Case No. 4860 999 09 05002161
Citation: *Ontario (Ministry of Labour) v. JR Contracting Property Services et al.*, 2011 ONCJ 316

ONTARIO COURT OF JUSTICE
Toronto Region

In the matter of the *Provincial Offences Act*, R.S.O. 1990, c.P. 33.

2011 ONCJ 316 (CanLII)

B E T W E E N:

ONTARIO (MINISTRY OF LABOUR)

Crown

-and-

JR CONTRACTING PROPERTY SERVICES,
TEISHA (TINA) LOOTAWAN, and ANDREW J. HANIFF

Defendants

INTERIM DECISION (NO. 2) ON CHARTER MOTION

Counsel:

Ms. C. Ashton, Wilson Vukelich LLP, for Ms. Lootawan, Moving Party
Ms. S. Loosemore and Ms. K. Malabar, Crown Counsel (MOL), Responding Party
Mr. S. Weisner, for JR Contracting Property Services

Hearing Dates: May 30 and 31, 2011
Written Interim Decision Released: June 8, 2011

INTRODUCTION:

[1] Jeff Lomer, an Inspector with the Ministry of Labour, has laid seven charges against the defendants herein resulting from an accident that occurred on October 15, 2008 that resulted in serious injury to an alleged worker, Garnet Stiff, under the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, as amended (the "*Act*").

[2] Ms. Lootawan has been charged with the following three counts under the *Act*:

(a) failing as a supervisor to ensure that a worker wore protective devices as required by s.26.1 of Ontario Regulation 213/91 and contrary to s.27(1)(a) of the *Act*;
(b) failing as a supervisor to take every reasonable precaution to protect a worker in violation of s.27(2)(c) of the *Act*, and in particular, failing to take the reasonable precaution of ensuring that an adequate form of fall protection is provided to a worker where a worker is exposed to a fall hazard of falling more than three metres; and
(c) knowingly furnish an inspector with false information required by the inspector in the exericse of his or her powers or the performance of his duties, contrary to s.62(3) of the *Act*.

[3] A motion was brought by Ms. Ashton, counsel for Ms. Lootawan, to question the constitutional validity by which Mr. Lomer obtained her statement, dated December 17, 2008. Ms. Ashton argued that Ms. Lootawan's rights under sections 7, 8 and 10 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") have been violated, and claims remedies under section 24 of the *Charter*, seeking a stay of the charges, or alternatively, a remedy with respect to her statement dated December 17, 2008.

[4] Both the moving party and the responding party (the Crown) have filed with the court substantial motion records and books of authorities, a reply and a sous reply. In addition, both sets of counsel did an excellent job of narrowing the issues before the court.

ISSUES:

[5] The following issues arise from this motion:

(a) whether or not Ms. Lootawan's *Charter* rights have been violated; and
(b) the granting or denial of *Charter* relief as a result.

DECISION:

[6] The motion is granted and Ms. Lootawan's statement of December 17, 2008 is hereby excluded from the trial.

ANALYSIS:

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Mr. Lomer's Regulatory Powers under the Act:

[7] Mr. Lomer testified that he is employed with the Ministry of Labour since 2006 as an inspector in the construction branch. He explained his various duties, which include conducting inspections and investigations, and issuing a range of different orders. It was clear from his evidence and the exhibits that he uses the terms “inspection” and “investigation” interchangeably both in speaking with individuals and on the Ministry documents which he issues. While he has been supplied with the standard wording for a caution, which was in place at the time and which has been recently updated (Exhibits 15 and 1), he could not recall if he had supplied it to anyone in any of his cases. The only information to obtain a search warrant that he recalled seeking was in this case, for the telephone records (Exhibit 16).

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[8] Despite Mr. Lomer's difficulty in distinguishing between his duties as an inspector and his duties as an investigator (“I do all inspections/investigations”), and his testimony that he relies on “gut feeling” to decide whether or not to provide an individual with a caution, nevertheless, I find him to be a credible witness, and give weight to his testimony and the documents that he prepared.

[9] It is clear from his testimony, and the various exhibits filed regarding the statements that he collected early on in this matter from different individuals, that he was provided with incomplete, conflicting and potentially misleading information. While Mr. Stiff had advised him early on in two different statements (Exhibit 6 statement of October 23, 2008 and Exhibit 7 statement of November 13, 2008) that Tina Lootawan was his supervisor, others that he interviewed claimed not to know who she was, or denied that she had any involvement. Thus, I accept his testimony that from the time he was dispatched to this accident scene, inspected it, spoke to the homeowner and obtained the receipt for a cash job (Exhibit 4) and the modest advertisement from the Scarborough Mirror which referred only to “Josh” (Exhibit 5), and ensured that a colleague, Mr. Williams, took measurements at the scene, there was a significant period of time in which he could not corroborate Mr. Stiff's opinion of Ms. Lootawan's role. While he was in the process of gathering documents and speaking with various individuals, he was fulfilling his regulatory role in good faith under section 54 of the *Act*.

[10] In particular, section 54(1) provides as follows:

> An inspector, may, for the purposes of carrying out his or her duties and powers under this Act, and the regulations,
>
> > (h) make inquiries of any person who is or was in a workplace either separate and apart from another person or in the presence of any other person that are or may be relevant to an inspection, examination, inquiry or test;

[11] However, the regulatory landscape shifted with time as Mr. Lomer's various inquiries continued. As noted above, I accept that Mr. Lomer was given conflicting and incomplete information for a significant period of time, and in particular refer to the statement he took from Deokallie Prasaud, dated November 14, 2008 (Exhibit 8), in which she denies that her sister-in-law, Ms. Lootawan, has any involvement with AIC, JR Contracting, or dealings with Mr. Stiff.

[12] As Ms. Ashton submitted, the relationship between Mr. Lomer and Ms. Lootawan was becoming increasingly adversarial by November 26, 2008, when Mr. Lomer issued the first Project Form (Exhibit 11). In this Project Form, he referred to this matter as an "inspectors investigation." He also confirmed their telephone discussion of November 25, 2008, in which she had advised him that she "has no involvement in this case and will not provide a statement unless it is put in writing so the requirement can be forwarded to her lawyer for review and then a decision shall be made whether information will be provided to this inspector." He confirmed that she would pick up this document on December 2, 2008, and provided her with five different dates and times to meet. While this appears on its face quite aggressive, it was clear from Mr. Lomer's testimony that she was unwilling to meet unless he put something in writing. He testified that he had advised her that she could have her lawyer call him, or bring her lawyer to their meeting. He further testified that others had brought their counsel with them to their meetings. At this point, I find he was still operating within his regulatory powers under section 54, and that she was refusing to cooperate.

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[13] On December 2, 2008, Mr. Lomer sent a letter to Tim Corcoran of Toronto Community News, with two attachments, of advertisements that had been placed in the Scarborough Mirror and online through www.insidetoronto.com, during the period of September 1, 2008 until November 30, 2008 (Exhibit 9). One advertisement said, "Call John" and the other advertisement said, "Josh", each providing a different telephone number. Mr. Lomer sent these materials to Mr. Corcoran by email, dated December 2, 2008, at 5 p.m. This letter indicated that they would meet on Friday, December 5, 2008. Again, Mr. Lomer was still operating within his regulatory powers under section 54, and if anything, the attached advertisements potentially implicated others, not Ms. Lootawan. The advertisement that referred to "Josh" was the same one that the homeowner had provided to Mr. Lomer (Exhibit 5).

[14] At the December 5, 2008 meeting, Mr. Lomer receives client information for "All-Can Services," which had a client number, and copies of invoices, in which Ms. Lootawan was listed as the contact person placing these two advertisements in various community newspapers across Toronto (Exhibit 10). Thus, as of December 5, 2008, Mr. Lomer had evidence that appeared to corroborate Mr. Stiff's opinion that Ms. Lootawan had a significant role in this matter.

[15] As His Worship Trachy noted in *R. v. Beachville Lime*, Ont. Ct. (Prov. Div.), May 28, 2003 (unreported), at p. 14, there is no "magic line" for determining when an inspector had reasonable and probable grounds and must "take off his inspectors hat and don an investigators hat. " His Worship then added, that, "one must look at the totality of the evidence."

[16] In *R. v. Jarvis*, [2002] 3 S.C.R. 757, at paragraph 88, the Supreme Court of Canada coined the phrase "cross the Rubicon" to describe situations in which regulatory officials engaged in an inquiry, which became an adversarial relationship between the individual and the state, and where the predominant purpose of the inquiry was the determination of penal liability. Once the regulatory officials have "crossed the Rubicon," then the individual was entitled to full *Charter* protections.

[17] Moreover, in *R. v. Jarvis*, at paragraphs 93-94, the Supreme Court of Canada examined whether the relationship between the individual and the state was effectively adversarial in nature, based on the context, examining the following factors, reproduced *verbatim*:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
(c) Had the auditor transferred his or her files and materials to the investigators?
(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

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[18] I find that on December 5, 2008, Mr. Lomer had reasonable and probable grounds to charge Ms. Lootawan as a supervisor. His decision to issue the second Project Form, dated December 12, 2008, compelling her attendance on December 17, 2008 at the MOL's Downsview office, was consistent with the pursuit of a criminal investigation. Moreover, I find that the evidence he sought was relevant to her general liability under the *Act*.

[19] Ms. Lootawan had sent him correspondence on December 9, 2008, in which she declined his request to attend a meeting, as set out in his first Project Form. By so doing, she had tried to invoke her right to silence.

[20] The second Project Form of December 12, 2008 warned her explicitly that if she were to be found guilty of refusing to comply, she could personally face either imprisonment or a fine of up to $25,000, or both. Despite invoking her right to silence, Mr. Lomer unlawfully compelled her to attend the meeting of December 17, 2008.

[21] Thus, the second project form violated her right under section 7 of the *Charter* to life, liberty and security of the person because it threatened her with imprisonment for failure to comply. Her statement obtained on December 17, 2008 appeared to be statutorily compelled, and violated her section 7 *Charter* right against self-incrimination. Through her counsel, she has established on a balance of probabilities that she had an honest and reasonably held belief that she was required to attend and provide a statement to Mr. Lomer on December 17, 2008. See: *R.v. White*, [1999] 2 S.C.R. 417 at para. 75; *R. v. Jarvis*, at para. 67-68; and *R. v. Ling*, [2002] 3 S.C.R. 814 at para. 32.

[22] The right against self-incrimination has been given a high level of deference. In *R. v. White*, Justice Iacobucci held as follows at paragraph 70:

> The protection afforded by the principle against self-incrimination does not vary based upon the relative importance of the self-incriminatory information sought to be used. If s. 7 is engaged by the circumstances surrounding the admission into evidence of a compelled statement, the concern with self-incrimination applies in relation to all of the information transmitted in the compelled statement. Section 7 is violated and that is the end of the analysis, subject to issues relating to s.24(1) of the *Charter*.

Section 8 of the Charter:

[23] Ms. Lootawar's right to be secure against unreasonable search and seizure under section 8 of the *Charter* was also violated when she was compelled to attend on December 17, 2008 and provide a statement.

[24] In the absence of a warrant, which Mr. Lomer could have obtained under section 56 of the *Act,* the Crown must establish on a balance of probabilities that the search was authorized by law, see: *R.v. Nolet*, [2010] 1 S.C.R. 851, at paragraph 21.

[25] The Crown has already conceded that the compelled attendance violated her section 7 and 8 *Charter* rights unless it was lawful within section 54(1)(h) of the *Act*.

Section 10(b) of the Charter:

[26] Section 10 of the *Charter* provides as follows:

Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[27] Both Crown and defence counsel agree that when detention occurs, an individual's section 10(b) rights are triggered. However, in the sous reply, the Crown states at paragraph 5 that “a Ministry of Labour inspector is never in the position of detaining (or arresting) anyone. As such, no section 10(b) rights are triggered and there is no requirement for a '10(b) caution.' ...The requirement for an inspector to caution is triggered by the existence of reasonable grounds and is, if you like, a 's.7 caution'. The purpose of the caution is to inform the person that they are not compelled to say anything...”

[28] In *R. v. Soules*, 2011 ONCA 429, a decision of the Ontario Court of Appeal released since this motion was heard, LaForme, J.A., set out the distinction between section 7 and section 10(b) rights, at paragraph 44:

> ...despite the strong connection between ss.7 and 10(b) of the *Charter*, the two are not mutually exclusive. As I believe the quote from *White* illustrates [para. 70], although it is a well established principle that s.10(b) rights are limited until arresting officers have developed reasonable and probable grounds to effect an arrest, the choice of whether or not to remain silent – and thus prevent self-incrimination – nevertheless remains.

[29] The handwritten notes of Mr. Williams, the other MOL inspector who attended Ms. Lootawan's interview with Mr. Lomer on December 17, 2008, supported the finding that Mr. Lomer had reasonable and probable grounds at the time. Although Mr. Lomer's evidence was that his notes of this matter were kept on his laptop which he did not share with his colleague, he testified that he may have had a brief

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discussion with him prior to meeting with Ms. Lootawan. Exhibit 13 provided as follows:

> December 17, 2008
>
> 10:32 a.m: Interview with Tina the Owner/implicated individual in a workplace accident...

[30] Detention may be effected without physical restraint if an individual submits or acquiesces because he or she reasonably believes he or she has no choice. See: *R. v. Therens*, [1985] 1 S.C.R. 613.

[31] In this case, I find that Ms. Lootawan's unlawfully compelled appearance and statement constituted psychological detention, and therefore her section 10(b) rights had also been triggered. See: *R. v. Therens*, at 644; and see *R. v. Grant*, [2009] 2 S.C.R. 353 at paragraphs 30-31.

[32] Ms. Lootawan had been invited by Mr. Lomer to have her counsel attend the December 17, 2008 meeting with her, or to have him telephone him in advance of the meeting. However, Mr. Lomer did not provide Ms. Lootawan with any caution, nor did he disclose the fruits of his December 5, 2008 meeting with Mr. Corcoran, and explain the significance of this evidence to her, and then invite her to call her counsel. She attended the meeting under both compulsion and under the mistaken belief that it was being held within the regulatory regime, unaware of the likelihood that she would be charged.

[33] The Supreme Court has repeatedly held that a new right to counsel arises when the extent of the legal jeopardy changes significantly. See: *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Manninen*, [1987] 1 S.C.R. 1233; and the recent trilogy of cases dealing with s.10(b), see: *R. v. Willier*, [2010] 2 S.C.R. 429; *R. v. Sinclair*, [2010] 2 S.C.R. 310; and *R. v. McCrimmon*, [2010] 2 S.C.R. 402.

[34] Thus, when Mr. Lomer had reasonable and probable grounds to charge her, he needed to provide her with a caution prior to speaking to her, and was unable to compel her statement. The right to choose counsel includes a specific lawyer, e.g. a reasonable opportunity to contact chosen counsel. If chosen counsel is not immediately available, the detainee has the right to wait a reasonable amount of time for him or her. Provided that the detainee exercises reasonable diligence in the exercise of these rights, the police must hold off questioning. See: *Willier, supra*; *R. v. Ross*, [1989] 1 S.C.R. 3; and *R. v. Black*, [1989] 2 S.C.R. 138.

[35] In *R. v. McCrimmon*, at paragraph 18, the majority stated, "...The right to counsel upon arrest or detention is intended to provide detainees with immediate legal advice on his or her rights and obligations under the law, mainly the right to remain silent." Paragraph 18 also affirmed the reasoning in *R.v. Brydges*, [1990] 1 S.C.R. 190, that part of this caution must include the existence and availability of duty counsel and Legal Aid plans, and in turn, the detained person must exercise reasonable diligence.

[36] It is clear from Mr. Lomer's evidence that he did not provide her with a caution, or offer her contact information for duty counsel or Legal Aid plans, prior to obtaining her statement on December 17, 2008. Thus, her right to counsel under section 10(b) of the *Charter* has also been breached.

The Remedy:

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[37] Ms. Ashton has asked that the charges against her client be stayed, or in the alternative, that the statement of December 17, 2008 be excluded. The onus is on the moving party to satisfy the court on a balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute, as per section 24(2) of the *Charter*.

[38] In determining whether the admission of evidence obtained by way of a *Charter* breach would bring the administration of justice into disrepute, the court must weigh three factors:

(a) the seriousness of the *Charter*-infringing conduct
(b) the impact of the breach on the accused's *Charter*-protected rights and interests; and
(c) society's interest in the adjudication of the case on its merits.

See: *R. v. Grant*, [2009] 2 S.C.R. 353; and *R. v. Harrison*, [2009] 2 S.C.R. 494.

[39] In *R.v. O'Connor*, [1995] 4 S.C.R. 411, at para. 75, a stay of proceedings is only appropriate when two criteria are fulfilled:

(a) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
(b) no other remedy is reasonably capable of removing that prejudice.

Balancing:

[40] Mr. Lomer proceeded on the basis of his understanding of the law, and was therefore acting in good faith. While he "crossed the Rubicon," he only did so 12 days prior to her compelled meeting and statement, and he did encourage her to bring her counsel with her. Thus, he was acting in good faith in that respect, as well.

[41] Nevertheless, Ms. Lootawan was compelled to attend and provide a statement after she had asserted her right to silence. Her right against self-incrimination was violated by the state. The fruits of this interview constituted a warrantless search. She was not provided with a caution, although objectively, Mr. Lomer had reasonable and probable grounds to charge her. The Crown conceded that the false information count hinged on this compelled statement, but argued that the Court of Appeal's decision in *R.v. Rivera*, [2011] O.J. No.1233, would save it for a limited purpose if the issues were confined to a section 10(b) breach. Given my findings of concurrent *Charter* breaches, it is not necessary to analyze *R. v. Rivera* in this context.

[42] Finally, society has a strong interest in the adjudication of this case on its merits, since the objective of the *Act* is to provide safe and healthy workplaces for workers in Ontario, see: *R. v. Ellis-Don Ltd.* 1 O.R. (3d) 193, at para. 53.

[43] The impact of these breaches can be easily cured by excluding the statement from the trial, and a stay of all the charges is unnecessary and unwarranted under all the circumstances.

ORDER:

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[44] For these reasons, I grant the motion and order the statement of Ms. Lootwan, dated December 17, 2008, excluded from the trial on its merits.

Dated at Toronto, this 8th day of June, 2011.

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Mary Ross Hendriks, J.P.

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