




HAMILTON POLICE SERVICE

CONFIDENTIAL

RECOMMENDATION REPORT

The Hamilton Police Services Board has agreed that this Report and Appendices be made public.

TO:	Chair and Members Hamilton Police Services Board
BOARD MEETING DATE:	July 29, 2021
SUBJECT:	Request for Extension – Service of Notice of Hearing – Section 83(17) of <i>Police Services Act</i> Police Constable DARREN SMITH
REPORT NUMBER:	21-078
SUBMITTED BY:	Frank Bergen, Chief of Police
SIGNATURE:	

RECOMMENDATION

That the Hamilton Police Services Board receive for processing the Application to extend the time for service of a Notice of Hearing against Police Constable Darren Smith regarding allegations of misconduct under Part V of the *Police Services Act*, as amended.

EXECUTIVE SUMMARY

The purpose of this report is to comply with the *Police Services Act* in respect of the service of a Notice of Hearing on a police officer, Police Constable Darren Smith, after 6 months have elapsed from the day on which the facts on which the complaint is based first came to the attention of the chief of police. An Investigative Report into the actions of Police Constable Darren Smith has substantiated misconduct. Numerous efforts to personally serve Police Constable Darren Smith with the Notice of Hearing within the six-month period have been unsuccessful, necessitating an Application before the Board to allow for service beyond the six-month time period.

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: N/A

Staffing: N/A

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Legal Implications:

This Application is submitted for approval of the Board for the service of a Notice of Hearing against Police Constable Darren Smith. The Investigation Report has substantiated four allegations of misconduct against Officer Smith. The Draft Notice of Hearing is attached as Appendix A and the Statement of Particulars is attached as Appendix B. The Investigative Report is attached as Appendix C.

Section 83(17) of the *Police Services Act* states:

If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the Board, in the case of a municipal police officer, or the Commissioner, in the case of a member of the Ontario Provincial Police, is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing.

The applicable subsection, section 83(18)(c), states:

The day referred to in subsection (17) is,

...

(c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be.

The Board must review the delay as a whole and from an objective standpoint. It is fair for the Board to consider the chronology of events, set out below, to determine whether it is reasonable to delay service of the notice of hearing in the circumstances.

Applications of this nature have historically been heard in an in camera session of the Board. This was the standard practice across the Province of Ontario. The decision of the Ontario Court of Appeal in *Canadian Broadcasting Corporation v. Ferrier* (released on December 27, 2019) must now be addressed by the Board prior to confirming its process under section 83(17) of the *Police Services Act*.

The *Ferrier* decision involved a challenge to the Thunder Bay Police Services Board decision to hold an Extension Application process *in camera*. The Ontario Court of Appeal held that a decision maker or Board must consider each application in light of its authority to hold a closed meeting or hearing under section 35(4) of the *Police Services Act*. Section 35 states that police services board meetings are presumptively open and this is consistent with section 2(b) of the *Charter of Rights and Freedoms*. Section 35(4) permits closed meetings or hearings to protect intimate financial or personal matters. The Board must balance the right to an open meeting (section 2(b) of the *Charter*) against the statutory objectives to protect intimate financial or personal matters (section 35(4) of the Act). In performing this balancing exercise, the Board must consider the following contextual factors:

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- Whether the issue before the Board involves a systemic issue or a more individualized complaint;
- Whether the issue has generated keen public interest;
- Whether the media has become involved;
- Whether information sought to be protected has already been publicized;
- Whether there is a need for transparency in a highly contentious issue;
- The nature of the information sought to be protected;
- The sensitivity of the information sought to be protected;
- Where individuals are involved, the desirability of protecting a complainant/witness/informant;
- The type of harm likely to be caused by the publication of the information;
- Whether the prohibiting of the publication of parts of the information would provide protection.

The following procedural steps will have to be addressed or taken by the Board:

1. Confirm whether the Application will be dealt with in the public session or the closed session of a future Board Meeting.
2. The Board is to only receive the Application at this meeting.
3. The respondent officer, Police Constable Darren Smith, must be provided with a full copy of this Application, including all appendices. Officer Smith must be provided with an opportunity to file written submissions in response to the Application prior to the Board making its decision.

INFORMATION

Chronology

Officer Smith has been absent from work since November 19, 2018. On January 24, 2019, he was approved for a [REDACTED].

On June 20, 2019, Police Constable Darren Smith was charged with four criminal offences, as set out in the Draft Notice of Hearing (See Appendix A) and Statement of Particulars (See Appendix B) attached to this report. He was suspended with pay on June 19, 2019.

Officer Smith pleaded not guilty and had a trial in the Ontario Court of Justice before the Honourable Justice Joseph Nadel. On December 22, 2020, Officer Smith was found guilty of all four counts of the criminal charges against him. These findings of guilt constitute Discreditable Conduct pursuant to section 2(1)(a)(ix) of the Code of Conduct, set out in Regulation 268/10 to the *Police Services Act*, as amended.

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Following the findings of guilt, the Hamilton Police Service Professional Development Division completed an investigation into the alleged misconduct. All of the documents related to the criminal charges were obtained and reviewed. The Investigation Report was completed by the assigned investigator on February 9, 2021. The report was reviewed and approved by Superintendent Nancy Goodes-Ritchie in February 11, 2021 (See Appendix C).

According to section 83(17) of the *Police Services Act*, the notice of hearing was to be served on Police Constable Darren Smith by June 22, 2021.

Attempts at Service

Following the completion of the Investigative Report, a Notice of Hearing was drafted and the Hamilton Police Service began its attempts to service the notice on Police Constable Smith.

The first attempt at personal service was at the sentencing hearing in respect of the criminal charges on March 23, 2021. Detective Ben Licop of the Professional Development Division attended at the assigned courtroom and attempted to serve the Notice of Hearing. Detective Licop made several attempts at service that day, both in the courtroom and in the hallway of the courthouse. However, Police Constable Darren Smith refused to accept service of the documents. Arrangements were made to attempt personal service at a further court appearance on April 19, 2021; however, that appearance proceeded by Zoom Conference.

Given the difficulty in effecting personal service, the Service reached out to Officer Smith's criminal defence counsel on May 21, 2021. Counsel confirmed that he did not have instructions or authority to accept service on behalf of Officer Smith for *Police Services Act* related matters. In addition, on May 21, 2021, the Service wrote to the Hamilton Police Association to inquire as to whether it could assist in effecting service on Officer Smith. On May 27, 2021, the Association confirmed that it did not have instructions to accept service of documents on behalf of Officer Smith.

Following these attempts at service through criminal defence counsel and the Association, the Service began efforts to serve Officer Smith personally at his residence. The Service retained the services of a Process Serving Company. On May 26, 2021, a process server attended at an address in Hamilton, Ontario, which was on file with Human Resources as the address of Officer Smith. The process server spoke to a female at the address who indicated that Officer Smith no longer resided at the address.

Further inquiries identified an address in Guelph, Ontario as the current residence of Officer Smith. On the afternoon of June 1, 2021, a process server attended at the Guelph residence. Nobody came to the door. However, a Dodge vehicle was located in the driveway. A second attempt was made by knocking at the door, again with no answer. On the evening of June 1, 2021, a second attempt was made by another process server. The process server knocked on the door, with no response. A card was left at the door for the occupants to contact him. The Dodge vehicle was again located in the driveway. The

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process server spoke to a neighbor who confirmed that Officer Smith resided at the Guelph address and that he should be home if the Dodge vehicle is in the driveway. The process server attended at the door and knocked again, with no answer.

On the morning of June 3, 2021, the process server who had attended on the evening of June 1, 2021 made another attempt to effect service at the Guelph address. The process server noted that the card he had left at the door was gone. He also noted that the Dodge vehicle was in the driveway. He knocked on the door, and there was no answer. He left a second note on the door. He tried knocking and ringing the doorbell several times, to no avail.

Following these unsuccessful attempts to serve Officer Smith personally through a process server, the Professional Standards Division began attempts to serve Officer Smith. On June 9 through 11, 2021, Superintendent William Mason made nine separate attempts to contact Officer Smith, either on his cell phone or at the land line associated with the Guelph residence. On three occasions, Superintendent Mason left a voicemail message on the cell phone, advising that the Service had a Notice of Hearing to serve on him. In the message, Superintendent Mason advised that he was willing to arrange an in person meeting at a location of Officer Smith's choosing to serve the documents. In the alternative, Superintendent Mason offered to serve the documents electronically if Officer Smith would provide him with an e-mail address. Superintendent Mason left his contact information on the message and asked Officer Smith to call him back. Superintendent Mason never received a call back.

Given that Superintendent Mason's repeated attempts at communication with Officer Smith were unsuccessful, the Professional Standards Branch made efforts to serve the documents personally on Officer Smith at the Guelph residence. Attempts at personal service were made on the following dates: June 14, 2021, June 15, 2021, June 17, 2021 and June 21, 2021. On June 14 and 15, the Dodge vehicle was observed to be in the driveway of the Guelph residence when officers attended.

On June 16, 2021, Detective Ben Licop spoke to Officer Smith's Probation Officer. She stated that she had spoken to Officer Smith, who confirmed the following:

- Officer Smith is aware that the Hamilton Police Service is attempting to serve him with documents and have been to his residence
- Officer Smith denied ever being home when service was attempted. He said that he found out through neighbours
- Officer Smith is aware that one of the documents is a Notice of Hearing and there must be dates set. If he is not served, the dates will have to be postponed and this will be to his advantage
- Officer Smith has no intention of returning calls to the Hamilton Police Service
- Officer Smith advised that he was not actively evading service

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Attempts at personal service were discontinued after the attempt on June 21, 2021. Despite Officer Smith's assertions to the contrary, it is the position of the Service that Officer Smith has been actively avoiding service of the Notice of Hearing.

Given the serious nature of the charges, and the fact that the Service will be seeking the dismissal of the officer if the misconduct is proven, the Service has made great efforts to have the officer served personally. However, if this Application is granted, the Service will avail itself of the provisions of the *Police Services Act* for alternatives to personal service.

ALTERNATIVES FOR CONSIDERATION

Not applicable

APPENDICES AND SCHEDULES ATTACHED

Appendix "A" – Draft Notice of Hearing

Appendix "B" – Draft Statement of Particulars

Appendix "C" – Investigative Brief

FB/M.Visentini



HAMILTON POLICE SERVICE
POLICE SERVICES ACT, R.S.O. 1990, c. P.15, as amended

NOTICE OF HEARING

TO: POLICE CONSTABLE DARREN SMITH

It is alleged that you committed the following acts of misconduct contrary to section 80(1)(a) of the *Police Services Act, R.S.O. 1990 c. P.15*, as amended:

COUNT ONE – DISCREDITABLE CONDUCT

You are alleged to have committed Discreditable Conduct in that on December 22, 2020, being a sworn member of the Hamilton Police Service, you were found guilty of an indictable criminal offence or a criminal offence punishable upon summary conviction, namely, that on or about the 22nd day of July, 2018, you did knowingly use a forged document to wit: Hamilton Police Service Firearms Destruction Waiver as if the document were genuine, contrary to the provisions of Section 368(1.1) of the *Criminal Code of Canada*, thereby constituting an offence against discipline, as prescribed in section 2(1)(a)(ix) of the Code of Conduct, Regulation 268/10, as amended.

COUNT TWO – DISCREDITABLE CONDUCT

You are alleged to have committed Discreditable Conduct in that on December 22, 2020, being a sworn member of the Hamilton Police Service, you were found guilty of an indictable criminal offence or a criminal offence punishable upon summary conviction, namely, that on or between the 3rd day of July in the year 2018 and the 22nd day of July in the year 2018 at the City of Hamilton in the said region, you did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the *Criminal Code of Canada*, thereby constituting an offence against discipline, as prescribed in section 2(1)(a)(ix) of the Code of Conduct, Regulation 268/10, as amended.

COUNT THREE – DISCREDITABLE CONDUCT

You are alleged to have committed Discreditable Conduct in that on December 22, 2020, being a sworn member of the Hamilton Police Service, you were found guilty of an indictable criminal offence or a criminal offence punishable upon summary conviction, namely, that on or about the 30th day of November in the year 2017 at the City of Hamilton in the said region, you did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the *Criminal Code of Canada*, thereby constituting an offence against discipline, as prescribed in section 2(1)(a)(ix) of the Code of Conduct, Regulation 268/10, as amended.

COUNT FOUR – DISCREDITABLE CONDUCT

You are alleged to have committed Discreditable Conduct in that on December 22, 2020, being a sworn member of the Hamilton Police Service, you were found guilty of an indictable criminal offence or a criminal offence punishable upon summary conviction, namely, that on or about the 30th day of November in the year 2017 at the City of Hamilton in the said region did knowingly use a forged document to wit: Hamilton Police Service Firearms Waiver as if the document were genuine, contrary to the provisions of Section 368(1.1) of the *Criminal Code of Canada*, thereby constituting an offence against discipline, as prescribed in section 2(1)(a)(ix) of the Code of Conduct, Regulation 268/10, as amended.

This is therefore to command you to appear before NAME OF HEARING OFFICER on DATE AND TIME OF FIRST APPEARANCE, at LOCATION OF FIRST APPEARANCE, to answer to said allegations.

Dated this _____ day of _____, 2021.

CHIEF OF POLICE FRANK BERGEN

Copy served on officer, this ____ day of _____, 2021.

(Officer Effecting Service)

NOTE:

This hearing is held pursuant to the *Police Services Act* and the *Statutory Powers Procedure Act*, which latter Act provides that if any party notified does not attend at the hearing, the tribunal may proceed in the absence of the party and the party will not be entitled to any further notice of the proceedings.

Copy received at time of service by:

POLICE CONSTABLE DARREN SMITH

NOTICE OF INCREASED PENALTY

TAKE NOTICE that pursuant to section 85(4) of the *Police Services Act*, the penalty of demotion or dismissal may be imposed if the misconduct with which you are charged is proven on clear and convincing evidence.

NOTICE OF RIGHT TO EXAMINE EVIDENCE

TAKE NOTICE that pursuant to section 83(5) of the *Police Services Act*, you are entitled to an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence at the hearing.

You may obtain such disclosure by personally contacting the Prosecutor or through your Counsel or Agent.

DRAFT



HAMILTON POLICE
POLICE SERVICES ACT R.S.O. 1990, c. P.15, as amended

STATEMENT OF PARTICULARS

TO: Police Constable Darren Smith

TAKE NOTE: Full particulars of the allegations are set out within the Hamilton Police Service Professional Standards Investigation Report.

1. On June 20, 2019, Police Constable Darren Smith was charged on Court Information 19-5373 with four counts as follows:
 - (1) that on or about the 22nd day of July, 2018, he did knowingly use a forged document to wit: Hamilton Police Service Firearms Destruction Waiver as if the document were genuine, contrary to the provisions of Section 368(1.1) of the *Criminal Code of Canada*.
 - (2) that on or between the 3rd day of July in the year 2018 and the 22nd day of July in the year 2018 at the City of Hamilton in the said region, he did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the *Criminal Code of Canada*.
 - (3) that on or about the 30th day of November in the year 2017 at the City of Hamilton in the said region, he did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the *Criminal Code of Canada*.
 - (4) that on or about the 30th day of November in the year 2017 at the City of Hamilton in the said region, he did knowingly use a forged document to wit: Hamilton Police Service Firearms Waiver as if the document were genuine, contrary to the provisions of Section 368(1.1) of the *Criminal Code of Canada*
2. Police Constable Darren Smith pleaded not guilty and had a trial in the Ontario Court of Justice before the Honourable Justice Joseph Nadel.

COUNT ONE – DISCREDITABLE CONDUCT

3. On December 22, 2020, Police Constable Darren Smith was found guilty of Count 1 on Court Information 19-5373. **(Investigation Report, Certified Copy of Court Information and Reasons for Judgement of the Honourable Joseph Nadel).**
4. The finding of guilt constitutes Discreditable Conduct.

COUNT TWO – DISCREDITABLE CONDUCT

5. On December 22, 2020, Police Constable Darren Smith was found guilty of Count 2 on Court Information 19-5373. **(Investigation Report, Certified Copy of Court Information and Reasons for Judgement of the Honourable Joseph Nadel).**
6. The finding of guilt constitutes Discreditable Conduct.

COUNT THREE – DISCREDITABLE CONDUCT

7. On December 22, 2020, Police Constable Darren Smith was found guilty of Count 3 on Court Information 19-5373. **(Investigation Report, Certified Copy of Court Information and Reasons for Judgement of the Honourable Joseph Nadel).**
8. The finding of guilt constitutes Discreditable Conduct.

COUNT FOUR - DISCREDITABLE CONDUCT

9. On December 22, 2020, Police Constable Darren Smith was found guilty of Count 4 on Court Information 19-5373. **(Investigation Report, Certified Copy of Court Information and Reasons for Judgement of the Honourable Joseph Nadel).**
10. The finding of guilt constitutes Discreditable Conduct.



Internal Complaint Investigative Report

Officer: Constable Darren Smith #907

Complaint Number: INT2019-018 (*Criminal conviction)

Investigated by: Detective Ben Licop #142

Completion Date: February 9th, 2021

Investigative Report

Summary of the Complaint

On or about November 30th, 2017, Constable Darren Smith forged and submitted a firearms waiver. This form is required to provide legal indemnification for Hamilton Police Service when a firearm is turned over and subsequently destroyed.

On or about July 3rd, 2018, Constable Darren Smith forged and submitted a firearms waiver. This form is required to provide legal indemnification for Hamilton Police Service when a firearm is turned over and subsequently destroyed.

During the course of a Professional Standards Branch investigation the forgeries were discovered and referred to Division 10 CID for a criminal investigation. On June 17th, 2019, Constable Smith was arrested and charged with Make False Document (two counts) and Use Forged Document (two counts). On December 22nd, 2020, after a full trial in criminal court before Justice J. Nadel, Constable Darren Smith was convicted on all counts. He will be sentenced March 23rd, 2021.

It is alleged that Constable Smith committed misconducts in the form of Discreditable Conduct in relation to his criminal convictions of Make False Document (two counts) and Use Forged Document (two counts), contrary to the Criminal Code of Canada.

Code of Conduct Allegations

- **Discreditable Conduct – Police Services Act 2(1)(a)(ix)-** in that he is guilty of an indictable offence or an offence punishable on summary conviction.
- **Discreditable Conduct – Police Services Act 2(1)(a)(ix)-** in that he is guilty of an indictable offence or an offence punishable on summary conviction.
- **Discreditable Conduct – Police Services Act 2(1)(a)(ix)-** in that he is guilty of an indictable offence or an offence punishable on summary conviction.
- **Discreditable Conduct – Police Services Act 2(1)(a)(ix)-** in that he is guilty of an indictable offence or an offence punishable on summary conviction.

Investigative Report

Summary of Statements – Respondent Officers

Statement Summary of Constable Smith

Constable Smith was unable to provide a statement.

Investigation

- June 19th, 2019 – assigned Internal Investigation.
- December 22nd, 2020 – Constable Smith found guilty on all counts
- December 22nd, 2020 – Obtained a copy of Her Majesty the Queen and Darren Smith “Reasons for Judgement” authored by Justice Nadel.
- February 5th, 2021 – Obtained a certified copy of Information 19-5373.
- Reviewed Ontario Police Services Act, Regulation 268/10.

Analysis

On November 21st, 2017, Constable Smith attended 200 West 33rd Street, Hamilton, for a Weapons/Ammo/Devices for Destruction call for service. Constable Smith received two firearms; a 12 gauge Model 20 JC Higgins shotgun and a .22 calibre Model 29 JC Higgins rifle. No waiver was signed by the owner, nor did they sign over ownership in Constable Smith’s notebook. Constable Smith completed a report for this incident on November 21st, 2017, and the firearms were submitted to property.

On November 28th, 2017, a NICHE task was received by Constable Smith requesting he have the owner sign a firearms waiver or sign over ownership in his notebook. Constable Smith filled out a Firearms Destruction / Receipt / Disposal Waiver in the name of the owner. Included on the waiver was a signature for the owner, then Constable Smith signed his own name as a witness to the signature. This form was dated November 30th, 2017, six days after the owner’s death, and scanned into NICHE in response to his assigned task.

On June 13th, 2018, Constable Smith attended 262 East 13th Street, Hamilton, for a Weapons/Ammo/Devices for Destruction call for service. Constable Smith received a Cooy Model 78 .22 calibre rifle, along with ammunition and a flare. No waiver was ever signed by the owners, nor did they sign over ownership in Constable Smith’s notebook. Constable Smith completed a report for this incident on June 14th, 2018, and the firearm and ammunition was submitted to property. The flare was never noted in Constable Smith’s notes or report; it is unknown where this item ended up.

Investigative Report

On June 15th, 2018, a NICHE task was received by Constable Smith requesting he have the owner sign a firearms waiver or sign over ownership in his notebook. Constable Smith filled out a Firearms Destruction / Receipt / Disposal Waiver in the name of the owner. Included on this waiver was a signature for the owner, then Constable Smith signed his own name as a witness to the signature. This form was dated July 3rd, 2018, and scanned into NICHE in response to his assigned task. It was confirmed that the owner never signed this form.

After the subsequent criminal investigation and consultation with a conflict Crown, Constable Smith was arrested on June 17th, 2019, and charged with Make False Document (two counts) and Use Forged Document (two counts), contrary to the Criminal Code of Canada. A certified copy of the Information is attached hereto as Appendix "A".

On November 9th, 10th, 12th and 13th, 2020, Constable Smith appeared in the Ontario Court of Justice before Justice J. Nadel for a full criminal trial. On December 22nd, 2020, Justice Nadel returned, ruling that Constable Smith was guilty on all counts. Justice Nadel wrote in his Reasons for Judgement, **"Likewise, Officer Smith's actions were not the product of negligence in the sense of failing to take proper care in the performance of his duties. He rejected and abdicated his sworn duty in these cases. These were not acts of negligence. They were acts of malfeasance"**. A copy of Justice Nadel's Reasons for Judgement is attached hereto as Appendix "B". Constable Smith is scheduled for sentencing on March 23rd, 2021.

The investigator reviewed the Police Services Act of Ontario Regulation 268/10, Code of Conduct which states the following:

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,
a) **Discreditable Conduct, in that he or she,**
ix) is guilty of an indictable offence or an offence punishable on summary conviction.

<h2>Conclusion</h2>

On December 22nd, 2020, Constable Smith was found guilty of the criminal offences Make False Document (two counts) and Use Forged Document (two counts). The mentioned offences are dual procedure offences, in which the Crown Attorney elected to proceed summarily.

Constable Smith was convicted of four criminal offences, therefore the **four allegations** of misconduct in the form of **Discreditable Conduct**, contrary to the Police Services Act of Ontario are **substantiated**.

Investigative Report

Investigator



Detective Ben Licop #142

Date: Feb 9, 2021

Supervisor/Manager



Detective Sergeant Gary Heron #824

Date: 2/02/09



Inspector Robin Abbott #648

Date: Feb 10/21



Superintendent Nancy Goodes-Ritchie #783

Date: Feb 11/21

Investigative Report

Referenced Information

- Certified copy of Information #19-5373
- Copy of Her Majesty the Queen and Darren Smith "Reason for Judgement" Released December 22nd, 2020, authored by Justice J. Nadel.
- Police Services Act of Ontario.
- Niche RMS report 17-791218

Appendices

- "A" Certified Copy of Information #19-5373
- "B" Copy of Her Majesty the Queen v. Darren Smith, "Reason for Judgement" Released December 22nd, 2020, authored by Justice J. Nadel.

Investigative Report

Appendix "A"

"A" Certified Copy of Information #19-5373

SMITH, D

19548158

Information / Dénonciation

Form 2, sections 506, 508.1 and 788 / Formule 2, articles 506, 508.1 et 788

☐ DV (Domestic Violence / Violence conjugale)☐ S (Impaired driving with substances / Conduite avec capacités affaiblies par des substances)☐ V (Vessel / Bateau)☐ Replacement Information / Dénonciation de remplacement☐ Non-Disclosure Order Pursuant to s. 486.31
Ordonnance de non-divulgence, art. 486.31☒ Publication ban pursuant to s. 517
Interdiction de publication en vertu de☐ Non-communication s. 515(12)/516(2)
Non-communication, par. 515 (12)/516 (2)☐ Provisions of 530(3) complied with
Dispositions du par. 530 (3) observées

19-5373

PTA 18 JULY 2019

Information Number / N° de la dénonciation

Arrest Date: 17th JUNE 2019
Date d'arrestation15 month Flag:
Alerte à 15 mois18 month Flag:
Alerte à 18 mois

Sworn/Affirmed Date /

Deemed Sworn/Affirmed Date: 20th JUNE 2019

15 month Flag:
Alerte à 15 mois18 month Flag:
Alerte à 18 moisDéclarée sous serment/affirmée solennellement le / réputée
être déclarée sous serment/affirmée solennellement leCANADA
PROVINCE OF ONTARIO
PROVINCE DE L'ONTARIOCENTRAL WEST
(Region / Région)Information of:
Dénonciation de :

L. FILICE

of HAMILTON POLICE SERVICE
de

PEACE OFFICER

(occupation / profession)

hereinafter called the informant. / ci-après appelé(e) le dénonciateur.

The informant says that he/she believes on reasonable grounds that
Le dénonciateur déclare qu'il a des motifs raisonnables de croire que

[Accused (last name, first name); address; date of birth (day, month, year) / accusé (nom, prénom); adresse; date de naissance (jour, mois, année)]

SMITH, DARREN; [REDACTED] FLAMBOROUGH, ON Canada; [REDACTED]

(1) on or about the / le ou vers le 22nd day of / jour de July, yr. / an 2018

at the CITY
à (au)of HAMILTON
dein the said region
dans ladite région

(enter charges here / insérer des accusations ici)

did knowingly use a forged document to wit: Hamilton Police Service Firearms Destruction Waiver as if the document were genuine, contrary to the provisions of Section 368(1.1) of the Criminal Code of Canada.

and further that Darren Smith on or between the 3rd day of July in the year 2018 and the 22nd day of July in the year 2018 at the City of Hamilton in the said region did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the Criminal Code of Canada.

and further that Darren Smith on or about the 30th day of November in the year 2017 at the City of Hamilton in the said region did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the Criminal Code of Canada.

and further that Darren Smith on or about the 30th day of November in the year 2017 at the City of Hamilton in the said region did knowingly use a forged document to wit: Hamilton Police Service Firearms Destruction Waiver as if the document were genuine, contrary to the provisions of Section 368(1.1) of the Criminal Code of Canada.

CERTIFIED A TRUE COPY OF THE ORIGINAL
POUR COPIE CONFORMEClerk of the Court
greffier de la Cour

NOV 09 2020 → Exclusion of witnesses EXCEPT Detective Petrovic

[illegible]

(date / date)

☐ Accused notified court under s. 530(3)
Tribunal avisé par l'accusé en vertu du par. 530 (3)

☒ Designation Filed
Désignation déposée

☐ Interpreter Required
Interprète requis

JUL 18 2019

Information Number / N° de la dénomination

Date	Accused Accusé	Adjournment Date Date d'ajournement	Adjournment Details Détails sur l'ajournement	Designation Désignation	Counsel As Agent Avocat comparaitre	Falls to Appear Omet de comparaître	Bench Warrant Mandat d'arrêt	Discretion Discretion	Certificate of Default Certificat de défaut
JUL 18 2019	DES. Filed ✓	22 Aug 19	SD 9am 204 APN						
AUG 22 2019	des	19 Sep 19	SD 9AM 204	✓	ADS				
SEP 19 2019	DES.	17 Oct 19	SD. 9am. 204. APN						
OCT 17 2019	Des.	31 OCT 2019	SD 9AM 204 APN						
OCT 31 2019	11 b waived (DES)	28 Nov 2019	SD 9am # 204 APN						
NOV 28 2019	des	19 Dec 19	SD 9 204 SEP						
DEC 19 2019	* to be traversed *	25 JAN 21	TR 10am COURT TBD (4 days)						
JUL 8 2020	Smitt (BF)	to 204 BWH	AUG 17 2020 SD 9a 204 APN						
AUG 17 2020	BWH	9 NOV 2020	TR 10am TBD (4 days)						
NOV 02 2020	BWH	9 NOV 2020	ST 9am 204						

Date Date	Clerk Greffier	Crown Couronne	For the Accused Pour l'accusé	Justice's initials Initiales du juge
JUL 18 2019	Hanna	Ellins	Ag. McGill	LC
AUG 22 2019	Yan gky	Rogers	McGill	JK
SEP 19 2019	Plati	Rogers	McGill	MB
OCT 17 2019	Kerehe	Rogers	McGill	MB
OCT 31 2019	Konu	Rogers	K. McGill	MB
NOV 28 2019	Pinner	Rogers	McGill	KV
DEC 19 2019	Plintoff	Leach	McGill	MB
JUN 08 2020	BROWN	Leach	" "	DD
AUG 17 2020	KBROWN	Leach	McGILLY	MB
NOV 02 2020			CERTIFIED A TRUE COPY OF THE ORIGINAL POUR COPIE CONFORME	

At Bail Review dated _____
À la révision de l'ordonnance
de détention datée du _____

☐ Original Order
Confirmed
Ordonnance
originale confirmée

☐ New Order
Made
Nouvelle
ordonnance
rendue

☐ Gladue Report
Requested
Rapport Gladue
demandé de la Cour (date / date)

Count / Chef _____		Sentence date / Date de détermination de la peine _____		<input type="checkbox"/> Withdrawn / Accusation retirée	
<input type="checkbox"/> Pre-sentence custody <i>Détention présentencielle</i>	_____ days/months _____ jours/mois	Time credited: <i>Crédit octroyé</i>	_____ days/months _____ jours/mois	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	_____
<input type="checkbox"/> Term that would have been imposed before credit granted: <i>Période d'emprisonnement imposée avant l'octroi de tout crédit</i>		_____ days/months/years _____ jours/mois/ans			
<input type="checkbox"/> Absolute discharge <i>Absolution inconditionnelle</i>	<input type="checkbox"/> Conditional discharge <i>Absolution conditionnelle</i>	<input type="checkbox"/> Suspended sentence <i>Condamnation avec sursis</i>			
<input type="checkbox"/> Imprisoned for <i>Emprisonnement pour</i>	_____ days/months/years _____ jours/mois/ans	<input type="checkbox"/> concurrent with <i>concurrent avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Intermittent sentence for <i>Peine discontinue</i>	_____ days _____ jours	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Conditional sentence for <i>Ordonnance de sursis</i>	_____ days/months/years _____ jours/mois/ans	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Probation <i>Période de probation</i>	_____ months/years _____ mois/ans	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Community service s.732.1(3)(f) / <i>Service communautaire, par.732.1 (3)f</i> _____ hours / heures					
<input type="checkbox"/> Fine of \$ _____ <i>Amende de</i>	VS \$ _____ \$ <i>sur. comp.</i>	Time to pay <i>délai de paiement</i>		_____	
<input type="checkbox"/> Restitution <i>Dédommagement</i>	<input type="checkbox"/> s. 738 / s. 739 art. 738 / art. 739	Amount: \$ _____ <i>Montant</i>	Time to pay <i>délai de paiement</i>	_____	
<input type="checkbox"/> Victim surcharge: \$ _____ <i>Suramende compensatoire</i>	\$ _____	Time to pay: <i>délai de paiement</i>	_____		

<input type="checkbox"/> Dismissed <i>Rejeté</i>	<input type="checkbox"/> HTA cautioned <i>Avertissement (Code de la route)</i>	<input type="checkbox"/> Driving prohibition: <i>Interdiction de conduite :</i>	_____ Months / Years _____ mois/années	<input type="checkbox"/> s.743.21(1) / par. 743.21 (1)
<input type="checkbox"/> Acquitted <i>Acquitté</i>	<input type="checkbox"/> Weapons prohibition: <i>Interdiction d'armes</i>	<input type="checkbox"/> s. 109(2): _____ years <i>par. 109 (2) ans</i>	<input type="checkbox"/> s. 109(3) (Life) <i>par.109 (3)(perpétuité)</i>	<input type="checkbox"/> s. 110: _____ years <i>art. 110 ans</i>
<input type="checkbox"/> Stayed <i>Sursis</i>	<input type="checkbox"/> DNA: <i>ADN</i>	<input type="checkbox"/> 5.03 (Primary) <i>5.03 (primaire)</i>	<input type="checkbox"/> 5.04 (Secondary) <i>5.04 (secondaire)</i>	<input type="checkbox"/> Denied (DND) <i>Rejetée</i>
<input type="checkbox"/> In Absentia <i>In absentia</i>	<input type="checkbox"/> S.O.I.R.A. order: <i>Ordonnance LERDS</i>	<input type="checkbox"/> 10 years <i>10 ans</i>	<input type="checkbox"/> 20 years <i>20 ans</i>	<input type="checkbox"/> Life <i>Perpétuité</i>
<input type="checkbox"/> Other <i>Autre</i>	<input type="checkbox"/> s. 161 prohibition: <i>Interdiction, art. 161</i>	_____ months/years _____ mois/ans	<input type="checkbox"/> s. 490 forfeiture order: <i>Ordonnance de confiscation, art. 490</i>	<input type="checkbox"/> Granted <i>Accordée</i>
				<input type="checkbox"/> Denied <i>Rejetée</i>

Count / Chef _____		Sentence date / Date de détermination de la peine _____		<input type="checkbox"/> Withdrawn / Accusation retirée	
<input type="checkbox"/> Pre-sentence <i>Détention présentencielle</i>	_____ days/months _____ jours/mois	Time credited: <i>Crédit octroyé</i>	_____ days/months _____ jours/mois	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	_____
<input type="checkbox"/> Term that would have been imposed before credit granted: <i>Période d'emprisonnement imposée avant l'octroi de tout crédit</i>		_____ days/months/years _____ jours/mois/ans			
<input type="checkbox"/> Absolute discharge <i>Absolution inconditionnelle</i>	<input type="checkbox"/> Conditional discharge <i>Absolution conditionnelle</i>	<input type="checkbox"/> Suspended sentence <i>Condamnation avec sursis</i>			
<input type="checkbox"/> Imprisoned for <i>Emprisonnement pour</i>	_____ days/months/years _____ jours/mois/ans	<input type="checkbox"/> concurrent with <i>concurrent avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Intermittent sentence for <i>Peine discontinue</i>	_____ days _____ jours	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Conditional sentence for <i>Ordonnance de sursis</i>	_____ days/months/years _____ jours/mois/ans	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Probation <i>Période de probation</i>	_____ months/years _____ mois/ans	<input type="checkbox"/> concurrent with <i>concurrente avec</i>	<input type="checkbox"/> consecutive to <i>consécutif à</i>	_____	
<input type="checkbox"/> Community service s.732.1(3)(f) / <i>Service communautaire, par.732.1(3)f</i> _____ hours / heures					
<input type="checkbox"/> Fine of \$ _____ <i>Amende de</i>	VS \$ _____ \$ <i>sur. comp.</i>	Time to pay <i>délai de paiement</i>		_____	
<input type="checkbox"/> Restitution <i>Dédommagement</i>	<input type="checkbox"/> s. 738 / s. 739 art. 738 / art. 739	Amount: \$ _____ <i>Montant</i>	Time to pay <i>délai de paiement</i>	_____	
<input type="checkbox"/> Victim surcharge: \$ _____ <i>Suramende compensatoire</i>	\$ _____	Time to pay: <i>délai de paiement</i>	_____		

CERTIFIED A TRUE COPY OF THE ORIGINAL
POUR VÉRIFIER CONFORMÉMENT À L'ORIGINAL

<input type="checkbox"/> Dismissed <i>Rejeté</i>	<input type="checkbox"/> HTA cautioned <i>Avertissement (Code de la route)</i>	<input type="checkbox"/> Driving prohibition: <i>Interdiction de conduite :</i>	_____ Months / Years _____ mois/années	<input type="checkbox"/> s.743.21(1) / par. 743.21 (1)
<input type="checkbox"/> Acquitted <i>Acquitté</i>	<input type="checkbox"/> Weapons prohibition: <i>Interdiction d'armes</i>	<input type="checkbox"/> s. 109(2): _____ years <i>par. 109 (2) ans</i>	<input type="checkbox"/> s. 109(3) (Life) <i>par.109 (3)(perpétuité)</i>	<input type="checkbox"/> s. 110: _____ years <i>art. 110 ans</i>
<input type="checkbox"/> Stayed <i>Sursis</i>	<input type="checkbox"/> DNA: <i>ADN</i>	<input type="checkbox"/> 5.03 (Primary) <i>5.03 (primaire)</i>	<input type="checkbox"/> 5.04 (Secondary) <i>5.04 (secondaire)</i>	<input type="checkbox"/> Denied (DND) <i>Rejetée</i>
<input type="checkbox"/> In Absentia <i>In absentia</i>	<input type="checkbox"/> S.O.I.R.A. order: <i>Ordonnance LERDS</i>	<input type="checkbox"/> 10 years <i>10 ans</i>	<input type="checkbox"/> 20 years <i>20 ans</i>	<input type="checkbox"/> Life <i>Perpétuité</i>
<input type="checkbox"/> Other <i>Autre</i>	<input type="checkbox"/> s. 161 prohibition: <i>Interdiction, art. 161</i>	_____ months/years _____ mois/ans	<input type="checkbox"/> s. 490 forfeiture order: <i>Ordonnance de confiscation, art. 490</i>	<input type="checkbox"/> Granted <i>Accordée</i>
				<input type="checkbox"/> Denied <i>Rejetée</i>

Justice of the Peace / Juge de paix

Judge / Juge

Information No. / N° de la dénonciation
Return Date / Date à laquelle le document est rapporté 20
INFORMATION Against / DÉNONCIATION visant DARREN SMITH
Address / Adresse FLAMBOROUGH, ON Canada

CHARGE / ACCUSATION

Charge 1 of 4
Make Forged Document CC 367
Refer to front page for further counts. / Reportez-vous à la première page pour plus de chefs.

FOR ADMINISTRATIVE PURPOSES ONLY À DES FINS ADMINISTRATIVES SEULEMENT			
<input type="checkbox"/> Summons Sommons	<input type="checkbox"/> Show Cause Audience de justification	<input type="checkbox"/> Warrant 1 st Mandat en 1 ^{re} instance	
<input type="checkbox"/> Replacement Information / Dénonciation de remplacement			
Reportable M.V. Offence (H.T.A. 199) Infraction V.A. à déclarer (Code de la route 199)	C.V.O.R. No (Commercial Vehicles Only) Numéro C.I.U.V.U. (véhicules utilitaires seulement)		
Sex Sexe	Birth Date / Date de naissance Day / Mois / Year / Année	Was defendant owner? La partie défenderesse était-elle propriétaire? <input type="checkbox"/> Yes / Oui <input type="checkbox"/> No / Non	
Driver's Licence Number / Numéro du permis de conduire			
Plate No. / Numéro de plaque	<input type="checkbox"/> Involves a Collision Infraction reliée à un accident		
Informant Dénonciateur			
Date Sworn/Affirmed Déclarée sous serment/affirmée solennellement le	Date of Arrest Date de l'arrestation		
<input type="checkbox"/> Deemed to be sworn/affirmed / Réputée être déclarée sous serment/affirmée solennellement le			
Officer / Agent de police	No. / N°		
Police Agency / Service de police Hamilton Police Service	Div. / Dist.		
Occurrence Number / N° d'incident 19548158	Courtroom / Salle d'audience 204		
At / À (Au) 45 MAIN ST E, HAMILTON, ON Canada (PROVINCIAL COURT)			

Information No. / N° de la dénonciation
Return Date / Date à laquelle le document est rapporté 20
INFORMATION Against / DÉNONCIATION visant
Address / Adresse

CHARGE / ACCUSATION

Charge 1 of
Refer to front page for further counts. / Reportez-vous à la première page pour plus de chefs.

FOR ADMINISTRATIVE PURPOSES ONLY À DES FINS ADMINISTRATIVES SEULEMENT			
<input type="checkbox"/> Summons Sommons	<input type="checkbox"/> Show Cause Audience de justification	<input type="checkbox"/> Warrant 1 st Mandat en 1 ^{re} instance	
<input type="checkbox"/> Replacement Information / Dénonciation de remplacement			
Reportable M.V. Offence (H.T.A. 199) Infraction V.A. à déclarer (Code de la route 199)	C.V.O.R. No (Commercial Vehicles Only) Numéro C.I.U.V.U. (véhicules utilitaires seulement)		
Sex Sexe	Birth Date / Date de naissance Day / Mois / Year / Année	Was defendant owner? La partie défenderesse était-elle propriétaire? <input type="checkbox"/> Yes / Oui <input type="checkbox"/> No / Non	
Driver's Licence Number / Numéro du permis de conduire			
Plate No. / Numéro de plaque	<input type="checkbox"/> Involves a Collision Infraction reliée à un accident		
Informant Dénonciateur			
Date Sworn/Affirmed Déclarée sous serment/affirmée solennellement le	Date of Arrest Date de l'arrestation		
<input type="checkbox"/> Deemed to be sworn/affirmed / Réputée être déclarée sous serment/affirmée solennellement le			
Officer / Agent de police	No. / N°		
Police Agency / Service de police Hamilton Police Service	Div. / Dist.		
Occurrence Number / N° d'incident 19548158	Courtroom / Salle d'audience 204		
At / À (Au) 45 MAIN ST E, HAMILTON, ON Canada (PROVINCIAL COURT)			

Information No. / N° de la dénonciation
Return Date / Date à laquelle le document est rapporté 20
INFORMATION Against / DÉNONCIATION visant
Address / Adresse

CHARGE / ACCUSATION

Charge 1 of
Refer to front page for further counts. / Reportez-vous à la première page pour plus de chefs.

FOR ADMINISTRATIVE PURPOSES ONLY À DES FINS ADMINISTRATIVES SEULEMENT			
<input type="checkbox"/> Summons Sommons	<input type="checkbox"/> Show Cause Audience de justification	<input type="checkbox"/> Warrant 1 st Mandat en 1 ^{re} instance	
<input type="checkbox"/> Replacement Information / Dénonciation de remplacement			
Reportable M.V. Offence (H.T.A. 199) Infraction V.A. à déclarer (Code de la route 199)	C.V.O.R. No (Commercial Vehicles Only) Numéro C.I.U.V.U. (véhicules utilitaires seulement)		
Sex Sexe	Birth Date / Date de naissance Day / Mois / Year / Année	Was defendant owner? La partie défenderesse était-elle propriétaire? <input type="checkbox"/> Yes / Oui <input type="checkbox"/> No / Non	
Driver's Licence Number / Numéro du permis de conduire			
Plate No. / Numéro de plaque	<input type="checkbox"/> Involves a Collision Infraction reliée à un accident		
Informant Dénonciateur			
Date Sworn/Affirmed Déclarée sous serment/affirmée solennellement le	Date of Arrest Date de l'arrestation		
<input type="checkbox"/> Deemed to be sworn/affirmed / Réputée être déclarée sous serment/affirmée solennellement le			
Officer / Agent de police	No. / N°		
Police Agency / Service de police Hamilton Police Service	Div. / Dist.		
Occurrence Number / N° d'incident 19548158	Courtroom / Salle d'audience 204		
At / À (Au) 45 MAIN ST E, HAMILTON, ON Canada (PROVINCIAL COURT)			

Investigative Report

Appendix "B"

"B" Copy of Her Majesty the Queen v. Darren Smith, "Reason for Judgement"
Released December 22nd, 2020, authored by Justice J. Nadel.

**ONTARIO COURT OF JUSTICE
(at Hamilton, Ontario)**

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

DARREN SMITH

Reasons for Judgment

**Mr. G. A. Leach, for the Crown
Mr. K. J. McGilly, for Darren Smith**

NADEL, J.:

The Allegation and the Charges

[1] This case is about (i) what is a false document, (ii) the *mens rea* required for forgery, and (iii) what constitutes “using” a document as genuine when it is alleged to be a forgery.

[2] Darren Smith, badge No. 907, is a police officer employed by the Hamilton Police Service (HPS). On two occasions, first in 2017 and then in 2018, he was dispatched to homes in Hamilton to pick up firearms for surrender to the police. On each occasion he lodged the surrendered items appropriately with the HPS property branch.

[3] Betty Grant is the HPS civilian employee responsible for, among other things, seeing to the destruction of surrendered weapons. After each surrender, she directed Officer Smith, [in police parlance she “tasked” him], to obtain and then to provide to her *either* a “waiver” form, a “Firearms Destruction/Receipt/Disposal Waiver”, signed by the

owner of the weapon documenting that owner's surrender of the weapon to the HPS for disposition of it by the HPS or a statement from the owner signed in Officer Smith's duty notebook to a similar effect.

[4] Officer Smith did neither on either occasion. Rather, he obtained the requisite waiver forms, and in each case, he completed the form *in its entirety*. He signed the name of the owner on the form in the spot where the owner of the weapon was required to sign. Then, he signed his own name to the form attesting to having witnessed the ostensible signature of the owner. He did so without documenting in any way that he signed the name of the owner. He then uploaded the waiver forms that he had created into the HPS document management system, called NICHE, so that Ms. Grant could access them and print them out.

[5] When Officer Smith's actions came to light, he was charged with one count of forgery and one count of uttering respecting each of the waivers that he created and submitted. He was essentially charged as follows¹.

[i] that between July 3, 2018 and July 22, 2018, Darren Smith knowingly made a false document; namely, that he forged a signature with intent that it be acted upon or used as genuine and thereby committed forgery, contrary to s. 367 of the *Criminal Code*;

[ii] that on July 22, 2018, he knowingly used a forged document; namely, a Hamilton Police Service Firearms Destruction Waiver, as if the document was genuine, contrary to s.368(1.1) of the *Criminal Code*;

¹ I've set out the four counts in the following order: count 2, count 1, count 3 and count 4. Darren Smith waived the limitation period and the Crown proceeded summarily.

[iii] that on November 30, 2017, he knowingly made a false document; namely, that he forged a signature with intent that it be acted upon or used as genuine and thereby committed forgery, contrary to s. 367 of the *Criminal Code*; and,

[iv] that on November 30, 2017 he knowingly used a forged document; namely, a Hamilton Police Service Firearms Destruction Waiver, as if the document was genuine, contrary to s. 368(1.1) of the *Criminal Code*.

The Position of the Defence

[6] That Darren Smith wrote the “signatures” of the owners that appear on the two waiver forms and that Darren Smith scanned the two forms that he created into NICHE is incontrovertible. Despite that, Darren Smith did not commit any of the crimes with which he is charged.

[7] While I shall review the facts and the law later, the position of the defence proceeds as follows.

[8] The waivers are not “false documents.” Before the crime of forgery, as alleged, can be committed, it is necessary for the Crown to prove that the waivers are false documents. Since the waivers are not false documents there is no act of forgery and therefore no act of uttering a forged document.

[9] The essential reason why the waivers are not false documents is that the signatures written by Officer Smith are not essential elements of those documents. It follows that since Officer Smith’s writing of the signatures is not essential to the waivers his ostensible witnessing of those non-essential elements is equally of no legal moment. While this last proposition was not explicitly submitted, it is a necessary corollary of the defence’s position.

[10] Alternatively, if the signatures are an essential element of the waivers, Officer Smith had the implied authority or implied consent of the owners of the weapons to sign their names on the waivers. This is so even if no request was ever made by the owners to have him do so for them and even if Officer Smith never contacted anyone to request their authority or consent to do so.

[11] In the further alternative, even if Officer Smith did not have the implied consent or implied authority of the gun owners to sign their names on the waiver documents, in the circumstances that obtained, it cannot be found to the exclusion of any reasonable doubt that Officer Smith had the necessary *mens rea* for the offence of forgery as pleaded. Again, if there is no forgery, then there is no uttering of a forged document.

[12] Further, even though Officer Smith uploaded or scanned the waivers that he created into NICHE, that act is so negligible and so minor as to fail to amount to “using” the waivers and hence he is not guilty of uttering those waivers, in any event.

[13] Moreover, given the precise wording of the forgery counts viz: “did knowingly use a forged document ... as if the document were genuine,” the Crown has particularized the allegations of forgery, which precludes the Crown from any reliance on s. 366(1)(b) of the *Code*. I will quote the relevant section later in these reasons.²

[14] Finally, Mr. McGilly urges that the principles enunciated in *R. v. Villaroman*, [2016] S.C.J. No. 33 (S.C.C) respecting the law of circumstantial evidence undergird the defence position throughout. *Villaroman* directs that, when assessing circumstantial evidence, the

² Mr. McGilly urged that further support for his particularization submission can be found in the wording of Darren Smith’s Promise to Appear. I do not accept that submission. As stated by Hill J. in *R. v. Ruetz*, [2007] O.J. No. 3071 (SCO), at paragraph [9]: “... the prosecution is not limited to a particular theory of liability at trial where a general and unparticularized count exists *in the charging document*” ... (emphasis added). I am of the view that the wording of Officer Smith’s Promise to Appear does not amount to a particularization of any count in the information.

trier of fact should consider *other possible theories* and *other reasonable possibilities* which are inconsistent with guilt. The Crown may need to negative these reasonable possibilities, but it certainly need not negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused as *other plausible theories* or *other reasonable possibilities* must be based on logic and experience applied to the evidence or the absence of evidence, but not ones based on speculation. (See *Villaroman* at paragraph [37].)

My Findings of Facts

The Jolly Surrender, 2017

[15] Audrey Jolly is the surviving spouse of Ronald Jolly. They were married for 64 years. They operated a back-hoe business together and Mrs. Jolly was very familiar with her husband's signature.

[16] In 2017, Ronald Jolly was dying from Parkinson's disease compounded by a form of dementia. He was under palliative care in their home at 200 West 33rd Street, Hamilton. In November of 2017 Audrey opened a letter from the RCMP that was addressed to her husband. By this letter the RCMP notified Ronald Jolly of his need to renew his licences for his rifle and his shotgun. Mrs. Jolly spoke to her husband about the letter and she testified that he advised her that he did not want to renew his licences

[17] So, she contacted the RCMP who directed her to contact the HPS to arrange to surrender the guns. She did so. She did not have Ronald Jolly's power of attorney.

[18] Mrs. Jolly did not recall the specific date when Officer Smith came to her house and picked up her husband's long guns. However, Officer Smith made cursory notes of his attendance in his duty notebook of that time. He noted that on Tuesday, November 21, 2017 at 10:50 a.m., he attended at 200 West 33rd Street. He noted down the particulars of the two guns that he took from that residence. Later during that shift he properly lodged the weapons into the HPS property branch. A portion of Officer Smith's duty notebook from that time containing his notes about attending the Jolly home was filed as Exhibit 12.

[19] Officer Smith never spoke to or met Ronald Jolly. When Officer Smith came into the Jolly living room Ronald Jolly was lying in a hospital bed in a bedroom of the home. The door to that bedroom was open and there was a line of sight into it from the home's living room. So, Officer Smith *may* have been able to see Ronald Jolly; but, Officer Smith never spoke to Ronald Jolly and never entered his bedroom.

[20] Officer Smith was only in the Jolly home for about five minutes to pick up the guns. He never asked Audrey Jolly to sign anything and she never saw him again, (other than at this trial).

[21] Some time later, on December 21, 2018, HPS Detective Brien Smyth called upon Mrs. Jolly and asked her if the signature on a waiver document that he showed her was written by her husband.

[22] Smyth showed her what became Exhibit 3 at this trial. She told him and she confirmed to me at trial that it was not her husband's signature. She also gave Smyth her husband's Driver's Licence, which did contain Ronald Jolly's true signature. That was made Exhibit 4.

[23] Ronald Jolly died on November 24, 2017.

[24] As noted above, Betty Grant, the HPS civilian employee, was responsible for, among other things, seeing to the destruction of surrendered weapons. Despite being a civilian employee of the HPS she was authorized to direct police officers to complete "Tasks" arising out of weapons being surrendered to the HPS. She required a destruction waiver before she could authorize and arrange for Jolly's guns to be destroyed by having them smelted at a local steel mill.

[25] On November 28, 2017 at 3:59 p.m., Betty Grant wrote to Officer Smith and directed him to provide her with documentation that she required before she could initiate the destruction of the weapons that Officer Smith had obtained from Audrey Jolly.

[26] As noted, Ms. Grant was authorized to direct Officer Smith to comply with the "tasking" directive that she sent to him. She classified the priority of the task that she had set for him as "High". She wrote to Officer Smith in the following terms:

"You submitted to (sic) long arms for destruction however I require the Destruction waiver or a copy of your signed notebook. Please scan into NICHE and advise. Thanks BG"

[27] Officer Smith did not contact Ms. Grant to ask her what she was writing about or to ask her for any further or other information about the task that she had directed him to complete. The Destruction waiver that Ms. Grant referred to is a document available to police officers on the HPS intranet.

[28] On November 30, 2017, Officer Smith completed the waiver that Brien Smyth showed to Audrey Jolly on December 21, 2018. He wrote all of the information that was added onto the pre-printed waiver form, (other than the page number that appears on the top of the document, which is the page number of this item in the defence disclosure package.)

[29] The information and markings that Officer Smith added to the pre-printed form included signing a scrawled signature with a large "R" and a large "J" purporting to be the signature of Ronald Jolly. He also signed the form with his own signature attesting to having witnessed Ronald Jolly's signature. A photocopy of this document, being Exhibit 3, is attached to these reasons.

[30] The form directs the officer witnessing the document to attach the form to the officer's original report and to then forward the document to central records. This instruction is consistent with Ms. Grant's direction to Officer Smith to scan the waiver into the NICHE system and to advise her that he had done so.

[31] Officer Smith complied with Ms. Grant's tasking directive. He documented that he had completed the waiver report on November 30, 2017 at 4:40 p.m. and he documented that he had entered the waiver into NICHE on that same date and at that same time.

[32] Officer Smith's duty notebook for November 30, 2017 contains no reference to any attendance on Ronald Jolly nor any attendance at the Jolly home.

[33] Relying on the Jolly waiver that Officer Smith created and filed in NICHE, Ms. Grant arranged for Ronald Jolly's guns to be destroyed by having them smelted at Dofasco on April 11, 2018.

The Shkumat Surrender, 2018

[34] Ruth Shkumat and her sister, Jean Ventura, were the surviving children of their mother and father who died in 2017 and 2018 respectively. In 2018 the sisters were in the process of emptying out their parents' home at 262 East 13th Street, in Hamilton. During those efforts Jean Ventura found her father's duck-hunting rifle as well as some ammunition, a shotgun shell and a broken flare. The sisters decided to hand in these items to the HPS.

[35] They left the items on the lid of a freezer in their parent's basement to be available for pick up by the HPS.

[36] Ms. Ventura's husband called the HPS to tell them about the items and the sisters' desire to hand them in. As a result, Officer Smith was dispatched to and attended at 262 East 13th Street on June 13, 2018. Jean Ventura recalled the date as she had arranged for a charitable furniture pick-up for that date. By coincidence, Officer Smith attended that day, too.

[37] Officer Smith noted his attendance in his duty book. An excerpt from his duty book that documented his attendance on June 13, 2018 was filed as Exhibit 8. Subsequently, Officer Smith lodged a bolt action Cooey 78 rifle, 37 .22 calibre shells and one 12-gauge shotgun shell with the HPS property branch.

[38] Officer Smith told the sisters that he was not certain about whether he ought to take the flare. He left the home briefly to make an inquiry about whether he could take it too. That, at least, is what Ms. Shkumat inferred, and I so find. Officer Smith came back and told her that he could take the flare and did so, although what he did with it thereafter is unknown, as he did not lodge it in property.

[39] As noted, the flare was broken.

[40] Before Officer Smith left Ms. Shkumat asked him if she had to sign anything. He told her, "No" and left. He was only at the home for perhaps 20 minutes and the longest period of his attendance was the time that he took to find out if he could take the flare.

[41] Before Officer Smith left, he said that he needed a name and a number, and he took down Ruth Shkumat's name and her telephone number. The number she gave him rang at her home address at 2 Clifton Road in Dundas, Ontario.

[42] The sisters never saw or met with Officer Smith subsequently. They sold their

parents' home in September of 2018.

[43] On June 15, 2018 at 11:19 a.m., Betty Grant tasked Officer Smith in the following terms:

"You submitted a rifle and ammo for destruction however I require the firearm waiver or a copy of your signed notebook to destroy. Please scan into NICHE and advise. Thanks BG"

[44] Ms. Grant went on sick leave for about two months after tasking Officer Smith with this duty. When she returned to work, she caught up with her work and on August 13, 2018 she noted that the waiver that she had tasked Officer Smith to obtain was now on file.

[45] On July 22, 2018, Officer Smith scanned a waiver into NICHE to meet the requirements of the task that Betty Grant had assigned to him. That waiver was ostensibly signed on July 3, 2018 by Ruth Shkumat. Ruth Shkumat's purported signature was attested to by Officer Smith as a police officer witnessing that signature.

[46] The precise date when Officer Smith created this document is unknown. It was not signed by Ruth Shkumat on June 13, 2018. It had to have been created between the date when Betty Grant tasked him on June 15, 2018 and prior to Officer Smith scanning the document into NICHE on July 22, 2018.

[47] On December 21, 2018, Detective Brien Smyth attended upon Ruth Shkumat at her home address in Dundas, Ontario, (after first going to 262 East 13th Street in Hamilton, where, of course, he did not find her.)

[48] Detective Smyth showed Ms. Shkumat a waiver ostensibly dated on July 3, 2018 and ostensibly signed by her. This document was filed as Exhibit 7. Smyth asked her if she had signed it. She told him and confirmed to me that the signature on the document was not her signature and that she had not signed the document.

[49] Smyth asked her if she would sign a new version of that document and she did so on December 21, 2018, after which Smyth witnessed her signature. The waiver that she signed for Smyth was filed as Exhibit 6. The waiver that she did not sign was filed as Exhibit 7. Copies of the Jolly waiver, (Exhibit 3), and these Shkumat waivers are

appended to these reasons.

[50] Ms. Grant arranged to have the firearm that Ms. Shkumat surrendered smelted on April 16, 2019.

[51] Ms. Grant testified at length to many of the aspects of her responsibilities for the HPS.

[52] When a firearm is lodged for destruction she does as complete a history of the weapon and the people involved with the weapon as she can to ensure its provenance and its relevance to any other occurrences. As well she contacts the RCMP to keep them informed about the destruction of any firearm.

[53] Ms. Grant testified that she tasked Officer Smith with obtaining the waivers because she required them before she could proceed with having the weapons smelted.

The *Criminal Code*

False Document

[54] The *Code* defines “false document” in s. 321:

“false document” means a document

(a) the whole or a material part of which purports to be made by or on behalf of a person

(i) who did not make it or authorize it to be made, or

(ii) who did not in fact exist,

(b) that is made by or on behalf of the person who purports to make it but is false in some material particular,

(c) that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by a person, real or fictitious, other than the person who makes it or under whose authority it is made;³

Forgery

[55] The offence of forgery is contained in s. 366 of the *Code*:

³ Section 366 (2) of the *Code* provides for the inclusion of other ways by which a genuine document can be turned into a false document.

366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or

(b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

Making false document

(2) Making a false document includes

(a) altering a genuine document in any material part;

(b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Exception

(5) No person commits forgery by reason only that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the federal government or of a provincial government.

Particularization

[56] The defence submits that given the specific wording of the two counts of forgery, the Crown has particularized those counts, contrary to s. 366(1)(a) so that it must prove:

(i) that Darren Smith on or between July 3rd and July 22nd of 2018 made a false document by forging a signature with intent that it be acted upon or used as genuine **to the prejudice of any one whether within Canada or not**; and,

(ii) that Darren Smith on or about November 30th 2017 made a false document by forging a signature with intent that it be acted upon or used as genuine ***to the prejudice of any one whether within Canada or not.***

[57] The words in bold italics do not appear in the forgery counts in the information. However, the other language in the forgery counts – viz: “that Darren Smith ... did knowingly make a false document to wit: forged a signature with intent that it be acted upon or used as genuine and did thereby commit forgery, contrary to the provisions of Section 367 of the Criminal Code of Canada” tracks some of the language of s. 366 (1) (a) of the *Code*. That subsection contains the words in bold italics quoted in paragraph [56], above.

[58] As a result of the wording used in the forgery counts the defence contends the Crown must prove a forgery that caused actual prejudice to someone; that it is insufficient for the Crown to merely prove that anyone was induced to do or refrain from doing anything because they believed the waivers in question were genuine, which is the language of s. 366(1)(b).

[59] The defence takes this position even though:

- the offence of forgery in each of the forgery counts is charged contrary to s. 367, the penalty section;
- the defence did not seek any order for particulars of the offences of forgery alleged;
- the wording of the forgery counts is consistent with the “forms of charges” set out in Martin’s Annual Criminal Code,
- the words in bold italics, above, do not appear in the information; and,
- no defence complaint or defence application was brought alleging a contravention of s. 581 or s. 583 of the *Code*.

[60] In my view, this particularization submission is of no legal moment for a variety of reasons. Assuming that the Crown is bound to prove the particularized case as the defence submits, the Crown has, to the exclusion of any reasonable doubt, done so.

[61] Betty Grant told Officer Smith that she required each of the waivers so she tasked Officer Smith to provide them. In the Jolly surrender Betty Grant acted to her potential

detriment and contrary to her employment directives by arranging for the smelting of the weapons surrendered by Audrey Jolly in the absence of a valid waiver or signed notebook statement. But for the intervention of Detective Brien Smyth she would have done so with respect to the Shkumat surrender as well.

[62] Moreover, with respect to both waivers the HPS suffered actual prejudice too.⁴ That prejudice included treating Officer Smith as if he was a responsible and honest police officer doing yeoman's work in the period after he committed these forgeries.

[63] The information specifically alleges that Officer Smith knowingly made a false document by forging a signature "with intent that it be acted upon or used as genuine." The information does not specifically allege that he made a false document "with intent that a person should be induced, by the belief that the document is genuine, to do or to refrain from doing anything," which is the language in s. 366(1)(b).

[64] Nonetheless, *to act upon a document or to use the document as genuine* is, in my view, the equivalent of *doing something or refraining from doing something as a result believing that the document is genuine*. In either case the essence of the offence is the creation of a false document with the intention that it be treated as a real or true document.

[65] Moreover, as noted above, the forgery charges were charged contrary to the penalty section and not contrary to s. 366(1)(a). Further, the words ***to the prejudice of any one whether within Canada or not*** are not part of forgery charges as pleaded. Despite proof of prejudice to Ms. Grant and the HPS as detailed above, the Crown was not obliged to prove that averment, even though it has done so.

[66] As discussed later in these reasons, neither prejudice nor an intention to cause it are elements of the offence of forgery. This expanded view of the intent required to be proved for the offence of forgery, together with a concise resumé of the debate surrounding this subject in Canadian law, is expounded in *R. v. Sebo*, [1988] A.J. No. 475 (C.A.) that I refer to below.⁵

[67] I find Darren Smith guilty of each of the four counts with which he is charged, to the exclusion of any reasonable doubt. In the balance of these reasons I shall try to explain why I have done so.

⁴ Section 2 of the *Code* defines "every one" and similar expressions as including an organization.

⁵ *R. v. Foley*, [1994] N.J. No. 166 (Nfld. C.A.) at paragraph [24].

Discussion

False Document - Materiality

[68] I begin with the issue of whether the waivers that Officer Smith created were false documents.

[69] As applied to this case, a false document means a document the whole or a material part of which purports to be made by or on behalf of a person who did not make it or authorize it to be made. Obviously neither Ronald Jolly nor Ruth Shkumat made either document. They did not sign their names to the waivers, although each of the two documents created by Officer Smith purport to be signed by them.

[70] The defence contends that the purported signatures written by Officer Smith are not a material part of either document.

[71] In my view that submission is incorrect. I find that if these documents had been submitted to NICHE without a signature Betty Grant would not have accepted them nor would she have acted upon them. She would not have accepted them any more than a payee would accept a cheque without a payor's signature, or any more than a pharmacy would accept a prescription without a doctor's signature or any more than Service Ontario would accept a motor vehicle ownership transfer without a signature.

[72] Indeed, in any endeavour to be documented, a signed document demonstrates that signer's agreement to the document's terms by virtue of their signing. The signatures of Ronald Jolly and Ruth Shkumat were material to these waivers. The task Ms. Grant set for Officer Smith was to obtain a signed waiver or a signed notebook.

[73] Similarly, if the required signature was not material, there would be no need for a witness to that signature. Documents that ask for a witness to a signature require the witness to authenticate the signature precisely *because* the signature is material to the document.

[74] I am of the view that resort to the reported cases is unnecessary to determine whether the signatures on these waivers is a material part of these documents. I find and rule that in each case the signature of the maker of the document was and is a material part of the document.

[75] Nonetheless, resort to the controlling authority would require the same conclusion.

[76] In *R. v. Gaysek*, [1971] S.C.R. 888 an inventory contained false entries despite being certified as true and correct. The lies about the entries did not change the nature of the document, it remained a purportedly true inventory. Yet, the inventory was false for the purposes for which it was created. Likewise, Officer Smith created these waivers and used them as purportedly true documents. But they were false documents for the purposes for which they were created.

[77] In *R. v. Ogilvie* (1993), 81 C.C.C. (3d) 125 (Que. C.A.) Justice Fish explained what *Gaysek* stood for. He wrote that *Gaysek* decided that “a document which is false *in reference to the very purpose for which it was created*” is one that is false in a material particular, within the meaning of s. 321 of the *Criminal Code*. So, in order to be a false document, the document in question must not simply “tell a lie”; it must be false in relation to the purpose for which it was created.⁶ That is clearly true, too, with respect to the two waivers that Officer Smith created.

Authorization

[78] As noted above at paragraph [54] the *Code* defines “false document” to mean a document the whole or a material part of which purports to be made by or on behalf of a person who did not make it or authorize it to be made. (emphasis added) The defence contends that neither waiver created by Officer Smith is a false document because Ronald Jolly authorized Officer Smith to create a waiver for him and likewise, Ruth Shkumat authorized Officer Smith to create a waiver for her.

[79] Merely stating those propositions demonstrates their wrongness. Officer Smith never spoke to Ronald Jolly. Audrey Jolly did not have Ronald Jolly’s power-of-attorney. Ronald Jolly was dead when Officer Smith purported to write Ronald Jolly’s signature on the waiver that he, (Officer Smith), created. Officer Smith never asked Audrey Jolly for her authorization to sign any documents on her behalf nor did he ask her for her authorization to sign any documents on her husband’s behalf. Neither Ronald Jolly nor Audrey Jolly authorized Officer Smith to sign the waiver that Officer Smith created. In my view there is no basis in law or on these facts to support a finding that either Ronald Jolly

⁶ *R. v. Helgason*, [2012] M.J. No. 343 (Man. C.A.) at paragraphs [41] to [44].

or Audrey Jolly authorized Officer Smith to create the waiver that Officer Smith fabricated. I make that finding to the exclusion of any reasonable doubt.

[80] I make the same findings and to the same degree with respect to the Ruth Shkumat waiver. Officer Smith never asked Ruth Shkumat or Jean Ventura for their authorization to sign any documents on their behalves nor did he ask them for their authorization to sign any documents on behalf of their father or their father's estate. Neither Ruth Shkumat nor Jean Ventura authorized Officer Smith to sign the waiver that Officer Smith created. In my view there is no basis in law or on these facts to support a finding that either Ruth Shkumat or Jean Ventura authorized Officer Smith to create the waiver that Officer Smith fabricated.

[81] The defence contends that even if the Jollys or Ruth Shkumat or Jean Ventura did not formally authorize Officer Smith to sign a waiver as he did, by their action of surrendering weapons to the HPS they consented to Officer Smith creating the waivers. At the very least, the defence contends that Officer Smith had their implied authority to do so. Mr. McGilly submits that support for this submission can be gleaned from *R. v. Ewanchuk*, [1999] S.C.J. No. 10. There, Major J. at paragraph [31] said: "The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law."

[82] The doctrine of implied consent is often discussed in allegations arising out of contact sports, especially hockey. The comment by Lacourciere J.A., in *R. v. Leclerc*, [1991] O.J. No. 1533 (C.A.) is useful. He said: "The weight of judicial authority appears to be that a player, by participating in a sport such as hockey, impliedly consents to some bodily contact necessarily incidental to the game, but not to overly violent attacks, all of which should be determined according to objective criteria."

[83] While there is no similarity to the facts in this case, there is a principle that can be gleaned from Justice Lacourciere's comment; namely, attempting to determine if there is some necessary implication grounded in the act of voluntarily surrendering a firearm to a local police service.

[84] I do not find that there is any necessarily incidental obligation on a surrenderer to sign the kind of waiver required by the HPS and hence no implied consent is given by the

surrenderer to have a police officer do so for them. At most a mutual signing of a bare receipt by the surrenderer and the receiving police service *might* necessarily be implied in turning over an unwanted firearm to a local police service. However, even that potentially limited implication is uncertain. I say that because *R. v. Wills*, [1992] O.J. No. 294 (C.A.) sets out the elements for a valid consent, including an implied consent, (albeit in the context of waiving the right to be secure from an unreasonable search and seizure). [85] *Wills* provides the elements of a valid consent whether express or implied as follows:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary in the sense that that word is used in *Goldman*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;⁷
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- (vi) the giver of the consent was aware of the potential consequences of giving the consent.

[86] In my view many of these requirements, particularly (ii), (iv) and (v) are missing, so far as the Jolly document is concerned and (iv) and (v) are absent from the Shkumat waiver.

⁷ In *R. v. Goldman*, [1980] 1 S.C.R. 976, 51 C.C.C. (2d) 1, at pp. 1004-06 S.C.R., pp. 23-24 C.C.C., and *R. v. Rosen*, [1980] 1 S.C.R. 961, 51 C.C.C. (2d) 65, at pp. 974-75 S.C.R., p. 75 C.C.C., the court addressed the nature of the consent required to render the interception of communications lawful pursuant to s. 178.11(2)(a) (now s. 184(2)(a)) of the Criminal Code, R.S.C. 1985, c. C-46). That section holds interceptions lawful where one party to the communication consents to the interception. These two cases are particularly instructive with respect to the present problem because they are concerned with a statutory exception to privacy protections predicated on consent. In *Goldman*, McIntyre J. said at p. 1005 S.C.R., pp. 23-24 C.C.C.:

The consent given under s. 178.11(2)(a) must be voluntary in the sense that it is free from coercion. It must be made knowingly in that the consenter must be aware of what he is doing and aware of the significance of his act and the use which the police may be able to make of the consent . . . A consent under s. 178.11(2)(a) is a valid and effective consent if it is the conscious act of the consenter doing what he intends to do for reasons which he considers sufficient. If the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for so doing are selfish and even reprehensible by certain standards will not vitiate it.

[87] Moreover, it is important to note, as did the Crown in its reply submissions, that the waiver document is far more than a mere acknowledgment that a firearm is being voluntarily surrendered.

[88] The "Firearms Destruction / Receipt / Disposal Waiver" contains a number of statements, declarations, acknowledgments, waiver of legal claims and promises of indemnification. All of the following are contained in the document, which is printed on the letterhead of the HPS:

I HEREBY VOLUNTARILY TURN OVER TO THE HAMILTON
POLICE SERVICE THE FOLLOWING ITEM FOR DISPOSAL OR
DESTRUCTION:

I HEREBY FULLY AND FINALLY RELINQUISH ALL RIGHTS,
TITLE OR CLAIM TO POSSESSION AND / OR OWNERSHIP OF THE
LISTED ITEMS, AND DECLARE THAT I AM ABANDONING THE
PROPERTY ABSOLUTELY WITH NO INTENTION OF EVER
RECLAIMING IT. I UNDERSTAND AND AGREE THAT THE POLICE
SERVICE TAKES NO RESPONSIBILITY FOR THE LOSS / DISPOSAL
/ DESTRUCTION OF THESE ITEMS, AND I AGREE TO MAKE NO
CLAIM AGAINST THE POLICE SERVICE, THE POLICE SERVICES
BOARD, OR THE CITY OF HAMILTON IN THIS REGARD, AND TO
PROTECT THE POLICE SERVICE ETC. (sic) FROM CLAIMS THAT
MAY BE MADE BY OTHERS.

[89] While all of the words in the waiver are important, the final promise to protect, i.e., to indemnify the police service etc. (sic) is particularly significant since the HPS does not investigate matters of inheritance or require proof of probate. Equally, Officer Smith did not ask for any proof of ownership of the items.

[90] Given the extent of the statements, declarations, acknowledgments, waiver of legal claims and promises of indemnification contained in the waiver forms, I hold that none of

the people involved, (*viz*: Audrey Jolly, Ronald Jolly, Ruth Shkumat or Jean Ventura), gave implied consent to Officer Smith to fabricate the waivers in issue on their behalves. [91] The *actus reus* of the offence of forgery is clearly made out.⁸ Officer Smith made false documents knowing them to be false.

***Mens Rea* for the Offence of Forgery**

[92] As noted above in paragraph [11] the defence position is it cannot be found to the exclusion of any reasonable doubt that Officer Smith had the necessary *mens rea* for the offence of forgery. Hence, a review of the law respecting the *mens rea* of forgery is required.

[92] Marshall J.A. in *R. v. Foley*, [1994] N.J. No. 166 is my starting point. There, under the heading, "The ingredients of forgery" one finds⁹:

18 In a leading English forgery case, *Welham v. Director of Public Prosecutions* (1961) A.C. 103, Lord Denning at pp. 132-133, singles out the following passage from Vol. 2 of *East's Pleas of the Crown* at p. 852 as best expressing the common law definition of forgery:

... Forgery at common law denotes a false making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit. ...

⁸ Reference can be made to *R. v. Foley*, [1994] N.J. No. 166 (Nfld. C.A.) under the heading: Forgery and the signing of another's name

28 The portion of these provisions which is relevant to the allegation that forgery was committed when Mr. Foley signed Mr. Tobin's name to the notice of sale is found in s. 321 and reads: "false document" means a document

(a) the whole or a material part of which purports to be made by or on behalf of a person
(i) who did not make it or authorize it to be made

29 As can be readily discerned from the foregoing, a document which purports to be made by a person who did not authorize it is to be considered false. It is thus an act of forgery. It follows as a consequential jural correlative that if such an instrument was authorized to be made, it is not to be deemed a "false document" and is not an act of forgery.

The discussion of this issue continues in *Foley* but the foregoing is sufficient for these purposes.

⁹ I have edited the quote slightly for ease of reading (as noted by the ...).

20 ... [T]he making of a false document is the essence of forgery at common law. It remains so in today's Criminal Code. This is apparent from s. 366(1) which sets out the essential ingredients of forgery.

21 ... [T]he scope of the *actus reus* and *mens rea* of forgery now depend upon the provisions of the Criminal Code which supersedes the common law.

22 There is a view that the concept of deception as an element of forgery has been expanded in the Code to transcend that of fraud which the common law required to ground a forgery conviction. In this context the following distinction, ... between the intents to deceive and to defraud, ... is apropos:

To deceive is ... to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

23 Proponents of the proposition that the intent component of forgery has been expanded beyond fraud in the Code point to paragraph (b) of s. 366(1) in support of their contention. This provision, they advocate, merely requires that the forger induce a state of mind that a document, which he or she knows to be false, is genuine. Inasmuch as this paragraph is expressed disjunctively from the preceding paragraph (a), which does invoke prejudice, they posit that the statutory offence of forgery requires merely an intent to deceive. Relating this specifically to s. 366(1)(b), this viewpoint asserts that the requisite intent is to falsely induce a state of mind by creating the impression that the document is genuine. ***Under this submission there would be no need to go further to establish an intent to defraud or even to cause prejudice.*** (emphasis added)

24 This expanded view of the intent of the offence of forgery, together with a concise resumé of the debate surrounding this subject in Canadian law over the years, is expounded in *R. v. Sebo* (1988) 60 Alta. L.R. (2d) 53 (Alta. C.A.).

...

[93] Accordingly, I next turn to *Sebo*.

[94] In *Sebo* Kerans J.A. retraced the history of the Canadian law of forgery to determine whether a conviction for forgery required proof of an intention to defraud or whether proof of an intention to deceive sufficed. Despite the legal acumen demonstrated

by Justice Keran's exegesis of the law of forgery, I am content to skip to his conclusion, which I adopt. He concluded:¹⁰

In my view, this context leaves the question of the purpose of the words in s. 326, [now s. 388, the offence of use, trafficking or possession of forged document], beyond rational dispute even though they might be said to have a harsh effect. Today's Code reflects the view that it is better to have a definition that catches the utterer and the forger who hope never to cause harm even at the risk of catching those who ... not only did not hope to gain advantage but also did not create a significant risk of harm. ...

I accept that, as a result, s. 324(1)(a), [now s. 366(1)(a)], is anomalously superfluous. The best explanation of the anomaly is that the Code emphasizes that it catches both the old and the new mental element. ...

In conclusion, I agree ... that **an intent to defraud and an awareness of the precise intent of the forger are not required mental elements of the offence of uttering.** ... (emphasis added)

I must now deal with the principal argument for the defence. ...

The argument incorrectly assumes that an intent to defraud is required by the Code for a conviction for forgery. I earlier dealt with the intent for forgery and uttering in order to dispose of this. The intent required of each is the same. (emphasis added)

[95] Accordingly, the intention required to be proved to ground a conviction for forgery is merely the intention to deceive. The Crown is not required to prove the forger had an intention to defraud, which is to say that for a conviction for forgery the Crown need not prove that Officer Smith intended to cause prejudice or harm.

¹⁰ Again, I edit by ellipsis, (...), for ease of comprehension.

[96] I reject the defence submissions that Officer Smith's actions were no more than carelessness or negligence.

[97] Clearly Officer Smith was a careless forger in one respect. He knew that Ronald Jolly was very ill, but he was careless in not determining if Mr. Jolly was still alive when he forged his signature. As a result of that carelessness, he forged Mr. Jolly's signature several days after Mr. Jolly had died.

[98] These forgeries were not careless acts otherwise. A look at the ostensible signatures shows that Officer Smith scrawled signatures that started with the correct initials of Ronald Jolly's and of Ruth Shkumat's names. Those actions were obviously intentional. Moreover, merely recounting the steps he had to take shows that Officer Smith's actions were not the product of mere carelessness.

[99] Officer Smith had to, in each case, receive and read the task set for him by Ms. Grant. He had to obtain a waiver form in each case. He had to fill out the form in each case. He had to forge the signatures on each form and then he had to submit the forms that he created in NICHE. That is not a description of carelessness. That is intentionally mendacious behaviour.

[100] Likewise, Officer Smith's actions were not the product of negligence in the sense of failing to take proper care in the performance of his duties. He rejected and abdicated his sworn duty in these cases. These were not acts of negligence. They were acts of ~~malfeasance~~ *malfeasance*.

[101] Regardless of what motivated Officer Smith to create these two forgeries, his intention to deceive by committing them has, in each case, been proved to the exclusion of any reasonable doubt.

The Counts of Uttering

[102] The defence submits that Officer Smith's use of the forged waivers; viz. scanning or uploading them in the HPS NICHE system, were acts so negligible as not to amount

to “using” the forgeries. Hence, he is not guilty of the two counts of uttering them contrary to s. 368(1.1) of the *Code*.

[103] Respectfully, I do not accept that submission. As noted by Mr. Leach in his submissions in reply, whether one hands a forged cheque to a teller in person or deposits it into an ATM that forged cheque is “used” in either case. Moreover, Mr. Leach points to the definition of “document” found in s. 321 of the *Code*: “document means any paper, parchment or other material on **which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, ...**” (emphasis added)

[104] Additionally, in *R. v. Stevenson*, [1980] O.J. No. 1621 (C.A.) the court held that putting a false affidavit into a photocopy machine to copy it was a “use” of it. Further, Justice Kerans, in *Sebo*, notes that *R. v. Harris*, (1965) Crim. App. R. 330 (U.K. C.C.A.) provides that when a photocopy of a forgery is made for wider distribution that too is a “use” and therefore an uttering of the forged original.

[105] I am satisfied to the exclusion of any reasonable doubt that by uploading the two waivers *that he forged* into the HPS NICHE system Officer Smith used the two waivers. I find, to the exclusion of any reasonable doubt, that Officer Smith is guilty of the two counts of uttering with which he is charged.

Similar Fact is not in Issue nor Applied

[106] Before completing these reasons I wish to stress, that while I have often talked about the two waivers in the same sentences and paragraph, I have not used the evidence adduced in support of the Jolly waiver to arrive at my conclusion on the Shkumat waiver or *visa versa*.

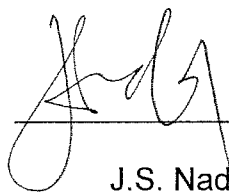
[107] While *R. v. T.B.L.*, [2003] O.J. No. 1502 (C.A.) provides some support to the Crown in seeking to have me apply the evidence across counts (which Mr. Leach urged upon me albeit not very strenuously), the more recent decision of our Court of Appeal in *R. v. Tsigirlash*, 2019 ONCA 650 precludes my doing so absent a formal similar fact

application. The Court in *Tsigirlash* severely limited the use of evidence across counts barring the circumstances that obtained in *T.B.L.*

[108] In arriving at my findings of fact and my legal conclusions I have not applied the evidence across counts between the Jolly waiver and the Shkumat waiver. Each fact pattern is more than sufficient to sustain the facts that I have found and the conclusions I have reached independent of each other, (albeit for ease of writing I have referred to both waivers in the same sentences or paragraphs, rather than expanding the length of this already too long judgment.)

[109] As noted earlier, I find Darren Smith guilty on all counts.

Dated at Hamilton, the 22nd day of December 2020.



J.S. Nadel, O.C.J

23

Exhibit No. 3



HAMILTON POLICE SERVICE

1st King William Street,
P.O. Box 1000, L.O.C. 1, Hamilton ON L8N 4C1
PHONE: 505-546-4023 FAX: 505-546-4752

FIREARMS DESTRUCTION /
RECEIPT / DISPOSAL WAIVER

NAME: Reino Lewis (please print name)
ADDRESS: 200 HWY 33/40 ST (please print address)
TELEPHONE: (905) 575-0025

I HEREBY VOLUNTARILY TURN OVER TO THE HAMILTON POLICE SERVICE THE FOLLOWING
ITEMS FOR DISPOSAL OR DESTRUCTION:

1. 16 HIGGINS - M.O.M. 20 - 12 GAUGE PUMP
2. 16 HIGGINS - M.O.M. 29 - 22 CAL LIT
3. _____
4. _____
5. _____

I HEREBY FULLY AND FINALLY RELINQUISH ALL RIGHTS, TITLE OR CLAIM TO POSSESSION
AND / OR OWNERSHIP OF THE LISTED ITEMS, AND DECLARE THAT I AM ABANDONING THE
PROPERTY ABSOLUTELY WITH NO INTENTION OF EVER RECLAIMING IT. I UNDERSTAND AND
AGREE THAT THE POLICE SERVICE TAKES NO RESPONSIBILITY FOR THE LOSS / DISPOSAL /
DESTRUCTION OF THESE ITEMS, AND I AGREE TO MAKE NO CLAIM AGAINST THE POLICE
SERVICE, THE POLICE SERVICES BOARD, OR THE CITY OF HAMILTON IN THIS REGARD, AND
TO PROTECT THE POLICE SERVICE ETC. FROM CLAIMS THAT MAY BE MADE BY OTHERS.

[Signature]
Signature of Donor, who by his/her
signature undertakes to be the lawful
owner of the above listed items.

[Signature]
Signature of Witness Police Officer

Detective Sargent #102
Name & Badge # of Witness Police Officer (print)

Date: Nov 30 / 2017

Incident #: 17-776615

WHEN COMPLETED, ATTACH THIS FORM TO THE ORIGINAL REPORT
AND FORWARD TO CENTRAL RECORDS.

FORM 100-10

25

Exhibit No. 6



HAMILTON POLICE SERVICE
155 King William Street,
P.O. Box 1380, L.C.O. 1, Hamilton ON L8N 4C1
PHONE: 905-546-4372 FAX: 905-546-4762

FIREARMS DESTRUCTION RECEIPT / DISPOSAL WAIVER

OCCURRENCE #: 18642465

NAME: Ruth Shikuma

ADDRESS: 262 East 46th St

22 Clifton Downs Road Hamilton

905-368-3478

I HEREBY VOLUNTARILY TURN OVER TO THE HAMILTON POLICE SERVICE THE
FOLLOWING ITEMS FOR DISPOSAL OR DESTRUCTION:

1. Gecozy 0 22 calibre

2. Ammunition

3.

4.

5.

I HEREBY FULLY AND FINALLY RELINQUISH ALL RIGHTS, TITLE OR CLAIM TO
POSSESSION AND / OR OWNERSHIP OF THE LISTED ITEMS, AND DECLARE THAT I AM
ABANDONING THE PROPERTY ABSOLUTELY WITH NO INTENTION OF EVER RECLAIMING
IT. I UNDERSTAND AND AGREE THAT THE POLICE SERVICE TAKES NO RESPONSIBILITY
FOR THE LOSS / DISPOSAL / DESTRUCTION OF THESE ITEMS, AND I AGREE TO MAKE NO
CLAIM AGAINST THE POLICE SERVICE, THE POLICE SERVICES BOARD, OR THE CITY OF
HAMILTON IN THIS REGARD, AND TO PROTECT THE POLICE SERVICE ETC. FROM CLAIMS
THAT MAY BE MADE BY OTHERS.

Signature of Owner, who by his/her
signature, undertakes to be the lawful
owner of the above listed items.

Date:

Dec 21/18

Signature of Witness Police Officer

Badge # and Name of Witness Police Officer

B.A. #637

18-642465

24

Exhibit No. 7



HAMILTON POLICE SERVICE

155 King William Street,
P.O. Box 1960, L.C.D. 1, Hamilton ON L8N 4G7
PHONE: 905-546-2525 FAX: 905-546-4762

FIREARMS DESTRUCTION /
RECEIPT / DISPOSAL WAIVER

NAME: Ruth Skumos
(please print name)
ADDRESS: 262 GALT ST
(please print address)
TELEPHONE: (613) 384 7479

I HEREBY VOLUNTARILY TURN OVER TO THE HAMILTON POLICE SERVICE THE FOLLOWING
ITEMS FOR DISPOSAL OR DESTRUCTION:

1. 1000 7R .22 cal
2. AK-47
3. _____
4. _____
5. _____

I HEREBY FULLY AND FINALLY RELINQUISH ALL RIGHTS, TITLE OR CLAIM TO POSSESSION
AND / OR OWNERSHIP OF THE LISTED ITEMS, AND DECLARE THAT I AM ABANDONING THE
PROPERTY ABSOLUTELY WITH NO INTENTION OF EVER RECLAIMING IT. I UNDERSTAND AND
AGREE THAT THE POLICE SERVICE TAKES NO RESPONSIBILITY FOR THE LOSS / DISPOSAL /
DESTRUCTION OF THESE ITEMS, AND I AGREE TO MAKE NO CLAIM AGAINST THE POLICE
SERVICE, THE POLICE SERVICES BOARD, OR THE CITY OF HAMILTON IN THIS REGARD, AND
TO PROTECT THE POLICE SERVICE ETC. FROM CLAIMS THAT MAY BE MADE BY OTHERS.

Ruth Skumos
Signature of Donor, who by his/her
signature, undertakes to be the lawful
owner of the above listed items.

[Signature]
Signature of Witness Police Officer
Dallen Smith #902
Name & Badge # of Witness Police Officer (print)

Date: 18/07/07 Incident #: 18-642965

WHEN COMPLETED, ATTACH THIS FORM TO THE ORIGINAL REPORT
AND FORWARD TO CENTRAL RECORDS.

1000-0000