Citation: *R. v. Hendrie*, 2021 YKTC 11

Date: 20210309
Docket: 19-00252
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JUSTIN ANTHONY HENDRIE

Appearances:
Sarah Bailey — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] COZENS T.C.J. (Oral): Justin Hendrie has been charged with having committed offences contrary to ss. 320.14(a) and (b) of the *Criminal Code*.

[2] Counsel for Mr. Hendrie has filed a Notice of Application alleging a breach of Mr. Hendrie's s. 9 *Charter* right not to be arbitrarily detained. Counsel seeks remedies under ss. 24(1) and (2) of the *Charter*.

[3] The trial commenced in a blended *voir dire* on December 10, 2020. Submissions on the *voir dire* were heard on February 4, 2021, and judgment was reserved until today's date. This is my ruling on the Application.

Evidence

Cpl. Hutton

[4] Cpl. Hutton, who was a constable at the time of his involvement with Mr. Hendrie, testified that at approximately 5:10 p.m. on June 8, 2019, he noted Mr. Hendrie driving a car. He suspected that Mr. Hendrie may be impaired.

[5] Cpl. Hutton engaged his police cruiser emergency lights and pulled in behind Mr. Hendrie's vehicle as it came to a stop.

[6] As a result of noting indicia of the consumption of alcohol, Cpl. Hutton made an ASD demand. After a "Fail" result was indicated, Cpl. Hutton arrested Mr. Hendrie at 5:27 p.m. and transported him to the RCMP Detachment, where two breath samples of 180 mg/% were obtained from Mr. Hendrie at 6:31 p.m. and 6:55 p.m. respectively.

[7] Although Cpl. Hutton's original intention had been to release Mr. Hendrie from the RCMP Detachment, he instead decided to transport Mr. Hendrie to the Arrest Processing Unit ("APU"). Cpl. Hutton said his practice was 50/50 whether he released an intoxicated person from the RCMP Detachment or had them held for a later release. This depended on Cpl. Hutton's assessment of the individual's level of intoxication and ability to care for themselves. Cpl. Hutton agreed that he may have initially told Mr. Hendrie that he would be released from the Detachment.

[8] Cpl. Hutton stated that he changed his original intention regarding the release of Mr. Hendrie due to Mr. Hendrie's escalating behaviour after he provided the 180 mg/% breath samples and was informed of the result.

[9] Cpl. Hutton testified that Mr. Hendrie was generally somewhat non-responsive and not listening to what Cpl. Hutton was saying to him at roadside and en route to the Detachment. This was after Mr. Hendrie had been arrested. However, this was not perceived by Cpl. Hutton as being due to the intoxication of Mr. Hendrie, as Mr. Hendrie had shown that he could understand what was going on and answer questions. Prior to his arrest, Mr. Hendrie was noted as being cooperative and with understandable speech. Cpl. Hutton agreed that the subsequent non-responsiveness was likely due to Mr. Hendrie having been arrested.

[10] Cpl. Hutton testified that Mr. Hendrie was initially friendly and responsive at the RCMP Detachment. He seemed to be jovial and pretty happy. He said that Mr. Hendrie pretended to weigh himself and talk on the phone. This said, Cpl. Hutton stated that Mr. Hendrie was still generally not listening to him.

[11] Cpl. Hutton testified that after Mr. Hendrie was advised of the 180 mg/% readings:

- Mr. Hendrie threw a box of tissue;
- Mr. Hendrie kicked off his shoes;
- Mr. Hendrie was crying and was screaming into his sweater; and
- Mr. Hendrie was not settling down right away.

[12] Cpl. Hutton stated that he did not feel that Mr. Hendrie was angry towards him in particular. However, as a result of these actions by Mr. Hendrie, Cpl. Hutton felt that

Mr. Hendrie needed to be transported to the APU rather than being released from the Detachment. Cpl. Hutton said that he was concerned that Mr. Hendrie's state of upset and intoxication posed a risk of self-harm or of Mr. Hendrie deciding to drive. He testified that he did not feel that Mr. Hendrie was capable of caring for himself at that stage.

[13] Cpl. Hutton had taken steps to have Mr. Hendrie's car impounded, but felt that Mr. Hendrie could decide to borrow someone else's car and drive.

[14] Cpl. Hutton agreed that Mr. Hendrie's state of intoxication had not increased from the time he detained Mr. Hendrie at roadside.

[15] He stated that Mr. Hendrie was pretty quiet on the ride from the Detachment to the APU. However, this did not change his mind about whether Mr. Hendrie needed to be further detained. He felt that Mr. Hendrie still needed some time to cool down.

[16] Cpl. Hutton agreed that Mr. Hendrie was coherent and could walk fine.

[17] Cpl. Hutton agreed that he could have released Mr. Hendrie on a Promise to Appear ("PTA") from the Detachment, and that it was not abnormal for a person to become upset after being told they were being charged with an offence, even if sober.

Corrections Officer Jordan Lindsay

[18] C.O. Lindsay was working in the APU on the evening of June 8 into the morning of June 9, 2019.

[19] He described the procedure for releasing an individual from the APU after he or she has been brought in by the RCMP.

[20] In Mr. Hendrie's case, Cpl. Hutton provided a C-13 Prisoner Report ("C-13"), that stated Mr. Hendrie was to be released on a PTA.

[21] C.O. Lindsay testified that, as such, Mr. Hendrie was unable to be released from the APU until an RCMP officer attended and authorized his release.

[22] C.O. Lindsay further testified as to the Prisoner Log for Mr. Hendrie. It notes that Mr. Hendrie was admitted into the APU at 19:08 hours, and was lodged into a cell at 19:10 hours.

[23] When admitted, Mr. Hendrie was noted in the Prisoner Log as being "upset with Cst. Hutton, intoxicated, slow to follow direction".

[24] The Prisoner Log shows that Cst. Wiltse attended at the APU at 03:41 hours and that the instructions from him were to change Mr. Hendrie's status to "RWS", which means "Release When Sober".

[25] The Prisoner Log shows that Mr. Hendrie was released from the APU at 03:54 hours. C.O. Lindsay stated that the interim between 03:41 hours to 03:54 hours was due to waiting for a cab to take Mr. Hendrie from the APU to his residence.

Cst. Wiltse

[26] Cst. Wiltse testified that he was working the late shift from 7:00 p.m. on June 8 until 6:00 a.m. on June 9, 2019.

[27] He said that he was aware that Mr. Hendrie was at the APU and that he would need to be released from there. He said that the procedure was to take the necessary documents for Mr. Hendrie to the APU, and Mr. Hendrie would be released from there. A cab would be called to take Mr. Hendrie where he needed to go.

[28] Cst. Wiltse stated that he believed he was told to attend at the APU at a time around midnight to arrange for Mr. Hendrie's release. He said that he was delayed however, and as a result he did not attend until approximately five to 10 minutes before Mr. Hendrie was released at 3:41 a.m.

[29] Cst. Wiltse stated that he had wanted to attend at the APU earlier than he did, and that his attendance there was later than originally planned. Cst. Wiltse was unable to recall specifically what the reasons were for his delay in attending at the APU, other than that he was responding to other calls.

[30] When asked whether another RCMP officer could have attended earlier at the APU to arrange for Mr. Hendrie's release, Cst. Wiltse stated that he could not recall what was keeping the other RCMP officers busy that night.

[31] Cst. Wiltse stated that "more usually than not" an individual being released on a PTA was released immediately.

Justin Hendrie

[32] Mr. Hendrie stated that he understood the approved screening devise ("ASD") demand, legal advice and the breathalyzer procedure. He said that he remembers everything. He said that he was not responsive while seated in the back of the police

cruiser because he was upset that he was there. He estimated that he was intoxicated to a level of five out of ten and that he was "me".

[33] Mr. Hendrie felt that the interaction between himself and Cpl. Hutton was cordial and positive.

[34] Mr. Hendrie said that he was not happy when he was told that he was going to be taken into custody. He said that he did not "bitch or moan". He said that Cpl. Hutton was the boss, and what could he (himself) do about what Cpl. Hutton decided.

[35] Mr. Hendrie denied crying, and stated that he did not throw his shoes on the floor. He agreed that he kicked off his shoes.

[36] Mr. Hendrie stated that he lived across the street from Sport Yukon, which I note is just a few blocks south of the RCMP Detachment.

[37] Mr. Hendrie agreed that he slept on and off while in cells, and that it was not the most comfortable. He said that he was aware that he would be let out of custody when "they" decided that he would be.

Video Evidence

[38] Video recording of the time Mr. Hendrie was at the Detachment was played. There was no audio.

[39] Mr. Hendrie can be seen tossing a Kleenex box from the bench he was on onto the floor. It travels several feet along the floor. In my opinion, the "tossing" action is

fairly minimal, and certainly quite distinguishable from “throwing” the Kleenex box forcefully.

[40] Mr. Hendrie can also be seen kicking his boots off. Again, this “kicking” was fairly minimal, and certainly not forceful or directed at anyone. In my opinion, it was not aggressive or particularly concerning.

[41] Mr. Hendrie is also seen throwing a used Kleenex on the floor directly in front of him, as well as one of his shoes.

[42] Mr. Hendrie can be observed with his sweater sleeve up to his mouth, consistent with what Cpl. Hutton described as him “screaming” into his sweater. There were no visible indicators, however, of crying or any other degree of upset.

[43] All of these actions by Mr. Hendrie appeared to be more demonstrations of frustration than hostility or anger.

Analysis

[44] The detention of Mr. Hendrie can be broken into three parts.

[45] The first portion is from the time of the traffic stop by Cpl. Hutton until the breath samples had been obtained, which would include any necessarily ancillary steps required to be taken after the sampling process. There is no challenge by Mr. Hendrie to this portion of his detention.

[46] The second portion is the period of time following the breath samples being taken at the Detachment and approximately midnight, when Cst. Wiltse was instructed to

attend at the APU to release Mr. Hendrie. This detention is challenged on the basis that it was not necessary, and Mr. Hendrie should have been released on a PTA from the Detachment.

[47] The third portion is from the time of Mr. Hendrie's intended release around midnight, until he is finally released just before 04:00 hours. This detention is challenged on the basis that, not only should he never have been there in the first place, but regardless, he clearly should not have been detained beyond the originally planned midnight release.

[48] Mr. Hendrie bears the burden of establishing that he was detained in breach of his s. 9 *Charter* right not to be arbitrarily detained.

[49] In ***R.*** v. ***Hardy***, 2015 MBCA 51, the Court states at paras. 37 and 38:

> 37 However, since *McIntosh,* [(1984), 29 M.V.R. 50 (B.C.C.A.)] numerous appellate decisions have confirmed that the accused bears the legal burden of proving an arbitrary detention in circumstances similar to this case. See for example *R. v. Pashovitz* (1987), 59 Sask.R. 165 (C.A.) (intoxicated accused detained in cell overnight); *R. v. Cutforth* (1987), 81 A.R. 213 (C.A.) (intoxicated accused detained for 12 hours); *R. v. Simms (A.P.)*, 2009 ABCA 260 at para. 26, 460 A.R. 215 (intoxicated accused alleged police had duty to inform him that he could be released to a sober adult).
>
> 38 In Manitoba, in *R. v. Weik (D.W.)*, 2012 MBQB 138 at para. 109, 279 Man.R. (2d) 38, the accused argued that he was arbitrarily detained in custody for between five and six hours. Joyal C.J.Q.B. specifically noted that it is the accused who bears the burden of establishing on a balance of probabilities the alleged s. 9 breach.

<u>Detention from 7:00 p.m. to 12:00 a.m.</u>

[50] Sections 497 and 498 of the *Code* govern release from custody by a peace officer. They read in part:

> Issue of Appearance Notice by Peace Officer
>
> 497. If, by virtue of subsection 495(2), a peace officer does not arrest a person, they may issue an appearance notice to the person if the offence is
>
> (a) an indictable offence mentioned in section 553;
>
> (b) an offence for which the person may be prosecuted by indictment or for which they are punishable on summary conviction; or
>
> (c) an offence punishable on summary conviction.
>
> Release from Custody — Arrest without Warrant
>
> 498. (1) Subject to subsection (1.1), if a person has been arrested without warrant for an offence, other than one listed in section 469, and has not been taken before a justice or released from custody under any other provision of this Part, a peace officer shall, as soon as practicable, release the person, if
>
> (a) the peace officer intends to compel the person's appearance by way of summons;
>
> (b) the peace officer issues an appearance notice to the person; or
>
> (c) the person gives an undertaking to the peace officer.
>
> …
>
> [Exception]
>
> (1.1) The peace officer shall not release the person if the peace officer believes, on reasonable grounds,
>
> (a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to
>
> (i) establish the identity of the person,

> (ii) secure or preserve evidence of or relating to the offence,
>
> (iii) prevent the continuation or repetition of the offence or the commission of another offence, or
>
> (iv) ensure the safety and security of any victim of or witness to the offence; or
>
> (b) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.
>
> …
>
> [Consequences of Non-Release]
>
> (3) A peace officer who has arrested a person without a warrant, or who has been given the custody of a person arrested without a warrant, for an offence described in subsection (1), and who does not release the person from custody as soon as practicable in the manner described in that subsection shall be deemed to be acting lawfully and in the execution of the officer's duty for the purposes of
>
> (a) any proceedings under this or any other Act of Parliament; or
>
> (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (1).

[51] As stated in ***R.*** v. ***Kavanaugh***, 2017 ONSC 637, in para. 31:

> It is common ground that keeping a person in custody contrary to s. 498 constitutes arbitrary detention, and a breach of s. 9 of the *Charter*.

[52] The decision by Cpl. Hutton to further detain Mr. Hendrie should be afforded considerable deference. As a trained member of the RCMP, Cpl. Hutton, like all police officers, must make decisions, often somewhat quickly, in an environment very different from that in court.

[53] This said, in order to avoid an unnecessary detention of Mr. Hendrie, Cpl. Hutton, as all police officers, was required to turn his mind to the circumstances that were present in order to come to a decision based upon a principled decision-making process.

[54] As stated in ***R.*** v. ***Sakhuja***, 2020 ONCJ 484, Dellandrea J. states in paras. 76 and 77:

> 76 In *Price*, [***R.*** v. ***Price***, 2010 ONSC 1898] Justice Durno provided a non-exhaustive list of factors to be considered in the assessment of the reasonableness of the "circumstances" of an individual's continued detention following an arrest for a drinking and driving offence. These include:
>
> (1) The accused's blood alcohol level;
>
> (2) Whether the accused was charged with impaired driving;
>
> (3) The accused's apparent level of comprehension;
>
> (4) The impact of the administrative driving suspension;
>
> (5) Whether the accused has outstanding charges
>
> (6) The accused's demeanour (which may include consideration of the poor judgment exhibited by drinking and driving).
>
> 77 An objective analysis of these, and any other relevant factors, should guide the analysis with respect to the accused's suitability for release. It is improper for this assessment to be guided only by the blood-alcohol levels, which is too narrow a focus.

(See also ***R.*** v. ***Al-Adhami***, 2020 ONSC 6421, at paras. 56-59.)

[55] I recognize that these comments in ***Price*** were questioned by Heeney R.S.J. in ***R.*** v. ***Kavanagh***, 2017 ONSC 637, at para. 41. I note that the primary concern expressed was about whether blood-alcohol levels alone could constitute a sufficient

basis for continued detention of an individual, noting that the Court of Appeal in ***R.*** v. ***Sapusak*** (1998), 40 W.C.B. (2d) 191 (Ont. C.A.), endorsed the lower court decision, (1998), 39 W.C.B. (2d) 274 (Ont. C.J. (Div. C.t.)) with this comment:

> 1 We are not persuaded that the police in light of the 130 mg. reading, were not justified in detaining the appellant for his own protection. However, in the event that there was an arbitrary detention, it could not, in our view, be a basis for excluding the breathalyzer evidence since there was no temporal or causal connection between the breach and the obtaining of the evidence. Further, this is not of those clearest of cases that would justify a stay of the proceedings. Leave appeal is granted but the appeal is dismissed.

[56] The decision in ***Kavanagh*** was discussed in ***R.*** v. ***Brar***, 2020 ONSC 4740, where Woollcombe J. stated in paras. 29 and 30:

> 29 The trial judge acknowledged the subsequent summary conviction appeal court decision in *R. v. Kavanagh*, 2017 ONSC 637. In that case, Heeney R.S.J. concluded, relying on *R. v. Sapusak*, [1998] O.J. 4148 (C.A.) firstly that high blood alcohol concentration levels alone could constitute a sufficient basis for an accused's detention and, secondly, that the trial judge's reliance on *Price* - in light of what he characterized as "the clear and binding authority for the proposition that detaining an individual for 6 to 7 hours, based solely on readings of 130 mg/100 mL, does not constitute arbitrary detention" - was in error: *Kavanagh* at paras. 37 and 40.
>
> 30 The trial judge commented that it did not appear that anyone made the argument in *Kavanagh* that *Sapusak* was a short Court of Appeal endorsement and not a full, considered decision of the Court of Appeal - an argument advanced by the appellant before her: *R. v. Singh*, 2014 ONCA 293 at para. 12.

[57] The simple reality is that a police officer is required to turn his or her mind to all of the circumstances that are present, and in appropriate cases, high blood-alcohol readings may be sufficient. The important thing is that there is a thoughtful inquiry

made by the police officer into the existing circumstances so that a careful assessment and consideration is made before further detention is decided to be necessary.

[58] As his justification for further detaining Mr. Hendrie and transporting him to the APU, Cpl. Hutton testified that he was concerned that Mr. Hendrie was a potential risk to drive another vehicle, and that he was concerned that Mr. Hendrie's emotional state, as evidenced by his actions, posed a risk of self-harm.

[59] I appreciate that, sitting as a trial judge, I am not in the same position as Cpl. Hutton was at the time that he made the decision to further detain Mr. Hendrie.

[60] Notwithstanding my ability to view the videotape evidence, which did not include audio of what took place at the Detachment, I recognize that I have an incomplete picture of what took place. I am also not trained in handling detained individuals, as Cpl. Hutton is.

[61] Therefore, as a trial judge, I should be careful when assessing the merits of what Cpl. Hutton chose to do at the time of these events, and in deciding whether or not to pass judgment criticizing his decision.

[62] This said, I find that there was absolutely no basis for Cpl. Hutton's decision to further detain Mr. Hendrie because of a concern he might obtain another vehicle and drive again while impaired. There is no evidence that raises this as a possibility, such as a situation where the offender said he was still going to go to work, thus raising a concern that he might choose to drive to get there.

[63] Nothing in the evidence before me raises the possibility of Mr. Hendrie driving while impaired beyond the same level of risk that any intoxicated individual detained or arrested for impaired driving poses. In the absence of some evidentiary foundation for the existence of such a risk, a police officer cannot simply choose to detain an individual because they "might" choose to drive again. Mr. Hendrie's level of intoxication, as high as the readings were, did not amount to a justification for his further detention on the basis of a risk that he might choose to drive another vehicle.

[64] It is more difficult, however, for me to say the same with respect to Mr. Hendrie's emotional state and risk of self-harm. It is clear that Mr. Hendrie was upset after learning the results of his breath samples, and being advised that he would be charged with impaired driving offences.

[65] Again, the lack of audio evidence of what took place at this time is unfortunate, as it would have enabled me to better understand Cpl. Hutton's testimony as to Mr. Hendrie's heightened emotional state. This is not a case, however, where the lack of audio evidence is due to some technical difficulty or failure on the part of Cpl. Hutton to make a recording he should have made. There is generally not audio evidence of what takes place in the booking area of the Detachment.

[66] I will repeat, however, that my assessment of Mr. Hendrie "throwing" the Kleenex box and "kicking off" his shoes, as well as his other actions, after viewing the video evidence, places these actions at the low end. It is not as though the Kleenex box was thrown forcefully overhand, or the shoes kicked off with any real measure of force.

[67] Had I not seen the video evidence, and only had the testimony of Cpl. Hutton to rely on, I would likely have a different idea of what took place.

[68] There was also nothing particularly dramatic or indicative of significant emotional distress or upset on the part of Mr. Hendrie when he had his face in the sleeve of his sweater. Again, perhaps an audio recording might have provided me additional useful information in this regard.

[69] There is no objective evidence that points to any probability that Mr. Hendrie would harm himself, whether directly or indirectly. I would be concerned if, in the normal course, being intoxicated and momentarily upset is all that is required for such a risk to be considered sufficient to justify detention.

[70] Mr. Hendrie's blood alcohol readings were high, however, and he was in an agitated state. These are factors relevant to the decision by Cpl. Hutton to further detain Mr. Hendrie. As recorded in the C-13 Mr. Hendrie was: "Lodged as high samples and up and down behaviour".

[71] The law is clear that police officers have the authority to detain intoxicated individuals until such time as the individual can be released when they no longer fit into one of the listed criteria.

[72] This said, I would have thought that the interaction between Cpl. Hutton and Mr. Hendrie prior to this relatively brief period of the display of emotional upset by Mr. Hendrie, followed by the change back to a calm demeanour while in transport to the

APU, may have caused Cpl. Hutton to change his mind about the necessity of further detaining Mr. Hendrie. It did not have that effect however.

[73] Freedom from the unnecessary intervention of the state in the liberty interests of individuals in Canadian society is a fundamental right enjoyed in our society. Therefore, the *Code* has made it clear that when a police officer is deciding whether to further detain an individual or not, the officer must turn his or her mind to the prescribed criteria. In doing so, there must be a careful and considered approach to assessing this criteria as applicable to the circumstance before the police officer.

[74] In the end, in order to find that there was a breach of Mr. Hendrie's s. 9 *Charter* right with respect to this period of his detention, I must be satisfied on a balance of probabilities that the actions of Cpl. Hutton were without any justifiable purpose as required under the prescribed criteria in the *Code*.

[75] I have concerns, and doubts, about the necessity of Mr. Hendrie being further detained as he was.

[76] This said, there was a lengthy exchange between Cpl. Hutton and Mr. Hendrie , the contents of which are unfortunately not available due to the lack of an audio recording. This may have provided me additional insight into what Cpl. Hutton stated when he said that Mr. Hendrie was not settling down, as well as support for Cpl. Hutton's decision to further detain Mr. Hendrie.

[77] Therefore, I cannot say with sufficient confidence that Cpl. Hutton was not acting within his lawful authority when he chose to further detain Mr. Hendrie. I am reluctant to

interfere with Cpl. Hutton's exercise of discretion to further detain Mr. Hendrie, given that there was some indicia that Mr. Hendrie was perhaps more upset than the circumstances warranted, or than others in similar circumstances may have been, and his blood alcohol readings were high, (for discussion on the exercise of police officer discretion in a particular set of circumstances, see also ***Hardy***, at para. 9).

[78] As such, I am not prepared to declare that Cpl. Hutton's actions in further detaining Mr. Hendrie constituted a breach of Mr. Hendrie's s. 9 *Charter* right, and I therefore decline to find a breach of this right.

[79] However, the following thought comes to mind:

Just because you can, does not mean that you should.

[80] As the circumstances of this case illustrate, this initial choice by Cpl. Hutton to further detain Mr. Hendrie resulted in an additional significant period of detention that cannot be justified.

Detention from 12:00 a.m. to 3:51 a.m.

[81] I have no difficulty finding that Mr. Hendrie's s. 9 *Charter* rights were breached when he was detained in excess of approximately three and two-thirds hours after Cst. Wiltse's original intended time to attend at the APU and authorize Mr. Hendrie's release.

[82] There may have been a reason or reasons for this overholding, but on the evidence before me, the reasons given do not in any way come close to providing a justification for this further period of detention.

[83] Mr. Hendrie spent this additional time in custody because the RCMP did not ensure that they had the appropriate mechanisms in place to facilitate Mr. Hendrie being released in a timely fashion. This was not a case where exigent circumstances resulted in an unavoidable situation where the release of Mr. Hendrie could not be facilitated. Cst. Wiltse was unable to testify as to the exact issue or issues that contributed to he, or any other RCMP member, not being able to attend at the APU to ensure that Mr. Hendrie was released as soon as reasonably possible.

[84] Cst. Wiltse was not able to testify with certainty as to the precise process that he understood required him to attend at the APU at approximately 12:00 a.m. to arrange for Mr. Hendrie's release.

[85] The fact that Mr. Hendrie may have been sleeping for much of this time, does not mean that a breach of his s. 9 *Charter* right did not occur. I suspect that he would rather have been sleeping in his own bed than in the APU cells.

[86] Ruddy J. discussed the issue of overholding in finding a s. 9 *Charter* breach in the cases of ***R.*** v. ***Davidson***, 2019 YKTC 16, oral reasons provided March 26, 2019, prior to the arrest of Mr. Hendrie, and ***R.*** v. ***Golebeski***, 2019 YKTC 50, written reasons provided November 25, 2019, after the arrest of Mr. Hendrie, stating in ***Davidson*** as follows:

> 41 However, the problem in this case does not lay with the initial decision to detain. Rather it lays with what appears to be a broader systemic problem in the relation to the loose policies that govern the detention and release of detainees at the APU.
>
> 42 It is clear on the evidence of both Cst. Caron and Mr. O'Neill that when a person is lodged at the APU on PTA status, COs do check on them

> regularly, but it is only the RCMP who can release. There does not seem to be any system of regular communication between the COs at the APU and the RCMP in relation to the status of a detainee which would ensure consistent monitoring of a detainee's condition to ensure that they are not held in custody any longer than necessary.
>
> 43 Even more troubling, both Cst. Caron and Mr. O'Neill referenced rough guidelines of holding individuals detained due to their state of intoxication for up to 12 hours. Indeed, Cst. Caron noted that the only apparent communication between the APU and the RCMP in relation to a PTA hold is if detention is getting close to 12 hours, at which point the CO will contact the Watch Commander to advise. This suggests a belief that any person detained as a result of their state of intoxication can be held up to 12 hours as of right regardless of the individual's state of intoxication at any given time.
>
> 44 It must be remembered that a deprivation of liberty is taken very seriously in our justice system. An unjustified deprivation of liberty is a breach of s. 9 of the *Charter*. The exceptions in s. 498 do allow for detention, but not unlimited detention. The continuing authority to detain under s. 498 lasts only so long as the circumstances that give rise to the reasonable grounds to detain continue to exist. Once they no longer exist, the person must be released as soon as practicable. Release is not a question of convenience for the RCMP or of compliance with a 12-hour hold policy. It is a question of whether there are continuing grounds to detain.
>
> 45 In this case, it is difficult to determine what Mr. Davidson's level of intoxication was at any given time over the course of his detention, as Mr. O'Neill has only a vague recollection. What is clear, however, is that there were no efforts made by Cst. Caron or another peace officer to assess Mr. Davidson's state of intoxication on an ongoing basis. Rather the timing of Mr. Davidson's release was dictated by the convenience of the RCMP within this rough guideline of 12 hours.
>
> 46 In my view, the failure to actively monitor Mr. Davidson's detention, against the authority set out in s. 498(1.1), to ensure his detention was no longer than necessary means that what began as an authorized detention became, at a point that the evidence does not fully make clear, an arbitrary detention. Accordingly, I am satisfied that the defence has established, on a balance of probabilities, that there was a breach of s. 9 of the *Charter*.

[87] There is an obligation on the State to ensure that individuals are not detained for any longer period of time than is necessary. There may be circumstances in which a

longer period of detention than is necessary occurs, for perhaps exigent, unavoidable or legitimate reasons that make the detention necessary. Perfection is not a requirement of justice.

[88] This however is not one of those cases. There was no exigent, legitimate or justifiable reason for Mr. Hendrie to have been detained as long as he was. Therefore, I find that his s. 9 *Charter* right not to be arbitrarily detained was breached.

Remedy for the Breach

[89] There are three potential remedies for the s. 9 *Charter* breach that occurred in this case.

Judicial Stay of Proceedings

[90] The first is a judicial stay of proceedings.

Section 24(1) of the Charter

[91] Section 24(1) of the *Charter* reads:

> 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.

[92] The case law is fairly clear that in circumstances such as these, using s. 24(1) of the *Charter* to issue a judicial stay of proceedings is not warranted. This is a remedy of last resort, when no other suitable remedy is available. The Courts have directed trial

judges to look first to the existence of other available remedies before considering a judicial stay.

[93] As stated in ***R.*** v. ***O'Connor***, [1995] 4 S.C.R. 411, at para. 82:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the justice system if the prosecution were continued.

[94] In ***Hardy***, the Court stated the following with respect to the concept of the remedy of a judicial stay for a s. 9 arbitrary post-offence detention:

> 67 Having found that no error was committed and therefore a s. 9 breach has not been established, there is no need to consider the appropriate remedy. However, I would note that appellate jurisprudence has consistently held that a judicial stay of proceedings is not an appropriate remedy in circumstances such as this, where the alleged conduct is post-offence and post-investigation. See *Iseler*, *Cutforth*, and *R. v. Salisbury (T.J.)*, 2011 SKQB 153, 372 Sask.R. 242. In Manitoba, there has not been a case where a charge has been judicially stayed based on a finding of a s. 9 breach as a result of arbitrary post-offence detention.
>
> 68 In my view, a declaration of a *Charter* breach as occurred in *R. v. Osiowy (D.L.)*, 2007 MBPC 61, 221 Man.R. (2d) 222, or a sentence reduction as recognized in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, are more appropriate remedies. In fact, in *Nasogaluak*, the Supreme Court of Canada recognized that the sentencing process is such that (at para. 55):
>
> > ... [A] sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a *Charter* breach. Provided the interests at stake can properly be considered by the court while acting within the sentencing regime in the *Criminal Code*, there is simply no need to turn to the *Charter* for a remedy. ...

(See also ***R.*** v. ***Poletz***, 2014 SKCA 16; ***R.*** v. ***Carlick***, 2016 YKTC 7, at paras. 25 to 35; and ***R.*** v. ***Knight***, 2018 SKQB 303, at paras. 33 to 41.)

[95] The circumstances of this case do not warrant a judicial stay of proceedings. The breach was not in any way causally connected to the impaired driving investigation, and occurred several hours after the investigation was completed.

[96] There was nothing particularly egregious about the conduct of the RCMP in committing the breach. It was more a question of carelessness or negligence than any deliberate attempt to override Mr. Hendrie's s. 9 *Charter* right. There were no other breaches of Mr. Hendrie's *Charter* rights.

[97] I have found that the initial detention of Mr. Hendrie by Cpl. Hutton was within the lawful exercise of his duties as a police officer, as was the detention following the completion of the breath sampling process.

[98] This is not the clearest of cases where a judicial stay is warranted.

Reduction in Sentence

[99] A second option for circumstances where a remedy is sought as a result of a *Charter*-protected right, is to impose a sentence that takes into account the breach of the *Charter* right as a mitigating factor. Thus a sentence can be imposed that is lesser than it otherwise would have been, but for the breach.

[100] This remedy is also available as part of the sentencing process without resorting to s. 24(1), although in some cases such a remedy can fall within the s. 24(1) analysis.

[101] In ***R.*** v. ***Nasogaluak***, 2010 SCC 6, at paras. 47 to 55, and 64, the Court addressed sentencing an offender where *Charter* breaches have occurred, considering the applicability of ss. 24(1) and (2) of the *Charter*.

> (2) The Role of *Charter* Breaches in the Regular Sentencing Process
>
> 47 The sentencing principles described above must be understood and applied within the overarching framework of our Constitution. Thus it may, at times, be appropriate for a court to address a *Charter* breach when passing sentence. This may be accomplished without resort to s. 24(1) of the *Charter*, given the court's broad discretion under ss. 718 to 718.2 of the *Code* to craft a fit sentence that reflects all the factual minutiae of the case. If the facts alleged to constitute a *Charter* breach are related to one or more of the relevant principles of sentencing, then the sentencing judge can properly take those facts into account in arriving at a fit sentence. Section 718.2(*a*) of the *Code* provides that a court should reduce a sentence "to account for any relevant ... mitigating circumstances relating to the offence or the offender". It would be absurd to suggest that simply because some facts also tend to suggest a violation of the offender's *Charter* rights, they could no longer be considered relevant mitigating factors in the determination of a fit sentence.
>
> …
>
> 55 …However, if a *Charter* breach has already been alleged and established, a trial judge should not be prevented from reducing the sentence accordingly, so long as the incidents giving rise to the breach are relevant to the usual sentencing regime. Of course, as we shall see, as a general rule, a court cannot reduce a sentence below a mandatory minimum or order a reduced sentence that is not provided for by statute. That said, circumstances of a *Charter* breach or other instances of state misconduct, in exceptional circumstances, do allow a court to derogate from the usual rules to which its decisions are subject.
>
> …

[102] After further discussion in paras. 56-62 about the competing jurisprudence on the availability of a sentence reduction under s. 24(1), the Court stated:

> 63 The judgments relying on s. 24(1) appear to have been concerned about instances of abuse of process or misconduct by state agents in the course of the events leading to an arrest, to charges or to other criminal

> procedures. But, inasmuch as they relate to the offender and the offence, those facts become relevant circumstances within the meaning of the sentencing provisions of the *Criminal Code*. As such, they become part of the factors that sentencing judges will take into consideration in order to determine the proper punishment of the offender, without a need to turn to s. 24(1). Factors unrelated to the offence and to the offender will remain irrelevant to the sentencing process and will have to be addressed elsewhere. In addition, the discretion of the sentencing judge will have to be exercised within the parameters of the *Criminal Code.* The judge must impose sentences respecting statutory minimums and other provisions which prohibit certain forms of sentence in the case of specific offences. [Emphasis mine]
>
> 64 …Although, as we have seen above, the proper interpretation and application of the sentencing process will allow courts to effectively address most of the situations where *Charter* breaches are alleged, there may be exceptions to this general rule. I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy or some particularly egregious form of misconduct by state agents in relation to the offence and to the offender. In that case, the validity of the law would not be at stake, the sole concern being the specific conduct of those state agents.

[103] The decision in ***Nasogalauk*** was further considered by the Ontario Court of Appeal, in ***R.*** v. ***Donnelly***, 2016 ONCA 988, where it is stated in paras. 166 and 167 and 170 to 173:

> [166] As the *Nasogaluak* court makes clear, in appropriate cases, the statutory sentencing scheme in Part XXIII permits sentencing judges to consider not only the conduct of the offender, but also that of state actors whose conduct relates to the circumstances of the offence or the offender. For state conduct to be considered under Part XXIII, it need not amount to a *Charter* infringement. And so it was that the trial judge was entitled to take the conduct of state actors in relation to Donnelly into account under Part XXIII in determining a fit sentence.
>
> [167] However, in exercising his discretion under the sentencing scheme for which Part XXIII provides, a trial judge must exercise that discretion within the parameters of the *Criminal Code*. The sentence imposed must comply with the statutory minimums (absent a successful constitutional challenge to them) and other provisions, for example, s. 742.1(b), which

> prohibits conditional sentences of imprisonment for those convicted of offences which carry a minimum term of imprisonment.
>
> …
>
> [170] And if we were to assume that *Nasogaluak* actually decided, rather than left open, that s. 24(1) may authorize imposition of a sentence outside statutory limits, even in the absence of a constitutional challenge to the limit, Donnelly's case would fail. And it would fail for two reasons.
>
> [171] …Even a most generous reading of *Nasogaluak* would confine an outside-limits sentencing remedy to exceptional cases where the *Charter* infringement involves some particularly egregious misconduct by state agents in relation to the offence *and* the offender: *Nasogaluak*, at para. 64. this is a very high standard, and one not met here.
>
> [172] If the conduct in *Nasogaluak* -- an amalgam of repeated assaults, significant bodily harm and official concealment -- falls short of this threshold, what occurred here must likewise fail. …
>
> [173] Second, the *Nasogaluak* decision contemplates sentence reduction outside statutory limits as an exceptional remedy only where it "may be the *sole effective* remedy" (emphasis added) for the state misconduct that is to be remediated. As a result, the trial judge erred in law by imposing a conditional sentence, which was clearly outside statutory limits given that it was prohibited by the *Criminal Code*, in a situation in which the trial judge himself recognized that a reduction in sentence to a minimum one-year sentence would be an effective remedy to reflect the *Charter* violations he had found. …

[104] Therefore, the possibility of a reduction in sentence for the s. 9 *Charter* breach, regardless whether under s. 24(1) or solely pursuant to the principles of sentencing under ss. 718 - 718.2, appears to be limited in accordance with the statements in ***Nasogaluak*** about the ability of a sentencing judge to impose a sentence that does not comply with a mandatory minimum sentence set out in the *Code*.

[105] Therefore, assuming for the moment that Mr. Hendrie, if convicted, would be subject to a mandatory minimum fine of $2,000 and a one year driving prohibition, noting that there are no other aggravating circumstances beyond the high blood alcohol

readings, and being aware from his testimony that he does not appear to have any prior criminal convictions, or at least none were brought to my attention, (and I say this recognizing that there may well have been prior criminal convictions that were not put to Mr. Hendrie – I simply do not know), there would likely be little I could do on sentence that would provide a meaningful remedy, unless I were to find the circumstances exceptional or sufficiently egregious to fall within the narrow category for such a remedy as stated in ***Nasogaluak***.

[106] Given the limited knowledge that I have at the time I am making this decision, it would appear that for all practical purposes, the possibility of a reduction in sentence as a remedy for the s. 9 *Charter* breach in this case is potentially very limited if available at all.

[107] I am aware that the Crown's position, based on ***Nasogaluak***, should Mr. Hendrie be found guilty and a sentencing hearing is conducted, will likely be to oppose any reduction in sentence from a mandatory minimum that may be prescribed. Based upon the law as set out in ***Nasogaluak***, I expect that the submission in these circumstances would likely be successful.

[108] Based upon the jurisprudence that I have reviewed, and the circumstances of this case as I understand them, and to the extent that I have been made aware of them, I am satisfied that a remedy by way of a reduction in any sentence that would be imposed on Mr. Hendrie is likely not available in a meaningful way in this case

Section 24(2) of the Charter

[109] As a third option, I can also approach the matter by considering whether there is a remedy under s. 24(2) of the *Charter*, in particular the exclusion of the Certificate of a Qualified Technician regarding the breath samples.

[110] Section 24(2) of the *Charter* reads:

> 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.

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

[112] The Court in ***R***. v. ***Sakharevych***, 2017 ONCJ 669, referring to the decision in ***R***. v. ***Grant***, 2009 SCC 32, 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 the justice system and our democracy.

[113] 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.

[114] In this case, the evidence of the breath samples was evidence that was obtained prior to the breach of Mr. Hendrie's s. 9 *Charter* right. There was no causal connection between the *Charter* right and obtaining the evidence. The impaired driving investigation was completed several hours before the s. 9 breach occurred.

[115] In ***R.*** v. ***Pino***, 2016 ONCA 389, the Court stated that there need not be such a causal link, and that a breach that occurred after the obtaining of the evidence can nonetheless result in the exclusion of the evidence, so long as the breach is part of the entire transaction.

[116] ***Pino*** stands for the proposition for taking a broad and liberal approach to the factors that are to be considered when determining whether evidence can be excluded as a result of a breach of an individual's *Charter* rights.

[117] In ***R.*** v. ***Pileggi***, 2021 ONCA 4, at paras. 101 and 102, and 107 and 108, Trotter J.A. states:

> 101 Courts have taken a generous view of the "obtained in a manner" threshold. In *R. v. Pino*, 2016 ONCA 389, 337 C.C.C. (3d) 402, at para. 56, Laskin J.A. described this requirement as "just the gateway to the focus of s. 24(2) - whether the admission of the evidence would bring the administration of justice into disrepute." He further held that courts should examine the "'entire chain of events' between the accused and the police" and that the "requirement may be met where the evidence and

> the *Charter* breach are part of the same transaction or course of conduct": *Pino,* at para. 72. Finally, Laskin J.A. said that any connection between the breach and the discovered evidence may be "causal, temporal, or contextual, or any combination of these connections", as long as the connection is not "too tenuous or too remote": *Pino,* at para. 72. See also *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 35; and *Hobeika*, at para. 77.
>
> 102 Acknowledging this generous approach to the "obtained in a manner" requirement, the respondent relies on the following passage from *Strachan*, in which Dickson C.J. said, at pp. 1005-1006:
>
> > The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a *Charter* right, will be too remote from the violation to be "obtained in a manner" that infringed the *Charter*. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote.
> >
> > …
>
> 107 I agree with the respondent that there was no causal connection between the s. 10(b) infringements and the discovery of the evidence. However, it has long been the law, from *Strachan* onwards, that a causal connection is not required to pass through the s. 24(2) "gateway".
>
> 108 That said, the absence of any such connection remains a relevant consideration. In *R. v. Lenhardt*, 2019 ONCA 416, 437 C.R.R. (2d) 328, at para. 11, this court held: "There need not be a causal relationship to establish a case for exclusion under s. 24(2), but the absence of any such connection is a factor weighing against exclusion." See also *R. v. Do*, 2019 ONCA 482, at para. 12. …

[118] In para. 86 of ***Sakharevych*** the Court stated, referring to para. 72 of ***Pino***, 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.

[119] I agree with the approach taken in ***Pino***. If there is a *Charter* right without access to a remedy in the event of a breach of that right, then the right is somewhat hollow. Therefore, a consideration of the s. 24(2) availability as a remedy should be a broad and liberal one.

[120] The right, however, is of access to a remedy. Whether there should or should not be a remedy in a particular case, or what that remedy may be, depends on the circumstances of that case.

*Consideration of the Three **Grant** Factors*

Seriousness of the Breach

[121] 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*.

[122] In ***Pileggi***, at para. 115, in considering the first of the ***Grant*** factors, the Court distinguished between *Charter* breaches which were situation-specific, as compared to those which were systemic in nature. If a breach is systemic and institutional in nature, the breach is more serious.

[123] In the present circumstances, the s. 9 breach is not a one-off. Ruddy J. noted the systemic problems in the 2019 decision of ***Davidson*** in March, 2019, and subsequently in ***Golebeski***, with respect to ensuring there was an appropriate system in place for the release of detained individuals at the APU. It is apparent that the concerns of Ruddy J. as stated in ***Davidson***, were not addressed by the RCMP, notwithstanding her clear language that this was an issue that needed to be addressed. I appreciate that this incident in June, 2019, was only two plus months after the decision in ***Davidson*** was released. However, this is a small jurisdiction and certainly what Ruddy J. said in that case should easily have been communicated to the RCMP.

[124] This was not a case where the s. 9 breach occurred because of a lack of assessment by the RCMP of Mr. Hendrie's condition. This was a case of careless or negligent action due to the lack of an appropriate mechanism on the part of the RCMP to ensure Mr. Hendrie was released in a timely fashion at the intended time. This is the same systemic issue Ruddy J. was concerned with and opined on in ***Davidson***, and which therefore should have been addressed by the RCMP.

[125] As such, this places the seriousness of the breach in between minor or inadvertent infringements, and conduct that is wilful or reckless (***R.*** v. ***George***, 2021 NLPC 1320, [2021] N.J. No. 7 (N.L.P.C.), at para. 140).

[126] Given the systematic nature of the problem that resulted in Mr. Hendrie's s. 9 *Charter* right to be breached, and the lack of any indication that the RCMP have taken steps to rectify the problem, I find this breach to be serious and to militate in favour of exclusion of the evidence.

Impact of the Breach

[127] 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.

[128] Mr. Hendrie spent approximately five hours in custody after the time he could have first been released, from approximately 7:00 p.m. to midnight. I found that there was no breach of Mr. Hendrie's s. 9 *Charter* right in the first two periods of detention, although I felt that perhaps the second period of detention may have been avoidable. However, the impact of the additional three and two-thirds unwarranted hours in custody was compounded by the approximately five previous hours in custody.

[129] There is nothing to show that Mr. Hendrie was subjected to any poor treatment by either the RCMP, or by the Corrections Officers at the APU.

[130] This is not a minor intrusion into the liberty interests of Mr. Hendrie, with a minor impact. Neither, however, is it a major intrusion with a major impact.

[131] The fact that Mr. Hendrie was sleeping through much of this time does not significantly mitigate the breach. There was likely not much more that he could do in cells. I expect that he would rather be sleeping in his own bed rather than in cells where he was awakened and taken home at approximately 4:00 a.m.

[132] In assessing the impact of the s. 9 breach upon Mr. Hendrie, I find that it is moderate, somewhere between those cases where the impact is minimal, and those where it is significant.

[133] I find that this aspect of the ***Grant*** consideration is somewhat neutral, weighing on its own at best only slightly in favour of the exclusion of the evidence of the breath samples.

Society's Interest in Adjudication on the Merits

[134] This 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* [[1987] 1 SCR 265] 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. (Emphasis mine)

…

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. (Emphasis mine)

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 (para. 226). 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" (para. 51). 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" (p. 282). 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.

[135] 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, at least with respect to the s. 320.14(1)(b) charge.

[136] The breach of Mr. Hendrie's s. 9 *Charter* right also occurred several hours after the evidence had been obtained.

[137] Impaired driving is a serious and widespread offence, which has resulted in a series of legislative amendments prescribing harsher penalties for impaired driving offences, in an attempt to deter individuals from committing these offences and to protect society.

[138] Fortunately, in this case it is an impaired simpliciter, and not an impaired where through an accident, death or bodily harm resulted.

[139] I find that a consideration of this factor leans somewhat in favour of admission of the evidence.

Impact upon the Public Confidence in the Administration of Justice

[140] 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, be taken into account.

[141] To repeat what was stated in ***Grant*** in para. 84, "Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus". In paragraph 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.

[142] In ***R.*** v. ***Thompson***, 2020 ONCA 264, 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.

[143] As stated in ***R.*** v. ***Ferose***, 2019 ONSC 1052, at paras. 35 and 37:

> 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.
>
> …
>
> 37 Importantly, the objective of s. 24(2) is not to rectify police misconduct, but rather, to preserve public confidence in the law.

[144] In ***George***, the Court stated in paras. 137 and 140:

> 137 More recently, in ***R. v. Le***, 2019 SCC 34, the Supreme Court indicated that it "is not necessary that both of these first two lines of inquiry support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute. …
>
> …
>
> 140 …
>
> 9. …Rather, a trial judge must consider "all the circumstances" and "place the police conduct along a spectrum of fault, weigh the impact of the breach on the accused's rights, and consider society's interest in the adjudication of the case, including the reliability of the evidence" (***Paradis***, at paragraph 19 and ***R. v. Moyles***, 2019 SKCA 72, at paragraph 104); and
>
> …

[145] One of the difficulties in turning to s. 24(2) to provide a remedy by excluding the evidence of the breath samples, is that there no longer remains a case for the Crown on the s. 320.14(b) charge. In effect, I will have provided a remedy no different for practical purposes than if I had issued a judicial stay. This said, the test and considerations for a judicial stay and a s. 24(2) analysis are different.

[146] And as Gorman J. stated in ***George***, in regard to the s. 24(2) analysis that:

> 129 …In these circumstances, exclusion of the evidence would only serve to indirectly punish the offending officers, rather than aligning with the overall purpose of s. 24(2) – vindicating the long-term repute of the criminal justice system…

[147] Were this to be a one-off overholding, the case for exclusion of the evidence of the breath samples would not serve the long-term interests of justice. Rather it would be more in the line of "punishing" the RCMP for this one particular incident, with no backdrop of trying to correct a systemic issue that was, or should have been, brought to the attention of the RCMP so that future such breaches do not occur.

[148] However, here there was an unaddressed systemic issue of overholding as a result of inadequate RCMP policies and procedures with respect to ensuring the timely release of individuals detained at the APU, who must remain in custody pending further RCMP action.

[149] This situation was noted in ***Davidson***, and in my opinion, steps should have been taken to correct the situation.

[150] In assessing the impact of exclusion of the evidence of the breath samples on the administration of justice and the public perception, I also consider the concept of there likely being no other practical remedy for a breach of a *Charter* right.

[151] Were I to have the ability to reduce Mr. Hendrie's below a mandatory minimum sentence, it could not be said that there was the lack of a meaningful remedy for the s. 9 *Charter* breach. However, without of course deciding whether such a remedy exists, the weight of jurisprudence would seem to indicate that I cannot do so, except in particularly egregious circumstances, which is not the case here.

[152] I would think that the public perception of the administration of justice would be negatively impacted by the lack of a meaningful remedy for the s. 9 *Charter* breach in this case.

[153] I think this negative impact would be enhanced because of the prior judicial admonition in the Yukon about the systemic problems that have contributed to such overholdings of individuals in RCMP custody in the past, and what appears to be the failure of the RCMP to heed these admonitions and take any action to rectify them.

[154] In my opinion, in a balancing of the three ***Grant*** factors, the systematic flaws that contributed to the s. 9 *Charter* breach in Mr. Hendrie's case are sufficiently significant that the impact upon the administration of justice requires that the evidence of the breath samples be excluded. Therefore, the Certificate of a Qualified Technician and Subject Test Samples are excluded from admissibility at trial.

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COZENS T.C.J.