NOTICE OF APPLICATION

ONTARIO COURT OF JUSTICE
(East Region)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

RYAN MATHESON

Applicant

NOTICE OF APPLICATION

TAKE NOTICE that an Application will be brought on the 6th day of February 2012, at the Ottawa Courthouse, Ottawa, Ontario, for an Order granting the exclusion of evidence under s.24(2) of the *Canadian Charter of Rights and Freedoms* (*Charter*) or, in the alternative, an Order staying the prosecution pursuant to either the remedy contemplated under section 24(1) of the *Charter* or pursuant to the powers of the Court at common law.

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THE GROUNDS FOR THIS APPLICATION ARE (enumerated as follows):

Contents

I. Factual Background

1. Ryan Matheson (the "**Applicant**") is an avid collector of Japanese animation, Japanese comic books and figurines. The Applicant works as a computer programmer to support himself, but is an amateur artist focusing on Japanese anime characters.
2. The Applicant arrived at the Canada Border Services Agency (the "**CBSA**") port of the Ottawa International Airport at approximately 4:40 p.m., on April 15, 2010. Border Service Officer ("**BSO**") Neil Smith,[1] was the first officer to interview the Applicant. BSO Smith referred the Applicant to secondary inspection.
3. According to the Narrative Report of the secondary inspection officer – BSO Tremblay - the Applicant arrived at the secondary examination counter at 4:52 PM. His customs declaration was coded "V– Visitor, 123 1, the hit of the day, and 23, **doubt of prohibited goods/pornography** [emphasis added]".
4. The Applicant was asked to provide passwords for his laptop and tablet devices so that they could be searched.
5. The secondary inspection was commenced by BSO Tremblay, who was assisted by BSO Proteau. According to his notes, at 5:24 p.m., BSO Tremblay finds an image file on the hard drive Mr. Matheson's Apple Macbook Pro. The image file in question is a collage of 48 discrete animated images which portray "persons"[2] involved in sexual acts. According to his Narrative Report at this time BSO Tremblay "stopped my examination of the laptop".
6. At this time, BSO Tremblay is unsure what – if anything – to make of the subject image. He speaks to his supervising officer, BSO Spencer. He attends Spencer's office and reviews the definition of child pornography in the Criminal Code.
7. According to Superintendent BSO Spencer's Narrative Report:

> *After TREMBLAY was aware of the definition of Child Pornography as per the Canadian Criminal Code **[…] TREMBLAY advised me***

[1] Peace Officer pursuant to s. 2 of the Criminal Code of Canada. Under that section "peace officer" includes: (d) an officer within the meaning of the Customs Act, the Excise Act or the Excise Act, 2001, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts

[2] The Applicant does not admit that the image in question depicts an actual "person" as defined 163.1 (1), and will seek permission to enter expert evidence that the drawings in question do not depict actual people or human children. That section provides:

In this section, "child pornography" means

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
> (i) that **shows a person** who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region **of a person** under the age of eighteen years

> ***<u>that he was going to proceed with a detention of MATHESON and afford him his Charter Rights and Freedoms as well as the Vienna Convention</u>***. *TREMBLAY then left the office and returned to secondary examination counter 6 where he executed the detention of Matheson.*
>
> [Emphasis added]

8. In a somewhat contradictory fashion the Narrative Report of BSO Tremblay indicates that at "17:35 Superintendent R. Spencer 16321 **<u>authorized my detention</u>** for suspected child pornography [emphasis added]". Thus, it remains unclear from the disclosed material who actually decided to explicitly detain the Applicant, whether Superintendent BSO Spencer "authorized" the detention – or whether BSO Tremblay formed independent grounds for detention and "advised" the superintendent officer.
9. According to his Narrative Report, BSO Tremblay then "read the detention notice, rights, caution and Vienna convention from the officer reference booklet version bsf5093(E)". According to BSO Tremblay, the Applicant stated that he understood and that he did not want to contact counsel or the US Embassy. A cuffless frisk was performed by BSO Proteau.
10. It is unclear if the Applicant was under arrest, or was simply detained as indicated by BSOs Spencer and Tremblay. The Ottawa Police Service ("**OPS**") ultimately responded. According to the Investigative Action of OPS Officer Plummer:

> *Border officer Philippe TREMBLAY [redacted] stated he located the images on MATHESON's laptop* ***<u>and arrested MATHESON</u>*** *as well as reading him his rights and Vienna Convention rights.*
>
> [Emphasis added]

11. However, prior to the arrival of the OPS, but after the "detention" or "arrest" of the Applicant – depending on which version of events is believed – at 5:48 PM room number 1427 is "sanitized" by BSO Proteau, according to this officer's notes. The Applicant was then escorted to room a sanitized room 1427 and held.
12. Then at 5:50 p.m, according to BSO Tremblay, he left a message on the CBSA investigation pager. Approximately, 5 minutes later CBSA Investigator Phil Browne contacted BSO Tremblay. According to BSO Tremblay's Narrative Report:

> *He told me that he would inform the Ottawa Police Service's High-Tech crimes division.* ***<u>He also gave me permission to continue my examination of the laptop.</u>***
>
> [Emphasis added]

13. According to the disclosed materials, there is then a 30 minute gap between the decision to contact the OPS and the execution of that decision. In this vein, according to the Narrative Report of Superintendent BSO Spencer. At:

> *18:20 I spoke with CBSA investigator Phil Brown who advised me to contact Ottawa Police Services to see if they would be interested in laying formal charges in regards to this case.*
>
> ***18:25 I proceeded to the Ottawa Police Services – Airport detachment and spoke with Ottawa Police Officer MARTIN and advised him of the case.*** *I then referred MARTIN to TREMBLAY.*
>
> [Emphasis added]

14. Therefore, BSO Tremblay and OPS Martin – the responding officer who ultimately provides the grounds for arrest to arresting OPS Officer Plummer – speak to one another for the first time at 6:28 p.m., 52 minutes after the decision is first made – by either Spencer or Tremblay - to detain or arrest the Applicant.
15. According to the Narrative Report of BSO Tremblay, he shows OPS Martin the image at 6:30 p.m, and Martin reviews the image and leaves the room 2 minutes later. There is no indication in any of the disclosed material that OPS Martin took the Applicant's laptop or a copy of the images with him when he left.
16. According to the Investigative Action of OPS Martin, "[BSO] Spencer indicated that an officer had discovered animated images on the suspect laptop computer and that ***they were not sure if the images constituted pornography*** [emphasis added]"; then, at 6:40 p.m.,[3] OPS Martin must have been wrestling with the same uncertainty because, according to his Investigative Action, he "contacted Det. Maureen Bryden of the High-Tech Crime Team, and ***she advised that the images would constitute child pornography***. Det. T Bryden requested that the suspect be arrested and transported to the cells at the Central Station" [emphasis added].
17. Therefore, the disclosed material makes it abundantly clear that neither CBSA nor OPS had the requisite reasonable and probable grounds initially upon reviewing the subject image; rather, it was Det. Maureen Bryden that provided the grounds for the arrest without having seen the image in question.
18. After his call with Det. Maureen Bryden, OPS Martin advises BSO Tremblay that they will be arresting the Applicant and taking him into their custody. This conversation took place at 7 p.m., according to the Narrative Report of BSO Tremblay. The Applicant was not read his Charter Rights, caution or Vienna Convention materials at this time. Nor, was the Applicant given access to counsel.

[3] The time from this call is recorded in the Police Will State of Detective Maureen Bryden.

19. Notwithstanding the fact that the decision to arrest the Applicant was made at 7 p.m., OPS Plummer - the officer that actually affected the arrest – was not dispatched until 7:23 p.m., and did not arrive on scene until 7:29 p.m.
20. According to the Investigative Action of OPS Plummer, he did not provide the Applicant with his rights to counsel until 8:19 p.m., a full hour and 19 min. after the decision had been made by the Ottawa Police Service to arrest the Applicant.
21. The Applicant was transferred to a police cruiser at 8:42 p.m., just over four hours since he landed at the airport. He had not yet spoken to either a lawyer or an embassy official.

Evidence of the Applicant to be called on Charter Voir Dire

22. For the limited purpose of a *Charter* voir dire, the Applicant would testify that:

    a. that he was asked if he wanted to speak to the US Embassy in customs and that he initially indicated that he did not wish to speak to the Embassy because he did not think that anything was "seriously wrong";
    b. the reason that the Applicant did not initially think that anything was "seriously wrong" at customs, was because both CBSA Officers continually referred to the animated Japanese style images on his computer as being "borderline".
    c. that he asked if he could speak to the Embassy later if needed and that a BSO indicated that he could talk to them anytime;
    d. that CBSA Officers continued to look though his computer the entire time he was in the secondary inspection;
    e. that he never spoke to a representative from the US Embassy;
    f. that he was finally able to contact counsel at approximately 9:30 p.m;
    g. that when he was in the custody of Ottawa Police in Central cells he was treated poorly:
        i. he was never provided a blanket, despite the fact that the cell block was very cold;
        ii. when he asked for food – given that he had been in transit or detained for over 10 hours – the OPS Officer that he asked told him that she would "talk to the chef";
        iii. that the Applicant repeatedly asked to be fed, at least 6 times, the Applicant was not provided with any food;
        iv. when the Applicant asked to be fed at 5 a.m., the OPS Officer replied "You're in jail, dude! What do you expect?";
        v. that he was provided a muffin the morning following his detention and arrest;
        vi. that while in custody the Applicant asked a blonde female OPS Officer in cell block if he could speak to the US Embassy;

vii. that the OPS Officer in questions asked the Applicant if "he was serious?" – the Applicant responded that he wished to speak to the US Embassy right away;

viii. that the OPS Officer indicated that "I'm not sure if the US Embassy is here. I'll have to ask the lieutenant". The officer never returned and he was never allowed access to his Embassy. Nor, was he even told that he was being denied access to them. The Applicant was simply ignored;

ix. that at his initial court appearance after arrest he had not yet retained counsel and that the Crown intended to show cause to prevent the Applicant's release;

x. that when he was being transported from the courthouse to the Regional Detention Center (the "**RDC**"), the Applicant was not placed into the protective custody section of the transport vehicle - as he was previously.

xi. that the Applicant asked the transport officer if he could be put into protective custody section again and the officer laughed and said "you are in there alone! Ha ha!" and then slammed the vehicle's door.

xii. that another officer eventually did move him to the protective custody section;

xiii. that when he arrived at the RDC one of the guards remarked that "since you're going into protective custody, that must mean that you've done something pretty bad, right, something child related?" Then, another guard remarked, "if you get raped in here, it doesn't count!";

xiv. that before being taken into the jail cell, the Applicant was asked whether or not he wanted to speak to the US Embassy, and indicated unequivocally that he did wish to speak to the Embassy; and,

xv. that the Applicant was never provided with an opportunity or the means to contact the Embassy.

II. The Applicant had his Right to Counsel and Consular Rights Violated

A. The Applicant was detained when entering the secondary customs inspection and was not promptly informed of the reason or provided timely access to counsel

23. The Supreme Court's interpretation of the content of the s. 10(b) guarantee has been dominated by the majority judgments of Chief Justice Lamer.[4] In *Bartle,*[5] speaking for 7 justices, he found that the purpose of s. 10(b) is to protect the disadvantaged against the risk of self-incrimination:

[4] For a fulsome discussion of all the *Charter* related materials cited or referred to herein, see: Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th Ed., (Toronto: Carswell, 2010).
[5] [1994] S.C.J. No. 74 (S.C.C.)

> The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request.[6]

24. In *Bartle*, the Chief Justice drew a distinction between what he called "informational" and "implementation" duties under s. 10(b) to reflect important differences in jurisprudence.

25. The Court held that it is critical that the informational component of the right to counsel be comprehensive in scope and presented by police in a timely and comprehensive manner. Unless they are clearly and fully informed of their rights at the outset, detainees cannot be expected to make informed choices about whether to contact counsel and whether to exercise other rights, such as their right to silence.

Bartle

26. The duty to inform an individual of his or her s. 10(b) Charter right to retain and instruct counsel is triggered at the outset of an investigative detention. From the moment an individual is detained, s. 10(b) is engaged and the police or state agents have the obligation to inform the detainee of his or her right to counsel "without delay". The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the Charter.

R. v. Suberu, [2009] S.C.J. No. 33 (S.C.C.)

27. In the *Suberu* companion case, *Grant,*[7] the Supreme Court provided further clarification on the qualitative aspects of "detention". There, the Court of seven justices were unanimous in deciding that the accused was detained and *Charter* rights violated but held that the evidence of the firearm should not be excluded under s.24(2).A lengthy and detailed joint opinion of McLachlin C.J. and Charron J. (LeBel, Fish and Abella JJ.

[6] *Bartle, supra,* at para. 16.
[7] [2009] 2 SCR 353

concurring but with Binnie and Deschamps J. dissenting), concluded that the following should be the approach to detention:

> 1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:
>
> > (a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
> > (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
> > (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.[8]

28. Clearly, the Supreme Court envisages distinctions of degree. This is evident in the context of border and customs searches in the earlier Supreme Court decision of *Simmons*. Routine questioning by customs officials or random luggage searches by such officials does not constitute detention for the purposes of s. 10, but there is a detention and entitlement to s. 10 rights where a person has been "taken out of the normal course and forced to submit to a strip search."
29. In *Simmons*, per Dickson C.J. and Beetz, Lamer and La Forest JJ., the Appellant was detained within the meaning of s. 10 of the Charter when she was required, pursuant to s. 143 of the *Customs Act*, to undergo a strip search at customs and she should have been informed of her right to retain and instruct counsel at that time. At the time of the search, appellant was clearly subject to external restraint. The customs officer had assumed control over her movements by a demand which had significant legal consequences. Appellant could not refuse to be searched and leave. Section 203 of the Customs Act makes it an offence to obstruct or to offer resistance to any personal search authorized by the *Customs Act*.

[8] *Grant, supra,* at para. 44.

30. There is little doubt that the search of one's personal computer falls within the same level of intrusiveness as a strip search of one's physical person, because in contemporary times a person's computer will envelop their "digital life". Plus, the Supreme Court in *Morelli,* notes that: "**It is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer** [emphasis added]".[9]
31. Given the jurisprudential clarification of what will constitute a detention, when a detention will take place in the context of a *Customs Act* search, and the corresponding constitutional requirements placed upon the state or its agents, it seems clear that the Applicant was detained when he arrived at the secondary inspection area and was asked to provide his passwords for the computer and iPad. As a consequence of the authority set out in section 203 of the *Customs Act,* had the Applicant refused to provide the necessary passwords he could have been charged with obstructing an officer. There is no indication that he was free to leave. In fact, he had been referred for doubt of prohibited goods/pornography, and consequently, it is equally clear that the Applicant was facing real legal jeopardy.
32. Given the foregoing, the Applicant was detained and his section 10 Charter Rights were engaged at 4:52 p.m. when he was taken out of the routine course of customs inspections for doubt of prohibited goods/pornography and statutorily compelled to provide the passwords for his electronic devices.
33. However, BSO Tremblay did not "read the detention notice, rights, caution and Vienna convention from the officer reference booklet version bsf5093(E)" until 5:35 PM, 43 minutes, after the Applicant had been detained and forced to provide his computer passwords.
34. Consequently, the Applicant has had his constitutionally guaranteed right to counsel breached in a significant way, and thus, seeks a corresponding remedy.
35. The Applicant was not informed of his right to counsel when he should have been, nor was he provided any opportunity to meaningfully exercise that right, notwithstanding the fact that he was exposed to tremendous legal jeopardy the moment he walked into the secondary inspection area and was statutorily compelled to provide the passwords for his electronic devices.

B. When the reason for detention changes there is a duty to re-inform the detainee of the right to counsel; a new s. 10(b) right is triggered. This right was also breached.

36. Where the reason for the arrest or detention changes, it is now clear that the police are under a duty to re-inform the person arrested or detained of the right to counsel. A new s. 10(b) right is triggered. The leading decision is the unanimous judgment of the Supreme Court of Canada in *Black.*[10] In *Black,* the accused had been arrested on a charge of

[9] [2010] S.C.J. No. 8 (S.C.C.) at para. 2.
[10] [1989] S.C.J. No. 81 (S.C.C.)

attempted murder but the victim died and the charge became first degree murder. For the Court, Madam Justice Wilson held that

> s. 10(b) should not be read in isolation. Its ambit must be considered in light of s. 10(a). S. 10(a) requires the police to advise an individual who is arrested or detained of the reasons for such arrest or detention. The rights accruing to a person under s. 10(b) arise because he or she has been arrested or detained for a particular reason. An individual can exercise his s. 10(b) right in a meaningful way only if he knows the extent of his jeopardy.[11]

37. In *Evans*,[12] McLachlin J. for the Court on this point applied *Black* to a case where an accused had been arrested on a charge of drugs and later became the prime suspect in murder cases. She added the slight qualification that the police would not have to reiterate the right to counsel every time an investigation touched on a different offence. However, they would have to restate the right to counsel

> when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning.[13]

38. As noted, the Applicant was referred to customs secondary inspection at 4:40 PM for the purposes of verifying compliance with the *Customs Act.* This referral for the purposes of the *Customs Act* quickly converted into a full-scale criminal investigation regarding the importation and possession of child pornography.
39. In fact, according to BSO Tremblay, BSO investigator Phil Brown decided that OPS would be contacted as early as 5:55 PM. Consequently, there is an unequivocal shift from verifying compliance with the *Customs Act* to a criminal investigation under the *Criminal Code of Canada*, at 5:55 PM.
40. Moreover, it is abundantly clear that at this time the Applicant was facing a new level of significant legal jeopardy, including a mandatory minimum jail sentence of a year in prison. As a result he should have been re-informed of a constitutionally guaranteed right to counsel.
41. The relevant authorities failed in every meaningful way to both re-inform the Applicant of his right to counsel or to allow him to exercise that right. He did not actually speak to a lawyer until approximately 9:30 PM. This was over 3 1/2 hours after the decision had

[11] *Black, supra,* at para. 24.
[12] [1991] S.C.J. No. 31
[13] Evans, *supra,* at para. 48.

been made to morph the search of the Applicant's computer from *Customs Act* compliance to obtaining information for the purposes of criminal prosecution.

C. The Applicant's Rights under Article 36 of the Vienna Convention on Consular Relations were also breached

42. Article 36 of the Vienna Convention on Consular Relations (the "**Vienna Convention**") requires that a person detained in a foreign country be advised of his right to contact consular officials of his own country.[14] Presuming the detainee does not object, foreign officials must be notified of the detention "without delay".
43. A consular official is expected to visit the detainee and explain the rights of a criminal defendant; primarily the right to legal counsel and the right to remain silent. He or she is also expected to assist the detainee in obtaining legal counsel.
44. Sections (1) (b) and (c) of Article 36 of the Vienna Convention provide that:

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

45. The reason behind this obligation is to ensure that a person traveling within a foreign country, with an unfamiliar legal system, is provided with a basic level of assistance that ensures – at a minimum – that they understand the nature of the proceedings against them.
46. In this particular case failing to implement the international legal obligations under the Vienna Convention is particularly egregious for three separate regions. First, this is the first time that the Applicant had ever traveled abroad. Second, he is a young person who would have been extremely frightened, overwhelmed and stressed by the circumstances.

[14] 21 U.S.T. 77, 101 T.I.A.S. No. 6820, 596 U.N.T.S. 261, 1967. The Vienna Convention on Consular Relations came into force on April 24, 1964, and was ratified by the United States on October 22, 1969 and was acceded to by Canada July 18, 1974. Therefore, the treaties obligations – as a matter of international law – are applicable in this case.

Third, and most importantly, the impugned material he is charged with possessing it a protected form of free speech within his home country of the United States.[15]

47. The applicability of the Vienna Convention, between the United States and Canada - in a domestic legal proceeding - was considered by Ontario Superior Court of Justice in 2001 in *R. v. Partak*.[16] There it was found, *inter alia,* that:

    a. in 1966, Canada ratified the Vienna Convention and then implemented it in the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41;
    b. that Article 36 does create, within the countries that have ratified the convention, an obligation on the authorities to advise a foreign national of his or her right to have them notify the appropriate consulate or embassy;
    c. a foreign national's entitlement to be advised of his or her consular rights arises at the time that the authorities know or reasonably ought to be aware that the detainee is a foreign national;
    d. while the right in issue is not a *Charter* right, it is appropriate, having regard to the wording of para. 2 of art. 36, to interpret the timing of the right to be advised of consular rights in conformity with *Charter* principles. Such an interpretation enables full effect to be given to the purposes for which the rights are intended.

48. In *Partak,* the Court also considers the purpose behind the obligation of consular notification. The Court recognizes that consular notification will allow the respective "government to make every effort to ensure that the detainee receives information about the local system" and that he or she "receives equitable treatment under the local law".

49. In this vein, the consular officials can, *inter alia*:

    a. notify family and friends of the national's situation;
    b. help the national communicate with their representative, family or friends;
    c. request immediate and regular access to the national;
    d. seek to ensure that treatment by the courts and conditions of detention are fair and equal to those accorded to local prisoners;
    e. obtain information about the status of the case and encourage authorities to process the case without undue delay;
    f. provide the national, the representative or family with information on the local judicial and prison systems, approximate times for court action, typical sentences in relation to the alleged offence and bail provisions;
    g. make every effort to ensure adequate nutrition, medical and dental care;
    h. arrange for the purchase of necessary food supplements, essential clothing and other basis items not available through the prison system;
    i. deliver mail and provide permitted reading material if normal postal services are unavailable;

50. In *R. v. Van Bergen*,[17] the Alberta Court of Appeal had an opportunity to comment on the purpose of art. 36 of the Vienna Convention in the course of considering an appeal from an order of committal from an extradition judge pursuant to the *Extradition Act*, 1999,

[15] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
[16] [2001] O.J. No. 6279 (O.S.C.J.)
[17] [2000] A.J. No. 882 (QL)

S.C. 1999, c. 18, and a judicial review of the decision of the Minister of Justice pursuant to the same Act.

51. The Alberta Court of Appeal agreed with the Minister of Justice that the purpose of art. 36 was "to ensure that foreign detainees receive equal treatment under the local criminal justice system and are not disadvantaged because they are not familiar with and do not understand the proceedings against them".
52. Following this decision, the Ontario Superior Court of Justice found in *Partak*, "that the purpose of consular rights is to provide support and information to foreign nationals concerning local law to ensure equal treatment under that law. Accordingly, the reason the police are obliged to notify a detained foreign national of his right to have the consulate or embassy contacted, is to ensure that the detainee has access to the information and support their embassy can provide to them, as detailed above".
53. *Charter* obligations are to be interpreted in harmony – to the extent possible – with Canada's international legal obligations. As a consequence, while the breach of a treaty obligation would not typically attract a domestic legal remedy, in this context the associated breach of the Vienna Convention can be considered alongside the corresponding section 10(b) Charter violation and the associated s. 24(2) analysis.[18]

III. Customs officers acted as agent for Police and conducted an illegal search

54. Pursuant to section 99 of the *Customs Act*, customs officers have wide latitude to search goods that are entering Canada. However, the powers of the police to search personal property are much more circumscribed. As a consequence, the police in the immediate case sought to obtain a search warrant in order to further the search of the subject laptop.
55. In order to obtain the search warrant, Detective Danielle Montgomery of the OPS swore an Information to Obtain before Her Worship Claudette Cain on April 16, 2010. Within Appendix "C" of the Information to Obtain a Search Warrant, Detective Danielle Montgomery swears the following:

    a. Customs Officer Tremblay conducted a routine search and located child pornography on the Apple laptop belonging to Ryan Matheson.
    b. The Ottawa Police Service were called and Constable Martin attended the Ottawa Macdonald Cartier international Airport. Constable Martin viewed a file on the Apple laptop titled 40 positions which contained animate child pornography. These images depict children in various sexual positions as well as engaging in sexual intercourse.
    c. These animate child pornographic images were also viewed by Constable Martin who confirmed these images meet the definition of child pornography as defined in the Criminal Code of Canada.

56. There are several discrete *Charter* breaches that can be ascertained as a result of the activities of both BSO Tremblay and Detective Danielle Montgomery. First, BSO Tremblay would have been aware that as of 5:55 PM the Ottawa Police Service's high-tech crimes division would become involved in the investigation – rendering it a police

[18] Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 348-349 (S.C.C.).

investigation pursuant to the *Criminal Code of Canada* and not a *Customs Act* investigation. The relevant portion of Tremblay's Narrative Report, noted above, states that CBSA Investigator Phil Browne contacted BSO Tremblay and:

> *He told me that he would inform the Ottawa Police Service's High-Tech crimes division.* ***He also gave me permission to continue my examination of the laptop.***
>
> [Emphasis added]

57. If BSO Tremblay knew that Ottawa Police Service's high-tech crimes division would be taking over the investigation, he should have discontinued his inspection pursuant to the *Customs Act*. At that moment, Mr. Matheson became the target of a police investigation regarding importation of child pornography. As a consequence, any further searching of the laptop that was done after 5:55 PM can be construed as a police investigation, with BSO Tremblay acting as an agent of the police.
58. Moreover, it is especially disconcerting that BSO Tremblay indicated in his Narrative Report at this time he "stopped my examination of the laptop". This is consistent with what BSO Tremblay told OPS Martin, as Martin's Investigative Action indicates that officer, "Phillipe Tremblay, had discovered the images during a routine check. Tremblay did not continue his inspection of the computer after finding the file."
59. However, the evidence from the disclosure is that the subject images is found at 5:36 p.m., and that OPS was informed at 6:25 p.m. While the Applicant would testify that the border service officers continued to search the material inside of his laptop notwithstanding what BSO Tremblay told OPS Martin. This continued searching would be consistent with the direction that BSO Tremblay received from investigator Phil Brown, who gave him permission to continue examining the laptop notwithstanding the fact that the police were going to take over the investigation.
60. Moreover, with respect to the Information to Obtain, Detective Danielle Montgomery indicated that this was a "routine" search. This is untrue. Rather, this was a secondary customs inspection where the Applicant had been referred for a specific reason, namely doubt of possession or importation of child pornography.
61. In the Sworn Information to Obtain, Detective Danielle Montgomery also indicates that they found the subject image in a file called "48 positions". This is also untrue. According to BSO Tremblay the file image was called "shijuuhatte-48-positions". But, most nefariously, in this Information to Obtain, Detective Danielle Montgomery swore under oath that:

> *"These animate child pornographic images were also viewed by Constable Martin* ***who confirmed these images meet the definition of child pornography*** *as define [sic] in the Criminal Code of Canada".*
>
> [Emphasis added]

62. This is simply untrue. If in fact Constable Martin was so sure that the subject images constituted child pornography, there would have been no reason for his telephone call to Detective Maureen Bryden. He "contacted Det. Maureen Bryden of the High-Tech Crime Team, and ***she advised that the images would constitute child pornography***. Det. T Bryden requested that the suspect be arrested and transported to the cells at the Central Station" [emphasis added].
63. Moreover, it is equally clear that the subject border services officers were unsure whether or not the images constituted child pornography. It appears that it was Detective Maureen Bryden who made the decision that the subject images would constitute child pornography, a fact which was withheld from the authorizing Justice.
64. As a consequence, there has been a constitutional breach against the right to be free from unreasonable search and seizure. This is a twofold breach. The first aspect is that BSO Tremblay effectively acted as an agent of police while conducting further examinations of the laptop even after he knew that Ottawa Police high-tech crimes division would become responsible for the investigation. Therefore, he went beyond any statutory powers conferred under the *Customs Act* and initiated a criminal investigation on behalf of the OPS.
65. The second aspect is that the Information Sworn to Obtain the search warrant which was ultimately used to search the hard drive of the Applicant was riddled with inaccuracies. The most damning inaccuracy is that there were fundamental difficulties and ambiguities in determining whether or not the subject images would even come within the purview of the Criminal Code of Canada. This was not mentioned.
66. In fact, Detective Danielle Montgomery misled the Justice of the Peace when indicating that Constable Martin determined that the images in question would fall within the definition of child photography. It was in fact Detective Maureen Bryden who made this determination, without having even seen the images.
67. The issue is complicated by the fact that the search straddles two scenarios: 1) a warrantless search; and, 2) a search pursuant to an improperly obtained warrant. These areas are subject to distinct lines of jurisprudence.
68. The search executed initially by BSO Tremblay would correctly be considered a warrantless search authorized by law, namely section 109 of the *Customs Act*. A search in this category will become illegal provided the search is not carried out in accordance with the procedural and substantive standards required by the authorizing law.

Warrantless Search

69. In the context of the search of an international traveler, the *Customs Act* affords extremely wide latitude to customs officers when executing a search of that person's property. There are several good policy reasons behind this broad latitude, which include ensuring that no contraband materials or persons enter the country, collecting duties and national security. However, these reasons – and broad mandate conferred to search people and their belongings - do not extend to allowing customs officers the ability to act as agents for the local police force
70. The moment CBSA determined that this was going to be a police investigation, the *Customs Act* mandate terminated. This is because it was established at this point in time

that the Applicant was going to be investigated for the possibility of breaching the Criminal Code, and the agency that was to have jurisdiction over that investigation was going to be the Ottawa Police Department.

71. Nevertheless, there is some evidence that the investigation into the Applicant's hard drive – a protected sphere of personal privacy – continued, as explicitly authorized by CBSA Investigator Phil Brown. As a consequence, this became a warrantless search which exceeded the scope of the statutorily authorizing law.
72. As the customs act search outstripped its statutory authority, it became an illegal search (*Caslake)*.[19]
73. An illegal search – as a matter of binding Supreme Court jurisprudence – will necessarily violate s. 8 (*Kokesch)*.[20]

Improperly obtained warrant

74. In addition to the violation of section 8 occasioned by the police agency of CBSA, once OPS did become involved and obtain the necessary search warrant, they did so in a manner that was both improper and illegal.
75. The second aspect is that the Information Sworn to Obtain the search warrant was riddled with inaccuracies. The most damning is that the difficulties in determining whether or not the subject images were even illegal was not mentioned. In fact, Detective Danielle Montgomery misled the Justice of the Peace when indicating that Constable Martin determined that the images fit the definition of child photography. This is not true, it was Detective Maureen Bryden who made this determination without having even seen the images.
76. In *Harris*,[21] Mr. Justice Martin for the Ontario Court of Appeal distinguished between "mere minor and technical defects" which would not automatically lead to a s. 8 violation and invalidity "in substance" which would. There would be a defect of substance where the information did not set out facts upon which the justice acting judicially could be satisfied that there were the requisite reasonable grounds or where a search warrant failed to meet the minimum requirements of particularity respecting things to be searched for and seized. Such defects have now been repeatedly held to have been searches conducted in violation of s. 8. This should be the case here as well.

IV. Wrongful Arrest

77. In order to affect the arrest of an individual without a warrant, police need to have "reasonable grounds to believe" that an accused has committed an offence, which has both subjective and objective requirements. Subjectively, the arresting officer must

[19] In *Caslake* [1998] S.C.J. No. 3 (S.C.C.) the majority indicated there are three ways in which a search can fail to meet the requirements of being authorised by law. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. Third, a search must not exceed its scope as to area and as to the items for which the law has granted the authority to search.

[20] In *Kokesch* [1990] S.C.J. No. 117 (S.C.C.) the Supreme Court reasserted *Collins* in a ruling making it quite clear that an illegal search will necessarily violate s. 8.

[21] [1987] O.J. No. 394

believe that the person in question has committed the offense. And, that belief must be objectively justifiable. That is, a reasonable person standing in the shoes of the arresting officer would have also believe that grounds for arrest existed.[22]

78. In the pre-Charter decision in *Whitfield*,[23] the majority of the Supreme Court adopted the following definition from *Halsbury's Laws of England*:

> Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest unless the person sought to be arrested submits to the process and goes with the arresting officer. An arrest may be made either with or without a warrant.

79. In *Latimer*,[24] the father of a severely disabled daughter advised the police that she had passed away in her sleep. When an autopsy found signs of poisoning the police visited the father and advised him: "You are being detained for investigation into the death of your daughter". The Supreme Court, in the course of dismissing an argument that there had been arbitrary detention contrary to s. 9 of the Charter, held that there had been a *de facto* arrest. It would be unduly formalistic to require the police to use the word "arrest".

Arrest by BSO Tremblay

80. In the event that the Court finds that the Applicant was under arrest when the cuffless frisk was performed by CBSA at 5:35 p.m., then the arrest of the Applicant was neither subjectively or objectively justifiable. Factual support for the proposition that the Applicant was placed under arrest by CBSA can be found in the Investigative Action of OPS Officer Plummer:

> *Border officer Philippe TREMBLAY [redacted] stated he located the images on MATHESON's laptop* ***and arrested MATHESON*** *as well as reading him his rights and Vienna Convention rights.*
>
> [Emphasis added]

81. First, the grounds for arrest were not objectively reasonable. According to the Investigative Action of OPS Martin, "[BSO] Spencer indicated that an officer had discovered animated images on the suspect laptop computer and that ***they were not sure if the images constituted pornography*** [emphasis added]". It is impossible, based on this information, to conclude that a reasonable person standing in the shoes of BSO Tremblay would have also believed that grounds for arrest existed – given the fact the BSO Tremblay was himself unsure.
82. Second, and in line with the fact that BSO Tremblay was unsure if the images were illegal, he subjectively applied the wrong standard for arrest. As noted, at 5:35 PM, BSO

[22] R v. Storrey, [1990] 1 S.C.R. 241 (S.C.C.)
[23] [1969] S.C.J. No. 66 (S.C.C.)
[24] [1997] S.C.J. No. 11 (S.C.C.)

Tremblay advises the CBSA Superintendent on Duty, BSO Spencer, of the subject image found on the Applicant's laptop. According to his notes, it appears that neither BSO Tremblay or BSO Spencer had determined that the subject image would even constitute child pornography. In this regard, BSO Spencer's notes indicate:

> *BSO Tremblay shows me images on a laptop **that may** constitute child pornography. Have officer Tremblay come into office to review 163(1).(1) CCC so he is aware of definition of child pornography. BSO Tremblay advises me that **he has enough suspicion to suspect the images are child pornography**.*
>
> [Emphasis added]

83. It is clear that in making his subjective determination, BSO Tremblay made the arrest based on his subjective belief that he had "enough suspicion to suspect". This is not a standard known at law. Therefore, any arrest based on this standard is unlawful.

Arrest by OPS

84. The subsequent re-arrest of the Applicant by OPS Plummer suffers from the same problem. As noted, at 6:40 PM, OPS Martin "contacted Det. Maureen Bryden of the High-Tech Crime Team, and ***she advised that the images would constitute child pornography***. Det. T Bryden requested that the suspect be arrested and transported to the cells at the Central Station" [emphasis added].
85. Therefore, the disclosed material makes it abundantly clear that neither CBSA nor OPS had the requisite reasonable and probable grounds initially upon reviewing the subject image; rather, it was Det. Maureen Bryden that provided the grounds for the arrest without having seen the image in question.
86. If OPS Martin had subjective grounds, he would not have needed to call Det. Bryden. And, if this arrest was objectively reasonable, then BSO Tremblay, BSO Spencer and OPS Martin would not have been so unsure. Rather, this arrest was the product of a snap decision made by a Det. Bryden at OPS Headquaters, who had not even seen the subject images.

V. The Applicant was the Subject of Cruel and Unusual Punishment

87. Pursuant to the Charter, *everyone* has "the right to be free of cruel and unusual punishment". As noted above, the Applicant was treated abhorrently while in Canadian custody. As indicated, the Applicant would testify that:

    i. he was never provided a blanket, despite the fact that the cell block was very cold;
    ii. that food was withheld, even when asked for repeatedly;

iii. that when he asked to speak to the Embassy he was asked if "he was serious?" – and then was simply ignored;
iv. that when he arrived at the RDC one of the guards remarked that "since you're going into protective custody, that must mean that you've done something pretty bad, right something child related?" Then, another guard remarked, **"if you get raped in here, it doesn't count!** [Emphasis added]".
v. that while at the RDC the Applicant asked again to speak to his Embassy and was never provided with the opportunity to do so;
vi. that the US Embassy was never contacted as required by the Vienna Convention.

88. Depriving the Applicant of food and keeping him in a cold cell is bad. Failing to contact the US Embassy and preventing the Applicant from establishing his own contact is illegal under international law. However, threatening the Applicant with rape is cruel, inhumane and degrading. The reason that individuals charged with crimes against children are typically kept in isolation from general population prisoners is because they will become the target of violence by virtue of the nature of the crimes with which they stand accused. Mentioning that the Applicant could potentially be raped while in custody – even jokingly – is wicked.
89. The Applicant was hungry, tired and cold. He was away from his home country for the first time in his life. He was initially placed in protective custody because of the nature of the charges, and then subsequently placed in the general population section of the transport vehicle. He was then threatened with the frightening possibility that he could be raped while in prison. Threatened rape is a form of psychological torture. As a consequence, there is little doubt it that rises to the level of a constitutional breach of the right to be free from cruel and unusual punishment.

VI. 24(2) Exclusion

90. The next step is to consider Mr. Matheson's remedies under s. 24(2) of the *Charter.* The Supreme Court of Canada, in the cases of *R.* v. *Grant*,[25] and *R.* v. *Harrison*,[26] has made the test more flexible in that now less importance is placed on whether the evidence sought to be excluded is conscriptive or non-conscriptive.
91. The line of inquiry is stated in *Grant*, *supra*, in para. 71, as follows:

> A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective.

[25] 2009 SCC 32, [2009] 2 S.C.R. 353 (S.C.C.)
[26] 2009 SCC 34, [2009] 2 S.C.R. 494 (S.C.C.)

> When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

The seriousness of the Charter-infringing state conduct

92. The more serious the state conduct, the more likely it is that the challenged evidence would be excluded. The relevant breaches alleged include:

    a. a failure to inform the Applicant of his right to counsel upon detention;
    b. a breach of the international legal obligations enunciated by the Vienna Convention;
    c. a failure to implement the Applicant's right to counsel with anything approaching reasonable diligence;
    d. an arrest that should have never taken place to begin with, because no one on scene could form the requisite grounds;
    e. a search warrant backed up by an information to obtain that is riddled with inaccuracy;
    f. and, most grievously of all, the fact that Mr. Matheson, a law abiding American citizen, was the subject – while in Canadian custody – to cruel and unusual punishment.

93. In essence this case involves a cascading series of breaches which ultimately culminate in a foreign citizen being subjected to physical discomfort and psychological torture while in Canadian custody. Instances such as this can only be classified the most serious of *Charter* infringing state conduct.

The impact of the breach on the Charter-protected interests of the accused

94. The impact of these breaches on the Charter protected interests of Ryan Matheson are severe. He had his liberty restrained (and still does because of his bail conditions). He had his personal property taken. He had his hard drive, which contained intimate details

of his life searched relentlessly. He was made to feel physically uncomfortable and then psychologically threatened in a foreign country with no access to his embassy. This took place because he possessed comic book images, comic book images which would not be illegal in his country of origin. In this way, the breaches in question cut right to the core of why a society protects those interests in the first place

Society's interest in the adjudication of the case on its merits

95. The images in question do not depict real people. They do not depict real children. They are fictional comic characters. Society's interest in seeing Mr. Matheson stand trial for the possession of these images, after the way he has been treated, is minimal at best. The images in question do not offend moral sensibility the way real depictions would, nor is there danger or risk posed to children.
96. Given the way that the Applicant has been treated, the conclusion necessarily follows that the admission of any evidence obtained after his referral to secondary inspection would tend to bring the administration of justice into disrepute.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

1. The materials provided by the Crown pursuant to its *Stinchcombe* obligations;

2. *Viva voce* testimony as may be required;

3. An Application Record.

THE RELIEF SOUGHT IS:

4. An Order allowing the Application and finding that the Applicant`s rights under s. 7, 8, 9, 10 and 12 of the *Charter of Rights* have been violated.

5. An Order allowing the Application and granting the exclusion of all evidence obtained after the referral of Ryan Matheson to secondary customs inspection; or,

6. In the alternative, an Order staying the prosecution pursuant to either the remedy contemplated under section 24(1) of the *Charter* or pursuant to the powers of the Court at common law.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION

By service in accordance with the rules.