because they did not contain any kind of "biographical core of information" related to the applicant.

d. Is the Scope of the ITO "Overbroad"?

In the *Merritt* case, even though there were numerous sub-facial concerns with the ITO due to misleading material omissions and the issue with the "free" information conveyed by the bank, none of this was enough to frustrate the validity of the production order. However, there was one violation of the order that was so serious it could not be saved through excision. The order was horribly overbroad. Going back to the complicated facts of the murder case, the entire reason for the production order in the first place was to obtain the bank's confirmation of the purchase of a pair of running shoes by the accused in the murder investigation. The purchase of the shoes took place on the day immediately preceding the murder—that is, August 22, 2013. One bank statement from one day was all that the police needed. Unfortunately, the officer who drew up the parameters of the production order included the following in his request of material from the bank:

- account opening forms;
- signature cards;
- copies of shareholder identification documents used to open the account;
- copies of the account's history, balances, bank statements, and monthly statements;
- copies of all transfers, cheques issued or deposited, and any other accounts connected to or associated with the account;
- any automated bank machine (ABM) transaction records and locations pertaining to the use of the debit card, along with video and images of the ABM transactions; and
- any over-the-counter (OTC) transaction records related to the card.[33]

33 It could very well be that the homicide department handed over the drafting of the production order to a fraud investigator because these points are commonly used to draft production

It is also to be noted that the time period covered by the production order was July 18, 2013 to September 3, 2013. The Crown defended this lengthy scope of the order by arguing other issues relevant to identification, but, in the end, these arguments could not overturn the reality that the only bank record that was relevant was the purchase of the running shoes. Another detail that did not assist the Crown was the fact that the accused's name was not specified in the production order—the police only listed the CIBC debit card number in the production order, and this may have contributed to the impersonalized assessment of the information that was sought.

The Crown had no alternative but to concede that the production order was overbroad. This was a wise concession. The Crown simply argued that the affiant was acting in good faith and simply "missed the mark" in the ITO, and, as such, severance should be applied to excise the offending parts of the ITO from the rest. While Dawson J did conclude that the ITO supported the production order, after making all necessary adjustments of excision from the sub-facial attack, he could not agree that severance would cure the problem when it came to the issue of overbreadth:

> [219] The main operative clause, to which the various document describing sub-clauses are attached, specifies the production of all debit card records for the period beginning July 18 and ending September 3, 2013. The Crown wants me to remove time from each end of this period and to shave the production order down to a far shorter time focused on August 22, 2013. I am being asked to substantially rewrite what was authorized to be done. What the Crown is asking me to do is quite different and more extensive than what has been done in any of the cases I have been referred to where severance was granted.
>
> [220] I also observe that this is not a situation, like *Patterson*, where there was no invasion of privacy occasioned by the "bad" parts of the order. Here the sole operative clause directed the bank to produce all of the records within the specified time frame. I have no evidence before me that the CIBC did not do so. Therefore, the bad parts of the production order have permitted a significant unauthorized interference with Mr. Fattore's privacy interests which s. 8 of the *Charter* is designed to prevent.
>
> [221] In these circumstances I am of the view that to rewrite the production order under the guise of severance would undermine the policy of the legislation, not to mention the *Charter*. The interference with a REP generally requires judicial preauthorization. No one suggests that Mr. Fattore did not have a REP in the records obtained pursuant to the production order or that judicial preauthorization was not required in the circumstances. Using severance to cut away most of the order to preserve the evidence the Crown wishes to introduce in circumstances where a considerable amount of private information was also obtained under the bad parts of the order, could encourage the police to take the same approach in the future.[34]

orders for the investigation of a fraud when documents are requested from a bank.

34 *Merritt*, *supra* note 25 at paras 219-21.

This ruling is highly instructive because in spite of numerous facial and sub-facial concerns with the ITO—and in spite of the fact that the bank had outrightly given the full account number to the police without any prior judicial authorization—the item that brought down the production order was the far-reaching scope of the warrant, which could have been so easily avoided had there been common sense applied in the drafting of the order at the early stages. In the end, privacy interests are sacrosanct and will trump many other errors on the face of an ITO. Dawson J made this clear at paragraph 226:

> [226] When dealing with severance, the question of whether the warrant is "good" or "bad" has already been decided with respect to part of the warrant. The purpose of protecting a REP will be defeated if any significant invasion of privacy occurs solely in reliance on the invalid part of the warrant. That will be so whether the authorities engaged in serious misconduct in obtaining the warrant or not. Consequently, what Crown counsel proposes [i.e., severance] would both defeat the purpose of the review process and undermine s. 8 of the *Charter*.[35]

2. Financial Data Production Orders—Section 487.018

Financial data production orders are obtained pursuant to section 487.018 of the *Criminal Code*, which reads as follows:

> **Production Order—Financial Data**
>
> 487.018(1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a financial institution, as defined in section 2 of the *Bank Act*, or a person or entity referred to in section 5 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, to prepare and produce a document setting out the following data that is in their possession or control when they receive the order:
>
> (a) the account number of a person named in the order or the name of a person whose account number is specified in the order, as well as, in the case of digital assets, including virtual currency, the name and account number of a person whose identifier associated with digital assets is specified in the order;
> (b) the type of account;
> (c) the status of the account; and
> (d) the date on which it was opened or closed.
>
> (2) For the purpose of confirming the identity of a person who is named or whose account number or identifier associated with digital assets is specified in the order, the order may also require the institution, person or entity to prepare and produce a document setting out the following data that is in their possession or control:
>
> (a) the date of birth of a person who is named or whose account number or identifier is specified in the order;
> (b) that person's current address; and

35 *Ibid* at para 226.

(c) any previous addresses of that person.

(3) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to suspect that:

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the data is in the possession or control of the institution, person or entity and will assist in the investigation of the offence.

(4) The order is to be in Form 5.008.

(5) A financial institution, person or entity that is under investigation for the offence referred to in subsection (3) may not be made subject to an order.

Section 487.018 is the "statutory descendant" of the former section 487.013 of the 2015 *Criminal Code*.[36] Section 487.018 is designed for the issuance of a judicial order to obtain very limited financial records, such as the name of an account holder or the account number of a particular account holder, so that police can then proceed with a formal production order for the contents of any bank account and the most recent amendments include provision for the name and number associated with virtual wallet accounts for digital assets such as Bitcoin. The status of an account may also be ascertained, as well as the dates on which it was opened or closed. This section also allows for a financial institution to reveal to the police an account holder's date of birth and address. Section 487.013 was enacted in 2004 to remedy the issue addressed by McCombs J in *Lillico*, where the police were seeking information as a precursor to a section 487.014 production order. This is undoubtedly the section the police should have applied under to obtain the account number in *Merritt* instead of making the telephone call to the bank. In spite of the ruling in *Merritt*, there has been case law since that has ruled that if the police resort to cold-calling bank officials and obtaining precursor client information without following the procedure as outlined in section 487.018, the evidence will be obtained in violation of the Charter. Since section 487.018 only requires a "reasonable suspicion" threshold, it is highly likely that the evidence will not be excluded pursuant to a section 24(2) analysis. In the recent case of *R v DeSilva*, Latimer J concluded thusly:

> [47] In the present case, I am not satisfied that this particular violation, standing alone, warrants exclusion of the evidence at trial. I consider the conduct of the police to sit somewhere in the middle of the spectrum, as they obtained information that they should have known required a section 487.018 production order to obtain. This branch of the test points towards exclusion. With regard to the impact on the applicants' *Charter*-protected interests, I note that s. 487.018 only requires a reasonable suspicion for issuance. This lesser threshold is demonstrative of a reduced expectation of privacy in the information improperly obtained: see *R. v. M. (B.)* (1998), 130 C.C.C. (3d) 353 at 376

36 Bill C-13, which came into force after proclamation on March 9, 2015, repealed s 487.013 and introduced s 487.018 as we know it today.

> (Ont. C.A.). I find this branch of the test points towards neither exclusion or admission. Finally, I accept that society, and the Ayr community specifically, has a strong interest in an adjudication of this case on the merits. This branch of the test points strongly towards admission of the evidence.[37]

a. What Is the Difference Between Section 487.014 and Section 487.018?

It has already been noted that section 487.014 requires a "reasonable grounds" threshold from the affiant who requests the information, whereas section 487.018 merely requires a "reasonable suspicion." The logic behind this distinction is clear: section 487.018 allows for very limited production of information, whereas section 487.014 provides for the rendering of information to which a reasonable expectation of privacy adheres. This was also supported by the words of the former Minister of Justice, the Honourable Peter MacKay, when Bill C-13 was introduced to the Houses of Parliament:

> Next, Bill C-13 proposes to update the existing judicially supervised production orders. These amendments would result in a comprehensive toolkit involving a general production order, which is comparable to a search warrant, and four specific production orders for information with little or no privacy impact. …
>
> The production orders could only be used to obtain historical information before the specific production orders contemplated by Bill C-13 would allow police to do the following: determine where individuals were or what they were doing at a specific moment in time, meaning tracking information; obtain transmission data, such as an email address the communication was sent to; trace the path of the telecommunication to determine the identity of a suspect; and, finally, collect basic financial information.[38]

The clear distinction between section 487.014 and section 487.018 was discussed in depth by Read J of the Alberta Court of Queen's Bench in *Alberta (Attorney General) v Provincial Court of Alberta*.[39] In this case, a police officer was trying to get to the bottom of a very large and complicated fraud that involved annoying robo calls, allegedly from the Canada Revenue Agency, that accused Canadian citizens of violating the tax laws. In 2015, most of these calls were made to newer immigrants in Alberta. The police investigated and found that the fraudsters had taken advantage of the immigrants' lack of knowledge of the Canadian legal system. The victims were instructed to pay their outstanding taxes or immigration fees by means of purchasing a pre-paid PayPower Reload card. Upon purchase of the card at a local convenience store, the

37 2018 ONCJ 60 at para 47.

38 "Bill C-13, An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act," 2nd reading, *House of Commons Debates*, 41-2, No 25 (27 November 2013) at 1435 (Hon Peter MacKay).

39 2015 ABQB 728.

victim was instructed to call back and reveal the ten-digit number on the back of the card to the "agency." Once the ten-digit number was relayed to the fraudsters, they could electronically load the funds to their accounts. By means of a thorough investigation, the police learned that the fraudsters' accounts were being held at a Financial Services Credit Union in Ontario. In an effort to learn the identity of the fraudsters and obtain access to the bank accounts, the Edmonton police applied for a production order pursuant to section 487.014 to obtain the account numbers into which the victims' money had been advanced, along with the client profiles associated with those accounts. The Alberta Provincial Court judge refused this application on the grounds that it was his opinion that the tombstone nature of the information requested by the police simply demanded that the proper application should have been made under section 487.018. On the second attempt,[40] the Edmonton police re-applied under section 487.014 and included a legal opinion from the Crown Attorneys' Office as to why the preferred section of the *Criminal Code* was section 487.014. The second application was refused on the same grounds.

The Court of Queen's Bench strongly disagreed with the Provincial Court's interpretation. Read J did not see the introduction of section 487.018 as an attempt to limit the scope of section 487.014. He clearly saw the two sections working together to assist investigators in their search for evidence, as long as the appropriate threshold could be met for each:

> [82] Because of the wording of s. 487.018 someone seeking an order must have either the account number or the name of the person in order to get the requested information. When, as is the case here, the investigators have neither, there is no option but to proceed under s. 487.014 to obtain that information. …
>
> [101] … the general production order provision (s. 487.014) is not intended to be used where the information could be obtained under the more specific provisions ss. 487.015 through 487.018 which follow, in circumstances where there is "reasonable grounds to suspect that an offence has or will be committed."
>
> [102] Section 487.018 specifically sets out the types of information that can be provided in a production order obtained under that section, however, and I do not read it as did the Provincial Court judge as providing a complete code for the data that may be obtained from a financial institution. I conclude, instead, that the legislative intention was that s. 487.014 could also be used to obtain information from a financial institution, if what is sought is other than enumerated in s. 487.018 or where the police officer can satisfy the more stringent requirement of s. 487.014 that he has "reasonable grounds to believe" that an offence has been or will be committed, and "that the document or data will afford evidence of the commission of the offence." There is nothing in the words used by Parliament in these sections to invite a contrary interpretation or to suggest

40 This really was the third attempt on the part of the police because the first application was for a search warrant, which was properly rejected outright.

> that s. 487.014 should only be used sparingly and as a last resort. I consider the contrary interpretation too narrow and not what Parliament intended.
>
> [103] Neither do I agree with the Provincial Court judge that there is anything in the legislation to disable a police officer from seeking to obtain a production order under s. 487.014 and under s. 487.018 at the same time provided the provisions of both of these sections are complied with.[41]

Read J ordered *mandamus* and *certiorari* that the Provincial Court judge grant an order under section 487.014 requiring the financial institution to provide the account numbers into which the funds had been deposited and the names of the individuals associated with the accounts. Read J also ruled that the Provincial Court judge should grant an order pursuant to section 487.018 for the specific information requested under section 487.018. In this case, the two sections worked together nicely to assist investigators in getting to the root of a very destructive telephone fraud. A subsequent ruling from Western Canada has approved this approach in that police may file for a general production order and for a financial data production order at the same time in one application. They must be very clear about which standard they are satisfying and which documentation they are seeking for each. They should then supply the proposed production orders using the forms as prescribed by each section.[42]

3. Search Warrants/Wiretaps

While production orders direct a third party to produce documents or data that are known to exist, the request is to "produce" while search warrants and applications to intercept private communications are much more invasive investigatory techniques. A search warrant is an application to search the documents that exist at the premises of a third party, and thus the standard to obtain is high. Such investigative options demand carefully drafted applications in order not to run afoul of section 8 of the Charter. Pursuant to section 487 of the *Criminal Code*, a search warrant may be obtained by a police officer who swears an information on oath before a justice of the peace or a judge and who states that they have reasonable grounds to believe that certain prescribed items will be found in a building, receptacle, or place. These items may include any items that will afford evidence that an offence has been committed or is presently being committed. The justice may issue the search warrant and authorize the police officer to search and seize the items delineated. The items must be specified in the search warrant, and the place to be searched and time of the search must also be noted. Once the search has taken place, the *Criminal Code* also mandates that the items seized must be brought back to the issuing justice or that a report must be provided to the justice as soon as possible.

41 *Alberta (Attorney General) v Provincial Court of Alberta*, *supra* note 39 at paras 82, 101-3.

42 See *Winnipeg Police Service Officer (Re)*, 2015 MBPC 70.

An application to intercept private communications is an application brought under the regime set out in Part VI of the *Criminal Code*—Invasion of Privacy—in particular, sections 185 and 186. Like an application for a search warrant, this is an *ex parte* application, and an affidavit from a police officer laying out the grounds for the application accompanies the application. In order to grant an application to intercept private communications, a judge of the Superior Court must be satisfied that it would be in the best interests of justice to issue the authorization, but the agent applying for the authorization must swear that there are reasonable and probable grounds to believe that a particular offence, conspiracy, attempt, or incitement to commit has been or is being committed, and that the authorization being sought will afford evidence of such. Authorizations for the interception of private communications must state the offence being investigated, the identity of the persons being intercepted, and the place at which the communications are being intercepted. These authorizations are for a limited period of time only and will contain specific terms and conditions as set by the authorizing justice. These applications are extremely invasive, and when they are resorted to in a fraud investigation, it is best if Crown counsel is assigned well in advance.

Online scams are on the rise in Canada and investigative authorities are having to pursue investigations that involve technically advanced methods to determine the identity of an online scammer. In *R v Bykovets*,[43] the Supreme Court of Canada has instructed that police investigations that cross national boundaries and that resort to assistance from third-party agencies still have to respect the Charter rights of all Canadians to be safe from an unwarranted search and seizure. In this case, police were investigating a scammer who purchased liquor from an online liquor store. The offender used an unauthorized credit card to purchase gift cards. He then went online to the liquor store and purchased liquor with the gift cards. The police contacted the third-party company that managed the online store sales—Moneris—in an effort to obtain the IP address of the individual who used the stolen gift cards to purchase the liquor. The transactions were clearly identifiable from the online sales record that Moneris produced for the police at their request—but the IP address attached to the impugned transactions was nothing more than a long string of numbers. Police properly obtained a production order for TELUS, the ISP, in order to obtain the address and identity of the purchaser as per *R v Spencer*.[44] Police then obtained a search warrant and searched Bykovets's house and found the illegal goods that became evidence for the fraud prosecution. At trial, Bykovets argued that the police carried out a warrantless search when they obtained the IP address attached to the impugned online liquor store sales from the third-party agency Moneris. The Crown argued that

43 2024 SCC 6.

44 2014 SCC 43.

Bykovets had no expectation of privacy in an IP address and the trial judge agreed, as did the Alberta Court of Appeal.

A majority of the Supreme Court of Canada confirmed *Spencer* as authority that subscriber information (that is, the name, address, and contact information) associated with an IP address is subject to a reasonable expectation of privacy and the police must obtain a search warrant prior to obtaining this information from a third party.[45] However, the Supreme Court went even further with the concept of identity protection in police investigations of online transactions by also finding that there is a reasonable expectation of privacy in an IP address. The Court explained that an IP address is a unique identification number. A third-party agency, Moneris in this case, keeps track of the subscriber information that attaches to every IP address for every online transaction. Since IP addresses are nothing more than a long string of computer-generated numbers, they are tracked by the ISP and they can often change. The important fact in this case is that with respect to each IP address the subscriber information *always* attaches such that the ISP, and the third-party agency it may work with, always know the identity of the subscriber at the other end of the IP address.

In deciding that a reasonable expectation of privacy attaches to an IP address, the Supreme Court applied a normative standard test. What is being balanced is the individual's right to be left in peace versus the community's right to be protected from an online fraud. The normative standard demands that courts take a broad, functional approach to the subject matter of the search and focus on the potential of the search to reveal personal or core biographical information. IP addresses are not just meaningless strings of numbers. They are, in fact, a link connecting Internet activity to a specific location and they can reveal deeply personal information that includes a user's identity and address where the laptop or computer is located. Therefore, a warrant must be obtained before a third party connected to an ISP hands over this information to the police.[46] The Supreme Court acknowledged the mass of information that is now within the purview of third-party ISPs—many scattered around the world and outside the reach of the Charter. Information that is handed over by these data collectors to the police strike at the very heart of a user's biographical core information that has always been protected within the application of section 8 of the Charter. The Supreme Court also acknowledged that society has a legitimate interest in safety, security, and the suppression of crime. The fact that the Internet encourages online anonymity is a real concern. Much online crime is the result of the easy access to the Internet and the anonymity it affords. Still, this case stands as a logical extension of *Spencer* and the burden on the police is not onerous. Going forward, in any fraud investigation where the police need to obtain an IP address from a third-party data tracker such as Google; Facebook; and, in this case, Moneris, the police will have had

45 *Bykovets*, *supra* note 43 at para 2.

46 *Ibid* at paras 9, 28.

to produce a search warrant, and this will have to be disclosed in the normal course of Crown disclosure. At all times, investigative authorities will have to approach the investigation from the point of view of the subject matter of the search—that is to say, the police will have to understand that what is being requested is not simply a long line of computer-generated numbers but the biographical core information of an alleged offender. Once this information has been obtained pursuant to the requirements of section 8 of the Charter, the Crown will have very powerful circumstantial evidence to lead in its case.

4. Seizure Warrants/Restraint Orders

If the Crown has reasonable grounds to believe that assets were obtained with the proceeds of crime from a fraud and the Crown ultimately wishes to pursue forfeiture of those assets, at the outset of its prosecution the Crown should direct the police to make an application for an asset restraint order under section 462.33 of the *Criminal Code* if the asset is real estate or a bank account. If the asset is movable—for example, a vehicle or jewellery—then the police should make an application for a special warrant of seizure as per section 462.32. Part XII.2—Proceeds of Crime—is the legislative framework that allows the police to obtain the special seizure/restraint orders. These orders freeze an asset until the prosecution can be brought to a conclusion. These provisions were proclaimed in force in 1989 and apply to "designated offences," which are broadly defined as "any offence that may be prosecuted as an indictable offence" and any conspiracy or attempt or party to the indictable offence in section 462.3. These provisions were created with the goal of identifying, locating, seizing, and ultimately forfeiting the proceeds of crime from criminals under the maxim that "crime does not pay."[47] The legislative framework for these orders is complex, since notice is often required to be given to parties who can demonstrate an interest in the assets. Also, the Crown must work with the police in the drafting of these applications because it is important that the Crown state *from the outset* the exact provision that it will be using in order to seek forfeiture: will it be section 462.37(1), where the court may make an order after a criminal conviction of a predicate offence, which first requires proof on a balance of probabilities that the assets were derived from the proceeds of crime; or will it be section 462.38(2), which requires the criminal standard of proof as to the origins of the assets in question? If the Crown has obtained foresight from reading the disclosure of the case that such orders are applicable, and if there are victims who lost their money and for whom these orders may one day provide the funds for restitution, then these orders are essential. We will discuss forfeiture and restraint orders in more detail in Chapter 9.

47 *Québec (Attorney General) v Laroche*, 2002 SCC 72 at para 25.

III. Pre-Charge Considerations from a Defence Perspective

A. Pre-Charge Consultation

Before turning to the issue of bail, it may be helpful to first consider the situation where the person being investigated for fraud reaches out to criminal defence counsel before the police are involved or charges are laid. It is not unusual for fraud investigations to come to the attention of the person being investigated in advance of the police investigation. For example, if the person works for a company that believes it has been defrauded, the company may undertake an internal or external audit to investigate any concerns about financial impropriety. Alternatively, a regulatory body such as the Canada Revenue Agency, the various provincial securities commissions, the Financial Services Regulatory Authority of Ontario, or CIRO which now has authority over the Mutual Fund Dealers' Association may launch an investigation. Accordingly, the person who is the subject of these inquiries may be aware that their conduct is under review and consult with defence counsel. So, what can defence counsel do under such circumstances?

The first step for defence counsel is to meet with the client and take a full, comprehensive statement from them about the structure of the corporate body, the client's role in that structure, and the specifics of what has occurred that has led to the investigation. This is no time to "hold off" from seeking information from the client, as may be done by some counsel once a client has been charged with a criminal offence to preserve a strategic avenue in the criminal litigation. If defence counsel is consulted at this stage, they need to understand the details of what occurred in order to properly understand the scope of the problem and, potentially, to ward off criminal charges.

Of course, a statement from the client will be only part of what defence counsel must consider. Counsel must also review the relevant documentation that touches on the issue. This may include corporate records, financial statements, minutes of meetings, etc. It will be important for counsel to work closely with the client to understand what records may be relevant and how to access those records. In some cases, where the client does not have access to these materials because of their position in the company, or if the client has been suspended or fired, it may be impossible for counsel to provide an informed assessment of the client's jeopardy. However, if the documents are accessible, it is critical that counsel review them with the client to properly understand the documented evidence of what has occurred and whether that record supports the client's version of events.

B. Ethical Considerations of Accepting a Retainer from the Client

1. First Consideration: Do Not Accept a Cash Retainer

As with any client, counsel must ensure that any moneys they receive as a retainer are not proceeds of crime and that the trust account is not being used as a shelter or a means to launder money. This concern is particularly acute when counsel assists a client who is charged with fraud or fraud-related offences. As a starting point, consider not accepting a cash retainer in these circumstances. This is prudent in all cases, but particularly so when the client is charged with fraud or fraud-related offences. If counsel fails to consider this, it puts them in a near-impossible situation should it later be alleged that the moneys provided as a retainer were proceeds of crime.

There is no positive scenario in such circumstances. At best, it could be suggested that counsel was an unknowing dupe of the client, who was trying to use counsel's trust account to shield illegally obtained funds. However, such an allegation could still result in an investigation by the Law Society of Ontario and a finding of professional misconduct on the basis that counsel *ought to have known* that they were being used by the client. Rule 3.2-7 of the *Rules of Professional Conduct*[48] states:

> 3.2-7 A lawyer shall not
>
> (a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;
>
> (b) do or omit to do anything that the lawyer *ought to know* assists in, encourages or facilitates any dishonesty, fraud, crime, or illegal conduct by a client or any other person; or
>
> (c) advise a client or any other person on how to violate the law and avoid punishment.

The commentary to the Rule states:

> [1] Rule 3.2-7 which states that a lawyer must not knowingly assist in or encourage dishonesty, fraud, crime or illegal conduct, applies whether the lawyer's knowledge is actual or in the form of wilful blindness or recklessness. A lawyer should also be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client or any other person. Rules 3.2-7.2 to 3.2-7.3 speak to these issues.
>
> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or any other person who is engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services … .

48 Law Society of Ontario, *Rules of Professional Conduct* (22 June 2000; amendments current to 28 June 2022), online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct> (emphasis added).

> [3] … It is especially important to obtain this information where a lawyer has suspicions or doubts about whether he or she might be assisting a client or any other person in dishonesty, fraud, crime or illegal conduct. …
>
> [3.2] A client or another person may attempt to use a lawyer's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a lawyer to be aware of their obligations under these rules and the Law Society's by-laws that regulate the handling of trust funds.[49]

In recent years, the Law Society has become much more vigilant in investigating and prosecuting counsel for failing to see "red flags" or "badges of fraud" and becoming a dupe of a client. This occurs most frequently in real estate transactions, but similar principles apply to counsel practising in other areas as well. A dupe has been defined in the commentary to Rule 3.2-7 as a lawyer who has unwittingly become involved with a client engaged in criminal activity. The Law Society still penalizes such behaviour as professional misconduct on the basis that counsel has facilitated or potentially facilitated their client's unscrupulous and often criminal conduct through carelessness, inattention, or other neglect or abdication of professional responsibilities.[50]

A finding of professional misconduct for being an unwitting dupe typically results in a suspension and can even lead to revocation of counsel's licence.[51]

Even worse, counsel could be charged by the Law Society with being a knowing and active participant in illegal activity (and/or a criminal offence by the police).

In addition, Rule 3.2-7.3 states, "A lawyer shall not use their trust account for purposes not related to the provision of legal services."

The Law Society of Ontario has established a near-zero tolerance threshold for counsel who knowingly engage in fraud. Such misconduct typically results in the revocation of counsel's licence to practise, absent exceptional circumstances.[52] It should be noted that counsel can be subjected to the same consequence on the basis of recklessness or wilful blindness.[53]

Thus, by accepting a cash retainer, counsel places themself in an extremely precarious situation because it becomes extremely difficult for counsel to demonstrate, as they must to defend themself from such allegations, that they took all reasonable steps to confirm that the moneys received were not proceeds of crime.

49 *Ibid*.

50 *Law Society of Upper Canada v Fazio*, 2009 ONLSAP 1.

51 *Law Society of Upper Canada v Gregoropoulos*, 2016 ONLSTH 148.

52 *Law Society of Upper Canada v Mucha*, 2008 ONLSAP 5.

53 *Law Society of Upper Canada v Osborne*, 2013 ONLSAP 14.

If counsel fails to consider this and accepts cash (at their own peril), counsel must ensure that they comply with the regulations regarding the acceptance of cash from clients, as promulgated by the Law Society. Section 4(1) of By-Law 9 of the Law Society of Ontario states, "A licensee shall not receive or accept from a person, in respect of any one client file, cash in an aggregate amount of 7,500 or more Canadian dollars."[54]

2. Second Consideration: Accept Payment from a Credit Card or a Cheque

If counsel is able to take the retainer through a credit card payment, that is likely the best scenario since it is the credit card company that is actually covering the retainer (later to be reimbursed by the client). However, counsel should ensure that the credit card is in the client's proper, legal name. And counsel must ensure that the payment is not connected in any way to the fraudulent activity under investigation. For example, one should not accept payment on a credit card issued to a company that may be implicated in the alleged criminal activity.

Alternatively, counsel can accept payment by cheque. It would be best if the client provided a certified cheque (or money order) from a known financial institution. Given that banks, like lawyers, are expected to engage in due diligence to ensure they are not participants or dupes in a fraud, it should provide some comfort to counsel to receive the retainer fees from a recognized financial institution. This would help displace any suggestion that counsel did not take reasonable steps to ensure the money was lawful.

The client may wish to pay with a company or personal cheque. However, counsel should take steps to confirm that any corporate cheque does not come from a corporate entity that is under investigation or connected to an entity under investigation. If the cheque is in the name of the client personally, counsel should ask the client to confirm that the money is separate and distinct from any of the transactions that may be under scrutiny. The conversation with the client should be documented and inserted into the file. This, too, may be of assistance if there is a subsequent allegation that the money was unlawful or that counsel was engaged in some form of misconduct.

54 Law Society of Ontario, By-Law 9 (amendments current to 12 May 2023), online: <https://lso.ca/about-lso/legislation-rules/by-laws>.

C. Ethical Considerations of Accepting Documents from a Client

Counsel should be very careful about taking *original* documents from a client. As we know from the decision in *R v Murray*,[55] real evidence in the hands of counsel is producible to the Crown or court. So, what happens if a client who is being investigated for fraud shows up at counsel's office with a box of documents, including documents that may implicate the client in an offence? If one of those documents implicates the client in an offence and it is the only copy of the document, counsel is now in the possession of evidence of crime. Some have argued that the possession of such an original document that implicates the client in an offence is no different from counsel being handed the "smoking gun" or the bloody T-shirt.

Interestingly, both the defence counsel and Crown counsel on the *Murray* case, Austin Cooper and Ian Scott, respectively, have written on that specific issue. Cooper speculated that in such circumstances, the *Murray* rules might apply and that the document(s) would be producible. Furthermore, he claimed that if counsel were to withhold those documents, they could be subject to a prosecution on the charge of Attempt to Obstruct Justice.[56]

Scott took an even stronger view. He concluded that there was no distinction between real evidence and documentary evidence and that any original documents that implicated the client would be producible.[57] However, Scott did note some differences between real evidence and documentary evidence that may immunize counsel from criminal liability.

Documents created *within the solicitor–client relationship*, such as counsel's notes of any meetings, a client's written statement to counsel, or the report of an expert retained by counsel, are protected by privilege and do not have to be produced.[58]

However, documents that existed or were created by the client *prior to the solicitor–client relationship* and that implicated the client would be producible. Accordingly, counsel should refuse to accept the document from the client and further advise the client that tampering with or destruction of the document would be a crime.[59]

Scott gave a very helpful tip to avoid counsel risking a charge of Attempt to Obstruct Justice. He noted that it is only when a document is being held by counsel for the purpose of frustrating access by law enforcement that liability may attach to counsel's conduct. Accordingly, the client should produce *copies of documents for counsel*,

55 (2000), 48 OR (3d) 544, 186 DLR (4th) 125 (SC).

56 Austin M Cooper, "The Ken Murray Case: Defence Counsel's Dilemma" (2003) 47:2 Crim LQ 141.

57 Ian D Scott, "Can Documents Smoke? The R v Murray Decision and Documents Characterized as Evidence of Crime" (2003) 47:2 Crim LQ 157.

58 *Ibid* at 170.

59 *Ibid* at 171.

with the originals retained by the client, so there can be no inference that counsel was attempting to frustrate the investigation. By accepting copies, counsel has the benefit of reviewing the documents without risking criminal liability. Moreover, when multiple copies of the documents exist in locations that are accessible to the police, then counsel's possession of a copy should not be seen as frustrating police access.[60]

To be even safer, it never hurts to follow the suggestion of Austin Cooper: consult with senior counsel for advice and take careful notes of the discussion and the advice proffered. In cases of significance, counsel should consider placing the issue before the Law Society as Murray did. This *bona fide* resort to the advice of other counsel or the Law Society may protect counsel from the risk of being criticized or, even worse, charged.[61]

These perspectives have recently been incorporated into the Law Society's *Rules of Professional Conduct*. Rule 5.1-2A states:

> 5.1-2A A lawyer shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.[62]

Portions of the related commentary read as follows:

> [1] In this rule, "physical evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. *It includes documents*, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor–client privileged or that the lawyer reasonably believes are otherwise available to the authorities. …
>
> [3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options, which may include consulting with a senior legal practitioner. These options include, as soon as reasonably possible:
>
> (a) considering whether to retain independent legal counsel to provide advice about the lawyer's obligations. If retained, the lawyer and independent legal counsel should consider
>
> (i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing lawyer to law enforcement authorities or to the prosecution, and
>
> (ii) whether independent legal counsel, should, either directly or anonymously, taking into account the procedures appropriate in the circumstances

60 *Ibid* at 171-72.

61 Cooper, *supra* note 56 at 155-56.

62 *Rules of Professional Conduct*, *supra* note 48 at r 5.1-2A.

> (I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or
> (II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;
> (b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;
> (c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or
> (d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.[63]

Counsel faced with this situation, including a concern about the possession of *documentary evidence*, should read the entire provision and consult with senior counsel.

D. The Innocent Client

If defence counsel has met with the client, reviewed all the relevant documentation, and satisfied themself that the client has not committed any offence, counsel and the client now have a decision to make—namely, should the client cooperate in the investigation that has been launched, whether it be an audit or a more formal investigation by a regulatory body?

The first step for counsel to consider is whether participation is mandatory, pursuant to any regulation or law. For example, if a client is compelled by law to provide to their regulatory body a statement regarding the matters in question, then noncooperation is not an option (short of inviting disciplinary action). However, there are still certain steps that counsel can take to protect the client.

First, counsel should ask the investigator whether the client is being interviewed as a witness or as a suspect in the investigation and the purpose for seeking the statement. Counsel can then ask the investigator to provide a list of the questions to be asked in writing in advance of any interview. There is typically no obligation on the investigator to do so, but the investigator may be willing, and there is no downside to making the inquiry.

Second, counsel should ask the investigator to provide a copy of any documents that will be put to the client during the interview. Again, the investigator is not obliged to produce such documents, but it can be suggested, as a matter of procedural fairness, that the client should have the opportunity to know what the relevant documents are and review them in advance with counsel. Counsel can point out that a

63 *Ibid* (emphasis added).

review of the relevant documents in advance of the meeting will allow for a more focused and efficient statement.

Third, counsel should write to the investigator, confirming that any statement is compelled by law and, as such, is not admissible against the client in any criminal proceeding, pursuant to the decision of the Supreme Court of Canada in *White*.[64]

What about situations where the client is not compelled to cooperate but has the option of participating in the investigation?

If counsel has fully satisfied themself that the client is innocent of any wrongdoing, then it may very well be in the client's interest to participate and provide an explanation for the situation. However, before doing so, defence counsel should recommend that the client obtain advice from the union or labour counsel (if the client is a unionized employee) or employment counsel to ensure that any employment-related considerations are being properly addressed. Of course, counsel should still request that any questions and documents to be put to the client be provided in advance of any meeting, to ensure that there are no issues that may be a surprise. Counsel should also get clear, written instructions from the client.

E. The "Less Than Innocent" Client

If counsel concludes that there is evidence implicating the client in some wrongdoing, the advice to be given is a more complex issue. First, counsel must consider whether the client's wrongdoing was caused by mere negligence or inadvertence, as opposed to an intentional act, or whether it is possible that the client was a mere dupe who was exploited by others to further a fraudulent scheme. The client who, for example, is sloppy in their bookkeeping, has an incorrect understanding of a financial procedure, or has been duped by others is differently situated than the intentional fraudster or embezzler.

If one can proffer an explanation that supports a conclusion of inadvertence or negligence, it may be in the client's interest to fully cooperate and explain the error, for several reasons. First, it may assist the client in keeping their job, if their employment is at risk. Second, it may satisfy the investigator or regulator that the impugned conduct was not intentional, and, as a result, the potential sanction is likely to be reduced. Third, if the matter is eventually referred to the police, it may assist in heading off charges if the explanation and the evidence demonstrate something less than an intentional act of deceit, which is required for a charge of fraud. Lastly, if the client should eventually be charged and convicted, the fact that the client cooperated with the investigation will assist them on sentencing. The Ontario Court of Appeal has specifically held that full cooperation with the authorities, in conjunction with an early plea and restitution, is a key factor in mitigating any potential sentence.[65]

64 *Supra* note 7.

65 *R v Drabinsky*, 2011 ONCA 582 at para 166.

However, for those situations where the client is implicated, counsel should take the same steps as noted above—that is, determine if cooperation is mandatory, ask for questions and documents in advance of any meeting, confirm that the statement is compelled and not admissible in criminal court, seek advice from labour or employment counsel, and get clear written instructions.

On the other hand, if a review of the evidence leads counsel to conclude that the client has engaged in an intentional fraud or offence, then the advice may be different.

First, the client must be clearly advised of counsel's perspective on the evidence.

Second, the client must be advised that if they cooperate in the investigation, the client may very well be implicating themself in criminal activity. Hence, the client is likely to lose their employment, be subject to discipline from any regulatory body, and risk being charged by the police. The client must understand and consider all of those possible consequences before deciding whether to cooperate or not.

If the client elects to cooperate under such a scenario (an unlikely scenario unless the client is mandated by law to do so), counsel must take the precautions noted above.

In either case, counsel should obtain clear, written instructions from the client that set out in plain language how the client wishes to proceed and confirmation that counsel has clearly outlined all the consequences of the particular course of action.

F. Show Them the Money

If the evidence discloses that a company, institution, or individual has lost money as a result of the actions of the client, it may be in the client's interest to take immediate steps toward restitution. This can be done without any admission of liability and could have several beneficial effects. First, it is a show of good faith on behalf of the client. Second, if the client's employment is in issue, restitution of any lost moneys may help the client in keeping their job. Third, restitution may preclude any potential civil claim against the client. Fourth, the return of lost moneys may assist in heading off a police investigation or charges. However, counsel should be careful in this regard. It is illegal for someone to offer something in consideration for not reporting a matter to the police. To do so would constitute the offence of Compounding an Indictable Offence, contrary to section 141 of the *Criminal Code*. So any payment of restitution must not be linked with an agreement not to report the matter to police. It must be done unconditionally as a show of good faith. Lastly, if the client is ultimately charged by the police, the client's early good-faith return of money will put counsel in a much-improved situation to try to convince Crown counsel that the charges should not proceed or, if the client is found guilty, that any sentence should be substantially reduced.[66]

66 *Ibid.*

While there is no guarantee that any of the above benefits will be realized, the possible upside is substantial, and there is little, if any, downside. Most importantly, if the police are notified, but informed that all moneys have been returned, it may be enough to stop the police from investigating further or laying charges. This potential benefit is, of course, of great value to the client.

G. The Police Investigation

If the police become involved in the investigation, criminal counsel are well versed in how to deal with the situation. Typically, the client will be instructed to provide no statement to the police. The client will also be told to comply with the terms of any search warrant that has been issued, while never agreeing to a consent search.

However, different considerations may apply if counsel's view is that the evidence supports the innocence of the client. In those circumstances, it may be an option for the client and counsel to meet with the police to provide the innocent explanation in the hope of warding off criminal charges.

This could be, of course, a risky step to take. The client and counsel may be unaware of the body of evidence possessed by the police. Thus, there are several steps counsel can take before determining whether the client should pursue this option.

First, counsel can request that any questions to be asked by the police be provided in advance in writing for review. This is unlikely to be successful, but there is no downside to making the inquiry.

Second, counsel can ask that any documents that are to be put to the client be produced in advance of any police interview. While this is, again, unlikely, we have seen police agreement on such a procedure before.

Third, and most importantly, counsel can negotiate an arrangement with the police that any statement from the client will be considered an "induced statement," meaning it is not voluntary and therefore not admissible against the client in any criminal court.[67] This allows the police to learn whatever information they may require for their investigation, without risking that a statement or utterance from the client will become evidence in the criminal case.

If the police are truly interested in "getting at the truth" and not merely in obtaining evidence in order to charge the client, then such an offer should be of interest to them. Assuming the police agree, counsel should attend at the police station with the client for the statement. The agreement between the police and counsel that the statement is induced and not admissible in court should be stated by counsel at the

67 Typically, an induced statement is sworn/affirmed and does not immunize the client from its use against them in prosecutions where some or all of the statement is the subject of a prosecution for charges against the administration of justice like perjury, attempting to obstruct justice, and public mischief.

beginning of the videotaped statement so that it is clearly on record, and the police should confirm the agreement.

On the other hand, should the police reject such a proposal, that strongly suggests that the police have already concluded they have reasonable and probable grounds to arrest and that any statement from the client would be insufficient to convince them otherwise and could instead be used against the client as evidence. Accordingly, the standard caution to the client not to provide a statement applies.