Citation: *R. v. Pye*, 2021 YKTC 5

Date: 20210212
Docket: 19-00578
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before His Honour Judge Seidemann III

REGINA

v.

BRAYDEN DOUGLAS ALEXANDER PYE

Appearances:
Leo Lane — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

**RULING ON *VOIR DIRE* AND REASONS FOR JUDGMENT**

[1] SEIDEMANN III T.C.J. (Oral): Mr. Pye is charged with the offences of operating a conveyance when his ability was impaired by alcohol and operating a conveyance when he had consumed alcohol such that his blood alcohol proportion exceeded the legal limit, contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*. At the outset of the trial, the Crown indicated that it did not intend to call evidence specifically related to the impaired charge and the only issue would be whether or not they were able to establish the offence under s. 320.14(1)(b).

[2] The offence is alleged to have occurred at Whitehorse on October 28, 2019, and the evidence establishes those jurisdictional facts. The Crown proceeded by summary conviction.

**The Issue**

[3] The defence has brought a *Charter* application, seeking the exclusion of evidence they say was obtained subsequent to a breach of Mr. Pye's rights pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms.* The relevant evidence is a test conducted upon Mr. Pye with an Approved Screening Device ("ASD"), the failure of which provided the basis for a demand for breath samples to be provided by Mr. Pye to an approved instrument for analysis. At the time that test was conducted, Mr. Pye was detained pursuant to a warrant to take a DNA sample from him, but had not been advised of his right to consult legal counsel as required by s. 10(b) of the *Charter*.

[4] The Crown concedes that, without evidence of the ASD test, there is not evidence of a proper basis for the demand for breath samples, the results of the test of the breath samples by an approved instrument would be inadmissible, and the charge would not be made out. The defence concedes that, if the ASD test results are admissible, there is evidence of all of the essential elements of the charge to support a conviction.

[5] The Crown led evidence from the one investigating police officer. The video and audio recordings of the officer's interactions with Mr. Pye, as recorded by the cameras in the officer's patrol vehicle, were viewed and made exhibits, as was the recording of the 911 call by a civilian which started everything, and the recording of the conversation between the officer and dispatch prior to the officer's interactions with Mr. Pye. All of this evidence was tendered in a *voir dire*, with the agreement of counsel that this would

be a blended hearing, whereby any admissible evidence would become part of the trial proper. The defence chose to call no evidence on the *voir dire* or the trial.

[6] This is my decision on the *voir dire* and the trial.

**Summary of the Relevant Facts**

[7] On the evening of October 28, 2019, a civilian called 911 to report a possible impaired driver. The civilian was in a neighborhood on the outskirts of Whitehorse, described a vehicle swerving from side to side on the roadway, provided the vehicle licence plate number, and advised that the vehicle was last seen pulling into a driveway. The police dispatch service checked the records for the licence plate number and advised the officer of the registered owner's name and address. The registered owner was Mr. Pye. The address was in the neighbourhood where the civilian had described these events. That was some distance from where the officer then was in downtown Whitehorse, and it took some time for the officer to drive there.

[8] While driving to the address of the registered owner of the vehicle, the officer was advised by dispatch that there was a warrant outstanding on their system for a DNA sample to be provided by Mr. Pye. The officer was also advised that Mr. Pye was subject to court imposed conditions that he not possess or consume alcohol. It was never clear to me, and it did not appear to me that it was ever clear to the officer, whether the conditions were part of a probation order, a conditional sentence, or a release document. What was clear was that the officer knew that there was a no alcohol condition that was applicable to Mr. Pye at this time.

[9] As a result of this information, the officer determined to go to the address and see if Mr. Pye was there. If circumstances permitted, the driving complaint would be investigated. But in any event, if Mr. Pye was there, he would be detained and taken to the detachment for the DNA sample to be obtained.

[10] When the officer arrived at Mr. Pye`s address, there was a vehicle in the driveway of the residence, with the engine running. It had the licence plate described by the civilian complainant. The officer pulled into the driveway and stopped just behind the vehicle. The officer`s vehicle was just off the roadway, or perhaps still slightly sticking out into the roadway. When the officer pulled in behind it, it was not clear from the view whether or not there was anyone in the vehicle.

[11] The officer exited his vehicle and walked up the driveway along the driver`s side of the vehicle. When he got beside the driver`s door of the vehicle, there was a person sitting in the driver`s seat of the vehicle. The officer knocked on the window of the door, and the door was opened by the person sitting in the car. They spoke through the open door.

[12] The officer asked the person if he was “Brayden”, to which Mr. Pye replied “yes”. The officer asked Mr. Pye if there was any reason why he would have been swerving on the road, to which Mr. Pye replied that there was no reason. In response to a question of any reason why the officer should have received such a report, Mr. Pye replied that he did not know why and responded to a further question by saying that he had not consumed any alcohol that night. The officer asked him to turn the vehicle off. This

whole interaction, as recorded on the patrol vehicle camera, took 25 seconds from the door opening to the vehicle being turned off.

[13] When the vehicle was turned off, the officer advised Mr. Pye that there was a DNA order outstanding and that Mr. Pye would be detained and would have to go with him to the detachment to provide a sample of his DNA. Mr. Pye exited the vehicle and was unsteady on his feet. He was asked if he had any weapons on him, to which he replied in the negative. The officer asked Mr. Pye why he "smelled booze on his breath", and Mr. Pye insisted that there was no reason. The officer asked if it was likely that the smell was coming from something else like cologne, and Mr. Pye said that was possible. The officer asked Mr. Pye why he would have almost fallen when exiting the vehicle. Mr. Pye said that he had not fallen.

[14] The officer requested that Mr. Pye go with him to the patrol vehicle. Mr. Pye asked if he could go into the residence and speak to his father. The officer advised him that he could not, that he was detained, that the officer would not put cuffs on him, "but right now we are going to go to the detachment". They walked to the patrol vehicle.

[15] I have detailed this to the extent that it includes items which might seem minor and inconsequential to illustrate how fast this all occurred. Between the first opening of the door of Mr. Pye's vehicle, and the officer and Mr. Pye passing out of view of the forward-facing camera on the patrol vehicle as they come to that vehicle, was one minute and 12 seconds.

[16] In the next 25 seconds, in the patrol vehicle, the officer again asks Mr. Pye whether he has had anything to drink tonight, which Mr. Pye again denies. The officer

tells him that he can clearly “smell booze off your breath” and asks him if he has ever provided a sample before. Mr. Pye replied “no”. At that point, the view and timeline of the record shifts to the patrol vehicle’s internal camera.

[17] The officer took steps to prepare the ASD and 46 seconds later says he is going to read something to Mr. Pye. He is interrupted by a call on his vehicle radio to which he responds, but at one minute 13 seconds, he starts to read the demand for an ASD sample. After reading the demand, the officer inquires of Mr. Pye if he understands the demand. Mr. Pye was at first entirely unresponsive. After the officer’s inquiries as to why Mr. Pye was unresponsive, the officer offers to read it again and Mr. Pye requests that. The officer reads it again and Mr. Pye says that he does not understand any of it.

[18] The officer describes what he is going to do and Mr. Pye says that he still does not understand. The officer demonstrates the operation of the ASD. He then presents the ASD to Mr. Pye and asks him to blow. Mr. Pye does nothing. The officer tells Mr. Pye that if he does not provide a sample, he will be charged with “refusal”. He presented the ASD to Mr. Pye, who leans forward and does provide a breath sample commencing at four minutes 30 seconds on the interior camera record, finishing at four minutes 46 seconds.

[19] The result of the test was a “fail”. At five minutes 13 seconds, the officer advises Mr. Pye that he is under arrest for impaired operation of a motor vehicle and breach of his conditions. At that point, he advised Mr. Pye, for the first time, that he had a right to speak to a lawyer and of his right to remain silent. Mr. Pye’s father came from the residence and spoke to the officer for a short time. The officer then sat in his vehicle

and read Mr. Pye his full *Charter* rights and warning from his prepared card. Mr. Pye was not cooperative, but when pressed about the exercise of his *Charter* rights, did indicate that he wanted to speak to a lawyer.

[20] Mr. Pye was conducted to the Whitehorse RCMP detachment office. He was given access to legal counsel. He provided samples of his breath into an approved instrument and the results were 130 and 120 milligrams of alcohol in 100 millilitres of blood. A certificate with those results and ancillary documents to comply with the procedural requirements were all tendered and marked as exhibits on the proceedings.

[21] Although there was argument directed toward whether Mr. Pye was arrested or arrestable for the breach of conditions at the same time as he was detained for the DNA warrant, the officer was explicit that he did not arrest or detain Mr. Pye for breach until he failed the ASD. The officer says, and I accept his evidence on this point without reservation, that he did not and, as a practice would not, arrest for breach of an alcohol condition without some additional criminal charge, as it was his experience that an alcohol breach, simpliciter, was never proceeded with.

**Analysis**

[22] This case illustrates the tension inherent in many activities of peace officers, where they must navigate conflicting priorities. Officers are required to make decisions in real time, often on incomplete facts and competing or inconsistent statutory directions.

[23] In this case, The *Canadian Charter of Rights and Freedoms*, in s. 10 provides:

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

[24] The *Criminal Code* in s. 320.27(1) provides:

> 320.27 (1) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug;

[25] The requirement of para. (b) is:

> to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose;

[26] In this case, Mr. Pye was detained by the officer when the officer told him that there was the DNA warrant, that he was detained, and had to go to the detachment with the officer. That detention triggered Mr. Pye's right under s. 10(b) of the *Charter*.

[27] On the officer's evidence, almost immediately after Mr. Pye exited the vehicle, the officer felt that he had the grounds referred to in s. 320.27(1). He says that this was based on the "stumble" when Mr. Pye exited the vehicle and what he considered to be

the clear odour of liquor on Mr. Pye's breath when he was out of the vehicle and facing the officer. The presence of those grounds then triggered the officer's option of demanding samples into an ASD. A number of cases have established that, in that circumstance, if a demand is to be made and samples obtained, the procedure must, as para. (b) provides, be carried out "immediately". If there is any unnecessary delay, the cases have held that samples provided are then not provided pursuant to this section and cannot then form the basis for a demand for more formal breath testing.

[28] So what is the poor officer to do? Does he advise Mr. Pye of his right to counsel and provide him with an opportunity to speak with a lawyer? That delay would almost certainly be such as to take away any opportunity for the lawful application of the procedure contemplated by s. 320.27(1). Or does he proceed as authorized by s. 320.27 and delay advising Mr. Pye of his *Charter* right?

[29] This officer chose the latter course. The officer acknowledged that this was a conscious decision on his part. He indicated that his prior experience was that, if he advised persons of their right to counsel prior to initiating the ASD procedure, it commonly introduced delay that rendered that procedure ineffective.

[30] The defence says that this was a serious breach of Mr. Pye's rights.

[31] As set out by the Supreme Court of Canada in *R. v. Bartle*, [1994] 3 S.C.R. 173, at para. 16:

> The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: R. v. Manninen

> [1987] S.C.R. 1233 at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s.10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her to regaining his or her liberty…

[32] The Supreme Court went on, at para. 17, to set out the duties of the authorities detaining a person, including "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)." This is commonly referred to as the "obligation to hold off".

[33] In this case, the officer clearly did not "hold off". He took steps as authorized by s. 320.27 of the *Code*. The defence says that Mr. Pye was at risk of incriminating himself with respect to the potential breach charge and perhaps with respect to some aspect of the DNA warrant, as it was not clear whether it may have been issued as a result of the failure by Mr. Pye to comply with an order to provide samples or some other compulsory mechanism. The defence says that this goes to the heart of the reasons for s.10 of the *Charter*, is serious, and should result in the exclusion of any evidence obtained prior to Mr. Pye being given his rights.

[34] The Crown conceded that the officer breached Mr. Pye's s.10(b) *Charter* right when he did not advise Mr. Pye of his right to counsel when he initially detained Mr. Pye for the DNA warrant. For reasons I will set out later, I am not at all sure that was a concession that the Crown was required to make, but, as that was their position, I will make my decision on that basis. The Crown position is that, based on authorities to which I will refer later, in circumstances where detention for the procedure under

s. 320.27 coexists with detention under some other basis, the detainee is entitled to be informed of their s. 10(b) right, but the state is entitled to delay implementing that right until the s. 320.27 procedure has been completed and is not required to "hold off" acting pursuant to s. 320.27.

[35] In this case, Mr. Pye was given his rights immediately after the s. 320.27 procedure was completed and he was given the opportunity to speak to a lawyer before any further steps were taken. The Crown says that the only breach was the failure to tell Mr. Pye about rights which he was unable to exercise at that time in any event, and, accordingly, he suffered no real prejudice and the evidence should still be admitted.

[36] The Supreme Court of Canada, in *R. v. Thomsen*, [1988] 1 S.C.R. 640, concluded, when looking at the predecessor provisions of s. 320.27, that the time limits imposed by those sections implied that the rights of a roadside detainee under s. 10(b) of the *Charter* were to be abridged and found that to be a constitutional limit on those rights. This was considered and amplified in *R. Orbanski*, 2005 SCC 37, at para. 52, where Mr. Justice Charron said:

> …In *Thomsen* this Court held that the exercise of the right to counsel was incompatible with the operational requirements underlying the demand for a sample for analysis in a roadside screening device made pursuant to s. 234.1 (1) of the *Criminal Code* (now s. 254(2)). In determining that there was an implicit limitation on the right to counsel prescribed by s. 234.1(1), the Court adopted the reasoning of Finlayson J.A. in *R. v. Seo* (1986), 25 C.C.C. (3d) 385 (Ont. C.A.), and concluded as follows at p. 653:
>
> > That there is to be no opportunity for contact with counsel prior to compliance with a s. 234.1(1) demand is, in my opinion, an implication of the terms of s. 234.1(1) when viewed in the context of the breath testing provisions of the *Criminal Code* as a whole. A s. 234.1(1) roadside screening device test is to be administered at roadside, at such time

> and place as the motorist is stopped, and as quickly as possible, having regard to the outside operating limit or two hours for the breathalyzer test which it may be found to be necessary to administer pursuant to s. 235(1) of the *Code*.

[37] The issue of whether that limitation exists or continues when a person is detained both for the roadside screening and some other reason has been considered by several courts. The defence relies very much on *R. v. Grant*, [1993] 3 S.C.R. 223, in the Supreme Court of Canada. They say that it is directly on point and binding upon me. I accept that it is completely binding upon me, but do not find it to be applicable to this case. In that case, the accused was detained because he was suspected of driving while disqualified. While detained, the police officer came to suspect alcohol involvement and purported to make a demand pursuant to the provisions then equivalent to what is now s. 320.27 of the *Code*. He had not been given his *Charter* rights when first detained. The Supreme Court found that the demand was not properly made pursuant to those provisions. Accordingly, the accused was entitled to his rights, which had been denied him, and whatever ramifications might properly flow from that breach.

[38] Similarly, several other cases referred to by the defence, when examined, all were cases where the procedures now set out in s. 320.27 had not been properly followed. The essence of the Supreme Court's decision in *Thomsen* is that the detention for that purpose is intended to be brief, and it is only when those provisions are strictly complied with to carry out that intention that the limitation on the accused's *Charter* rights may be implied. If the roadside screening procedure is not properly carried out, the accused is entitled to his or her *Charter* rights to be strictly enforced.

[39] The Crown has provided two cases where the roadside screening demand coexisted with another basis for detention and the roadside screening procedures were found to have been properly applied. In *R. v. Commisso*, 2020 ONSC 957, Mr. Commisso was arrested for breach of his bail terms. Mr. Commisso was told of his s. 10(b) rights, but was given no opportunity to exercise them. Subsequently, a demand was made for a roadside screening device sample pursuant to the provisions then in effect. Mr. Commisso argued, as does Mr. Pye, that having been detained for something that entitled him to his s. 10(b) rights, the officers had a duty to "hold off" and making the roadside screening demand breached that duty.

[40] Mr. Justice Code does a review of a number of cases that have considered that issue. His summation of that review is at para. 39, where he says:

> This long line of authority, most of it at the trial level, has consistently held that when a drinking and driving investigation overlaps with another *Criminal Code* (or *Highway Traffic Act*) investigation, and when the accused is arrested and cautioned and has asserted his right to counsel in relation to the non-drinking and driving investigation, the law requires the following:
>
> * first, the police must comply with the informational component of s. 10(b) in relation to the charge (or warrants) on which the accused has been arrested;
>
> * second, the police are entitled to proceed with a parallel or over-lapping drinking and driving investigation by making a lawful ASD demand, pursuant to s. 253(2), and need not "hold off" on this investigation pending implementation of the accused's asserted s. 10(b) rights in relation to the previous charge on which he has already been arrested; and
>
> * third, the police must "hold off" on eliciting any incriminating evidence to be used at trial in relation to the previous charge on which the accused has been arrested.

[41] Mr. Justice Code quotes with approval Henderson J. from *R. v. Michener*, 2013 ABPC 232, at para. 51, where he said:

> Based on the authorities, I conclude that where a motorist is under arrest or detention for an offence unrelated to impaired driving, police have a duty to comply with the informational component of s. 10(b) in relation to the offence for which the motorist was arrested or detained. If, subsequent to this initial arrest or detention, police form the grounds to make an ASD breath demand in accordance with s. 254(2) a further detention occurs. However, the right of the motorist to consult with counsel is suspended until after the ASD sample is taken, provided that the requirements of s. 254(2) are satisfied, including, in particular, the requirement that the ASD breath sample is taken "forthwith."

[42] Mr. Justice Code emphasizes the requirement that the police hold off any further investigation for the other charge upon which the accused has been detained until the s. 10(b) rights have been fully implemented. In this case, it is clear that nothing was done or elicited from Mr. Pye with respect to the DNA warrant while the driving investigation proceeded.

[43] *Commisso* was approved and applied by Chisholm J. (now C.J.) in *R. v. Beattie*, 2020 YKTC 15. In *Beattie*, the accused was arrested and charged with a number of offences. He was originally stopped for an impaired driving investigation. A screening device demand was made. The accused said that he wanted to speak to a lawyer and was told that he did not have that right and was required to provide the breath sample. While interacting with the arresting officers, the accused was arrested and charged with obstruction before the breath sample had been provided. The accused was read his rights but then required to provide the ASD sample. He refused and was charged for that refusal. The accused took the position that the police should have implemented his s. 10(b) rights for the obstruction charge and held off on the ASD.

[44] Judge Chisholm's conclusion on this issue was at para. 47, where he said:

> I accept and endorse the reasoning and statements of the law in *Commisso* and apply them to the matter of Mr. Beattie. Cst. Kidd acted in accordance with the law in arresting Mr. Beattie for obstruction, complying with the informational component of s. 10(b) in relation to his arrest, and then proceeding with the formal ASD demand.

[45] Applying this authority, I accept the Crown's position that the only breach of Mr. Pye's *Charter* rights was the failure to advise him of his right to counsel before proceeding with the procedure under s. 320.27. In these circumstances, the officer was not required to permit Mr. Pye to actually speak to a lawyer before proceeding. He was not required to "hold off" his impaired driving investigation. Immediately after the ASD test was completed, the officer took all steps required to both inform Mr. Pye of his rights, and to implement his exercise of them.

[46] Having determined the nature of the breach, I must now consider what effect it should have on the trial. The defence position, as previously stated, is that all evidence obtained prior to Mr. Pye being given his rights should be excluded. The Crown's position, not surprisingly, is that nothing should be excluded. The starting point for this determination is the case of *R. v. Grant,* 2009 SCC 32. The ultimate test is whether the admission or exclusion of the evidence would bring the administration of justice into disrepute.

[47] *Grant* sets out three areas of inquiry to address this issue: the seriousness of the *Charter*-infringing state action; the impact on the accused's *Charter*-protected interests; and society's interest in adjudicating on the merits.

[48] The defence says that the rules regarding right to counsel have been in force since the *Charter* came into effect and that there is no good excuse for ignoring them. To consciously do so, as the officer did in this case, should be considered serious.

[49] The Crown, on the other hand, says that the failure to advise Mr. Pye of his rights was entirely understandable in the circumstances. The officer was detaining Mr. Pye, not arresting him. That was underscored by the officer advising Mr. Pye that he was not going to put cuffs on him, which he did do after the arrest for impaired driving. Although the defence speculates that Mr. Pye might have been at some risk of charges concerning a failure to provide the DNA sample, there is no evidence that the officer was engaged in, or even thought about, such an investigation. He had a DNA warrant, which he would detain Mr. Pye to carry out, and he was investigating possible impaired driving.

[50] Although the defence might disagree, I am of the view that the law was clear that, when properly conducting the procedure under s. 320.27, police do not have to permit a subject to contact a lawyer. I am also satisfied that the law was clear that the existence of other charges, or in this case a different basis for detention, does not oblige an officer to delay implementing the process under s. 320.27. In the circumstances of this case, where the grounds for the s. 320.27 process became apparent within seconds of the DNA warrant detention, it is arguable that even the obligation to inform Mr. Pye of his s. 10(b) rights was suspended by the s. 320.27 process.

[51] The defence says that the impact on Mr. Pye's protected interests were very serious. Most of that submission relates to the possibility that Mr. Pye might be subject

to potential charges about a failure to provide a DNA sample. On the evidence before me, the officer had never met Mr. Pye before, and the conversations with dispatch, which were put before me, were the full extent of the officer's knowledge about him. The officer was not investigating any offence except possible driving offences. Any potential charges regarding the failure to provide a DNA sample are purely speculative and not in any way supported or suggested by the evidence.

[52] On the state of the law as it is, at a maximum, the impacts on Mr. Pye's protected interests were non-existent. He was not told about a right which he could not exercise. Had he been told of that right, he could not legally have done anything different than he did. At the worst, if he had been told of his right but that its exercise would be delayed until the test was conducted, it is possible he might have disputed that delay and illegally refused to provide a sample, incurring unnecessary jeopardy, as did occur in *Beattie*. Other than the results of the ASD test, the officer obtained no other evidence and did no other investigation until he did provide Mr. Pye with his *Charter* rights.

[53] The final line of inquiry concerns society's interest in adjudicating criminal cases on the merits of the actual facts. In this case, the results of the ASD sample are critical to the result. The Crown concedes that, if the ASD result is excluded, the officer did not have a proper basis for demanding the sample into an approved instrument, the results of that analysis are not admissible, and their case cannot be established. The defence acknowledges that, if the ASD result is admissible, there is a proper basis for the analysis by the approved instrument and the Crown will have established all material elements of the offence.

[54] Having said that, the defence submission is correct when they say that impaired driving investigations are so common and routine, with breath sample evidence often crucial, and law enforcement is or ought to be well aware of the importance of lawfully collecting such evidence. The simple fact of such evidence being crucial cannot be sufficient to determine the issue or breath sample evidence would never be excluded in such cases.

[55] Another consideration in this line of inquiry is the seriousness of the offence. This is not the most serious of offences, but the defence acknowledges that impaired driving is at least a moderate severity. The Crown emphasizes the devastating impact of impaired driving. The Supreme Court and various courts of appeal, when dealing with the cases that established the s. 320.27 procedure as being a limitation on *Charter* rights, spoke at length about the societal harm caused by impaired driving.

[56] The defence says that this seriousness should be balanced against "catastrophically undermining the application of the *Canadian Charter of Rights and Freedoms* in everyday cases such as impaired driving". They say that to admit the evidence would add Mr. Pye to "what could be a near limitless list of *Charter*-breach casualties in impaired driving cases". The defence has a more jaundiced view of the state of the law than I have. In my experience on the bench, I have seen fewer and fewer driving cases where *Charter* breaches are alleged. Except where the law is unclear, in my experience, the Crown has tended to abandon or deal away most of those cases. Unless there is some exculpatory explanation, judges have come to expect law enforcement to comply with the *Charter* and have been entirely prepared to exclude evidence obtained by its breach, even in impaired driving cases.

[57] Summarizing my view of the *Grant* inquiries, I find that the seriousness of the breach and the impact on Mr. Pye's interests are intertwined. The real effect of the breach was to have no effect on Mr. Pye's protected interests. He was not told of a right which he was not entitled to exercise until the time when he was entitled to exercise it. To exclude evidence, which would or should have been obtained in exactly the same way if the officer had told Mr. Pye of his right to counsel, would, in my view, bring the administration of justice into disrepute. This would be perceived by the public as the absolute height of technicalities without real substance.

[58] The defence application to exclude evidence is denied. The evidence is all admissible at the trial of these matters and will be considered as evidence on the trial. All of the various exhibits on the *voir dire* should be marked, sequentially, as exhibits on the trial proper.

[59] I will say that, in these circumstances, I believe it is possible that the officer did not breach Mr. Pye's *Charter* rights at all. Where, as here, the grounds for initiation of the s. 320.27 procedure follow immediately on the original detention, before there has even been time for the s. 10(b) rights to be given, I cannot see the utility of, and can easily foresee harm which could arise from, telling a person they have a right but are not allowed to exercise it. If you are not allowed to exercise it, it is not a right you have. Those circumstances may be rare, but here, where the s. 320.27 grounds were apparent as soon as Mr. Pye exited the vehicle, it is clearly arguable. The Crown having made the concession they did, my decision is based on that, but it is not beyond argument in another case.

[60] On the basis of all of the admissible evidence, I find Mr. Pye guilty of Count No. 2 on the information. As the Crown indicated at the commencement of the trial, they did not call any evidence to tie Mr. Pye to the earlier driving activity and were unable to prove Count No. 1, and I find him not guilty of that charge.

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SEIDEMANN III T.C.J.