Citation: *R. v. McGuire*, 2020 YKTC 32 Date: 20200507
Docket: 17-00542
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JOHN HAROLD McGUIRE

Appearances:
Leo Lane (by telephone) Counsel for the Crown
Richard S. Fowler (by telephone) Counsel and Agent for the Defence

RULING ON *CHARTER* APPLICATION

[1] COZENS T.C.J. (Oral): John McGuire has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

[2] Counsel for Mr. McGuire has filed an application alleging breaches of Mr. McGuire's ss. 8, 9, and 10 *Charter* rights. Counsel seeks that the evidence of the breath samples obtained from Mr. McGuire and any statements that he made be excluded from admission at trial under s. 24(2) of the *Charter*.

[3] Crown indicated at the start of the trial that a conviction was not being sought on the s. 253(1)(a) offence.

[4] The trial commenced by way of *voir dire*.

Cst. MacEachen

Investigation and Arrest

[5] Cst. MacEachen testified that on October 6, 2017, at approximately 7:06 p.m., she received a complaint through RCMP Dispatch about a white Kenworth semi-trailer transport truck ("the Kenworth") driving on the Alaska Highway between Teslin and Whitehorse. She continued to receive updates from Dispatch based on further calls from the civilian complainant. The initial information provided was that the Kenworth had been driving erratically. The updates that Cst. MacEachen had received were that the Kenworth had passed the complainant by crossing a double solid line, had subsequently stopped in the middle of a lane where the driver was noticed to be stumbling on the side of the road while going to the bathroom, and that the Kenworth had passed the complainant a second time.

[6] As a result of receiving the initial complaint, Cst. MacEachen left Whitehorse in a police cruiser and started to drive towards Teslin in an attempt to locate the Kenworth. Just past the Wolf Creek Campground south of Whitehorse, Cst. MacEachen noted a white northbound transport truck pulling a white trailer (the “Transport") that appeared to match the description that had been provided to her.

[7] Cst. MacEachen made a U-turn and caught up to the Transport. She activated her police cruiser's lights and siren. She then followed the Transport, noting the speed to fluctuate between approximately 60 to 80 kilometres per hour. While following the Transport, she noted it to cross the centre line and to be jerky as it went around corners.

[8] Cst. MacEachen testified that she was concerned that the Transport was not pulling over. She pulled her police cruiser somewhat into the opposing lane in order to ensure that the police cruiser's emergency lights would be visible to the driver of the Transport.

[9] Cst. MacEachen radioed to Cpl. Stelter to express her concerns that the Transport did not appear as though it was going to pull over and stop.

[10] The Transport then pulled over at approximately 7:57 p.m., which was a distance of approximately five kilometres after Cst. MacEachen had made the U-turn and activated the police cruiser's emergency lights and siren.

[11] Cst. MacEachen approached the driver's side of the still-running Transport. She testified that at that time she intended to investigate both the motor vehicle complaint that she had received, as well as the driving that she had observed while following the Transport.

[12] Cst. MacEachen stated that she did not observe any other vehicles on the highway that matched the description of the Kenworth that she had been provided with.

[13] Cst. MacEachen initially testified that while she was aware that the complainant had provided the Dispatch operator with the license plate number of the Kenworth, she was unsure whether she had been provided this license plate number by Dispatch. While she believed that it had been provided to her at some point, she could not say when, and she had made no notes as to when this information had been provided.

[14] Cst. MacEachen testified that she provided Dispatch with the license plate number of the Transport. Upon reviewing the audio recording of her communications with Dispatch, Cst. MacEachen agreed that Dispatch never confirmed to her that the license plate number Cst. MacEachen provided to them was the same license plate number that had been provided in the civilian complaint. Cst. MacEachen further agreed that she never asked Dispatch to confirm whether these two license plate numbers were the same.

[15] An agreement was made between counsel as to the following facts:

- The civilian complainant provided a vehicle license plate number 5F3 96C Alberta; and

- The radio communication of Cst. MacEachen to Dispatch provided a plate number of 5FC 963 Alberta.

[16] As Cst. MacEachen approached the driver door of the Transport, Cpl. Stelter arrived on scene. He took a position standing in the roadway at the bottom of the driver's door.

[17] At the driver's door Cst. MacEachen told the driver, subsequently identified as Mr. McGuire, to turn off the Transport. After she stepped up to the driver's side window to speak further to Mr. McGuire, she observed his eyes to be glossy, he had slurred speech, and there was an odour of liquor on his breath. She was standing on the side step at window level and one to two feet from Mr. McGuire's face when she made these observations.

[18] Mr. McGuire told her that he had swerved while driving because of the actions of the dog that was in his Transport.

[19] He told her that he continued driving until he was able to find a safe place to pull over.

[20] Cst. MacEachen formed the opinion that Mr. McGuire had alcohol in his blood. Her suspicion was based upon:

- the odour of alcohol or liquor on his breath;
- the driving pattern that she had observed, and as had been communicated to her through the initial complaints and updates that she had received; and
- his glossy eyes and slurred speech.

[21] At 8:04 p.m., Cst. MacEachen read the demand to Mr. McGuire that he provide a sample of his breath into an approved screening device ("ASD"). Cst. MacEachen requested Mr. McGuire to accompany her to the police cruiser in order to provide a breath sample into the ASD. She then provided the ASD test to Mr. McGuire while he was sitting in the passenger side rear seat of the police cruiser.

[22] Cst. MacEachen stated in her direct testimony that Mr. McGuire provided two breath samples into the ASD that were insufficient. Cst. MacEachen stated she believed this was because Mr. McGuire was not blowing enough air into the ASD. On

his third attempt he provided a suitable sample that resulted in a “Fail” reading at 8:08 p.m.

[23] In cross-examination, however, Cst. MacEachen stated that there were, in fact, three failed attempts before a suitable sample was received.

[24] Based upon the “Fail” reading and the observations she had made, as well as the information and the complaints to Dispatch as relayed to her, Cst. MacEachen formed the opinion that Mr. McGuire was impaired. She asked Cpl. Stelter to search Mr. McGuire, and subsequently arrested him at 8:12 p.m. for impaired driving, and read him the breath demand.

[25] At 8:13 p.m., Cst. MacEachen read Mr. McGuire his *Charter* right to counsel. He stated that he understood and he wished to speak to a lawyer. The door of the police cruiser was shut at approximately 8:17 p.m., and at approximately 8:18 p.m. Mr. McGuire was transported to the RCMP Detachment. En route to the Detachment, in response to something Mr. McGuire said to her, Cst. MacEachen asked him whether he had had anything to drink when he stopped in Teslin. Mr. McGuire admitted to having had two beers. Cst. MacEachen and Mr. McGuire arrived at the Detachment at approximately 8:25 p.m.

[26] After arriving at the RCMP Detachment, Cst. MacEachen placed Mr. McGuire in an interview room. She contacted Legal Aid at 8:28 p.m., and counsel called back at 8:32 p.m. Mr. McGuire spoke to counsel for several minutes.

[27] Cst. MacEachen testified that she did not offer Mr. McGuire the opportunity to speak to duty counsel until arriving at the Detachment. She did not do so because it was her general practice to allow those individuals who had been arrested an opportunity to speak to counsel in private. It was also not her general practice to allow for her personal cell phone to be used by a detainee. She agreed that she did not ask Mr. McGuire if he had a phone with him. She did not recall whether he had said anything about having a phone on him.

[28] After Mr. McGuire's conversation with duty counsel was concluded, Cst. MacEachen commenced the first of two observation periods. At the end of the first observation period, a breath sample of 130 mg% was obtained. After the second observation period, a breath sample of 130 mg% was obtained.

ASD Breath Samples

[29] In cross-examination Cst. MacEachen agreed that it was only on the fourth attempt to obtain a sample of Mr. McGuire's breath that a sample was obtained and that the previous three attempts did not provide a suitable sample of his breath.

[30] The video/audio recording of the ASD process was played in court. The first attempt to obtain a breath sample was as follows:

- There was a “beep” sound. Cst. MacEachen testified that this meant the ASD was ready to receive a breath sample;
- There was a second “beep” approximately three or four seconds later. Cst. MacEachen testified that she was unsure if the first “beep” was

just the machine getting ready. When the ASD is ready, it will say "Blow" and then emit a beep. She was unable to recall the tone;

- There was a double "beep" approximately eight seconds later. Cst. MacEachen testified that this meant that the ASD did not receive a proper sample;

- However, after the double "beep" Cst. MacEachen requested Mr. McGuire to blow, saying, "Keep going", several times to him. When counsel for Mr. McGuire pointed out to Cst. MacEachen that the double "beep" was prior to the breath sample being provided, Cst. MacEachen stated that she would have to listen back in order to address that;

- Cst. MacEachen testified that there were a lot of "beeps". She stated that she did not know off the top of her head what each beep to this point signified. She also stated that the ASD screen provides a reading on it. She stated that she was looking at this screen, however, she could not recall what was indicated on the screen at this point;

- She agreed that after the double "beep" she then stated, "You stopped your breath before I told you to", while at the same time there was a continuous beeping. This was at approximately 8:06:41 p.m.;

- She recalled that the ASD screen indicated that there was an insufficiency, although she could not remember how this was displayed on the screen; and

- She was asked in cross-examination whether the screen display showed: a) the breath flow fell below minimum flow requirements; b) the breath flow exceeded the maximum allowable flow rate; c) the breath flow was not consistent, or d) the breath flow stopped too abruptly. She was unable to recall which of these it was.

[31] The second attempt to obtain a breath sample, which occurred at approximately 8:07 p.m., also resulted in an insufficient sample. Cst. MacEachen was unable to recall which code was given by the ASD at that time. I note from listening to the video/audio recording that there was a long beep followed by five beeps.

[32] Cst. MacEachen changed the mouthpiece at this point in time.

[33] On the third attempt, which took place at approximately 8:07:52 p.m., there was a long beep followed by five beeps. A proper sample was not obtained on this attempt.

[34] On the fourth attempt a “Fail” result was recorded. This breath sample was provided at approximately 8:08:35 p.m., and the “Fail” result showed on the ASD at approximately 8:08:40 p.m.

[35] Cst. MacEachen was asked whether she was aware that the ASD preset would turn off the ASD after three failed attempts. She stated that she would have to read the manual in order to say if that was correct. Cst. MacEachen stated that she had

completed the ASD course approximately one to two years earlier. That would have been when she last read the ASD instruction manual.

Calibration and Checks

[36] Cst. MacEachen stated that she checked the Video in Car System ("VICS") at the start of her 7:00 p.m. shift to confirm that it was working. She also confirmed that the radar was working. She agreed that she did so because it was important to note that these were operating correctly at the outset of her shift.

[37] She also searched the back seat of the police cruiser at the start of her shift. She agreed that it was important to do so to make sure there was nothing in the back seat that could put herself or others at risk.

[38] Cst. MacEachen agreed that it was her general practice to do all of these checks at the start of her shift.

[39] Cst. MacEachen testified that she recorded all of these checks that she had conducted in her notebook.

[40] She testified that she had retrieved the ASD and Alco-Sensor FST from a shelf at the beginning of her shift. She was unsure how many ASDs were on the shelf at the time.

[41] She testified that she did not record the serial number of the ASD she used that night. While it was her normal practice to do so after using it, she forgot to that night.

[42] Cst. MacEachen testified that she believed based upon her memory and general practice, that the ASD was operating correctly and that it was functional and working properly. She believes so because at the beginning of her 7:00 p.m. shift that day she checked the expiry date of the ASD to ensure that it was not expired.

[43] The RCMP member who calibrates the ASD puts a label with an expiry date on it. As was her general practice, she checked the inspection date, turned on the ASD, and provided a sample into the ASD to ensure that she received a zero rating. She said that the ASD would not work if it was not calibrated.

[44] She agreed that there is nothing recorded in her notes with respect to the ASD that she used to obtain a sample of Mr. McGuire's breath. Cst. MacEachen testified that she was relying on her memory and her general practice when she was testifying about the ASD she used that evening. She agreed that she had not followed her normal practice by failing to make any notes that day in regard to the ASD that she utilized.

[45] She stated that she is not qualified as a calibrator for the ASD. She believes that the ASD requires calibration every 30 days, or maybe a couple of days less than that, by a person approved to do so. She testified that if the ASD is not properly calibrated or if the calibration is expired, it will lock itself out. Once the ASD locks out, it requires further testing by the calibrator, which may require that it be sent out to a lab.

[46] Cst. MacEachen agreed that in order for the ASD to obtain an accurate result it needed to be maintained, calibrated, and operated properly. If this is not done properly, then the ASD may not provide an accurate result.

[47] Cst. MacEachen agreed that the sounds that the ASD make indicate various things.

[48] She also agreed that the ASD screen displays various codes. She testified that while she remembered looking at the screen, she did not make any notes of any of the codes displayed. She also testified that she did not recall what these various codes were.

[49] She was aware that the ASD shows a code BLN, which indicates it is performing a blank test automatically as part of its own internal programing to ensure it is accurate. Cst. MacEachen did not recall whether she saw the BLN code prior to requiring Mr. McGuire to provide breath samples into the ASD. She stated the ASD would have had to show this code in order for it to work. She agreed that it is important to know what the ASD is indicating in regard to its current status at any time.

[50] The operating temperature range for the ASD is between minus 12 and plus 55 degrees Celsius. If operated outside this range, it will read "too cold" or "too hot" before shutting itself off. She did not recall what the temperature of the ASD was in this case.

[51] Cst. MacEachen testified she did not know for certain the reasons why she was supposed to ask Mr. McGuire to take a deep breath before providing a sample, or what the ASD manual said about that.

Cpl. Stelter

[52] Cpl. Stelter testified that he believed there were at least three attempts to obtain a breath sample into the ASD before the fourth attempt provided the “Fail” result.

Cst. Allain

[53] Cst. Allain testified that he had been trained to calibrate and operate the ASD utilized to obtain breath samples from Mr. McGuire, including teaching others how to do so. He was questioned about the accuracy check process for the ASD at the time that Mr. McGuire was arrested.

[54] In the Yukon, the accuracy checks are done no later than every 28 days rather than the 31 days required nationally. If these checks are not done, the ASD gets locked out and cannot be utilized until the accuracy check is performed. In the Yukon, the practice is to conduct these checks prior to the 28-day period elapsing.

[55] An operator of the ASD is unable to change any of the settings of an ASD. An operator is taught a certain number of status messages, what these mean, and what is required once an ASD is logged out.

[56] He used a sample completed Alco-Sensor FST accuracy check form to explain the process for ensuring that an ASD is ready to be utilized to obtain a breath sample.

[57] Cst. Allain stated that if the ASD is working properly, after three failed attempts to obtain a breath sample, the ASD powers down and needs to be restarted.

Submissions of Counsel

Counsel for Mr. McGuire

[58] In the Amended Notice of Application, counsel for Mr. McGuire submitted that there were the following issues:

1. Cst. MacEachen did not have the requisite reasonable suspicion prior to making the demand for Mr. McGuire to provide a sample of his breath into the roadside screening device, therefore, Mr. McGuire's s. 8 *Charter* rights were violated by the seizure of Mr. McGuire's breath sample;

2. Cst. MacEachen did not have reasonable and probable grounds to believe Mr. McGuire had committed an indictable offence when she arrested him without a warrant. Further, even if Cst. MacEachen was found to have possessed the requisite grounds for making the ASD demand, in the circumstances it was not objectively reasonable for her to rely on the “Fail” reading to form the grounds to arrest Mr. McGuire, therefore, Mr. McGuire's s. 9 *Charter* rights were infringed;

3. The seizure of the breath samples at the RCMP Detachment was unreasonable, as they were seized following an unlawful arrest, therefore, his s. 8 *Charter* rights were violated; and

4. Cst. MacEachen failed to provide Mr. McGuire an opportunity to speak to legal counsel immediately following his arrest and there were no justifications for this delay, therefore, Mr. McGuire's s. 10 (b) *Charter* rights were violated.

[59] In his Written Submissions filed at the conclusion of the *voir dire*, counsel for Mr. McGuire submits Mr. McGuire's ss. 8, 9, and 10(b) *Charter* rights "…were violated when Cst. MacEachen made the roadside breath demand, arrested him without

warrant, delayed access to counsel, and made further breath demands at the police station”. Counsel submits the evidence of the breath samples obtained at the RCMP Detachment should be excluded. Counsel submits that:

1. Cst. MacEachen's suspicion that Mr. McGuire had alcohol in his blood was not objectively reasonable;

2. Furthermore, Cst. MacEachen did not have objectively reasonable and probable grounds to believe that Mr. McGuire had committed an offence regardless of whether the ASD breath demand was valid, therefore, Cst. MacEachen's demands for breath samples subsequent to Mr. McGuire's arrest were also unreasonable. This constituted a contravention of Mr. McGuire's ss. 8 and 9 *Charter* rights; and

3. Finally, Cst. MacEachen's delay in providing Mr. McGuire access to legal counsel was unreasonable.

Issue 1: Cst. MacEachen did not have the requisite suspicion that Mr. McGuire had alcohol in his blood.

[60] Counsel submits that the evidence considered from an objective perspective does not provide a basis for Cst. MacEachen to have determined that the Transport was, in fact, the one that was the subject of the civilian complaint. Cst. MacEachen did not ensure that the license plate of the Transport was the same number that Dispatch had provided to her through the civilian complaint. All that is known with certainty is that she called in the license plate of the Transport. Therefore, Cst. MacEachen could not

rely on the information from the civilian witness as to the driving pattern of the Kenworth as being applicable to Mr. McGuire.

[61] Counsel submits that the driving pattern Cst. MacEachen observed was not sufficient to contribute to her forming a reasonable suspicion that Mr. McGuire had alcohol in his body. He provided an explanation for the swerving in that it was caused by his dog that was travelling with him. He also explained that the delay in pulling over the Transport was due to his needing to find a safe place to do so.

[62] Counsel submits that Cst. MacEachen had no reason to believe that the smell of alcohol was indicative of Mr. McGuire having consumed alcohol and she made no attempt to ascertain the source of the smell. He further submits that Cst. MacEachen was not previously acquainted with Mr. McGuire, and she had no way of knowing that his glossy eyes and slurred speech were indicative of his having consumed alcohol.

[63] At most, the observations of Cst. MacEachen equated only to a mere suspicion that Mr. McGuire had alcohol in his body that did not rise to a level of a reasonable suspicion.

Issue 2: Cst. MacEachen's reliance on the "Fail" reading on the ASD was not reasonable in these circumstances. Further, the indicia of impairment, without the ASD "Fail" result, was insufficient to provide grounds for the breath demand. Therefore, the breath demand was unreasonable and the evidence of the breath test results should be excluded.

[64] Counsel for Mr. McGuire submits that Cst. MacEachen failed to make basic observations that were necessary in order for her to have a reasonable belief that her

use of the ASD to obtain a breath sample from Mr. McGuire would produce reliable results.

[65] Counsel submits that Cst. MacEachen was not aware as to whether the temperature of the ASD was within the required operating range. She also testified she was not aware that it is set out in the procedure for operating the ASD that Mr. McGuire was required to hold his breath prior to providing a breath sample.

[66] Counsel submits that throughout the use of the ASD that evening there were a number of beep sounds. These beeps could potentially be "error" sounds. Cst. MacEachen testified that she was not sure what the various beep sounds meant at the time, although they may have meant that air was flowing into the ASD. She also took no notes of any error messages that may have been recorded by the ASD.

[67] He submits that there were at least three failed attempts to obtain a breath sample prior to the "Fail" result being recorded. There is no evidence, however, that the ASD powered down after three failed attempts as it was supposed to. There was also no beep between the third and fourth samples, which was contrary to what should have occurred if the ASD had operated properly. As such, he submits Cst. MacEachen should not have been in a position to believe that the ASD was ready to receive a breath sample for analysis.

[68] Counsel submits that in this case Cst. MacEachen's failure to take notes or have an independent knowledge of why the ASD was emitting beep sounds, or what the ASD screen was displaying at certain times, meant that she could not reasonably believe, viewed objectively, that the ASD was functioning properly. This is compounded by the

other deficiencies exhibited by Cst. MacEachen with respect to her lack of knowledge of some operational aspects of the ASD, such as the purpose for directing a detainee to take a deep breath.

[69] Therefore, Cst. MacEachen's subjective belief that the ASD was functioning properly and her reliance on the “Fail” reading was objectively unreasonable. In order to rely on the ASD results, Cst. MacEachen had to ensure that she operated the ASD in accordance with the requisite procedures. This required more than her simply believing the ASD was providing a reliable result.

[70] He submits there must be an evidentiary foundation to support the reasonableness of that belief. Such an evidentiary foundation required that Cst. MacEachen understand the basic parameters for the operation of the ASD, something that the Crown had failed to establish on the evidence that she did, in particular, given the evidence which indicates that she, in fact, did not. While the Crown does not have an onus to prove that the ASD was working properly, once the issue arises, the evidence must support a finding that the manner in which the ASD was utilized produced results which are reasonably capable of being relied upon on both a subjective and objective basis.

[71] Counsel submits that without the ASD “Fail” result there was no basis for the arrest of Mr. McGuire and the breath demand. The other indicia of impairment Cst. MacEachen relied upon was insufficient to form the requisite reasonable and probable grounds that Mr. McGuire committed an impaired driving offence. As such

Mr. McGuire was arbitrarily detained and the seizure of the breath samples was unreasonable.

Issue 3: Mr. McGuire's s. 10 Charter right was breached by the unreasonable delay in providing him access to legal counsel; and this breach was exacerbated when Cst. MacEachen questioned him about his alcohol consumption after his arrest but before he was given an opportunity to speak with counsel.

[72] Counsel submits that the delay between Mr. McGuire being provided the informational component of his *Charter* right to counsel and his actually being provided the opportunity to speak to legal counsel was an unreasonable delay.

[73] Counsel submits that Cst. MacEachen should have inquired of Mr. McGuire whether he had a phone that he wished to use to contact counsel at roadside after his arrest. She could have provided him her own phone. She also should have inquired of Cpl. Stelter whether he had a phone Mr. McGuire could use. This s. 10(b) breach is further aggravated by Cst. MacEachen questioning Mr. McGuire while he was in police custody and in transport to the Detachment about whether he had consumed alcohol earlier.

Section 24(2)

[74] Counsel submits that as per the application of the tests in ***R. v. Grant***, 2009 SCC 32, the evidence of the breath samples should be excluded on the basis that the admission of the evidence would bring the administration of justice into disrepute. He submits that the actions of Cst. MacEachen in the detention and arrest of Mr. McGuire demonstrate, at a minimum, a disinterest in Mr. McGuire's *Charter* rights. This elevates the seriousness of the state conduct.

[75] Counsel submits that the circumstances of Mr. McGuire's unwarranted detention and arrest had a serious impact upon Mr. McGuire's dignity and privacy.

[76] Counsel acknowledges that the evidence of Mr. McGuire's breath samples is critical to the Crown's case, however, he submits that the long-term repute of the justice system requires that the justice system be beyond reproach. The actions of Cst. MacEachen failed to live up to that expected of a police officer in this case, and the balance of the ***Grant*** factors requires that the evidence of the breath samples be excluded.

Crown Counsel

[77] Crown counsel submits that, based upon all that she had observed, Cst. MacEachen had the requisite reasonable suspicion in order to make the ASD demand.

[78] The proper focus when considering the ability of a police officer to rely on the results of the ASD test is whether the police officer had reasonable grounds to believe that the ASD was in good working order. The Crown is not, however, required to prove that the ASD was, in fact, in good working order.

[79] It was also not necessary that Cst. MacEachen know the intricacies of the workings of the ASD. She possessed the requisite reasonable belief that the ASD was properly calibrated and in working order. She needed only to believe that the ASD was in good working order, not to know that it was.

[80] Crown counsel also submits that there is no evidence that the ASD did not shut down after three unsuccessful attempts to obtain a breath sample. Cst. MacEachen was not questioned about this. What matters is what was evident to Cst. MacEachen at the time, not what she should have known.

[81] Counsel submits that, in order for Mr. McGuire to establish a *Charter* breach based upon a lack of sufficient grounds to arrest Mr. McGuire and to further detain him for the purpose of providing breath samples into an approved instrument, it must be shown that Cst. MacEachen proceeded to administer the ASD recklessly and/or contrary to her training. The inability of Cst. MacEachen to, at the time, rely on the accuracy of the ASD "Fail" result had to be premised upon essentially a "reckless disregard" or "conscious misuse" to problematic issues with respect to the operation of the ASD. There is no evidence as to either, and Mr. McGuire bears the onus to show this to be the case.

[82] Counsel further submits that even without the ASD "Fail" reading, Cst. MacEachen had the grounds to arrest Mr. McGuire and require him to provide breath samples into the approved instrument.

[83] Counsel submits that the delay between advising Mr. McGuire of his right to counsel and providing him access to legal counsel was not unreasonable in the circumstances.

[84] Counsel concedes that Cst. MacEachen improperly asked Mr. McGuire whether he had consumed alcohol, but points out that it was Mr. McGuire who initiated this

exchange by stating that he had stopped in Teslin. Cst. MacEachen's subsequent question was more off-hand than it was inquisitory.

[85] With respect to s. 24(2), counsel submits that the breath testing on which the samples were obtained is on the low end of intrusiveness, and given that Mr. McGuire is operating a massive transport truck, to exclude the evidence of the breath samples would be contrary to the proper administration of justice.

Analysis

Initial Stop and ASD Demand

[86] The decision by Cst. MacEachen to follow and to stop the Transport in order to investigate the civilian complaint was reasonable. The Transport was within the general description of that provided by the civilian complainant to Dispatch and as relayed to Cst. MacEachen. Furthermore, the driving pattern that she observed, as was apparent from the video recording played in court, and the lengthy delay before Mr. McGuire pulled his Transport over, certainly warranted further investigation.

[87] With respect to this delay, while I appreciate that the location where Mr. McGuire pulled his Transport over may have been a safe location, he had already passed other safe locations, including, in particular, the McCrae service station pullout, where there was considerable space to pull over several transport truck and trailer units.

[88] I appreciate the argument that Cst. MacEachen did not confirm with Dispatch that the license plate of Mr. McGuire's Transport matched that of the Kenworth. This could, and likely should have, been confirmed. I somewhat agree with counsel for

Mr. McGuire that this limits the ability of Cst. MacEachen to have relied on the driving pattern described by the civilian complainant in forming the grounds for her suspicion that Mr. McGuire may have been driving with alcohol in his body. While she may have subjectively concluded that it was the same vehicle, it is questionable whether, objectively viewed, this was a reasonable assumption for her to make.

[89] I also agree that Cst. MacEachen could have taken additional steps to confirm the source of the smell of alcohol that she noted. This would not necessarily have been difficult to do. While standing on the step of the Transport may not have facilitated this, Cst. MacEachen could have asked Mr. McGuire to step out of the Transport in order for her to isolate the smell of alcohol to ensure that it was not emanating from another source. This said, she testified that she observed the smell as coming from Mr. McGuire's breath. While she could have looked for other sources for the odor of liquor, given what she had already observed, I am not convinced that she needed to do more.

[90] I also appreciate that Mr. McGuire provided Cst. MacEachen an explanation for the swerving of the Transport. However, Cst. MacEachen need only consider this explanation in forming the requisite suspicion; she need not accept this explanation as necessarily being true.

[91] I am aware that Cst. MacEachen's observations of Mr. McGuire's slurred speech and his glossy eyes must be considered in light of the fact that Cst. MacEachen had no prior interactions with Mr. McGuire when he was sober that would assist her in

determining that his appearance at this time was different than she had previously observed.

[92] This said, these symptoms are consistent with the type of symptoms generally observed and associated with impaired driving. At this stage of the investigation Cst. MacEachen is not required to determine the cause of symptoms such as these. She is only observing them in the context as to whether they provided her with a reasonable suspicion as to whether Mr. McGuire had alcohol in his body. If an alternative explanation for observations is provided at the time, then she must also consider that explanation.

[93] Once Cst. MacEachen had assessed what she observed, and concluded that she had a reasonable suspicion that Mr. McGuire had been driving with alcohol in his system, she was able to move on to the next stage in the investigation, which was to make the ASD demand in order to see whether her suspicion could, therefore, be turned into reasonable and probable grounds to believe that Mr. McGuire was impaired or not.

[94] The standard set out in s. 254(2) of the *Code* simply requires that a police officer have reasonable grounds to suspect that a driver has alcohol in his or her system. The reasonable suspicion standard is a relatively low threshold.

[95] As stated by Lilles J. in ***R.*** v. ***Loewen***, 2009 YKTC 116, in para. 6:

> The test, obviously, is not a demanding or high level one. There must only be a reasonable suspicion that there is alcohol in the accused's body. A mere suspicion without a reasonable evidentiary basis or a hunch that the

> driver has had something to drink is insufficient to justify a demand to provide a screening sample. [See also ***R.*** v. ***Chipchar***, 2009 ABQB 562]

[96] A mere suspicion on the part of a police officer that a driver has consumed alcohol does not equate to a reasonable suspicion (see ***R.*** v. ***Paton***, 2006 SKPC 7, at para.17; ***R.*** v. ***Kang-Brown***, 2008 SCC 18, at para. 75; and ***R.*** v. ***Bernshaw***, [1995] 1 S.C.R. 254, at para. 62).

[97] As stated in ***Kang-Brown***:

> 75 …A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123:
>
> > [T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment.

[98] There is no question that Cst. MacEachen subjectively believed Mr. McGuire had alcohol in his body. Her subjective belief was based on all the factors noted, including the civilian complaint. Even discounting the driving pattern described in the civilian complaint, I am satisfied that the remaining factors, being the driving pattern observed by Cst. MacEachen, the odour of liquor, the slurred speech, and the glossy eyes, were sufficient to make her subjective belief also an objectively reasonable one.

[99] Therefore, I am satisfied that the ASD demand was a valid one.

Arrest and Breath Demand

[100] This issue is more problematic, compounded by the lack of notes or any record of observations made by Cst. MacEachen about the administering of the ASD. What we know is that Cst. MacEachen obtained an ASD from the RCMP locker room and that she conducted a preliminary test to satisfy herself that it was working at the time. The indications to her were that it was.

[101] What we also know is that Cst. MacEachen's understanding as to how the ASD functioned, in particular what the various beeping sounds meant and when they should occur, was somewhat rudimentary. She admitted in testimony that she was not sure what certain beeps meant. She was unable to testify as to the various displays that were visible after each of the tests that did not result in a proper sample being received, not having a specific memory or any notes in this regard.

[102] There were three failed attempts before a fourth attempt resulted in a breath sample being received for analysis. We also know that after three failed attempts, the ASD is supposed to power down. There was no evidence that this in fact occurred. I appreciate that Cst. MacEachen was not asked whether the ASD did power down as it was supposed to, and whether she had to power it back up at any time, therefore, I cannot say with certainty that it did not. This said, from the audio/video evidence before me, there is nothing that assists me in this regard. There is certainly no indication that Cst. MacEachen had to power the ASD up, or that she made any comments in this regard.

[103] I appreciate that the Crown is not required to prove as part of its case that the ASD was working properly (see ***R.*** v. ***Topaltsis***, 2006 CarswellOnt 4790 (C.A.)).

[104] I understand, however, that the challenge by counsel is premised on the submission that Cst. MacEachen should have been alerted to something possibly not operating as it should with the ASD. Therefore, she should have had concerns about the reliability of the ASD “Fail” result and should not have relied on it as having produced an accurate result.

[105] Counsel's submission is that Cst. MacEachen's assumption that the ASD was functioning properly in the face of her apparent lack of knowledge as to the meaning of the various beeps and some of the operating procedures, is an unacceptable basis upon which to rely on the ASD results. She should have known and understood what the ASD operational procedure was. Her lack of notes and recall in light of what was apparently taking place as captured on the video/audio recording compounds this problem. As a result, Cst. MacEachen's reliance on the ASD “Fail” result as part of the grounds for subsequently arresting Mr. McGuire for an impaired driving offence was not reasonable.

[106] As per ***Bernshaw***, in paras. 48 to 60, the Court states that in order for a police officer to rely on an ASD result, the police officer must have a reasonable basis to believe that the test was done properly. As stated in para. 54:

> In *R. v. Richardson*, Ont. Prov. Div., October 31, 1990, unreported, Sharpe Prov. Div. J. held that an officer who was trained in the use of screening devices and who failed to wait 15 minutes prior to administering the test did not have reasonable and probable grounds to demand a breathalyzer. The reasoning of Sharpe Prov. Div. J. emphasizes that an

unreliable test cannot form the necessary legal foundation for a subsequent breathalyzer demand:

> …An improper taking of the test with a resulting variable reading cannot in the opinion of the court, form either reasonable or probable grounds for the making of a Demand under Section 254(3) of the Criminal Code of Canada. (Emphasis added]

…

[107] As stated in ***R.*** v. ***Biccum***, 2012 ABCA 80, in para. 20:

> The law requires that the constable have an honest subjective belief that he has grounds to make the demand for a breath sample. Further, that honest subjective belief must be objectively reasonable…

[108] In my opinion, ignorance of the fundamental operational aspects of the ASD, i.e. the displays generated, the temperature of the ASD, and the beeping sounds emitted, which are intended to alert the operator as to where the ASD is in the sampling process, does not serve to enhance the ability of the operator to, in a somewhat wilfully blind manner, accept the results at face value. There is an obligation on a police officer to have this fundamental knowledge and to monitor the operation of the ASD accordingly when seeking to obtain a breath sample from a detainee.

[109] Cst. MacEachen had been an RCMP officer for just under six years at the time of Mr. McGuire's arrest and had participated in a number of impaired driving investigations previously, so she was not inexperienced. While her experience can, of itself, be evidence that her subjective belief was objectively reasonable, this is not necessarily conclusive of the matter (see ***Biccum*** at para. 21).

[110] I appreciate that Cst. MacEachen did not need to be familiar with all the intricacies of the ASD in order to be allowed to administer it. She only needed to:

> …have a reasonable belief that the device is properly calibrated and in working order before relying on a “fail” result to confirm his or her suspicions that a driver may be impaired or over the legal limit. There is no requirement the officer knew the calibration setting of the device, when it was last calibrated, or whether the device was in fact working properly…
>
> > Manifestly where a roadside test is being used solely for the purpose of confirming or rejecting a police officer's suspicion that a motorist might be impaired or over the legal limit, none of these facts need to be proved. It is sufficient if the administering officer believes them to be true…
> >
> > [See ***R.*** v. ***Mastromartino***, [2004] 70 O.R. (3d) 540 (O.S.C.J.), at paras. 78 and 79]

[111] Counsel also submits that Cst. MacEachen's failure to ensure that the ASD was working properly is enhanced by the statements of Mr. McGuire that he was trying to provide a breath sample. Counsel essentially submits that, therefore, Cst. MacEachen should have had further concern as to whether the ASD was properly functioning.

[112] On this point, I place little weight. This is somewhat analogous to a police officer discounting a detainee's comment that he or she consumed no alcohol. The fact that something is said does not, as a result, amount to a persuasive case that this is in fact true. It remains only a factor to be considered along with the other factors.

[113] In my opinion, it is incumbent on a police officer operating an ASD to have an understanding as to what the displays mean and what the beeping sounds mean. This is important information as to the proper operation of the ASD. I am also of the opinion that care needs to be taken in recording this relevant information in notes or the

equivalent. I appreciate that an officer is not always easily able in such investigations to record contemporaneous notes, however, as seen in this case, there is an audio recording and it would have been simple enough for Cst. MacEachen to have said at the time that a display is generated what the display was so as to be able to later record it in her notes or an Occurrence Report or to otherwise testify as to what was displayed.

[114] A perfectly functioning tire on a vehicle may in an instant stop functioning even though it was working fine at the start of a drive. Who is to say whether the same may be true of an ASD. If Cst. MacEachen had been able to testify as to the various displays and beeping sounds and the operating temperature of the ASD, particularly in consideration of the three failed attempts in order to give meaning to them, perhaps her ability to rely on the results would have been enhanced.

[115] I appreciate that, as stated in ***Biccum*** at para. 17:

> …Even if there was evidence on this record that it was later proven that the approved screening device was highly accurate, or completely unreliable, that would not affect the reasonableness of the demand when made: ***R. v. Black***, 2011 ABCA 349 at paras. 43-4. Facts that were unknown at the time of the search, and that were not then reasonably anticipated, cannot influence the reasonableness of the demand. …

[116] I am also cognizant that a police officer is not required to strictly adhere to every aspect of a practice manual. As stated in ***R.*** v. ***Jennings***, 2018 ONCA 260, at para. 17:

> Failure to follow policy or practice manual directions does not automatically render reliance on test results unreasonable. What matters is whether the officer had a reasonable belief that the device was calibrated properly and in good working order, and whether the test was properly administered: *Bernshaw,* at paras. 59-60, 83*; R. v. Topaltsis* (2006), 34 M.V.R. (5th) 27 (Ont. C.A.) at paras. 7, 9. A failure to follow a practice manual direction can serve as *some* evidence

> undermining the reasonableness of an officer's belief. But the fact that an officer failed to follow a practice manual direction is not itself dispositive. Not every failure to follow a direction is necessarily fatal to reasonableness of belief. Not all practice manual directions will bear equally, or perhaps at all, on the reasonableness of an officer's belief that the ASD is properly functioning. It is necessary to take the further step and determine how or whether each of the specific failures identified undermine the reasonableness of the officer's belief that the ASD was functioning properly.

[117] In these circumstances, however, there are aspects of the operation of the ASD that should have alerted Cst. MacEachen to the possibility that perhaps the ASD was not functioning properly. Ignoring the signals and, in this case, not having an accurate record or recollection of what transpired to support an argument that the signals were properly considered, cannot be equated with the circumstances as set out in ***Biccum*** above, as it cannot be said that there were facts which were unknown and which could not be reasonably anticipated.

[118] In order for Cst. MacEachen to rely on the "Fail" results as part of her grounds for arresting Mr. McGuire, she had to reasonably believe that she completed a "properly conducted roadside test" (see ***R.*** v. ***Gill***, 2011 BCPC 355, at paras. 20 to 21, and ***R.*** v. ***Baldeon***, 2012 BCPC 8, at paras. 42 to 45 and 63 to 65).

[119] There were things that occurred, in my opinion, which should have alerted Cst. MacEachen to a need on her part to ensure the ASD was properly functioning. Because of the lack of a contemporaneous record, or clear recollection on her part as to some of what transpired, which may have been able to address my concern in this regard, I am left with a serious concern about her ability to rely on the ASD "Fail" result in forming her reasonable and probable grounds.

[120] Therefore, I am excluding the “Fail” result from her consideration as to whether Mr. McGuire was arrestable for an impaired driving offence.

[121] I am further satisfied that without the “Fail” result there is insufficient evidence of other factors indicative of impairment by alcohol consumption such as would have provided Cst. MacEachen with the requisite reasonable and probable grounds to believe Mr. McGuire had committed an impaired driving offence. At most, these only rise to the level of a reasonable suspicion.

[122] There is no evidence from Cst. MacEachen that she had formed reasonable grounds to believe Mr. McGuire had committed an impaired driving offence prior to noting the ASD “Fail” result.

[123] Therefore, I find Mr. McGuire's arrest, subsequent detention, and the obtaining of the breath samples from him to be in breach of his ss. 8 and 9 *Charter* rights.

Right to Counsel

[124] As per ***R.*** v. ***Drummond***, 2017 YKTC 63, at paras. 71 to 79, I find that the delay in providing Mr. McGuire an opportunity to speak to legal counsel was not so unreasonable as to constitute a breach of his s. 10(b) *Charter* rights.

[125] Cst. MacEachen could have provided Mr. McGuire with her personal cell phone to use. She also could have inquired as to whether Mr. McGuire had a cell phone with him in order to contact legal counsel. I note that there is no evidence that he did or did not request to use his own cell phone to contact legal counsel. She could have asked Cpl. Stelter as well whether he had a phone.

[126] However, given the relatively brief period of time before Mr. McGuire would be brought to the RCMP Detachment and provided the opportunity to speak to legal counsel in a room which would allow for access to phone numbers for legal counsel and for private communications between himself and legal counsel, I find that it was not necessary that she do so at roadside.

[127] Nor was there any legal obligation on Cst. MacEachen to provide Mr. McGuire the use of her own cell phone (see ***R.*** v. ***Taylor***, 2014 SCC 50, at para. 27). The same is true in respect of any cell phone Cpl. Stelter may have had with him.

[128] As stated in para. 78 of ***Drummond***:

> I am loath to determine that the immediacy requirement for the implementation of the right to counsel would require police officers, as a matter of course, to be required to provide detained or arrested individuals the opportunity to contact legal counsel at roadside, when there is a Detachment nearby where the right can be facilitated in private, including privacy from the eyes of the public. Certainly there will be circumstances, including where there is undue delay, that a police officer will be required to allow for a detained or arrested individual to contact legal counsel from the place of detention or arrest. This, however, is not one of those cases.

[129] Although Mr. McGuire's place of arrest was several minutes further from the RCMP Detachment than was the case in ***Drummond***, I am satisfied that in the circumstances the delay in facilitating Mr. McGuire's right to contact legal counsel, occasioned by his transport to the Detachment was reasonable.

[130] I agree, however, that the dangers of not providing earlier access to speak to legal counsel were realized when Cst. MacEachen, after arrest and prior to his opportunity to speak to legal counsel, asked Mr. McGuire whether he had consumed

any alcohol. This was clearly a breach of his s. 10(b) *Charter* rights. As stated in ***Taylor*** at para. 26:

> Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence (*R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12; *R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 269).

[131] Inadvertent as the question by Cst. MacEachen may have been, and although not intended to cause Mr. McGuire to provide self-incriminating evidence in an inquisitorial way, the fact that it was asked, is, nonetheless, a significant error in judgment.

[132] The question before me now is whether these breaches of Mr. McGuire's *Charter*-protected interests require that the evidence of the breath samples be excluded from the trial.

<u>Section 24(2)</u>

[133] Section 24 of the *Charter* reads:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[134] Once a breach of a *Charter*-protected right has been established, the sole question of deciding if the evidence obtained as a result of the breach should be excluded from a trial is whether in the circumstances the admission of the evidence would bring the administration of justice into disrepute.

[135] In para. 86 of ***R.*** v. ***Sakharevych***, 2017 ONCJ 669, referring to ***R.*** v. ***Pino***, 2016 ONCA 389, at para. 72, the Court stated that:

> In determining whether or not the evidence was "obtained in a manner that infringed or denied any rights or freedoms" of the applicant, the court should be guided by the following considerations:
>
> (1) the approach should be generous, consistent with the purpose of s. 24(2);
>
> (2) the court should consider the entire "chain of events" between the accused and the police;
>
> (3) the requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct;
>
> (4) the connection between the evidence and the breach may be causal, temporal or contextual, or any combination of these three connections;
>
> (5) but the connection cannot be either too tenuous or too remote.
>
> See *R. v. Pino*, supra, at para 72.

[136] The Court in ***Sakharevych***, referring to the decision in ***Grant***, stated in para. 88 that:

> …a Charter breach in and of itself brings the administration of justice into disrepute. However, in their view, subsection 24(2) was concerned with the future impact of the admission/exclusion of the evidence on the repute of the administration of justice. In other words, the court was concerned with whether admission/exclusion would do further damage to the repute

> of the justice system. In doing so, the court noted that the analysis required a long-term view, one aimed at preserving the integrity of our justice system and our democracy.

[137] The three factors as set out in ***Grant*** are as follows:

- the seriousness of the breach;
- the impact of the breach on the *Charter*-protected interests of the individual; and
- society's interest on an adjudication of the case on its merits.

Seriousness of the Breach

[138] In ***Grant***, the Court noted as follows:

> 73 This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

[139] There was nothing in the conduct of Cst. MacEachen that could be attributed to her having demonstrated a “brazen, flagrant and reprehensible” disregard for Mr. McGuire's *Charter*-protected interests.

[140] She was polite and courteous throughout her dealings with Mr. McGuire. The initial detention order to administer the ASD to Mr. McGuire was a lawful detention. I

note that Cst. MacEachen, consistent with her generally respectful treatment of Mr. McGuire, drove Mr. McGuire to his friend's house after he had been released from police custody, an act of kindness that she was not required to do.

[141] The subsequent breach of Mr. McGuire's ss. 8 and 9 *Charter* rights resulted from Cst. MacEachen having demonstrated an apparent lack of understanding of the need to associate what actually was occurring during the operation of the ASD while Mr. McGuire was providing breath samples, with what the ASD operating procedures were, and in particular what signals the ASD was providing, whether by beeps or via a display.

[142] The fact that she did not take notes or otherwise record the steps taken in the investigative process at this stage limited her ability to recall what occurred during administering the ASD to Mr. McGuire. This, as previously stated, exacerbated the difficulties with considering the objective reasonableness of Cst. MacEachen's subjective belief.

[143] With respect to the s. 10(b) *Charter* breach, as stated earlier, I find that Cst. MacEachen's actions, in this regard, can be characterized as being inadvertent, rather than a deliberate attempt to obtain incriminating evidence from Mr. McGuire.

[144] The absence of any bad faith on the part of Cst. MacEachen does not, however, mean that the breaches are not serious, or were committed in good faith.

[145] As stated in ***Loewen***:

> 34 The BC Court of Appeal in *R. v. Washington*, 2007 BCCA 540, notes at para. 78, that the concept of good faith is not fully defined in the jurisprudence. However, the court mentions the Supreme Court of Canada decision *R. v. Kokesch*, [1990] 3 S.C.R. 3, where Justice Sopinka discusses good faith. *Washington* held that Justice Sopinka,
>
>> seemed to accept that "good faith" is a state of mind, an honestly held belief, but he also found that to constitute good faith the belief must be reasonably based. The evidence in *Kokesch* established that the police officers were mistaken about their authority to trespass on a homeowner's property. Either the police knew they were trespassing or they ought to have known. In either case, they cannot be said to have proceeded in good faith.
>
> 35 The Court in *Washington* summarized good faith as "an honest and reasonably held belief". If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong" (para. 79).
>
> 36 Additionally, Rowles J., in a dissenting opinion, provides at para. 117:
>
>> When engaging in an analysis of "good faith", it is also important to clarify its meaning within the context of s. 24(2). It is a term of art that has been used to describe whether the authorities knew or ought to have known that their conduct was not in compliance with the law (see Sopinka at s. 9.116; *R*. v. *Silveira*, [1995] 2 S.C.R. 297, 23 O.R. (3d) 256 at para. 65; *R*. v. *Wise*, [1992] 1 S.C.R. 527, 133 N.R. 161 at para. 97; *R*. v. *Kokesch*, [1990] 3 S.C.R. 3, 121 N.R. 161 at para. 52). Therefore, an inquiry into good faith examines not only the police officer's subjective belief that he or she was acting within the scope of his or her authority, but it also questions whether this belief was objectively reasonable.

[146] See also ***R.*** v. ***Smith***, 2019 SKCA 126, at para. 73:

> Nevertheless, in my assessment of the evidence and the trial judge's findings, the searching officer was acting under an honest but mistaken belief that he had the authority to search Ms. Smith's purse pursuant to the General Warrant; but that still does not mean the searching officer was

> acting in good faith. In *R v Smith*, 2005 BCCA 334 at para 61, 199 CCC (3d) 404, the Court reviewed several Supreme Court decisions and held that:
>
> > [61] To sum up, good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.
>
> See also *R v Shinkewski* (at para 31), where this Court said that "an absence of bad faith does not presumptively lead to a finding that the police acted in good faith".

[147] I have determined that, without the “Fail” reading from the ASD, Cst. MacEachen had no grounds to arrest Mr. McGuire and further detain him for the purpose of requiring him to provide a breath sample into an approved instrument. In relying on the ASD to give the requisite grounds, Cst. MacEachen was expected to have at least a rudimentary understanding of the operation of the ASD in order to ensure that, both subjectively and objectively viewed, her reliance on the results of the ASD tests were reasonable.

[148] In my opinion, there was a further obligation to ensure that there was sufficient information recorded through notes or occurrence reports to substantiate the objective reasonableness of Cst. MacEachen's subjective belief given that these events were audio-recorded. As I said, it may have even been sufficient for Cst. MacEachen to have stated out loud what she was observing as it was occurring.

[149] Any of the above would have assisted her in her recall of events when she was testifying. Given the prevalence of police investigations into impaired driving and the use of ASDs in such investigations, I expect that police officers would have an

obligation to ensure that a consistent, straightforward, and transparent process is utilized when a motorist is detained for the purpose of providing a breath sample into an ASD. This was not the case here.

[150] As stated in ***R.*** v. ***Wong***, 2015 ONCA 657, in para. 63, even though the police "did not deliberately set out to violate the appellant's … rights" under s. 9, their "failure to appreciate … [their] duties led to that result". Even though Cst. MacEachen did not deliberately set out to violate Mr. McGuire's *Charter* rights, through a lack of attention to detail, she did so. I consider this to be a serious breach.

[151] Further, the s. 10(b) *Charter* breach is also serious. It has been a longstanding fundamental obligation on police officers to hold off from obtaining incriminating information once a person under arrest has requested to speak to legal counsel until after the implementational component of the right to counsel has been complied with.

[152] As stated in ***R.*** v. ***Bartle***, [1994] 3 S.C.R. 173, at para. 17:

> This Court has said on numerous previous occasions that s. 10(b) of the Charter imposes the following duties on state authorities who arrest or detain a person:
>
> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).
>
> …

[153] In ***R.*** v. ***Willier***, 2010 SCC 37, the same standard was reiterated:

> 33 Detainees who choose to exercise their s. 10*(b)* right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. …

[154] Albeit inadvertent, the actions of Cst. MacEachen in asking Mr. McGuire whether he had consumed alcohol, before he had an opportunity to speak to legal counsel, was a violation of a fundamentally important *Charter* right to counsel that has been the law for decades. A higher standard is expected and is required, therefore, this breach is very serious.

[155] The first branch of the ***Grant*** test militates in favour of exclusion of the breath samples. I note that the Crown is not seeking the admission of the evidence of what Mr. McGuire said to Cst. MacEachen in the police cruiser when she asked him whether he had consumed alcohol. Nonetheless, and even though the evidence of the breath samples did not result from this *Charter* breach, this breach is part of the entirety of events that is to be considered under s. 24(2).

[156] As stated in ***R.*** v. ***Thompson***, 2020 ONCA 264, in para. 79:

> …A temporal connection between the breach of a *Charter* right and the discovery of evidence is enough to engage s. 24(2)…

These breaches are temporally connected.

The Impact of the Charter Violations on Mr. McGuire

[157] On this branch of the test in ***Grant***, the Court stated:

> 76 This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[158] The s. 9 *Charter*-protected right of Mr. McGuire was his liberty from unjustified state interference. I note that after he provided the “Fail” sample, but prior to his arrest, Mr. McGuire was subjected to a pat-down search by Cpl. Stelter. This search was standard police procedure. It was not particularly intrusive, although it delayed for a brief time Mr. McGuire being arrested and provided his *Charter* rights. Mr. McGuire was brought to the RCMP Detachment approximately 13 minutes after he had been arrested, which was approximately four minutes after Cst. MacEachen formed the belief that he had committed an impaired driving offence, and he was further detained for the purpose of providing breath samples.

[159] It has been recognized in law that the obtaining of breath samples is a minimally intrusive procedure (see ***R.*** v. ***Fisk***, 2020 ONCJ 88, at paras. 64 and 65; and ***R.*** v. ***Bernhardt***, 2017 YKTC 28, at para. 26).

[160] In ***Jennings***, at paras. 27 to 32, Watt J. limits the scope of this branch of the ***Grant*** inquiry in the case of breath samples to only the intrusiveness of the breath

sample itself, rejecting the line of authority that takes a broader approach to also considering everything that flowed from the breach.

[161] However, as stated in ***R.*** v. ***Gunarasan***, 2020 ONCJ 139, at para. 51, this minimal level of intrusiveness of Mr. McGuire's privacy interests in the breath samples needs to be balanced against intrusion into his other privacy interests:

> Regarding s. 8, I am mindful that breath samples are viewed as minimally intrusive invasions of privacy. However, I do not view the s. 9 violation as trivial. It involved being handcuffed, searched and kept in police custody until released. The collective infringements favour exclusion of the evidence.

[162] Without necessarily agreeing with the narrow approach of the Court in ***Jennings***, even were I to consider it persuasive, I am dealing not only with a s. 8 breach but also ss. 9 and 10(b) breaches. Mr. McGuire was searched and kept in police custody until he had provided the second breath sample at the Detachment and was processed before he was released. He was improperly questioned by Cst. MacEachen.

[163] In my opinion, the cumulative effect of the breach of these three protected interests of Mr. McGuire militate in favour of exclusion of the evidence of the breath samples.

Society's Interests in Adjudication on the Merits

[164] The third branch of the ***Grant*** inquiry was explained as follows:

> 79 Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring

that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

…

81 …The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, … this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

…

83 The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

84 It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution .... In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" .... And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" .... The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in

> having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[165] The evidence of the breath samples is reliable evidence and it is necessary evidence for the Crown to be able to prove its case. Exclusion of this evidence would not allow the case to be further adjudicated on its merits. In saying this, I recognize that Mr. McGuire was also charged with having committed the offence of impaired driving, contrary to s. 253(1)(a), an offence which did not rely on the breath samples. The Crown, however, has chosen not to proceed with this charge (see ***R.*** v. ***Doobay***, 2019 ONSC 7272).

[166] Impaired driving is a serious offence, although fortunately in this case it is an impaired simpliciter and not an impaired where, through an accident, death or bodily harm resulted. I find that this factor, as conceded by counsel for Mr. McGuire, militates in favour of admission of the evidence.

Impact upon the Public Confidence and the Administration of Justice

[167] The balancing of the ***Grant*** factors requires both a short and long-term view of the justice system and the public's perception of it to be taken into account.

[168] To repeat what was stated in ***Grant*** at para. 84; “Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)’s focus”. And at para. 86 it is made clear that there is no “overarching rule” or “mathematical precision” governing how a trial judge is to balance the three factors.

[169] In ***Thompson***, the Court stated the following:

> 106 The final step under the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision: *Harrison*, at para. 36.
>
> 107 If, however, the first two inquiries together make a strong case for exclusion, the third inquiry "will seldom if ever tip the balance in favour of admissibility": *Le*, at para. 142; *Paterson*, at para. 56; and *McSweeney*, at para. 81.
>
> 108 Here, both the first and second lines of inquiry pull towards exclusion, though not with identical force. This case involve serious *Charter* breaches coupled with a somewhat weaker but still significant impact on the appellant's *Charter*-protected interests. Cumulatively, the first two inquiries make a strong case for exclusion, one that in my view outweighs society's interest in the adjudication of the case on the merits.
>
> 109 Despite the reliability of the evidence and its importance to the Crown's case, I have therefore concluded that the administration of justice would be brought into dispute by its admission. The evidence therefore should have been excluded under s. 24(2).

[170] As stated in ***R.*** v. ***Ferose***, 2019 ONSC 1052, in paras. 34 to 37:

> 34 The court must also consider the cumulative effect of the breaches: *R. v. Boutros*, 2018 ONCA 375, 361 C.C.C. (3d) 240, at para. 32; *R. v. Chaisson*, 2006 SCC 11, [2006] 1 S.C.R. 415.
>
> 35 In applying *Grant*'s three factors, there is no requirement that all three factors or a majority of them be satisfied. Rather, it is a balancing exercise where the key question is whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter,* would conclude that the admission of the evidence would do harm to the long-term repute of the administration of justice: *Grant*, at para. 68.
>
> 36 It is to be noted, however, that in *McGuffie*, at para. 62, Doherty J.A. held that it will be a rare instance where consideration of the third branch of the *Grant* analysis will result in admission of evidence where the first two branches are tipped towards exclusion.
>
> 37 Importantly, the objective of s. 24(2) is not to rectify police misconduct, but rather, to preserve public confidence in the law.

[171] In the present case, one of the factors is that Mr. McGuire was operating a tractor-trailer unit on the highway. He is a professional driver and, as such, is expected to adhere to the standards of a professional driver. His tractor-trailer unit, being of considerably larger size than the average vehicle on the road, is also therefore capable of inflicting greater harm in the event of an accident. The public perception and concern in this case is therefore somewhat elevated, and there could be a negative impact on the public confidence in the justice system if the evidence of the breath samples is excluded and the prosecution is unable to further advance its case.

[172] Also important to consider is the devastating impact of impaired driving in Canadian society and upon so many innocent victims. The need to hold impaired drivers accountable for their actions in a meaningful way in order to deter others from committing impaired driving offences cannot be understated. Exclusion of the evidence in this case would allow Mr. McGuire to escape being held accountable for his actions in driving his tractor-trailer unit after having consumed alcohol.

[173] These concerns need to be balanced against the importance of having a policing system that demonstrates an understanding of the legal parameters of the exercise of their powers. The freedom and autonomy of individuals living in Canada is fundamental to our civil liberties, and when these freedoms and autonomy are going to be restricted, it is critical that these restrictions be imposed in a manner that conforms to the law.

[174] Police officers, who have the authority and the power of the state behind them, are expected to understand the laws they operate under and enforce, and to be diligent in ensuring, as much as possible in any given situation, that they act in accordance with

these laws. As such, there is a societal expectation of carefulness and diligence in the investigative procedures of policing. To whom much is given, much will be required. This applies to police officers, whom, having been given considerable power, carry out their duties under this requirement. Having this power of the state to interfere with the liberty interests of individuals, imposes a responsibility on police officers to understand the extent of their power, and constraints upon this power, to ensure that they carry out their duties lawfully, including ensuring that they do not contravene the *Charter*-protected interests of individuals.

[175] Public confidence in the administration of justice is negatively impacted when police officers fail to take such steps as they should reasonably be expected to in the circumstances, when subjecting individuals to the powers of the state by interfering with their liberty interests when detaining and arresting them.

[176] In saying this, I recognize that certainly the public expects police officers to have the ability to investigate criminal actions and act so as to prevent criminal conduct from occurring, recognizing that the circumstances at the time will not afford the police officers the luxury of time and space to ensure every step is taken as properly as it could be.

[177] There will be many instances where the circumstances do not make that possible or easy to do, but where such circumstances do exist, then public confidence in the justice system at the policing stage relies on a police officer's understanding in exercising their powers in compliance with the law, in particular, when the law has been well settled.

[178] In the present case, on a balancing of the ***Grant*** factors, I find, in particular, focusing on the long-term effect on the administration of justice, that maintaining public confidence in the administration of justice requires that the breath samples be excluded from trial. To admit the breath samples would bring the administration of justice into disrepute. Therefore, they are excluded from trial.

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COZENS T.C.J.