Citation: *R. v. Burdek*, 2021 YKTC 41

Date: 20211018
Docket: 20-00678
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

JONATHAN DUANE BURDEK

Appearances:
Sarah Bailey — Counsel for the Crown
Luke Faught — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Jonathan Burdek is charged with offences contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*, for impaired operation of a conveyance and operating a conveyance with a blood alcohol content equal to or exceeding 80 mg/% on December 10, 2020, at Whitehorse, Yukon.

[2] Mr. Burdek came to the attention of Cst. Talbot, the investigating officer, during the course of an unrelated investigation. Mr. Burdek was located sleeping behind the wheel of his truck with the engine running, in the parking lot at the intersection of the Alaska Highway and the South Klondike Highway, commonly referred to as the Carcross Cut-off. This led to an impaired investigation wherein Mr. Burdek ultimately provided two samples of his breath, both exceeding the legal limit.

[3] Mr. Burdek has filed a Notice of *Charter* Application, seeking exclusion of all RCMP observations, the WatchGuard audio/video footage, and the breath sample readings, including the Certificate of Qualified Technician. The Notice alleges breaches of ss. 8, 9, 10(a), and 10(b) of the *Charter* as follows:

1. Unlawful search and seizure based on insufficient grounds to make the breath demand contrary to s. 8;

2. Arbitrary detention based on insufficient grounds for investigative detention contrary to s. 9;

3. Failure to promptly inform the accused of the reasons for detention contrary to s. 10(a); and

4. Failure to administer rights without delay and breach of the duty to hold off contrary to s. 10(b).

Facts

[4] The facts are, largely, not in dispute, particularly as the majority of the interactions relevant to the *Charter* application were video and audio recorded. As an aside, I would note that Cst. Talbot's approach as it related to the recording was very effective, as he was careful to verbalize his visual observations at any point where they may not be captured by the video, such as Mr. Burdek's actions and reactions while still seated in his vehicle.

[5] That being said, a brief overview of the facts is that shortly after midnight on December 10, 2020, Cst. Talbot and another RCMP member were called to the

Carcross Cut-off area with respect to a report of domestic violence, specifically, an assault with a weapon, with the victim having allegedly been struck in the head with a hammer. Both officers attended in separate vehicles.

[6] The call originated from an area across the Alaska Highway from the Carcross Cut-off, which would appear to be at or near the neighbourhood of Golden Horn. Cst. Talbot's partner arrived at the location of the complaint slightly before Cst. Talbot and radioed to advise him that the male victim had left the residence. Cst. Talbot decided to patrol the area to see if he could locate the victim.

[7] At approximately 00:50 hours, Cst. Talbot observed a blue Nissan Titan truck parked, with the motor running and the running lights on, located in the parking lot across the Alaska Highway at the Carcross Cut-off. Because of its proximity to the domestic violence complaint, Cst. Talbot decided to approach the vehicle to see if the victim was either in the vehicle or had approached the vehicle seeking assistance.

[8] Cst. Talbot activated his emergency lights to initiate a traffic stop, which he explained was to let the people inside the vehicle know that he was a police officer, and to make it easier for his partner to locate him in case he required assistance, especially as it was nighttime.

[9] Cst. Talbot walked to the driver's window of the truck and noted a man, later identified as Mr. Burdek, slumped down in the driver's seat. The officer could see a number of beer cans in the center console. At this point, the officer says he was still investigating the original call, but recognized the possibility that this situation was completely unrelated.

[10] Cst. Talbot retrieved his lapel mic from his police vehicle, and then returned to the truck. He knocked on the window and said, “Hello sir”, but there was no response or movement. The door was ajar, Cst. Talbot opened it, and continued to make efforts to awaken the individual using verbal cues to no effect. Ultimately, Cst. Talbot did a trap squeeze to try to get a pain response. Mr. Burdek gave a slight grimace and a slow wave of his hand as if to brush the officer’s hand away. He slowly opened his eyes and gave Cst. Talbot the middle finger. His movements were described as slow, lethargic, and uncoordinated. Mr. Burdek then exhaled, and Cst. Talbot says that he noted a smell of liquor on Mr. Burdek’s breath that was strong enough to make the officer’s stomach turn.

[11] At this point, Cst. Talbot formed the opinion that Mr. Burdek was impaired by alcohol and arrested him for impaired operation of a motor vehicle.

[12] When Mr. Burdek got out of the vehicle, Cst. Talbot says he noted poor balance, and that his speech was very slurred and very drawn out, as if Mr. Burdek was having difficulty forming thoughts. Cst. Talbot escorted Mr. Burdek back to the police vehicle, securing him in the back seat.

[13] Once Mr. Burdek was lodged in the police vehicle, Cst. Talbot returned to the blue truck on a couple of occasions to search for various items and to take photographs. Between the first and second search, Cst. Talbot confirmed with Mr. Burdek that he was under arrest for impaired operation of a conveyance. Cst. Talbot read Mr. Burdek his right to counsel, the police warning, and the demand for breath samples.

[14] Ultimately, Cst. Talbot departed the Carcross Cut-off, with Mr. Burdek, 30 minutes and 12 seconds after the WatchGuard video was initiated. On the drive to the Whitehorse Detachment, there was conversation between Mr. Burdek and Cst. Talbot, primarily regarding why Mr. Burdek was "pulled over", his right to counsel, and the breath sample demand.

[15] At the Detachment, Mr. Burdek provided two samples of his breath. The first sample, taken at 2:10 a.m. registered 230 milligrams percent, and the second sample, taken at 2:31 a.m., registered 220 milligrams percent.

Issues

[16] As indicated, Mr. Burdek's Notice of *Charter* Application raises several issues for determination on the *voir dire*:

1. Did Cst. Talbot have reasonable grounds to make the demand? (s. 8);

2. Did the initial stop of Mr. Burdek amount to an arbitrary detention? (s. 9);

3. Was Cst. Talbot required to advise Mr. Burdek of the initial grounds for the detention? (s. 10(a));

4. Was there unreasonable delay in implementing Mr. Burdek's rights, and did Cst. Talbot fail to hold off questioning Mr. Burdek before implementation of Mr. Burdek's right to counsel as required? (s. 10(b)); and

5. Should Mr. Burdek be successful in establishing a breach, what, if any, remedy would be appropriate?

Section 8: Reasonable Grounds to make the Demand

[17] Defence counsel argues, though not strenuously, that Cst. Talbot did not have reasonable grounds to make the breath demand and as such the taking of breath samples from Mr. Burdek amounted to an unreasonable search and seizure contrary to s. 8 of the *Charter*.

[18] To make a breath demand under s. 320.28(1), a peace officer must have reasonable grounds to believe that a person has: (1) operated a conveyance; and (2) done so while the person's ability to operate the conveyance was impaired to any degree by alcohol. The officer's grounds must be both subjectively held and objectively reasonable.

[19] With respect to the first requirement, operation of a conveyance, this is generally established by means of an observed driving pattern. In this case, there was no actual driving observed, making this what is commonly referred to as a case of care and control. Operation is therefore established by means of legislative application through the definition of "operate" in s. 320.11 which reads:

> …
>
> "*operate* means"
>
> (a) in respect of a motor vehicle, to drive it or <u>to have care or control of it</u>; [Emphasis added]

[20] Section 320.35 includes a presumption of operation where a driver is in care and control as follows:

> In proceedings in respect of an offence under section 320.14 or 320.15, if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion.

[21] The evidence in this case clearly places Mr. Burdek in the driver's seat. In the circumstances, Cst. Talbot's subjective belief that Mr. Burdek was operating a conveyance was, through operation of law, objectively reasonable.

[22] The real question is whether the indicia observed by Cst. Talbot, upon which he based his opinion, is sufficient to establish that his subjective belief that Mr. Burdek was both impaired and that his ability to operate a motor vehicle was impaired by alcohol was objectively reasonable.

[23] Cst. Talbot summarized his grounds as follows:

- Very slow uncoordinated movements;
- Not spontaneously responsive to Cst. Talbot's presence and not responsive to repeated verbal stimulus;
- Took a very strong trap squeeze for Cst. Talbot to get a reaction from Mr. Burdek;
- Poor social filter by giving Cst. Talbot the middle finger;

- Intense odour of liquor on his breath strong enough to turn Cst. Talbot's stomach; and

- Numerous cans of liquor in the vehicle both open and closed, and within easy reach of the driver's seat.

[24] While Cst. Talbot also observed issues with balance and very slurred, drawn-out speech, these observations were noted after he arrested Mr. Burdek for impaired operation, and, therefore, cannot be considered in assessing the objective reasonableness of Cst. Talbot's grounds at the time he formed his opinion.

[25] Defence counsel raises two arguments in support of his assertion that Cst. Talbot did not have objectively reasonable grounds to make the demand: (1) the movements observed by Cst. Talbot in forming his belief that Mr. Burdek was impaired by alcohol are equally consistent with someone who has just been woken up; and (2) the officer noted no indicia that Mr. Burdek's ability to operate a motor vehicle was impaired by alcohol to any degree.

[26] Counsel relies on the summary conviction appeal decision of *R. v. Baltzer*, 2011 ABQB 84, out of the Alberta Court of Queen's Bench. The appellant had been stopped for not having operable taillights and the investigating officer noted him to exhibit confusion, a heavy odor of liquor, glassy bloodshot eyes, and fumbling with documents. After a review of relevant case law, Graesser J. notes that the Supreme Court of Canada has set the bar relatively low regarding the grounds required to make the demand:

> 34 It appears from my reading of ***Shepherd*** that the Supreme Court has set the bar quite low for objective standards. There, it was subjectively and objectively reasonable for the police officer to make a breath demand of a tired, lethargic, slow and deliberate moving red-eyed man whose breath smelled of alcohol, after he had been stopped for going through a red light, was speeding and did not stop for a police car with its sirens activated.
>
> 35 The accused in ***Shepherd*** did not smell "strongly" of alcohol, nor was the smell of alcohol "gutteral". He did not fumble with documents. His speech was not slurred. His eyes were red, but not bloodshot or glassy or glossy. He did not seem confused. He did not fail any sobriety tests by stumbling or weaving. His driving pattern was unlawful, but not marked by a lack of coordination. He did not admit to drinking any particular quantity, or at all.

[27] The appeal judge, in *Baltzer*, notes the challenge for trial judges in objectively assessing indicia, particularly where "…most things can be explained by things other than alcohol consumption, except for the smell of alcohol on the breath and admissions made by the driver. …" (para. 37). The appeal judge concludes that:

> 38 Impairment is objectively found in matters such as coordination, comprehension and a poor (but not simply illegal) driving pattern. When there are objective findings of a lack of coordination, a lack of comprehension or a poor driving pattern coupled with evidence of alcohol consumption, the dots are connected and there is an objective basis to conclude that the driver's ability to drive is impaired by alcohol. …

[28] As noted, defence counsel firstly argues that Cst. Talbot had insufficient indicia to form objectively reasonable grounds to believe that Mr. Burdek was impaired by alcohol, as his movements were equally consistent with someone who is just waking up.

[29] In my view, the extreme difficulty in rousing Mr. Burdek when coupled with the overpowering smell of liquor on his breath and the presence of numerous cans of beer in close proximity combine to make it entirely reasonable for Cst. Talbot to conclude that

the issues with Mr. Burdek's coordination and apparent confusion upon waking related to alcohol impairment rather than sleep.

[30] In assessing whether Cst. Talbot's belief that Mr. Burdek's ability to operate a motor vehicle was impaired by alcohol is objectively reasonable in circumstances where there is no observed driving pattern, I am mindful of the Alberta Court of Appeal's decision in the oft-quoted case of *R. v. Andrews*, 1996 ABCA 23. The decision involved the evidentiary requirements to establish impaired ability to drive at trial to the much higher standard of proof beyond a reasonable doubt and held that actual erratic driving was not required:

> 23 Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by Sissons C.J.D.C. in McKenzie, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired. …

[31] Indeed, it was essentially this inferential approach that was taken by Graesser J. in *Baltzer* in upholding the trial judge's findings with respect to the objective reasonableness of the officer's grounds to make the breath demand, in the absence of erratic driving. At para. 42, the appeal judge noted:

> The learned trial judge's factual findings were that Mr. Baltzer was confused and fumbled twice with his documents. That is some evidence of impairment of driving skills (comprehension and coordination). The trial judge also accepted the officer's observations that Mr. Baltzer's breath smelled strongly of alcohol. Mr. Baltzer's slurred speech and droopy and bloodshot eyes are also consistent with alcohol consumption. He thus

> found that there was evidence of both impairment and alcohol consumption. I find no error of law in the trial judge's conclusion. …

[32] I accept Cst. Talbot's evidence that Mr. Burdek's movements were very slow and uncoordinated upon being roused. I further find that Mr. Burdek exhibited apparent confusion regarding the circumstances in seemingly being unaware that he had, after much effort, been roused by a police officer who he nonetheless gave the middle finger. Again, the extreme difficulty with waking Mr. Burdek, the intense odour of liquor on his breath, and the multitude of beer cans in the cab of Mr. Burdek's truck, satisfy me that it was reasonable for Cst. Talbot to believe that Mr. Burdek's lack of coordination and apparent confusion related to impairment by alcohol rather than sleep. Noting the issues with both comprehension and coordination plus clear evidence of consumption, I am also satisfied that it was reasonable for Cst. Talbot to infer that Mr. Burdek's ability to operate a motor vehicle was impaired by alcohol.

[33] In the result, I am satisfied that Cst. Talbot had both subjectively and objectively reasonable grounds to make the breath demand. Accordingly, defence has not persuaded me that there was any breach of s. 8 of the *Charter* in this regard.

Section 9: Arbitrary Detention

[34] Turning to the question of whether Mr. Burdek was arbitrarily detained contrary to s. 9 of the *Charter*, the evidence with respect to detention was clear. On cross-examination, Cst. Talbot agreed that Mr. Burdek was detained at the time Cst. Talbot pulled in behind the blue truck and activated his police lights. Cst. Talbot further agreed that he effected the detention solely because of the proximity of the vehicle to the

location of the domestic assault under investigation and his search for the missing victim.

[35] In assessing the circumstances before me, I must say that I had real questions about whether Cst. Talbot approaching Mr. Burdek's vehicle to seek information about the missing victim would even amount to a detention in law given that the occupant was not suspected to be involved in any criminal activity at that point.

[36] In *R. v. Mann*, 2004 SCC 52, at para. 19, the Supreme Court recognized that:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. …

[37] The Supreme Court affirmed and expanded on the law in relation to detention and the purpose of s. 9 of the *Charter* in *R. v. Le*, 2019 SCC 34, noting at para. 25 that:

> Section 9's prohibition of "arbitrary detention" is meant to protect individual liberty against unjustified state interference. Its protections limit the state's ability to impose intimidating and coercive pressure on citizens without adequate justification (*Grant*, at para. 20). …

[38] At para. 27, the Court went on to say:

> Having said that, not every police-citizen interaction is a detention within the meaning of s. 9 of the *Charter*. A detention requires "significant physical or psychological restraint" (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19; *Grant*, at para. 26; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 3). Even where a person under

> investigation for criminal activity is questioned, that person is not necessarily detained (*R. v. MacMillan*, 2013 ONCA 109, 114 O.R. (3d) 506, at para. 36; *Suberu*, at para. 23; *Mann*, at para. 19). While "[m]any [police-citizen encounters] are relatively innocuous, ... involving nothing more than passing conversation[,] [s]uch exchanges [may] become more invasive ... when consent and conversation are replaced by coercion and interrogation" (Penney et al., at pp. 84-85). In determining when this line is crossed (i.e. the point of detention, for the purposes of ss. 9 and 10 of the *Charter*), it is essential to consider all of the circumstances of the police encounter. …

[39] In *R. v. Grant*, 2009 SCC 32, the Supreme Court of Canada quoted from its decision in *Dedman v. the Queen*, [1985] 2 S.C.R. 2, at para. 21:

> More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), 32 O.R. (2d) 641, at p. 653):
>
> > Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless ... [he] arrests him ... .

[40] In light of these authorities, and given the very limited infringement of liberty that would result to a potential witness approached by the police to answer a few questions, I would have been hard-pressed to conclude that Cst. Talbot's stated intention of approaching Mr. Burdek's vehicle to seek information on the missing victim would amount to a detention engaging s. 9 of the *Charter*. However, the evidence of Cst. Talbot, on cross-examination, was unequivocal. In his mind, Mr. Burdek was detained and not free to leave once Cst. Talbot activated his emergency lights. There is no basis to reject his evidence on this point. Accordingly, in the circumstances, this interaction must be assessed as a detention, requiring a determination of whether

Cst. Talbot had the requisite reasonable grounds to exercise the common law power to effect an investigative detention. It should be noted, that while Cst. Talbot referred to initiating a traffic stop by turning on his emergency lights, nothing in his evidence suggested that the detention was effected for any legitimate purpose under the *Motor Vehicles Act*, RSY 2002, c. 153. Accordingly, the assessment of reasonable grounds need not consider the validity of the detention as a "traffic stop".

[41] The law, as it relates to investigative detentions, is set out in *Mann*, in which the Supreme Court of Canada held:

> 34 The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the [page77] interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

[42] The Court summarized the investigative detention power as requiring "…reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. …" (para. 45). Any detention must be of brief duration and conducted in a reasonable manner.

[43] Defence argues that at the point of detention, Cst. Talbot did not have the requisite grounds to effect an investigative detention, rendering the detention arbitrary. Defence relies on the cases of *R. v. Hawkins*, 2012 ONCJ 419 and *R. v. Liang*, 2007 YKTC 18.

[44] In *Hawkins*, the accused was observed by an officer in the midst of a traffic stop to make three left turns, which made the officer suspicious and led him to stop the vehicle to find out why. Maresca J., of the Ontario Court of Justice, found a breach of s. 9 on the basis the only reason for the stop was curiosity, concluding that a "hunch" is not sufficient grounds to stop a vehicle.

[45] In *Liang*, I made similar findings in relation to a vehicle that was stopped by an officer for the purposes of identifying the occupants as the officer believed the vehicle to be connected to a house in the area suspected to be involved in drug activity. Given the unreliability of the evidence linking the vehicle and its driver to the house in question, I concluded there was no clear nexus warranting the investigative detention.

[46] There are factual distinctions between these two cases and the case at bar, most notably the fact that, in both, the vehicles were pulled over rather than parked and the occupants were suspected to be involved in criminal activity.

[47] Crown argues that Cst. Talbot did have grounds to detain Mr. Burdek given the proximity of the vehicle to the domestic assault. Crown further argues that Cst. Talbot would have had the grounds even in the absence of the domestic assault to approach a vehicle parked in a strange place with the engine running, in the middle of the night. With respect to this latter argument, I would disagree that the Carcross Cut-off would be

a strange place for a vehicle to be parked. Furthermore, Cst. Talbot made absolutely no mention that the fact the truck was running at night, parked in that particular area, had anything to do with the detention. Accordingly, I would not find this to be a relevant consideration in assessing his grounds for the detention.

[48] Crown relies on the Yukon case of *R. v. Fotheringham*, 2016 YKTC 70, a decision of Cozens J. The facts of that case involved the police responding to a call in Riverdale regarding a possible intruder. En route, the police observed a truck parked with its headlights and brake lights on and music blaring. The police stopped to investigate; locating the accused slumped over in the middle console inside the vehicle. Efforts were made to rouse the occupant due to concern for his well-being. When met with no response, one of the officers broke the driver's window. This led to an impaired driving investigation when indicia of impairment were noted. In the decision, Cozens J. remarked that he found "…the police officers were acting within their lawful authority when they approached Mr. Fotheringham's vehicle to investigate what could be reasonably assessed as being a somewhat unusual circumstance. …" (para. 44).

[49] While this case is factually very similar to the case at bar, it is notable that defence counsel took no issue with the police officer's actions in approaching the vehicle and breaking the window to gain entry. Accordingly, there was no s. 9 argument made before Cozens J.

[50] In Mr. Burdek's case, the grounds for detention to be considered are limited to what was in Cst. Talbot's mind at the time he effected the detention by turning on his emergency lights. Essentially, Cst. Talbot was aware that a male victim who had

reportedly been hit in the head with a hammer had left a residence on the opposite side of the Alaska Highway from the Carcross Cut-off. Cst. Talbot had no information about the direction the victim had travelled, or whether the victim was on foot or in a vehicle. Furthermore, timing of the victim's departure was unclear, but could have been upwards of 30 minutes before Cst. Talbot began his patrols looking for the victim, making any temporal connection somewhat limited.

[51] Accordingly, the only link between Mr. Burdek's truck and the missing victim was the fact the truck was parked in the general vicinity of the location of the assault with a weapon. There is no other information upon which to assess the nexus, if any, between Mr. Burdek and the domestic assault and missing victim.

[52] In the circumstances, it is difficult to conclude that mere general proximity is sufficient to establish "reasonable grounds to suspect" that Mr. Burdek was connected to the domestic assault, or that his detention was necessary as required by the investigative detention test set out in *Mann*. There is, therefore, no option but to conclude that Mr. Burdek's detention was an arbitrary one contrary to s. 9 of the *Charter*. Whether it is a breach warranting exclusion, however, is a different matter.

Section 10(a): Advising of Grounds for Detention

[53] In a related argument, defence argues that Mr. Burdek's right under s. 10(a) of the *Charter* to be informed of the reason for his detention was breached as Cst. Talbot did not advise Mr. Burdek that he was initially detained in relation to the domestic assault investigation until they were en route to the detachment. I would echo my earlier comments about my uncertainty about whether these circumstances gave rise to

a detention triggering s. 10(a), but, again, conclude that I must treat it as such due to Cst. Talbot's evidence.

[54] Section 10(a) reads:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;

[55] Defence counsel argues that Mr. Burdek's rights under s. 10(a) were breached as Cst. Talbot did not advise Mr. Burdek of the initial reason for detention until more than 30 minutes after the officer effected the detention by turning on his emergency lights, which falls well short of anyone's definition of "prompt". Defence argues that "prompt" in this case would have been the point at which Mr. Burdek was conscious and in a position to be told of the reasons for his initial detention.

[56] For two reasons, I am not satisfied that there was a breach of s. 10(a) in the circumstances of this case.

[57] Firstly, it is important to be mindful of the purposes of s. 10(a) in determining whether there has been a breach. In *R. v. Evans*, [1991] 1 S.C.R. 869, the Supreme Court of Canada defined the purpose, at para. 31, as follows:

> The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not [page887] know the reasons for it: R. v. Kelly (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in R. v. Black, [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a

> purposive manner, regard must be had to the double rationale underlying the right.

[58] Thus, s. 10(a) is about ensuring that an accused person understands their jeopardy and can make informed decisions about submitting to detention and exercising their right to counsel. In this case, the original reasons for detention did not place Mr. Burdek in any jeopardy as he was not suspected of any criminal behaviour at that point, nor was he sufficiently conscious to be advised of the reasons for the detention at that time, and he could not, therefore, have refused to submit to the detention or exercised his right to counsel in any event. Once he was sufficiently aware to be advised, the reasons for detention had clearly changed to the point that he was then facing actual jeopardy in relation to the impaired driving investigation, was clearly advised of the reasons for his then detention in compliance with s. 10(a).

[59] It makes absolutely no logical sense to suggest that there is any rational reason that would require Cst. Talbot to advise Mr. Burdek of his original reasons for approaching the vehicle.

[60] Secondly, even if a technical application of s. 10(a) would require Mr. Burdek to be advised immediately of the original reason for the detention, I am of the view that Mr. Burdek was, in fact, given enough information about the reasons for his initial detention at a sufficiently early opportunity to meet the requirements of s. 10(a).

[61] In *Evans*, McLachlin C.J. made it clear that s. 10(a) does not require a formulaic approach to advising an accused of the reasons for detention. At para. 35, she notes:

> When considering whether there has been a breach of s. 10(a) of the Charter, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b).

[62] In *Evans*, what began as a drug investigation became much more when the police came to suspect the accused of killings. Even though there was no express discussion with respect to this change, McLachlin C.J. found that the requirements of s. 10(a) had been met based on the following exchange:

> 33 …In fact the police informed the appellant that he was a suspect in the killings shortly after their suspicion of him formed, as the following portion of the interview discloses:
>
> > JS: (LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.
> >
> > WE: Yeah but …. why are you asking me this? I never killed no one …. I don't know who did. It's none of my business.

[63] In the case at bar, Cst. Talbot arrested Mr. Burdek for impaired operation at two minutes and 45 seconds into the WatchGuard video. Shortly thereafter, at five minutes and seven seconds into the video, Cst. Talbot is heard to tell Mr. Burdek, "so you're not the guy I was originally out here looking for because someone called the police". In my view, this statement is sufficient, in light of the *Evans* decision, to meet the requirements of s. 10(a) in relation to the initial detention. From this, Mr. Burdek could reasonably be supposed to understand that the initial detention resulted from a call to police that had

nothing whatsoever to do with him personally. In my view, that is the substance of what Mr. Burdek needed to be told in relation to the initial detention. The specifics of the domestic violence investigation are really immaterial to Mr. Burdek's exercise of any rights he would have in relation to the initial detention.

Delay

[64] Turning to the question of delay, in the defence's Notice of *Charter* Application, defence argues that there was a failure to administer Mr. Burdek's right to counsel without delay contrary to s. 10(b). Furthermore, defence counsel argued that Cst. Talbot failed to make the breath demand as soon as practicable as required.

[65] Crown takes the position that any delay was adequately explained by the officer and was reasonable in all the circumstances.

[66] An overview of the timing of events is critical in assessing whether there was any breach of Mr. Burdek's rights as a result of unreasonable delay. For these purposes, I will, once again, for ease of reference, rely on the time counter on the WatchGuard video, expressed in minutes and seconds; rather than the hour of day.

[67] The timing of events is as follows:

- 00:35 emergency lights are activated to initiate traffic stop;
- 1:07 Talbot walks up to driver's window and observes Burdek slumped down in driver's seat;
- 1:15 Talbot returns to his vehicle to retrieve lapel mic;

- 1:31 Talbot knocks on window and makes verbal and physical efforts to rouse Burdek;

- 2:45 Talbot places Burdek under arrest for impaired operation of a vehicle;

- 3:43 Talbot cuffs and searches Burdek;

- 5:36 Talbot places Burdek in the police vehicle;

- 6:10 Talbot says, “I’ll be back to read you your rights in a second”;

- 6:20 Talbot brushes snow off the licence plate and calls in for a check;

- 6:40 Talbot looks in vehicle;

- 6:55 Talbot calls for a tow truck;

- 7:50 Talbot goes to other side of vehicle and looks in other side of vehicle;

- 8:20 Talbot returns to the police vehicle and asks Burdek about the keys;

- 9:30 Talbot asks Burdek his name, spelling, and date of birth;

- 10:40 Talbot calls in for a police check (receiving a response at 12:30);

- 13:20 Talbot says, “I’m just finishing a couple of notes then I’m going to read you your rights”;

- 15:05 Talbot has a conversation with his partner indicating he may need him for breath samples;

- 17:20 Talbot confirms with Burdek that he is under arrest for impaired operation of a conveyance;

- 17:50 Talbot reads Burdek his rights to counsel;

- 18:48 Burdek indicates his desire to speak to a “free lawyer”;

- 19:12 Talbot reads the police warning;

- 19:30 Talbot reads the breath demand;

- 20:06 Talbot has the following exchange with Burdek:

    - Cst. T: **“**your cell phone still back there, I’m going to grab that for you; do you happen to remember what you did with the ignition key for this?”;

    - Mr. B: “it’s a fob”;

    - Cst. T: “do you know where that fob is right now?”;

    - Mr. B: “it’s in the truck”;

    - Cst T: “do you remember where in the truck”;

    - Mr. B; “nope”;

- Cst. T: “do you have any house keys in there that you know where they are that I can grab for you?”;

- Mr. B: “no, it’s all good”; and

- Cst. T: “I’m going to grab your phone at least, because that I do know where it is**”;**

- 21:26 Talbot returns to the vehicle, photographs the licence plate, finds an empty wallet, rustles through the numerous beer cans, possibly takes photographs of the cans, and finally finds the fob;

- 26:39 Talbot places the fob behind the gas cap cover for the tow truck driver;

- 27:19 Talbot returns to the police vehicle and advises dispatch where the fob is; and

- 30:12 Talbot departs the Carcross Cut-off to head to the RCMP Detachment.

[68] Based on the timing of events, the question of delay arises on two fronts: firstly, delay between the arrest and reading Mr. Burdek his right to counsel; and secondly, delay between the arrest and making the breath demand.

Delay Informing of Right to Counsel

[69] With respect to the first of these, delay in advising of right to counsel, s. 10(b) reads:

> 10. Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

[70] The right to counsel includes both informational and implementational components. The informational component requires an accused person to be advised of their right to counsel. Even though the reference to “without delay” is included in the first half of the clause in relation to retaining and instructing counsel, s. 10(b) has long been interpreted as requiring that an accused also be informed of their right to counsel without delay.

[71] In *R. v. Suberu*, 2009 SCC 33, at para. 2, the Supreme Court of Canada summarized their findings with respect to the timing of the informational component 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*.

[72] In *R. v. Debot*, [1989] 2 S.C.R. 1140, the Supreme Court of Canada made the following comments at para. 42 about exceptions to the “without delay” requirement based on officer safety:

> Section 10(b) also instructs the police to inform a detainee of his or her rights to counsel "without delay". As I have stated elsewhere, the phrase "without delay" does not permit of internal qualification: R. v. Strachan; R. v. Simmons; R. v. Jacoy. As I pointed out in R. v. Jacoy and R. v. [page1164] Strachan, the phrase does not mean "at the earliest possible convenience" or "after police 'get matters under control'", or even "without reasonable delay"; to which I add here that "without delay" likewise does not mean "after police have had a chance to search the suspect". In R. v. Strachan, I suggested at p. 1013 that there may be "situations in which the police for their own safety have to act in the heat of the moment to subdue the suspect and may be excused for not pausing to advise the suspect of his rights and permit him to exercise them ...." See also R. v. Manninen, [1987] 1 S.C.R. 1233. In my view, time spent in legitimate self-protection is not an example of the "delay" which has to be justified within a s. 10(b) analysis. The police are not deliberately forestalling advising a suspect of his or her s. 10(b) rights when they could be going ahead. They are not expected to go ahead with undue risk to their own lives or safety. …

[73] In *R. v. La*, 2018 ONCA 830, the Ontario Court of Appeal held that concerns with respect to safety must be "…circumstantially concrete. General or theoretical concern for officer safety and destruction of evidence will not justify a suspension of the right to counsel…" (para. 39).

[74] A number of cases have considered delays in informing of the right to counsel in circumstances similar to those before me.

[75] In *R. v. Pillar*, 2020 ONCJ 394, there was a delay of eight minutes between arrest and informing the accused of his right to counsel. In the intervening period, the officer cuffed the accused, searched him, took him to the police vehicle, then ran his licence on the onboard computer. The trial judge concluded that even if handcuffing and searching were necessary for officer safety, any safety concern ended when the accused was handcuffed. Furthermore, cuffing and searching the accused would have required no more than two and one-half minutes. The trial judge held that the remaining

activities of taking the accused to the police vehicle and running the licence check were not necessary for officer or public safety, and concluded that the remaining delay of five and one-half minutes was a breach of the s. 10(b) right to be informed immediately of the right to counsel.

[76] In *R. v. Hawkins*, 2013 ONCJ 115, (a different *Hawkins* from the case filed by the defence), there was a delay of 12 minutes between arrest and informing the accused of the right to counsel. Activities over the 12 minutes included allowing the accused to retrieve personal belongings from the vehicle, cuffing the accused and placing him in the police vehicle, and explaining the tow procedure to another officer. The trial judge concluded that while the officer was not acting in bad faith, neither retrieving belongings nor explaining the tow procedure were justifiable reasons for delaying the right to counsel, and found the delay to be a breach of s. 10(b).

[77] In the case at bar, the facts indicate that Mr. Burdek was arrested at 2:45. He was not informed of his right to counsel until 17:50, a delay of 15 minutes and five seconds. In the intervening period, Cst. Talbot cuffed and searched Mr. Burdek, put Mr. Burdek in the rear of the police vehicle, searched the truck, ran the licence plate, ran a check on Mr. Burdek, called his partner regarding the need for a breath technician, and updated his notes.

[78] To adopt the reasoning in *Pillar*, it is arguable that any safety issues would have been addressed once Mr. Burdek was cuffed and searched at 3:43, leaving a remaining 14 minutes and seven seconds of delay. Even if I accept that placing Mr. Burdek in the police vehicle was a relevant safety issue, arguably so in December in the Yukon,

Mr. Burdek was in the vehicle before 6:10 when Cst. Talbot tells him he will be back to read him his rights, leaving an additional 11 minutes and 10 seconds of delay before Cst. Talbot returns to dealing with Mr. Burdek, first confirming that he is under arrest, and another 30 seconds before he informs Mr. Burdek of his right to counsel.

[79] Nothing in that roughly 11 minutes of delay can be said to be related in any way to officer or public safety. Firstly, the decision to search the vehicle before reading Mr. Burdek his rights, in particular, was concerning and somewhat confusing. Cst. Talbot testified that he was looking in the vehicle for Mr. Burdek's keys, cell phone, and wallet, suggesting he was doing so for Mr. Burdek's benefit; though it is clear Mr. Burdek had made no request for items to be retrieved, and the later exchange at 20:06, makes it clear Mr. Burdek did not want anything retrieved, in any event. Furthermore, Cst. Talbot seems to have recovered none of the items he said he was looking for during this first search, not even the cell phone which he himself had placed on the side of the truck bed during the search of Mr. Burdek. I should also note there was a question about whether Cst. Talbot was aware of the location of the keys as well, as Cst. Talbot had testified that he had removed the keys and placed them on the dash when he first opened the truck door. However, the exchange at 20:06 makes it clear that Cst. Talbot was mistaken on this point as the truck was operated by a fob and Cst. Talbot clearly had no idea where the fob was located. The important point, however, is that there is absolutely nothing to indicate that the search of the vehicle was in any way necessary at that point in time.

[80] Similarly, there is nothing to suggest that the various checks, calls for a tow truck and breath technician, and the almost four minutes writing notes were related in any

way to officer or public safety, and could not have waited until after Cst. Talbot complied with Mr. Burdek's constitutional right to be advised immediately upon arrest of his right to counsel. The resulting delay is a clear breach of s. 10(b).

Delay in making Breath Demand

[81] With respect to the delay in making the breath demand, s. 320.28 sets out the authority for and requirements of making a breath demand:

> 320.28 (1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable,
>
> (a) require the person to provide, as soon as practicable,
>
> (i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, …

[82] A demand that is not in compliance with the section is not a valid demand and the taking of any samples pursuant to an invalid demand would be a breach of s. 8 of the *Charter*. In determining the validity of the demand, at issue, is whether the demand was made "as soon as practicable" in compliance with the authorizing section.

[83] In *Pillar*, the trial judge summarizes the law on "as soon as practicable" as follows:

> 95 The Court of Appeal held in *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489 at paras. 12-13, that the words "as soon as practicable" in s. 258(1)(c) do not mean that the tests must be taken as soon as possible. Nor does the provision require an exact accounting of every moment in the chronology. As the Court stated:

> The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably.
>
> In deciding whether the test were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the Criminal Code permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason.
>
> 96 In *R. v. Singh*, 2014 ONCA 293, the Court of Appeal reiterated the *Vanderbruggen* decision, holding that the requirement that the samples be taken as soon as practicable means "nothing more than that the tests should be administered within a reasonably prompt time in the overall circumstances."

[84] In *Hawkins*, the trial judge considered whether the same delay that had resulted in a breach of s. 10(b) similarly rendered the demand invalid for not being made as soon as practicable. The trial judge reiterated that the officer was acting in good faith, and noted that he was being considerate of the accused in allowing him to retrieve his belongings. The trial judge further noted that everything else done during the delay was legitimately connected to the investigation. However, the trial judge found that each of these things could and should have been done after the demand was read, and concluded that the demand was invalid as it was not made as soon as practicable.

[85] In my view, the same conclusion must be reached in this case. The actual delay between the arrest and the making of the breath demand was 16 minutes and 45 seconds; however, I am satisfied that the time spent cuffing, searching, and placing Mr. Burdek in the police vehicle was entirely reasonable; as was the time spent addressing Mr. Burdek's right to counsel, which immediately preceded the breath demand. Accordingly, the delay at issue is the same roughly 11 minutes as that discussed with respect to the right to counsel. While the brief interludes spent making

the various police checks and request for a tow truck and breath technician are not particularly unreasonable, the search of Mr. Burdek's vehicle and the four minutes of note taking were entirely unreasonable, and should have been done after the breath demand had been made. Accordingly, I am not satisfied that the demand was made as soon as practicable, rendering the demand invalid, and the taking of breath samples an unreasonable search and seizure contrary to s. 8 of the *Charter*.

Section 10(b): Holding Off

[86] The final argument raised by defence is that the officer failed to hold off on questioning as required once Mr. Burdek indicated his desire to exercise his right to counsel. It is well established that once an accused asks to speak to counsel, police cannot question an accused until such time as the accused has been given a reasonable opportunity to exercise their right to counsel. In *R. v. Mcrimmon*, 2010 SCC 36, the Supreme Court of Canada confirmed at para. 17 that:

> Provided the detainee exercises reasonable diligence in the exercise of these rights, the police have a duty to hold off questioning or otherwise attempting to elicit evidence from the detainee until he or she has had the opportunity to consult with counsel of choice.

[87] Defence counsel argues that Cst. Talbot failed to hold off as required during the drive from the Carcross Cut-off to the police detachment. He specifically points to the officer asking Mr. Burdek about the classification of his driver's licence. Counsel further argues that Cst. Talbot saying, "whatever questions you have will be answered" acted as an inducement.

[88] In my view, there was no breach of s. 10(b) in this regard. The requirement to hold off means the police cannot question an accused in an attempt to elicit evidence. It does not require the police to refuse to answer questions posed by an accused about process. In this case, I am satisfied that Cst. Talbot was not attempting to elicit any information from Mr. Burdek in violation of Mr. Burdek's right to counsel. Rather, it is clear from the WatchGuard video that Mr. Burdek, notwithstanding having been advised of his right to silence, was unusually loquacious. By and large, Mr. Burdek volunteered information without any prompting from Cst. Talbot. Cst. Talbot merely responded where appropriate to questions posed by Mr. Burdek.

[89] The sole exchange where Cst. Talbot asked Mr. Burdek a question, which could be said to be an attempt to elicit information, was the exchange about Mr. Burdek's driver's licence. Crown is quite right that this would not be information that would be prejudicial or even relevant at trial. To the extent that this exchange could be said to be a technical breach of the requirement to hold off, it would certainly not warrant exclusion.

[90] On balance, I am not satisfied that the evidence establishes a breach of s. 10(b) for failing to hold off.

Section 24(2)

[91] In the result, I am satisfied that defence has made out the following breaches:

1. Arbitrary detention contrary to s. 9 with respect to the initial investigative detention;

2. Failure to advise of the right to counsel without delay contrary to s. 10(b); and

3. An unreasonable seizure of breath samples based on an invalid demand contrary to s. 8.

[92] The remaining issue for determination is what, if any, remedy is appropriate. Defence seeks exclusion of all observations made by Cst. Talbot, all video/audio recordings, and all results of the breath samples, including the Certificate of Qualified Technician.

[93] The test for exclusion is set out by the Supreme Court of Canada in a trilogy of 2009 cases led by *Grant*, and requires consideration of three factors:

1. The seriousness of the *Charter*-infringing conduct;

2. The impact on the *Charter*-protected interests of the accused; and

3. Society's interest in adjudication on the merits.

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

Seriousness of Charter-infringing Conduct

[95] In terms of seriousness, in my view, the s. 9 breach relating to the initial investigative detention of Mr. Burdek is not a serious one. As already noted, absent Cst. Talbot's evidence that he believed Mr. Burdek was detained when the emergency lights were initiated, I would not likely have found the initial approach to Mr. Burdek's

vehicle to be a detention at all. Furthermore, any detention at that point did not involve significant physical or psychological restraint as Mr. Burdek's vehicle was parked rather than pulled over. In the result, I am not satisfied that the s. 9 breach was a serious one.

[96] The same cannot be said of the breaches of ss. 8 and 10(b) of the *Charter*. Both relate to statutory and constitutional requirements that have been the subject of continuous litigation for in excess of 30 years. Section 10(b), for example, has been incessantly litigated since the inception of the *Charter* in 1982. And the requirement that an accused be informed of their right to counsel immediately has been enshrined in the law almost that long. The *Debot* decision quoted above was rendered in 1989. It is unacceptable in this day and age for an officer to believe that more mundane investigatory matters could or should take precedence over well-established constitutional requirements.

[97] The same can be said for statutory requirements. As noted by Cozens J. in *R. v. Wells*, 2017 YKTC 34, at para. 74:

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

[98] It is important to note that there was no indication that Cst. Talbot was acting in bad faith. Rather, he appears to be a conscientious and diligent officer who is thorough and detailed in his approach. These characteristics are laudable and important ones in a police investigation, but such an approach cannot be taken at the expense of ensuring

that constitutional rights and statutory requirements are respected, particularly not where the law of impaired driving is designed to allow for accused persons to be dealt with expeditiously to limit the necessary infringement on their liberty rights.

[99] I am satisfied that both the s. 8 and s. 10(b) breaches are serious ones that would support the exclusion of evidence.

Impact on Charter-protected Interests

[100] With respect to the impact of the breaches, again, I would conclude that the s. 9 breach relating to the investigative detention, for the reasons already stated, had minimal, if any, impact on Mr. Burdek's *Charter*-protected interests.

[101] With respect to the s. 8 breach, this second *Grant* factor requires consideration of the impact of the breach on the accused's privacy interests, bodily integrity, and human dignity (see *R. v. Loewen*, 2009 YKTC 116, para. 40).

[102] The s. 8 breach, in this regard, resulted in Mr. Burdek being compelled to provide incriminating evidence through the provision of breath samples. While not as extreme an intrusion on bodily integrity as blood samples, breath samples are nonetheless a significant intrusion on Mr. Burdek's privacy interests and right against self-incrimination.

[103] With respect to the s. 10(b) breach, I would echo the comments of Bovard J. in *Hawkins*, at para. 108:

> The impact on Mr. Hawkins of these breaches is serious. The right to counsel is one of the hallmarks of a democratic and free society. It distinguishes us from regimes in which persons are routinely stopped by

> the authorities and are helpless to defend themselves. It is a serious thing for the ordinary citizen to be detained, arrested, handcuffed and put in a police cruiser on the side of the road in the middle of the night without being told that they have the right to speak with a lawyer who can advise them and assuage their fears by explaining to them the jeopardy in which they find themselves and what they should do about it.

[104] I am satisfied that the impact of the breaches on Mr. Burdek's *Charter*-protected interests was significant and would militate strongly in favour of exclusion.

Society's Interest in Adjudication on the Merits

[105] The final factor, society's interest in adjudication on the merits, would clearly favour inclusion in light of the societal interest in addressing impaired driving along with the significant reliability of the evidence in question and its crucial importance to the Crown's case.

Balancing the Three Factors

[106] A balancing of the three *Grant* factors would favour exclusion, particularly given the well-entrenched and longstanding law in relation to both ss. 8 and 10(b). To find otherwise would, in my view, bring the administration of justice into disrepute.

Exclusion

[107] The remaining question is what evidence should be excluded. Section 24(2) of the *Charter* allows for exclusion of evidence "…obtained in a manner that infringed or denied any rights…". In general, there must be a causal or temporal nexus between the breach and the evidence sought to be excluded.

[108] Applying this test, I am satisfied that the Certificate of Qualified Technician and any evidence with respect to Mr. Burdek's blood alcohol content should be excluded as such evidence flows directly from the unlawfully seized breath samples. It should also be noted that the results of the breath samples would be inadmissible, in any event, as they flow from an invalid demand.

[109] Of the remaining evidence the defence seeks to exclude, I am not satisfied that there is any justification to exclude evidence of Cst. Talbot's observations or the WatchGuard video flowing from the very minor and technical s. 9 breach with respect to the investigative detention.

[110] In my view, there must be exclusion of any observations made by Cst. Talbot and of the WatchGuard video from the point Mr. Burdek's ss. 8 and 10(b) rights were breached, which I would place at the time Cst. Talbot ought to have advised Mr. Burdek of his right to counsel and read the breath demand. This means that there will be exclusion of all observations and the WatchGuard video from 6 minutes and 10 seconds into the WatchGuard video. Any observations made by Cst. Talbot and the portion of the WatchGuard video up to that point are admissible.

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RUDDY T.C.J.