Citation: *R. v. Golebeski*, 2019 YKTC 50

Date: 20191125
Docket: 18-00762
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

BRITTANY GOLEBESKI

Appearances:
Leo Lane — Counsel for the Crown
Stephen M. Smith — Counsel for the Defence

RULLING ON *VOIR DIRE*

[1] On December 26, 2018, police responded to a report of a single vehicle accident in the Ibex Valley area north of Whitehorse, Yukon. Through the course of the investigation, Brittany Golebeski was identified as the driver and sole occupant of the vehicle. She was subsequently charged with operating a conveyance while impaired and operating a conveyance while the concentration of alcohol in her blood exceeded the legal limit contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*. Ms. Golebeski has entered not guilty pleas to both counts.

[2] The trial began by way of a *voir dire* in relation to a notice of application filed by Ms. Golebeski's counsel alleging breaches of her rights under ss. 8, 9, and 10(b) of the *Charter*. Specifically, the notice outlines the following alleged breaches:

1. The lack of reasonable grounds rendered the arrest unlawful and the demand invalid, resulting in an arbitrary detention contrary to s. 9 and an unreasonable seizure contrary to s. 8;

2. Questioning of the accused after advising her of her right to counsel but before affording her an opportunity to exercise that right was a breach of her s. 10(b) right to counsel;

3. Contacting Legal Aid on the accused's behalf instead of providing her with a phone book or list of available counsel did not provide the accused with the right to contact counsel of choice in breach of s. 10(b);

4. Breath samples were not taken as soon as practicable as required. At trial, counsel for Ms. Golebeski conceded that the evidence adequately supported any delay occasioned at the scene, but argues that unexplained delay with respect to the taking of samples at the detachment was a breach of s. 8; and

5. The accused was not released as soon as practicable contrary to s. 497 of the *Criminal Code* resulting in an arbitrary overhold in breach of s. 9.

[3] Counsel for Ms. Golebeski asserts that the appropriate remedy for the breaches would be the exclusion of all evidence gathered following Ms. Golebeski's arrest, including all statements made by Ms. Golebeski, all observations made by the investigating officer, the WatchGuard video, the Certificate of Qualified Technician, and evidence of service of the Certificate of Qualified Technician on Ms. Golebeski.

[4] Evidence on the *voir dire* consisted of testimony from the investigating officer (the "Officer") and the Watch Commander who released Ms. Golebeski, along with a number of exhibits, including the WatchGuard video, the Certificate of Qualified Technician, an email from the Officer to the next Watch, video from the RCMP detachment, and a prisoner log from the Arrest Processing Unit (the "APU").

[5] The Crown's case turns on the evidence and actions of the Officer, who indicated that he had just over two years experience as a member of the RCMP at the time of this incident. He presented as an earnest and well-intentioned young police officer, however, his lack of experience was manifest in the profound deficits in his understanding of and ability to articulate the scope of his authority under the *Criminal Code* and the law as it relates to impaired driving investigations.

1. Sections 8 and 9, Reasonable Grounds:

[6] The Officer arrived at the scene of the single vehicle accident at 9:17 p.m. He noted there were no streetlights in the area; it was fully dark; the temperature was roughly minus 30 degrees; and the road conditions were icy. He observed a small green Nissan in the ditch with Ms. Golebeski sitting in the driver's seat. The Officer walked to the vehicle and spoke briefly to her at which point he noted the smell of alcohol on her breath.

[7] An ambulance attendant spoke to Ms. Golebeski and helped her from the vehicle. While she was in the ambulance, the Officer spoke to the witnesses who had reported the accident. They advised that Ms. Golebeski told them she was heading home, and that she had recently been in an accident with fatalities. She would not get out of the vehicle and was very upset. She was responsive but looked intoxicated, though she denied drinking. The witnesses observed a bottle of Bombay under the front seat and a bottle of champagne in the back seat. Neither witness could be located to subpoena for trial.

[8] On the WatchGuard video, the Officer is heard speaking to someone who asks if the Officer has a 'breathalyzer'. The Officer responds that he will not need an approved screening device ("ASD") as Ms. Golebeski "is pretty confused and you can smell alcohol on her breath". There is then a discussion about the accident. The Officer says he followed the tracks from where the vehicle crossed over a driveway, but he did not look beyond to where the vehicle left the highway.

[9] At 9:24 p.m., the Officer went to the ambulance and spoke to Ms. Golebeski. He says he was approximately three to four feet from her when he smelled alcohol and noted that her eyes were 'red shot'. She says she is sorry, and is responsive to questions about her age and birthdate. Within seconds of arriving at the ambulance, the Officer arrests Ms. Golebeski for impaired driving. He asks the ambulance attendant to let him know when she is finished with Ms. Golebeski. He then calls to arrange for a breath technician and a tow truck.

[10] Once the ambulance attendant is finished, the Officer escorts Ms. Golebeski to the police vehicle where he reiterates that she is under arrest for impaired driving, advises her of her *Charter* right to counsel, and makes the breath demand.

[11] The Officer concedes on cross-examination that he had formed his opinion before speaking to Ms. Golebeski in the ambulance, as is evidenced in the exchange with the ambulance attendant regarding the ASD. It is also notable that immediately after the arrest, the Officer calls to arrange for a breath technician, making it clear that he had, at that point, decided to make the breath demand.

[12] When asked to articulate his grounds, the Officer says he based his belief on the following:

- Ms. Golebeski was behind the wheel of the vehicle;
- He noted a strong odour of liquor from her breath, slurred speech, red-shot eyes;
- He heard her laugh when she was in the vehicle which he felt was not normal in the circumstances; and
- The statement of the witnesses.

[13] In considering the Officer's evidence with respect to his stated grounds, I conclude that there are issues with his evidence regarding slurred speech. Firstly, when giving his evidence, he makes no mention of slurred speech when describing the two brief conversations he had with Ms. Golebeski in her vehicle and in the ambulance. Instead, he mentions it almost as an afterthought when asked to enumerate his grounds. Similarly, the Officer made no mentioned of slurred speech in his notes or in his Supplementary Occurrence Report. It is not until some, unspecified, time later when the Officer wrote the Crown Brief that he first makes note of slurred speech. When one considers that both smell of liquor and blood shot eyes are indicative of consumption, while slurred speech is indicative of impairment, it is curious that the Officer would not have highlighted slurred speech in both his evidence and notes.

[14] Finally, there is no noticeable slurring heard on the WatchGuard video prior to arrest. While Ms. Golebeski's speech appears somewhat slow, it is not unusually so during the limited time period before arrest and she is responsive to the questions asked by the Officer.

[15] In the circumstances, I conclude that the Officer's evidence in relation to slurred speech is simply not reliable. If the Officer did observe slurred speech at some point over the course of the evening, I am not satisfied that he did so before making the decision to arrest Ms. Golebeski and make the breath demand. Therefore, I do not accept that it formed part of his grounds.

[16] With respect to hearing Ms. Golebeski laugh, on the WatchGuard video, the ambulance attendant is heard to tell Ms. Golebeski that 'we're going up there to the flashing lights" to which Ms. Golebeski responds, "Oh, to the ambulance" after which she lets out a short laugh. In my view, the laugh is not entirely out of place when considered in context, and it adds little to the question of impairment.

[17] The witness statement the Officer says he relied upon also adds little to his grounds as it amounts to a bald statement that Ms. Golebeski seemed intoxicated. However, other than smell of alcohol and the bottles in the vehicle, the witnesses appear to have offered no other indicia upon which the opinion as to intoxication was based.

[18] The Officer's belief, therefore, is essentially founded on indicia of consumption (i.e. smell of alcohol, red-shot eyes) rather than indicia of impairment. He fails to articulate the accident as part of his grounds, though I accept that it must also be considered in assessing objective reasonableness.

[19] An assessment of reasonableness must consider both whether the Officer's grounds were subjectively held and whether they were objectively reasonable.

Generally, the subjective branch of the test is the branch more easily established on the evidence. However, that is not the case here.

[20] Firstly, it is entirely unclear to me whether the accident formed part of the Officer's grounds. As noted, he did not include the accident in his listed grounds. In addition, on the WatchGuard video, one of the witnesses who contacted dispatch about the accident says that he had come across an accident in the same place the year before. The Officer responds, "there's no lights, it's hard to see, and it's pretty icy too", by so saying he seems to agree that the area is a high risk one for driving in the winter months. As a result, I cannot conclude that the accident did form part of his grounds, which would mean that his subjective belief would be based solely on evidence of consumption.

[21] Secondly, it is entirely unclear to me what belief the Officer had even formed. Two relevant sections of the *Criminal Code* allow a peace officer to make a demand for a breath sample:

> 1. Section 320.27 where a peace officer has reasonable grounds to suspect that a person has alcohol in their body and that they have operated a conveyance within the preceding three hours, the peace officer may make a demand for the person to provide breath samples into an approved screening device; and
>
> 2. Section 320.28 where a peace officer has reasonable grounds to believe that a person has operated a conveyance while that person's ability to operate it was impaired to any degree by alcohol, the peace officer may make a demand for breath samples into an approved instrument.

[22] The two sections are entirely different demands requiring the application of different tests. The belief formed by the peace officer dictates which of the two demands

can be made. The distinction between the two is also important to the question of arrest. Section 495 allows for arrest where a peace officer has reasonable grounds to believe that a person has committed an indictable offence. The reasonable suspicion required to make the demand under s. 320.27 would fall short of the test for arrest, while the reasonable grounds in s. 320.28, if founded on the evidence, would support the existence of grounds to arrest.

[23] The actual demand in this case was for a sample into an approved instrument presumably pursuant to s. 320.28. However, the Officer's evidence is equivocal on what opinion he had actually formed and whether he understood the distinction between s. 320.27 and 320.28.

[24] When the Officer arrests Ms. Golebeski, he simply tells her that it is because he can smell alcohol. In direct examination, he articulated the aforementioned grounds, but at no time did he say that he had formed the opinion that Ms. Golebeski's ability to operate a conveyance was impaired by alcohol. In cross-examination, it is pointed out to the Officer that in his Occurrence Report the Officer had written that he had grounds to believe that Ms. Golebeski was in care and control with alcohol or a drug in her body, which appears to be closer to the test for a demand under s. 320.27. When asked if that accurately reflected his reason for arresting Ms. Golebeski, he says part of it, but that it did not include the slurred speech, red shot eyes or odour of liquor. He does not appear to have registered that he had articulated the wrong test for the demand made, in his written report. It is not until he is prompted by Crown in re-examination that he articulates anything even approximating the test under s. 320.28, in saying that he believed that Ms. Golebeski had been driving while impaired.

[25] In the circumstances, the evidence fails to satisfy me that the Officer had even formed the subjective belief, on reasonable grounds, that Ms. Golebeski had operated a conveyance while her ability to do so was impaired by alcohol as required by s. 320.28, nor does it satisfy me that he formed the necessary subjective belief to arrest Ms. Golebeski.

[26] In terms of the objective branch of the test, as I noted in *R. v. Wabisca*, 2018 YKTC 7, the assessment of objective reasonableness requires consideration of the following factors (at para. 4):

- The test is whether there are reasonable grounds to believe the accused's ability to drive was impaired by alcohol to even a slight degree;
- Objective reasonableness is assessed from the perspective of a reasonable person placed in the position of the officer, with the officer's training, knowledge and experience;
- The assessment must be based on the totality of the circumstances;
- The question is whether the officer's belief was reasonable at the time the belief is formed, not whether it was subsequently proven to be accurate;
- The reasonableness standard is defined as being more than a mere suspicion, but less than either proof beyond a reasonable doubt or the civil standard of proof on a balance of probabilities.

(See *R. v. Bush*, 2010 ONCA 554; *R. v. Nguyen*, 2017 BCPC 131; *R. v. Lavallee*, 2016 YKTC 57)

[27] As noted, the only evidence at the point the Officer arrested Ms. Golebeski and formed whatever opinion led him to make the demand for a breath sample would be evidence consistent with consumption combined with the accident. In *R. v. Rhyason*,

2007 SCC 39, the Supreme Court of Canada found that evidence of alcohol consumption plus an unexplained accident may or may not be sufficient to establish reasonable grounds. Whether it is indeed sufficient in any given case will be dependent on the circumstances of the particular case.

[28] When I consider the totality of the circumstances of this case, I am not satisfied that the accident elevates the evidence of mere consumption to objectively reasonable grounds. Unlike the *Rhyason* case in which the striking of the pedestrian occurred on a road that was "straight, dry and lit", the accident in this case occurred in an unlit area with icy road conditions, making it a decidedly less persuasive piece of evidence. The evidence of consumption and the accident certainly give rise to a reasonable suspicion warranting further investigation including an ASD demand, but they simply do not rise to the level of reasonable grounds to believe Ms. Golebeski's ability to operate a conveyance was impaired by alcohol.

[29] In the result, I am satisfied that the arrest was unlawful and therefore arbitrary contrary to s. 9 of the *Charter*, and that the demand for breath samples was invalid rendering the taking of breath samples an unreasonable seizure contrary to s. 8.

2. Section 10(b), Holding Off:

[30] Once in the police vehicle and still at the scene, the Officer advised Ms. Golebeski of her right to counsel and she indicated that she wished to speak to counsel. The Officer then read the breath demand. Ms. Golebeski appeared confused about the breath demand, and the Officer repeated it. He then proceeded to ask her numerous times whether she intended to provide a sample or not, and seemed quite insistent on

getting a response even though Ms. Golebeski had not yet been given an opportunity to speak to counsel.

[31] The Crown concedes that this line of questioning amounted to a breach of s. 10(b), though argues that no remedy is required as no incriminating evidence was elicited as a result of the breach.

[32] However, it is important to note that this breach is an additional example of the Officer's lack of appreciation for the limits of his authority in this case.

[33] In 1994, the Supreme Court of Canada, in *R. v. Prosper*, [1994] 3 S.C.R. 236, held that once an accused has indicated a desire to speak to counsel, police are required to "hold off" on questioning the accused with a view to eliciting incriminatory evidence until the accused has been given access to counsel. When asked about the obligation to "hold off", the Officer indicated that he understood that he could continue to question the accused, but that she had the right not to answer if she so chose. It was clear that the Officer had absolutely no knowledge or understanding of the well-established law in relation to "holding off".

3. Section 10(b), Counsel of Choice:

[34] Before departing the scene to go to the RCMP detachment, the Officer asks Ms. Golebeski if there is a lawyer she wants to call. She says she does not know. He says he will call Legal Aid for her. He could not remember her response. When the WatchGuard video was replayed, the Officer felt it sounded like she was okay with the plan to call Legal Aid. In my view, the video is not at all clear in relation to whether she

is in agreement with calling Legal Aid, although it is clear that she does not seem, at any time, to voice an objection to the plan. She does ultimately speak to Legal Aid Duty Counsel; and she does not voice any dissatisfaction with her access to counsel.

[35] However, the Officer offered her no other options. At no time did he provide her with a phone book or with the list of lawyers that he says is available on the internet, though he says that he has never actually printed it off. He indicated that he would only provide a phone book or the list if someone did not want to talk to Legal Aid or have a lawyer in mind. In effect, the Officer offers Ms. Golebeski no options to find counsel other than calling Legal Aid.

[36] In *R. v. Edzerza-MacNeill*, 2019 YKTC 3, Cozens J. found that failure to provide a list of counsel and effectively choosing to call Legal Aid on someone's behalf amounts to a denial of the s. 10(b) right to speak to counsel of choice. In my view, the facts of this case demonstrate that the Officer failed to understand that the right to counsel includes the right to counsel of choice. His failure to offer Ms. Golebeski a phone book or list of lawyers to allow her to make her own choice, rather than his choice to call Legal Aid on her behalf, amounts to at least a technical breach of Ms. Golebeski's s. 10(b) right to counsel of choice.

4. Section 8, As Soon As Practicable:

[37] Section 320.28 requires that breath samples be taken as soon as practicable following a demand. As indicated, counsel for Ms. Golebeski concedes that the evidence adequately addresses any questions with respect to delay in taking the samples occasioned at the scene, but he asserts that there is still unexplained delay at

the detachment such that the evidence falls short of establishing the samples were taken as soon as practicable.

[38] Specifically, he argues that the Officer provides no evidence as to the normal length of time required for the observation period before the taking of samples. Unlike the decision of *R. v. Bramadat-Willcock*, 2017 YKTC 25, the Officer was unable to articulate the purpose of the observation period, thereby justifying the need for the delay occasioned by the observation period.

[39] On balance, I am not satisfied that a breach has been made out in this regard. The Officer's evidence is sufficient to establish that any delay in the taking of the samples related to the observation period and the number of insufficient samples provided by Ms. Golebeski. While the requirement for an observation period is not codified, it is nonetheless such an established requirement to ensure that any samples are not tainted by mouth alcohol, that I am of the view that I can take judicial notice of the need for an observation period. With respect to the length of the observation period, s. 320.31(1)(b) mandates an interval of at least 15 minutes between the taking of samples. It is reasonable that a similar time period be required for the preliminary observation period.

[40] Regarding the Officer's lack of understanding of the purpose of the observation period, his evidence did demonstrate deficits in this regard. When asked the purpose he was able to articulate that he was observing to ensure that Ms. Golebeski did not take anything by mouth. He did not, however, seem to understand the need to ensure there was no burping or regurgitation, nor did he articulate that the overall purpose was

to ensure there was no mouth alcohol to skew the validity of any subsequent readings. Furthermore, his view that the purpose of the observation period was to elicit more evidence to use against the accused is clearly not one of the established purposes for the observation period.

[41] In my view, the Officer's lack of understanding may perhaps be relevant to an argument regarding the validity of the breath readings on the basis a proper observation period was not observed, but it does not render the delay required by the observation period a breach of s. 8 of the *Charter*.

5. Section 9, Overhold:

[42] The Officer indicated that it was his original intention to release Ms. Golebeski on a Promise to Appear; however, while he was completing the documents, Ms. Golebeski left the detachment. He located her a couple blocks from the detachment. When he asked her where she was going, she said that she did not know. The Officer then indicated that he formed the grounds to believe it would be better to lodge Ms. Golebeski in cells at the Arrest Processing Unit ("APU") as he was concerned about her safety given her blood alcohol content, the fact she left the detachment, and she did not know where she was going.

[43] The Officer transported Ms. Golebeski to the APU and advised them that she would be released on a Promise to Appear when sober. The Whitehorse Correctional Centre's ("WCC") log filed as exhibit 5 indicates that she was lodged in cells at 23:59. The Officer left an email for the next RCMP Watch indicating that she was to be released with the documents left on the Watch Commander's desk. He indicated that

he expected staff at the APU to monitor Ms. Golebeski's state of intoxication, and believed they used ASDs to assess. Exhibit 5 does not indicate that any such testing or other sobriety assessments were conducted by WCC staff.

[44] The log further indicates that Ms.Golebeski was finger printed by the RCMP at 8:40 a.m. and was released from the APU at 9:24 a.m. by Cpl. Stelter, the Watch Commander. There is no evidence that anyone from the RCMP checked on her state of sobriety over the course of the almost nine hours she spent in APU custody before Cpl. Stelter's arrival. From the time of arrest to the time of release, Ms. Golebeski spent approximately 12 hours in custody.

[45] Counsel for Ms. Golebeski argues that her detention at the APU amounts to an arbitrary detention contrary to s. 9 of the *Charter*.

[46] I considered this overhold issue at length in the decision of *R. v. Davidson*, 2019 YKTC 16. Section 497 of the *Criminal Code* requires that a person arrested without warrant be released as soon as practicable unless one of the following exceptions in s. 497(1.1) applies:

> (1.1) A peace officer shall not release a person under subsection (1) if the peace officer believes, on reasonable grounds,
>
> (a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to
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> (i) establish the identity of the person,
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> (ii) secure or preserve evidence of or relating to the offence,

> (iii) prevent the continuation or repetition of the offence or the commission of another offence, or
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> (iv) ensure the safety and security of any victim of or witness to the offence; or
>
> (b) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

[47] In this case, I am of the view that the Officer did have reasonable grounds to believe that Ms. Golebeski's detention was necessary in the public interest in light of the concerns for her safety flowing from her state of intoxication, unexpected departure, and obvious confusion. That being said, the following comments from *Davidson* are equally applicable here:

> 44 It must be remembered that a deprivation of liberty is taken very seriously in our justice system. An unjustified deprivation of liberty is a breach of s. 9 of the *Charter*. The exceptions in s. 498 do allow for detention, but not unlimited detention. The continuing authority to detain under s. 498 lasts only so long as the circumstances that give rise to the reasonable grounds to detain continue to exist. Once they no longer exist, the person must be released as soon as practicable. Release is not a question of convenience for the RCMP or of compliance with a 12-hour hold policy. It is a question of whether there are continuing grounds to detain.
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> 45 In this case, it is difficult to determine what Mr. Davidson's level of intoxication was at any given time over the course of his detention, as Mr. O'Neill has only a vague recollection. What is clear, however, is that there were no efforts made by Cst. Caron or another peace officer to assess Mr. Davidson's state of intoxication on an ongoing basis. Rather the timing of Mr. Davidson's release was dictated by the convenience of the RCMP within this rough guideline of 12 hours.
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> 46 In my view, the failure to actively monitor Mr. Davidson's detention, against the authority set out in s. 498(1.1), to ensure his detention was no longer than necessary means that what began as an authorized detention became, at a point that the evidence does not fully make clear, an arbitrary detention. Accordingly, I am satisfied that the defence has

> established, on a balance of probabilities, that there was a breach of s. 9 of the *Charter*.

[48] I am similarly satisfied that Ms. Golebeski's initially lawful detention became, at some point, an arbitrary detention contrary to s. 9.

6. Section 24(2):

[49] Having determined that numerous breaches of Ms. Golebeski's *Charter* rights occurred in this case, the remaining issue to determine is the appropriate remedy. As noted, counsel for Ms. Golebeski seeks exclusion of all evidence following the unlawful arrest including statements made by Ms. Golebeski, observations made by the Officer, the WatchGuard video, the Certificate of Qualified Technician, and evidence of service of the Certificate of Qualified Technician on Ms. Golebeski.

[50] The test for exclusion set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, requires consideration of three factors:

1. The seriousness of the *Charter*-infringing conduct;
2. The impact on the *Charter*-protected interests of the accused; and
3. Society's interest in adjudication on the merits.

Consideration of these three factors must be balanced in determining whether admission of the evidence would bring the administration of justice into disrepute.

[51] With respect to the first consideration, the seriousness of the *Charter*-infringing conduct, the s. 9 breach flowing from the unlawful arrest, involving as it does, a deprivation liberty, must be viewed as extremely serious. The unreasonable seizure of

breath samples contrary to s. 8 would be equally serious in my view. In both instances, the Officer failed to comply with statutorily mandated requirements. As noted by Cozens J., in *R. v. Wells*, 2017 YKTC 34, at paragraph 74:

> Failing to comply with a statutorily required threshold for delaying an individual in order to obtain a breath sample cannot be said to be simply a technical or minor error. Regardless of the good intentions of Cst. Harding, this does not amount to an insignificant breach. The need for police officers to comply with *Charter* obligations, in light of powers provided to police officers, is important in order for confidence in the justice system to be maintained.

[52] It should be noted that the *Wells* case involved an arbitrary detention in relation to an ASD demand, where only reasonable suspicion is required. The powers to arrest pursuant to s. 495 and to demand breath samples pursuant to s. 320.28, as in this case, both require compliance with a higher standard in terms of the requisite grounds, making these breaches objectively more serious than those in *Wells*.

[53] The seriousness of each of these breaches would weigh in favour of exclusion. In addition, it must be remembered that there were multiple breaches in this case. An assessment of the seriousness of some of the breaches may not favour exclusion. For example, the s. 10(b) breach for failing to hold off did not result in any incriminating evidence. As a result, it would be a less serious breach in the circumstances. Similarly, in *Davidson*, I found that the s. 9 overhold did not allow for a retrospective remedy of exclusion, which raises questions about how it as a breach should be viewed within the *Grant* analysis. However, while some of the other breaches may not, in the circumstances of this case, be as serious, such a pronounced pattern of disregard for

Ms. Golebeski's *Charter*-protected rights can only be viewed as extremely serious even where some of the individual breaches are less serious when considered in isolation.

[54] I accept that the Officer's lack of regard for Ms. Golebeski's *Charter* rights stems from ignorance of *Charter* norms likely relating to his inexperience rather than from bad faith, but that makes it no less serious. As stated in *Grant* at paragraph 74: "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith".

[55] The seriousness of some breaches and the overall failure to understand and comply with *Charter* requirements weighs heavily in favour of an exclusionary remedy.

[56] The second *Grant* factor, the impact on the *Charter*-protected interests of the accused, requires consideration of the impact of the breach on the accused's privacy interests, bodily integrity and human dignity (see *R. v. Loewen*, 2009 YKTC 116, para 40).

[57] In my view both the s. 8 breach and s. 9 wrongful arrest breach must be viewed as intrusive. The s. 9 breach, in particular, had a pronounced impact on Ms. Golebeski's liberty interests, interests that are fundamental to human dignity in a free and democratic society. The s. 8 breach resulted in Ms. Golebeski being compelled to provide incriminating evidence through the provision of breath samples. While less intrusive in relation to her bodily integrity than blood samples would have been, they nonetheless represent a significant intrusion on her privacy interests and right against self-incrimination.

[58] This factor would weigh in favour of exclusion.

[59] The final factor, society's interests in adjudication on the merits, would favour inclusion, given the societal interest in addressing impaired driving, the reliability of the evidence, and the crucial importance of the evidence to the Crown's case.

[60] A balancing of the three *Grant* factors, in my view, would support the remedy of exclusion. In particular, I am satisfied that the dominant factor to be considered in this case is the seriousness of the combined breaches. Admission of evidence obtained as a result of a such profound failure to respect and comply with *Charter* norms would bring the administration of justice into disrepute.

[61] In terms of the specific evidence to be excluded, s. 24(2) of the *Charter* allows for exclusion of evidence "obtained in a manner that infringed or denied any right". In general, there must be a causal or temporal nexus between the breach and the evidence. Applying this test, I am satisfied that the Certificate of Qualified Technician and any evidence with respect to Ms. Golebeski's blood alcohol content should be excluded as such evidence flows directly from the unlawfully seized breath samples.

[62] Having concluded that the Certificate itself is to be excluded, evidence of service of the Certificate is essentially irrelevant and need not be addressed.

[63] I am also satisfied that any statements made by Ms. Golebeski and any observations made by the Officer subsequent to the arrest should be excluded as they flow directly from the unlawful arrest. For the same reason, the cell block video will be excluded.

[64] The remaining question is exclusion of the WatchGuard video. Defence argues that any footage following time of arrest should be excluded as it flows from the unlawful arrest. Crown argues that it should nonetheless be admitted, particularly the footage showing Ms. Golebeski walking to the police vehicle, as she was not handcuffed and the level of detention was minimal.

[65] While this submission may be persuasive in some circumstances, I am of the view that the pronounced pattern of *Charter* breaches flowing from the Officer's complete lack of appreciation of his obligations under the *Charter*, in this case*,* warrant exclusion of all of the WatchGuard video footage following the time of the unlawful arrest.

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RUDDY T.C.J.