Citation: *R. v. Simon*, 2021 YKTC 4

Date: 20210210
Docket: 19-00563
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

ROY JACKSON SIMON

Appearances:
Kevin Gillespie — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT

[1] Roy Simon has entered not guilty pleas to one count of impaired operation of a conveyance and one count of operating a conveyance with a blood alcohol concentration equal to or exceeding 80 mg of alcohol in 100 ml of blood on October 11, 2019, in Carmacks, Yukon. Crown concedes that the evidence is insufficient to support a conviction on Count 1 alleging impaired operation, but seeks a conviction on Count 2. Through his counsel, Mr. Simon has filed a Notice of *Charter* Application seeking exclusion of the breathalyzer readings based on an alleged breach of his s. 10(b) right to counsel.

[2] Trial proceeded by way of a blended *voir dire*, with all evidence called in the *voir dire*, on the understanding that any admissible evidence would then be applied to the trial proper.

[3] Crown's case relies on the evidence of Cpl. Harper, the investigating officer. Mr. Simon testified on his own behalf. Mr. Simon's *Charter* Notice raises questions of both delay and comprehension in relation to Mr. Simon's right to counsel; however, due to issues arising subsequent to hearing the evidence, counsel have asked that I disregard certain portions of Mr. Simon's testimony, and defence counsel has advised that exclusion is now sought solely on the basis of delay in notification of the right to counsel.

Overview of the Facts

[4] The factual backdrop for the *Charter* motion is, largely, not in dispute. On October 11, 2019, Cpl. Harper was stationed in Carmacks in the position of detachment commander.

[5] Cpl. Harper received a report, via the offices of the Little Salmon Carmacks First Nation, of a possible impaired driver operating a purple Chrysler Intrepid. Cpl. Harper located the suspect vehicle at approximately 9:45 a.m. and confirmed the license plate matched the license plate given in the report. He initiated a traffic stop.

[6] Mr. Simon was in the driver's seat of the vehicle. Passengers were located in the front passenger seat and in the back seat on the driver's side. Cpl. Harper could smell liquor emanating from the vehicle. He asked Mr. Simon if he had been drinking and

Mr. Simon denied consuming any alcohol that day, though later advised that his last drink was the previous night. Cpl. Harper read the mandatory Approved Screening Device ("ASD") demand at 9:50 a.m.

[7] While Mr. Simon was attempting to provide a suitable sample into the ASD, Cpl. Harper could smell liquor emanating from Mr. Simon's breath. Mr. Simon provided a suitable sample on his fourth attempt, which registered a fail.

[8] At 9:53 a.m., Cpl. Harper read the breath demand. Mr. Simon indicated that he understood. Mr. Simon expressed concern about his vehicle and the passengers. The two then went to the vehicle to determine if one of the passengers was able to drive the vehicle.

[9] Cpl. Harper searched Mr. Simon and placed him in the rear of the police vehicle at 9:57 a.m. The passengers followed Cpl. Harper to the police vehicle and Cpl. Harper indicated one of them could drive the vehicle if they provided a sample indicating they were sober. Both declined, and Cpl. Harper indicated that he would have the vehicle towed. Cpl. Harper decided to drive the passengers home as he was concerned with their safety because of the busy roadway, the rain, and the lack of sidewalks.

[10] During the drive, the parties discussed how long it would be before Mr. Simon would be returned home, and the passengers made some efforts to find a sober driver.

[11] After dropping off the passengers, Cpl. Harper headed to the detachment with Mr. Simon. Cpl. Harper contacted dispatch regarding a tow and short-term impoundment of Mr. Simon's vehicle. Mr. Simon raised a concern about the tow.

[12] Cpl. Harper stopped at Mr. Simon's vehicle to turn the vehicle off and retrieve the keys. There is little conversation in the vehicle on the remainder of the trip, but Cpl. Harper has some further communication with dispatch regarding the tow. They arrived at the detachment at 10:01 a.m. At 10:03 a.m., Cpl. Harper escorted Mr. Simon into the intoxilyzer room and started the first observation period.

[13] At 10:10 a.m., Cpl. Harper realized that he had neglected to advise Mr. Simon of his right to counsel. Accordingly, also at 10:10 a.m., Cpl. Harper read Mr. Simon his *Charter* right to counsel. Mr. Simon indicated that he understood. Cpl. Harper asked if he wished to call a lawyer, and Mr. Simon replied, "[y]es, later". Cpl. Harper then read the police warning.

[14] Mr. Simon provided a breath sample at 10:24 a.m., which registered 240 mg/%. At 10:26 a.m., Cpl. Harper began the second observation period. Mr. Simon made some unsuccessful attempts to provide a second breath sample, but provided a suitable sample at 10:47 a.m., which registered 220 mg/%.

[15] At 10:52 a.m., Cpl. Harper advised Mr. Simon he was being charged with impaired driving and driving over 80 mg/%. He re-read Mr. Simon his *Charter* rights. Mr. Simon indicated he understood, but said he could not afford a lawyer. Legal Aid was explained, and Cpl. Harper asked if Mr. Simon wished to call a lawyer now. Mr. Simon replied, "[h]e can call me. I'll call later. Give me the number".

[16] Mr. Simon was released at 11:12 a.m., and Cpl. Harper drove him home at 11:15 a.m.

The Issues

[17] At issue is whether the delay in advising Mr. Simon of his right to counsel amounts to a breach of his right to counsel under s. 10(b) of the *Charter*. The onus is on Mr. Simon to establish the breach on a balance of probabilities. If the breach is established, the second issue to be determined is whether the evidence of the breath readings as set out in the Certificate of Qualified Technician, filed as Exhibit 1, should be excluded pursuant to s. 24(2) of the *Charter*.

Section 10(b): The Law

[18] Section 10(b) of the *Charter* guarantees that "[e]veryone has the right on arrest or detention … (b) to retain and instruct counsel without delay and to be informed of that right". It is well established in the jurisprudence that implicit in s. 10(b) is the requirement that a detainee be advised of their right to counsel immediately upon detention. In *R. v. Suberu*, 2009 SCC 33, the Supreme Court of Canada outlined this requirement and applicable exceptions in para. 2 as follows:

> The specific issue raised in this case is whether the police duty to inform an individual of his or her s. 10(*b*) *Charter* right to retain and instruct counsel is triggered at the outset of an investigative detention -- a question left open in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 22. It is our view that this question must be answered in the affirmative. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10(*b*) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, s. 10(*b*) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay". The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the *Charter*.

[19] In the case at bar, there is no doubt that Cpl. Harper failed to advise Mr. Simon of his right to counsel immediately upon detention. On cross-examination, Cpl. Harper agreed that Mr. Simon was detained when Cpl. Harper read him the breath demand at approximately 9:53 a.m. Cpl. Harper did not advise Mr. Simon of his right to counsel until 10:10 a.m., a delay of approximately 17 minutes. Although, I would note that Cpl. Harper's time estimates differ slightly from the clock on the Vehicle Information and Communication System ("VICS") video.

[20] The VICS video indicates the breath demand was made at 9:49:19. The passengers were dropped off approximately seven minutes after the breath demand. Cpl. Harper and Mr. Simon arrived at the detachment approximately five minutes after the passenger drop off. According to Cpl. Harper, he provided Mr. Simon with his right to counsel nine minutes after arriving at the detachment. Thus the total time from breath demand to the time Mr. Simon was advised of his right to counsel was approximately 21 minutes. The delay from passenger drop off to right to counsel was approximately 14 minutes.

[21] Crown has provided two cases that he says are analogous and support his contention that the delay in advising Mr. Simon of his right to counsel in this case does not amount to a breach of s. 10(b).

[22] In *R. v. Evans* (1999), 176 Sask.R. 140 (Q.B.), the accused was stopped approximately half a block from the RCMP detachment. The arresting officer made the breath demand, but forgot to inform the accused of his right to counsel. The accused was transported to the detachment where he was advised of his rights. The delay was

four minutes. The appellate decision, in concluding there was no s. 10(b) breach, offers little in the way of analysis that would be applicable to the case at bar. The Court merely opines that while there may be instances where such a delay would amount to an infringement, this is not one of them. The only rationale to be found suggests that the Court was persuaded by the fact that the accused had not been required to provide any incriminatory evidence before being advised of his right to counsel. Given the comparatively brief delay and the lack of a comprehensive analysis, I find the *Evans* case offers little guidance in assessing whether the delay amounts to a breach of s. 10(b) in Mr. Simon's case.

[23] In *R. v. Smith*, 2003 YKTC 52, the facts are somewhat more similar. Lilles J. concluded that there was an initial delay of five minutes while the investigating officer conducted roadside sobriety tests, which did not cause the Court any particular concern. Following this initial delay, the officer began to read the *Charter* card when the accused and his passenger, both seated in the police vehicle, began to argue. This led to the officer calling for additional transport for the passenger. The accused was advised of his right to counsel upon arriving at the detachment. The total delay from the argument to right to counsel was 23 minutes. The Court found that the officer could and should have advised the accused of his right to counsel when transport arrived for the passenger rather than waiting until arriving at the detachment, which would have shortened the delay by 10 to 12 minutes. However, Lilles J. ultimately concluded that there was no s. 10(b) breach as this additional delay, while avoidable, was nonetheless triggered by the argument which was beyond the control of the officer, and as there was no prejudice to the accused as a result of the delay.

[24] Crown argues that the questions from Mr. Simon and his two passengers regarding plans for Mr. Simon's vehicle and how long Mr. Simon could expect to be in police custody had a similar distracting effect on Cpl. Harper, such that the delay ought not to be considered a breach of s. 10(b). The Crown further argues that the delay in Mr. Simon's case similarly did not result in any prejudice to Mr. Simon as the oversight was rectified before breath samples were provided.

[25] Factually, this case falls somewhere between the *Evans* and *Smith* cases. The delay is not so negligible as to be inconsequential like in *Evans*. Conversely, responding to some fairly routine questions from Mr. Simon and his passengers, while a minor distraction, does not rise to the same level as the argument in *Smith* which necessitated back up being called.

[26] In considering whether the delay in this case amounts to a breach of s. 10(b), there are a number of important considerations.

[27] Cpl. Harper, an experienced police officer, conceded that he is well aware of the requirement to advise detainees of their right to counsel immediately upon detention. He testified that it is not his normal practice to delay advising a detainee of their s. 10(b) rights. He describes his failure to advise immediately in this case as a memory lapse. He says that he was preoccupied dealing with three intoxicated persons and his concerns for the safety of the two passengers, and did not think of it at the time.

[28] It seems to me that the delay occasioned by Cpl. Harper's efforts to ensure the safety of the passengers was not unreasonable in the circumstances. That being said, Cpl. Harper agreed that once he dropped off the two passengers, there was no

impediment to advising Mr. Simon of his right to counsel, other than the fact he was driving and dealing with arrangements for Mr. Simon's vehicle. Seeing to the passengers does not account for the remaining 14 minutes of delay.

[29] Cpl. Harper's oversight must be balanced against the vital importance of the right to counsel for any detainee, which includes the obligation that all detainees be advised of that right immediately upon detention. As noted in *Suberu* at para. 41:

> A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(*b*) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(*b*) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

[30] While I am satisfied that there was no intentional breach in this case, it is nonetheless concerning that something as vital as the right to counsel could be overlooked even unintentionally. In the result, I am satisfied that the additional 14 minutes of delay after the passenger drop off, while not a flagrant breach, amounts to at least a technical breach of s. 10(b).

Section 24(2): Exclusion

[31] Having found a breach, however, does not mean that Mr. Simon is necessarily entitled to an exclusionary remedy pursuant to s. 24(2). The test for exclusion was

articulated by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, at para. 71, as follows:

> … When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
>
> > (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
> >
> > (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and
> >
> > (3) society's interest in the adjudication of the case on its merits.
>
> The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. …

[32] Turning first to the seriousness of the *Charter*-infringing state conduct, I am satisfied that the conduct on the facts of this case is not particularly serious. I accept that Cpl. Harper simply forgot that he had not yet provided Mr. Simon with his *Charter* rights until he was working on his notes during the first observation period. There was absolutely no evidence of any inappropriate or malicious motive underlying the delay; it was simply a human error.

[33] The absence of bad faith does not always translate to good faith, but in this case, I am satisfied that Cpl. Harper was acting in good faith. Indeed, the VICS video demonstrates that Cpl. Harper was respectful and compassionate in dealing with Mr. Simon and his passengers throughout.

[34] Consideration of the first branch of the *Grant* test, in my view, favours admission of the Certificate of Qualified Breath Technician.

[35] Turning to the second branch, the impact of the breach on the *Charter*-protected interests of the accused, the right to counsel is absolutely fundamental to protecting accused persons from self-incrimination and inappropriate state action. That being said, there are nonetheless degrees of seriousness in assessing the impact a breach has on a detainee. In this case, the negative impact on Mr. Simon was mitigated by the fact that Cpl. Harper remembered his oversight in time to ensure that Mr. Simon was advised of his right to counsel before providing the breath samples or any other incriminating evidence.

[36] In addition, there is no evidence to suggest that the delay affected Mr. Simon's decision with respect to contacting counsel in any way. He effectively waived his right to contact counsel when first advised of his right. He was advised a second time of his right to counsel after providing breath samples when he was formally arrested for operating a conveyance with a blood alcohol concentration which exceeded the legal limit, and he was again asked if he wished to contact counsel. His response was effectively the same as his earlier response – he preferred to contact counsel later. This persuades me that his decision about whether and when to exercise his right to counsel would not have been any different if he had been advised of his right to counsel earlier.

[37] Consideration of the second branch of the *Grant* test generally favours exclusion given the importance of the right to counsel, but not overwhelmingly so in this case, given the mitigating factors.

[38] Finally, on the third branch of the *Grant* test, society's interest in the adjudication of the case on its merits, "the court considers factors such as the reliability of the evidence and its importance to the Crown's case" (see *R. v. Harrison*, 2009 SCC 34, at para. 33). Analysis of breath samples by use of approved instruments have universally been accepted as highly reliable, subject to any specific evidence which may call into question whether an instrument was functioning properly in any given case. No such evidence has been called in this case.

[39] With respect to the Crown's case, as this case will stand or fall based on my ruling with respect to admissibility of the breath sample readings, admission of the evidence is clearly crucial to the Crown's case.

[40] Consideration of the third branch of the *Grant* test clearly favours admission of the evidence.

[41] The Supreme Court of Canada in the *Grant* trilogy of cases has made it clear that there are no longer any categories of either automatic inclusion or exclusion. Rather, the Court must balance the three branches of the *Grant* test in considering the impact of admission or exclusion on the administration of justice. As noted by the Supreme Court of Canada in *Harrison,* at para. 36:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether

> the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[42] Considering the totality of the circumstances before me, I am satisfied that the long-term repute of the administration of justice does not require dissociation from the state conduct in this case. A balance of the three branches of the *Grant* test, in my view, ultimately favours admission of the Certificate of Qualified Technician. Accordingly, the Certificate is admissible as evidence in the trial proper along with the remainder of the evidence called in the *voir dire*.

[43] Based on the evidence of Cpl. Harper and the Certificate of Qualified Technician, I am satisfied that the Crown has met its burden in proving the offence beyond a reasonable doubt. A conviction will, therefore, be entered, with respect to Count 2 on the information. Count 1 is dismissed.

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RUDDY T.C.J.