Citation: *R. v. Brewster*, 2022 YKTC 6

Date: 20220216
Docket: 20-00076
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

KYHIA LYN TUBMAN BREWSTER

Appearances:
Kevin Gillespie — Counsel for the Crown
Jennifer Budgell — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Kyhia Brewster has entered not guilty pleas to offences of impaired operation of a conveyance, contrary to s. 320.14(1)(a) of the *Criminal Code*, and operation of a conveyance when the concentration of alcohol in her blood equalled or exceeded 80 mg/%, contrary to s. 320.14(1)(b), on April 6, 2020, in the City of Whitehorse. At the outset of the trial, Crown appropriately indicated that they would not be seeking a conviction on count 1 for impaired operation. As the evidence falls well short of establishing that Ms. Brewster's ability to operate a conveyance was impaired by alcohol, an acquittal will be entered on count 1.

[2] With respect to the remaining count, counsel for Ms. Brewster has filed a Notice of *Charter* Application alleging violations of Ms. Brewster's rights under ss. 7, 8, 9,

10(a), and 10(b) of the *Charter*. In terms of remedy, counsel seeks exclusion of the Certificate of Qualified Technician and an utterance made by Ms. Brewster at the detachment immediately after speaking to duty counsel when asked by the investigating officer if she had understood the legal advice she received.

[3] Trial proceeded by way of a blended *voir dire* in which the sole witness was the investigating officer, Cst. Brown. The majority of the facts are not in dispute. Indeed, much of the interaction between Cst. Brown and Ms. Brewster was captured on the WatchGuard video.

Facts

[4] A brief summary of the undisputed facts are that in the early morning hours of April 6, 2020, Cst. Brown was dispatched to investigate a report of a possible impaired driver in a white sedan in the drive-through area of the McDonald's restaurant. The driver of the vehicle had been asked to pull into one of the stalls at the end of the drive-through, an area provided for vehicles to park and wait when there is a delay in the preparation of an order.

[5] Cst. Brown drove to McDonald's and located a white Dodge Charger parked in one of the waiting stalls. She approached the vehicle. Ms. Brewster was located in the driver's seat and ultimately identified via her valid Yukon driver's licence. An unidentified female was in the front passenger seat, and a male, later identified as Patrick Parker, was seated in the rear behind the driver's seat.

[6] Cst. Brown observed no indicia of either alcohol consumption or impairment in dealing with Ms. Brewster. When asked, Ms. Brewster indicated that she had not consumed any alcohol since the preceding day. In the circumstances, Cst. Brown had no grounds to suspect that Ms. Brewster had alcohol in her body. Based on the fact the vehicle was in the drive-through area and what Cst. Brown termed "a concern for safety on the road", Cst. Brown says that she decided to make the mandatory alcohol screening demand under s. 320.27(2).

[7] After several attempts, Ms. Brewster provided a suitable sample into an approved screening device ("ASD"), specifically the Alco-Sensor FST. The device registered a fail reading. Based on her understanding that the device is calibrated to register a fail with a blood alcohol reading of 100 mg/% or more, Cst. Brown formed the opinion that Ms. Brewster was operating a motor vehicle while impaired by alcohol. Cst. Brown arrested Ms. Brewster for impaired operation. Several minutes later, Cst. Brown escorted Ms. Brewster to the police vehicle where she read Ms. Brewster her right to counsel and the police warning verbatim from the *Charter* card. Cst. Brown indicates that she forgot, at that time, to read Ms. Brewster the formal breath demand.

[8] After dealing with the passengers and awaiting the arrival of another RCMP officer to wait for the tow truck and taxi, Cst. Brown took Ms. Brewster back to the RCMP detachment. Cst. Brown contacted Legal Aid at Ms. Brewster's request, and left Ms. Brewster in the lawyer room to speak to duty counsel in private.

[9] While Ms. Brewster was consulting counsel, Cst. Brown realized she had not read Ms. Brewster the formal breath demand. Cst. Brown did not read the breath demand until after Ms. Brewster finished speaking with duty counsel.

[10] Cst. Brown then escorted Ms. Brewster to the breathalyzer room for the required observation periods and breath tests. Ms. Brewster ultimately provided two sufficient breath samples, the first registering 100 mg/%, and the second 90 mg/%.

Issues

[11] With respect to Ms. Brewster's Notice of *Charter* Application, at trial, defence counsel opted not to pursue the unlawful arrest argument articulated therein, and advanced no arguments in relation to s. 7 of the *Charter*. Accordingly, the issues to be addressed are as follows:

1. Whether the delay in reading Ms. Brewster her right to counsel was a breach of s. 10(b) resulting in an arbitrary detention in breach of s. 9 of the *Charter*;

2. Whether the delay in reading Ms. Brewster the formal breath demand resulted in an unlawful demand thereby creating an arbitrary detention contrary to s. 9 and rendering the taking of breath samples an unlawful seizure contrary to s. 8 of the *Charter*;

3. Whether, Cst. Brown's failure to reiterate Ms. Brewster's right to counsel and provide her with another opportunity to consult with

counsel after the delayed reading of the breath demand amounted to a breach of ss. 10(a) and (b) of the *Charter*; and

4. In the event Ms. Brewster is successful in establishing one or more of the alleged breaches, what, if any remedy, would be appropriate?

Relevant Facts and Timeline

[12] As delay is at the heart of Ms. Brewster's *Charter* motion, consideration of the specific timing of events surrounding the delays is crucial. The following is a detailed timeline based on the WatchGuard video. It should be noted the details are based solely on the audio track of the WatchGuard video. Due to the positioning of Cst. Brown's police vehicle, Ms. Brewster's vehicle and the occupants are not visible on the WatchGuard video:

- 03:03:04 – Ms. Brewster provides a suitable sample into the approved screening device;

- 03:03:40 – Cst. Brown advises Ms. Brewster that the sample registered a fail reading. Ms. Brewster asks how that is possible as the last time she drank was the preceding night;

- 03:03:50 – Cst. Brown advises Ms. Brewster that she is under arrest for impaired operation of a motor vehicle;

- 03:04:18 – Cst. Brown tells Ms. Brewster, "We're going to go back to the detachment and we're going to do breath samples there";

- 03:04:30 – Cst. Brown says she is going to call a cab for the passengers and the vehicle will be towed. She asks Ms. Brewster to turn off the vehicle and pass her the keys. There is some discussion about whether Mr. Parker can drive, but he says he does not have a licence. Cst. Brown says she has to tow the vehicle. Ms. Brewster again questions how her reading could be over the legal limit;

- 03:05:10 – Cst. Brown interrupts Ms. Brewster and says, "I just want you to know that I'm a police officer and you don't have to talk to me. You also have the right to a lawyer";

- 03:06:00 – Cst. Brown calls dispatch to arrange for a cab and a tow truck;

- 03:06:58 – Ms. Brewster asks how she is going to get home;
  Cst. Brown tells Ms. Brewster she will explain all that later.
  Ms. Brewster asks if she can get her belongings. Cst. Brown tells her to go ahead;

- 03:08:12 – Responding to an apparent question from the female passenger about Ms. Brewster being able to eat, Cst. Brown says, "No, we have to do breath tests, so she can't eat or drink anything."
  Ms. Brewster asks about the food, and Cst. Brown tells her, "Once you've done the breath tests, you can have it";

- 03:10:11 – Cst. Brown says, “Listen to me right now, there’s three people talking at once. She’s under arrest; she’s coming with me”. She tells the passengers she is leaving the vehicle unlocked and warm so they can wait for the cab inside, but that they are free to go. Cst. Brown escorts Ms. Brewster to the police vehicle;

- 03:11:47 – Cst. Brown re-arrests Ms. Brewster and reads the right to counsel from the *Charter* card. Ms. Brewster says that she understands, but when asked if she wants to call a lawyer, Ms. Brewster exhibits confusion about what to do as she has never had this happen to her before;

- 03:13:36 – Cst. Brown says “So, this is how this is going to work, you’re going to do some breath tests at the detachment, and you’re going to be released. If you blow under the legal limit, you’ll be released; if you blow over, you’ll be charged with impaired operation.” Ms. Brewster responded by again asking how her reading could be over as she had not had anything to drink that day;

- 03:14:07 – Cst. Brown interrupts Ms. Brewster and reads the police warning;

- 03:14:56 – Cst. Brown calls dispatch and requests someone to come “sit on the vehicle” so she can take Ms. Brewster back to the detachment to do breath tests;

- 03:15:29 – Cst. Brown exits the vehicle and is heard talking to the passengers. Cst. Brown asks the male passenger his name, and is told he is Patrick Parker. The female passenger declines to give her name. There is discussion about social distancing, and how the passengers will get home;

- 03:17:46 – Cst. Lennsen arrives. Cst. Brown passes him the keys, and tells him there are two passengers. The female is concerned about how she's getting home. Cst. Brown tells him the male passenger is Patrick Parker;

- 03:18:40 – Cst. Brown departs for the detachment with Ms. Brewster. Ms. Brewster asks about her friends and her vehicle, but the trip is largely silent;

- 03:21:25 – Cst. Brown and Ms. Brewster arrive at the detachment. There is discussion about counsel and Cst. Brown gets the number for Legal Aid and leaves a message for duty counsel to call back;

- 03:27:10 – Duty counsel calls back. Cst. Brown speaks to duty counsel briefly, then leaves Ms. Brewster in the lawyer room to speak to duty counsel;

- 03:34:26 – There is an unrelated conversation between Cst. Brown and another officer. After this, there are periodic sounds and one indistinct

conversation, but no further audio of significance before the WatchGuard video ends.

[13] As previously indicated, Cst. Brown testified that while Ms. Brewster was speaking to duty counsel, Cst. Brown reviewed her notes and realized that she had forgotten to read the breath demand. When Ms. Brewster finished speaking to duty counsel, Cst. Brown asked if she understood counsel. Cst. Brown testified that Ms. Brewster said either, "he told me to give samples" or, "I'm going to give samples". Cst. Brown then read the breath demand. She estimated the time to be around 03:40:00.

Analysis

Delay in Right to Counsel

[14] Turning to the first issue, the delay in advising Ms. Brewster of her right to counsel, per the timeline, there is a delay of approximately eight minutes between the time Cst. Brown arrests Ms. Brewster and the time Cst. Brown reads Ms. Brewster her right to counsel from the *Charter* card.

[15] Defence counsel argues that the eight-minute delay constitutes a breach of s. 10(b) of the *Charter* resulting in an arbitrary detention contrary to s. 9. Crown argues that any delay was reasonable as it was largely caused by interruptions from Ms. Brewster and the two passengers. Crown further notes that Cst. Brown informally advised Ms. Brewster of her right to counsel at 03:05:10, approximately one minute and 20 seconds after arrest.

[16] The right to counsel enshrined in s. 10(b) of the *Charter* states “Everyone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right”. The right places obligations on the police to both inform an accused of their right to counsel and to facilitate implementation of that right. While the reference to “without delay” is only included in the first half of s. 10(b) in relation to implementation of the right, s. 10(b) has long been interpreted as requiring that an accused also be informed of their right without delay.

[17] 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 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*.

[18] Defence counsel has provided two cases in which similar circumstances of delay to those before me were held to be a breach of s. 10(b).

[19] In *R. v. Lester*, 2015 SKQB 53, following an ASD fail reading, there was a delay of 12 minutes before the officer read the breath demand and 13 minutes before the officer read the right to counsel. On appeal before the Saskatchewan Court of Queen’s Bench, the Court held that the evidentiary record did not support the trial judge’s conclusion that the delay was occasioned by “…securing the scene, or making it safe

for travellers by having the vehicle moved or generally ensuring safety and dealing with the sole passenger…". The appeal judge concluded that as there was no valid reason for the delay, the breath demand was invalid and there was a breach of s. 10(b).

[20] In *R. v. Hawkins*, 2013 ONCJ 115, there was a delay of 12 minutes before advising the accused of the right to counsel. Over the 12 minutes, the officer allowed the accused to retrieve personal belongings from the vehicle, cuffed the accused and placed him in the police vehicle, and explained the tow procedure to a junior officer. The trial judge found the delay to be a breach of s. 10(b) on the basis that, while the officer was not acting in bad faith, neither retrieving belongings nor explaining the tow procedure were justifiable reasons for delaying the obligation to inform the accused of his right to counsel without delay.

[21] The Crown relies on two cases to the contrary.

[22] In *R. v. Smith*, 2003 YKTC 52, an argument erupted between the accused and his female passenger when the officer began to read the accused his right to counsel. The accused was not read his rights until after backup arrived to transport the passenger and the accused was transported to the police detachment. Lilles J. held that the accused should have been read his rights as soon as backup arrived to deal with the passenger rather than waiting until arrival at the detachment. This resulted in an additional delay of 10 to 12 minutes. However, Lilles J. concluded that there was no breach of s. 10(b) as the additional delay, while avoidable, was nonetheless triggered by the argument, which was beyond the control of the officer.

[23] In *R. v. Simon*, 2021 YKTC 4, a recent decision of mine, the officer read the breath demand but neglected to advise the accused of his right to counsel as the officer was distracted by questions from the two passengers. The accused was not read his rights until arrival at the police detachment, a delay of 21 minutes. While I ultimately found the delay to be a s. 10(b) breach, I excluded seven minutes from the calculation of delay that on the basis I was satisfied that this time was legitimate delay to ensure the safety of the passengers who would otherwise have been left on a busy road with no safe pedestrian walkway.

[24] In the case at bar, the eight-minute delay involved allowing Ms. Brewster to gather her belongings, calling dispatch to arrange for a tow truck and taxi, responding to numerous questions from Ms. Brewster and the passengers about whether Ms. Brewster could eat, how the passengers would get home, and how Ms. Brewster could have blown over if she had not had anything to drink since the preceding day.

[25] Other cases, like *Hawkins*, have concluded that arranging for tow trucks and allowing an accused to collect their belongings are not justifiable reasons for delaying advising an accused of the right to counsel.

[26] This then leaves the question of whether the behaviour of Ms. Brewster and the passengers provides a legitimate reason for the delay as argued by the Crown. In reviewing the WatchGuard video, I noted that while there are some moments of relative silence during the delay period, much of the time Ms. Brewster and the passengers are talking, interrupting and asking questions, often with more than one person speaking at

once. This does make the recording feel somewhat chaotic, such that it is evident that the situation required some proactive management of those present.

[27] In considering the impact of passenger behaviour on the "without delay" requirement, I am mindful of the decision of the Supreme Court of Canada in *R. v. Debot*, [1989] 2 S.C.R. 1140, in which they noted that:

> 42 …the phrase does not mean "at the earliest possible convenience" or "after police 'get matters under control'", or even "without reasonable delay"... .

[28] Ultimately, I am not satisfied that the passenger behaviour was beyond the officer's control. While initially difficult to focus Ms. Brewster and the passengers on next steps, when Cst. Brown does raise her voice and take control at 03:10:11, she is able to move things along by transferring Ms. Brewster to the police vehicle in short order. From this, I conclude that the participants, while difficult, were, nonetheless, easily manageable when Cst. Brown asserted control. There is nothing to indicate that Cst. Brown could not have done so sooner to meet her constitutional obligation to advise Ms. Brewster of her right to counsel without delay.

[29] It is clear that the only legitimate basis for delay in advising of the right to counsel is an identifiable concern for officer or public safety. 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).

[30] In this case, the only safety concern alluded to by Cst. Brown was the general safety of the passengers, which she connected to it being cold. This was clearly enough of a concern that Cst. Brown decided to leave the vehicle open so that the passengers could wait inside until the taxi arrived. However, Cst. Brown also advised the passengers that they were free to go if they chose not to wait in the vehicle. From this, I conclude that while there was enough concern to leave the vehicle unlocked, Cst. Brown's concern did not extend to preventing the passengers from walking away if they so chose.

[31] Cst. Brown did indicate that her risk assessment was heightened upon learning that the male passenger was Patrick Parker, a person she knows to be unpredictable and involved in the drug trade. However, Cst. Brown did not become aware of his identity until after she read Ms. Brewster the right to counsel. Furthermore, she agreed that Mr. Parker did not do anything threatening or interfere with the investigation at any time. Rather, she agreed, he was quite jovial throughout.

[32] Finally, I would note that Cst. Brown did not, at any time, mention any safety concerns when in contact with dispatch. Rather, when calling for another officer, Cst. Brown mentioned only that she needed someone "to sit on the car". Nor did she relate any specific safety concerns to Cst. Lennsen when he arrived, beyond telling him Mr. Parker's name, which she assumed would result in heightening his own risk assessment.

[33] The combined impact of each of these factors leads me to conclude that any safety concerns were vague and theoretical at best. Nothing in the evidence gives rise

to concrete safety issues that would justify the delay in informing Ms. Brewster of her rights.

[34] As a final point on this issue, Crown noted that Cst. Brown did informally advise Ms. Brewster of her right to a lawyer shortly after the arrest. In my view, this offers little to attenuate the delay as the information provided fell well short of meeting the legal requirements, and the information was relayed in circumstances where things were sufficiently chaotic that there is no reason to believe that Ms. Brewster would have comprehended her rights. Cst. Brown was clearly aware of this latter concern as she testified that she deliberately chose to wait until she had Ms. Brewster in the police vehicle before reading her the right to counsel, so that Cst. Brown could be sure that she had Ms. Brewster's full attention.

[35] Ultimately, the delay in advising Ms. Brewster of her right to counsel is a breach of s. 10(b), though whether it is, on its own, sufficiently egregious to warrant exclusion is another matter.

Delay in Breath Demand

[36] Turning to the second issue, the breath demand delay, s. 320.28 requires that a demand for a breath sample be made "as soon as practicable" once a peace officer has reasonable grounds to believe that a person is operating a conveyance while impaired. In this case, Cst. Brown indicated that she forgot to read the breath demand in the police vehicle when she read the right to counsel and police warning from the *Charter* card. The formal demand was read at the detachment after Ms. Brewster spoke to duty counsel. The demand was not recorded, but Cst. Brown estimated that it was made at

approximately 03:40 a.m., a delay of approximately 37 minutes from the time of the fail reading which formed the basis of Cst. Brown's grounds to believe that Ms. Brewster was operating a conveyance while impaired.

[37] Defence counsel argues that the breath demand was not a valid demand pursuant to the section, as it was not made as soon as practicable, resulting in an arbitrary detention and rendering the taking of samples an unlawful seizure contrary to ss. 8 and 9 of the *Charter*.

[38] Crown takes the position that any delay in the breath demand was a result of the numerous interruptions by Ms. Brewster and the passengers. Crown concedes that the full delay of 37 minutes would be a clear breach if Cst. Brown had made no mention of breath samples over that period. However, he argues that Cst. Brown did informally advise Ms. Brewster of the need to give breath samples on three occasions, twice at roadside and the third in the police vehicle, which, he says, were sufficient to meet the requirements of the section. He points to an utterance made by Ms. Brewster after she spoke to duty counsel as evidence that Ms. Brewster fully understood that she was detained and required to give breath samples.

[39] The "as soon as practicable" requirement in making a breath demand does not import the same degree of immediacy as the "without delay" requirement in advising an accused of the right to counsel. Rather the phrase has been consistently interpreted as meaning "within a reasonably prompt time" and not "as soon as possible".

[40] Cases that have found delay to be contrary to the "as soon as practicable" requirement generally turn on whether the circumstances giving rise to the delay involve

matters which could quite easily have been attended to after the demand was made (see *Hawkins*).

[41] In this case, there are two distinct periods of delay in relation to the formal breath demand: firstly, the roughly 10 minutes between the ASD fail reading and when Cst. Brown starts to speak about breath samples in the police vehicle, at 03:13:36, after advising Ms. Brewster of her right to counsel; and, secondly, the remaining 27 minutes between that point and when Cst. Brown reads the formal breath demand at the detachment.

[42] With respect to the first period of delay, there were matters, which could certainly have waited until after the breath demand was made, including calling for the tow truck and allowing Ms. Brewster to collect her belongings; however, I would agree with the Crown that much of the delay was driven by the chaotic situation created by the questions and interruptions of Ms. Brewster and the passengers. I would not find that the delay over this first period would amount to unacceptable delay vis-a-vis the "as soon as practicable" requirement.

[43] The same cannot be said of the second period of delay. Cst. Brown freely admitted that she could have read the breath demand to Ms. Brewster once they were in the police vehicle. She agreed that the breath demand is written on the same *Charter* card used to provide the right to counsel and police warning, and that reading the demand would have required a matter of mere seconds. Cst. Brown testified that the only reason that the breath demand was not read at that point was that she simply

forgot, as her attention was divided between Ms. Brewster and the passengers, in particular, Mr. Parker who was getting in and out of Ms. Brewster's vehicle.

[44] As is made clear by numerous cases filed by the defence, simply forgetting to make the breath demand is not an acceptable reason for delay (see *R. v. Howe*, 2013 ONCJ 166).

[45] However, the real issue in this case in determining whether the breath demand was made "as soon as practicable" is whether any or all of Cst. Brown's three earlier references to breath samples were sufficient to amount to a lawful breath demand.

[46] The law is clear that the breath demand does not require prescribed wording to constitute a valid demand. In *R. v. Ghebretatiyos* (2000), 8 M.V.R. (4th) 132 (Ont. Sup Ct), Hill J. of the Ontario Superior Court of Justice summarized the law in this regard:

> 19 No particular words are necessary to make a breath sample demand. As observed by Culliton C.J.S. in Regina v. Ackerman (1972), 6 C.C.C. (2d) 425 (Sask. C.A.) at 427:
>
> > In my opinion, no particular words are necessary to make a demand under this section. The demand, if made in popular language or in the words of the section, or in any other words that are such that convey to the person that the demand is made pursuant to the section, is a lawful demand. In determining whether or not the words used were such as to convey to the person the nature of the demand consideration can properly be given to the surrounding circumstances.
>
> To similar effect is the statement of Chief Justice Culliton in Regina v. Flegel (1972), 7 C.C.C. (2d) 55 (Sask. C.A.) at 57:
>
> > It was the right of the learned trial Judge to determine whether the demand was made, and he could do so from

> > whatever was said viewed in the light of the surrounding circumstances.
>
> This approach is entirely consistent with the result in Regina v. Humphrey (1978), 38 C.C.C. (2d) 148 (Ont. C.A.). In that case, the trial evidence did not include the actual words of the breath sample demand, the investigating officer having testified that "the accused was given a demand in regards to a breathalyser test". Jessup J.A. stated at 150:
>
> > In the view of my brother Brooke and myself, the evidence of the police officer that the accused was given "a demand in regards to a breathalyser test" was some evidence that he made a demand on the appellant, pursuant to s. 235(1) [rep. & sub. 1974-75-76, c. 93, s. 16] of the Criminal Code.
> >
> > In the result, we are of the view that the learned trial Judge erred when he held that the failure of the Crown to adduce the actual wording of the demand for a breath sample made by the police officer to the accused, rendered inadmissible the certificate of analysis.
>
> 20 This flexible yet functional approach, focusing on whether the vehicle driver understood he or she was required to give a sample of breath, is consistent with that jurisprudence recommending a review of the entirety of the circumstances in deciding whether a breathalyser technician has acted pursuant to a lawful demand: Regina v. Boyce (1997), 26 M.V.R. (3d) 238 (Ont. C.A.); Regina v. Walsh (1980), 53 C.C.C. (2d) 568 (Ont. C.A.); Regina v. Hall (1981), 57 C.C.C. (2d) 305 (Alta. C.A.); Regina v. Teague (1973), 11 C.C.C. (2d) 191(B.C.C.A.).

[47] This summary indicates that an assessment of whether an informal breath demand constitutes a valid demand includes consideration of the words used, the surrounding circumstances, and what the accused understood from the words used and the surrounding circumstances. In particular, whether the accused understood that breath samples were being demanded and the accused was required to provide them. In other words, the “demand” amounted to more than an invitation.

[48] As noted, there are three points when Cst. Brown mentions breath samples:

1. At 03:04:30, when Cst. Brown says, “We’re going to go back to the detachment and we’re going to do breath samples there”;

2. At 03:08:12, when the female passenger asks if Ms. Brewster can eat and Cst. Brown replies, “No, we have to do breath tests, so she can’t eat or drink anything”. Shortly thereafter, Ms. Brewster asks about the food, to which Cst. Brown replies, “Once you’ve done the breath tests, you can have it”; and

3. At 03:13:36, when Cst. Brown tells Ms. Brewster, “So, this is how this is going to work, you’re going to do some breath tests at the detachment, and you’re going to be released”.

[49] The first two mentions of breath samples occur at the roadside; the third in the police vehicle.

[50] In terms of words used, the defence has provided two cases in which similar language was used, but found to be insufficient to constitute a valid demand.

[51] In *R. v. Inataev*, 2015 ONCJ 166, at para. 10, “…the accused asked the officer what would happen next after his arrest and the officer told him that he would be taken to the station and he would ‘have to do two tests’ to see how much alcohol was in his breath”. One of the reasons the Court held that this did not amount to a valid demand was that the officer:

> 12 …was not engaged in making a demand even in informal terms when he referred to the breath tests. He was answering a question from the

> accused who wondered what would happen next. Reference to breath tests as a next step is not the same thing as making a statutory demand.

[52] Similarly, in *Hawkins*, at para. 76, the Court concluded that "…merely explaining to Mr. Hawkins that he was going to the police station to give samples of his breath does not constitute a lawful demand…". Noting the "coercive element to a demand", the Court held at para. 75:

> …if popular language is used to make the demand, at minimum that language should communicate to the accused that the peace officer is requiring that the accused provide breath samples for the purpose of determining how much alcohol the accused has in his or her blood. As Justice Blacklock indicated in *Palanacki* (supra): it is not an invitation. [emphasis added]

[53] The wording used by Cst. Brown in each of the informal mentions of breath tests, in my view, similarly falls short of conveying the coercive element of a lawful demand.

[54] With respect to surrounding circumstances, the first two mentions of breath tests occurred at the roadside, when, by the Crown's own submission, the situation was chaotic, characterized by frequent interruptions and people talking over each other. I am hard pressed to conclude that where circumstances are chaotic and distracting enough to cause an experienced police officer to forget well-established legal requirements, that Ms. Brewster, who indicated she had never been through this before, should have clearly understood, amidst the chaos, that the words uttered amounted to a legal demand requiring her to provide samples. This is particularly so when Cst. Brown testified that Ms. Brewster appeared to be confused about the process. And again, Cst. Brown herself was obviously concerned about what would be understood at

roadside when she chose to wait until Ms. Brewster was in the police vehicle before reading the right to counsel to ensure that she had Ms. Brewster's full attention.

[55] The third mention of breath tests, in the police vehicle, was not initiated as a demand, even an informal one, but was in response to Ms. Brewster's expressed concern about missing an appointment the following day. Cst. Brown testified that she was trying to allay Ms. Brewster's concerns by assuring her that she would be released.

[56] In terms of what was understood by Ms. Brewster, Cst. Brown agreed that she did not ask Ms. Brewster if she understood what was required of her after any of the references to breath tests other than the formal demand read later at the detachment. Secondly, Ms. Brewster was not an accused person with experience of the justice system and impaired driving investigations, such that she could be said to have understood what was required of her from the informal language used. Thirdly, Ms. Brewster was clearly preoccupied with her vehicle, the passengers, and, most notably, how she could possibly have failed the ASD test when she had not had anything to drink that day. Indeed, her immediate response to Cst. Brown's third reference to breath samples in the police vehicle was to start asking Cst. Brown questions about how she could have failed the ASD test.

[57] This leaves the question of the impact, if any, of Ms. Brewster's utterance after speaking to duty counsel regarding giving breath samples. Crown argues that this statement was indicative of the fact that Ms. Brewster fully understood that she was detained for the purposes of providing samples of her breath for testing.

[58] There are two problems with this argument. Firstly, I have serious concerns about the reliability of Cst. Brown's recollection in this regard. The exchange was not audio recorded, for reasons Cst. Brown cannot explain, even though earlier exchanges in the same vicinity were captured by the WatchGuard audio. There is no mention of what Ms. Brewster said in Cst. Brown's handwritten notes. When asked why, Cst. Brown said this was because she was focussed only on recording responses to what she referred to as the "legals". I find this to be extremely curious as one would think that Ms. Brewster's satisfaction with her access to counsel would fall squarely under the heading of the "legals".

[59] Cst. Brown's first notation regarding what was said by Ms. Brewster was in her general report which she started at the beginning of her next shift approximately 12 hours later. In the report she wrote:

> Brewster completed her phone call with Dick and Constable Brown asked her if she had understood what was said and if she understood what was going on. Brewster said that she understood and that she was required to provide breath samples to police. Constable Brown read Brewster the breath demand verbatim off the approved card. [transcript p. 66, line 22 to 27]

[60] This differed from what Cst. Brown testified to at trial. She did indicate she asked Ms. Brewster if she understood duty counsel, but not if Ms. Brewster understood what was going on. Furthermore, Cst. Brown testified that Ms. Brewster's response was either "he told me to give samples" or "I'm going to give samples". Crown argues that the three different phrases are not concerning as each mentions giving breath samples. In my view, the differences are concerning. While the three statements all refer to breath samples, there are subtle differences in what each says about what

Ms. Brewster understood about the legal requirement to give breath samples. "I am going to give samples" is simply not the same as "I am required to provide breath samples to police" in this regard.

[61] In my view, if I am to infer what Ms. Brewster understood from what she said about giving samples, then I need to be satisfied that the evidence establishes what she actually said. While I do not find that Cst. Brown wrote the aforementioned passage in her report to cover her failure to read the breath demand as soon as practicable, I do find that I have serious concerns about the overall reliability and accuracy of her recollection of what was actually said by Ms. Brewster.

[62] Even if I were satisfied of the accuracy of what was said by Ms. Brewster, as the comment was made after speaking to duty counsel, it is not in any way indicative of what Ms. Brewster understood from the words used earlier by Cst. Brown in referring to breath samples. If the words used, surrounding circumstances, and evidence of accused understanding are not sufficient to constitute a valid demand at the time the "demand" is made, I fail to see how advice from counsel can be used to render the demand valid after the fact.

[63] Ultimately, I find that the three earlier references to breath samples do not constitute valid breath demands. The only valid demand was made after a 37-minute delay, and, as such, was not made "as soon as practicable", resulting in an arbitrary detention, a breach of s. 9 of the *Charter*, and an unlawful seizure of breath samples, a breach of s. 8 of the *Charter*.

Failure to Reiterate Right to Counsel after Demand

[64] Turning to the final issue, whether Cst. Brown's failure to reiterate Ms. Brewster's right to counsel and provide her with another opportunity to contact counsel after Cst. Brown read the formal breath demand resulted in a breach of ss. 10 (a) and (b), the Ontario Superior Court of Justice, in *R. v. Gadsen*, 2012 ONSC 5948, summarized the law on the right to re-consult counsel at paras. 10 to 13, as follows:

> 10 The obligation on a police officer to suspend the breath testing procedure to afford to the Respondent an opportunity to re-consult with counsel is governed by the Supreme Court of Canada decisions in *R v. Sinclair,* 2011 SCC 40, [2011] 3 S.C.R. 3, *R v. McCrimmon,* 2010 SCC 36, [2010] 2 S.C.R. 402, and *R v. Willier,* 2010 SCC 37, [2010] 2 S.C.R. 429. For the purposes of this appeal, the above cases are referred to as the "trilogy".
>
> 11 In *Sinclair*, the Court began by acknowledging that normally s. 10 (b) affords the detainee a single consultation with a lawyer. However, in some instances, a further opportunity to consult a lawyer may be constitutionally required. These generally involve a material change in the detainee's situation (circumstances) after the initial consultation.
>
> 12 The Supreme Court went on to identify three instances that could represent a change in the detainee's situation that would warrant a renewed consultation with counsel:
>
> a) Where there are new procedures involving the detainee;
>
> b) Where there is a change in the detainee's jeopardy;
>
> c) Where there is reason to question the detainee's understanding of his s. 10 (b) rights.
>
> 13 In identifying these situations in which a second consultation with counsel was required, the Supreme Court sought to provide guidance to investigating police officers. However, the Court added that the categories were not closed and enunciated a general principle underlying the circumstances discussed:
>
> ... where a detainee has already retained legal advice, the implementational duty on the police under s. 10 (b) includes an obligation to provide the detainee with a reasonable opportunity to consult counsel again where a change of

> circumstances makes this necessary to fulfill the purpose of s. 10 (b) of the Charter of providing the detainee with legal advice on his choice of whether to cooperate with the police investigation or decline to do so.

[65] Crown argues that there was no obligation on Cst. Brown to reiterate the right to counsel or to provide an opportunity to re-consult counsel as there was no change in jeopardy because the evidence demonstrates that Ms. Brewster fully understood that she was going to the detachment to provide breath samples. There are two difficulties with this argument. Firstly, I have not found, as a fact, that Ms. Brewster fully understood that she was going to the detachment to provide breath samples. Secondly, and perhaps more importantly, the question of change in jeopardy triggering the right to re-consult is not a question of what the accused did or did not understand, it is a question of whether a change in circumstances has changed the jeopardy faced by the accused.

[66] In this case, the question is whether Ms. Brewster's jeopardy was changed by the delayed reading of the breath demand. Ms. Brewster was arrested for impaired driving. Even when Cst. Brown spoke about the consequences of blowing over, she made no mention of a possible charge of driving while over .08. In *R. v. Pavey*, 2015 SKQB 40, the Court noted that while the consequences for impaired driving and driving over .08 are the same, the manner in which the two charges are proven is distinctly different. Because of this, the Court concluded that a delayed breath demand did change the jeopardy faced by the accused, noting at para. 41:

> In my view, the Trial Judge had no evidence on which to base his observation that Mr. Pavey must have known that he had been "taken in" to provide samples of his breath. I also find that the Trial Judge erred

> when he speculated that the formal reading of the breathalyzer demand "could not conceivably have changed anything in the mind of the accused whereby he would have wished to consult with a lawyer." I would instead be inclined to conclude that Mr. Pavey's s. 10(a) right to be informed of the reasons for his arrest and detention and his s. 10(b) right to be informed of his right to retain and instruct counsel without delay was indeed breached when neither the arresting officer nor the qualified technician inquired of him if he had changed his mind about consulting with counsel after the formal breathalyzer demand was made. I am of the view that the making of the formal breathalyzer demand effectively changed the reason for Mr. Pavey's detention, namely, to obtain conscriptive evidence for a charge of driving while over .08. This was, in my opinion, a significant enough change in jeopardy to warrant a re-reading of the right to counsel.

[67] Similar conclusions were reached in *R. v. Lester*, 2015 SKQB 53, and *R. v. Schlamp*, 2015 SKQB 348. Indeed, in *Schlamp*, the Court opined that, “[i]f the accused received the breath demand *after* exercising his right to counsel, a breach is potentially more serious. I say this because the accused would not have had the opportunity to discuss his jeopardy with counsel.”

[68] I would adopt the reasoning in *Pavey* in concluding that the delayed breath demand resulted in a change in jeopardy, which triggered an obligation on Cst. Brown to advise Ms. Brewster of the possibility of a charge for driving over .08, and to reiterate the right to counsel and provide Ms. Brewster with another opportunity to consult with counsel before being compelled to provide samples of her breath. Failure to do so was a breach of ss. 10 (a) and (b) of the *Charter*.

Section 24(2)

[69] In the result, I am satisfied that the defence has established the following breaches:

1. Delay in advising of right to counsel contrary to s. 10(b);

2. Invalid breath demand resulting in an arbitrary detention contrary to s. 9; and the unlawful seizure of breath samples contrary to s. 8; and

3. Failure to advise of a possible charge for driving over .08 and failure to reiterate the right to counsel and offer an opportunity to re-consult contrary to ss. 10 (a) and (b).

[70] The remaining issue for determination is what, if any remedy is appropriate. Defence seeks exclusion of both the utterance made by Ms. Brewster after speaking to duty counsel and exclusion of the Certificate of Qualified Technician.

[71] With respect to the utterance, having concluded that the evidence was not sufficiently reliable to establish what was actually said by Ms. Brewster, the utterance has essentially not been proven, and therefore need not be excluded.

[72] With respect to the Certificate of Qualified Technician, the test for exclusion, set out in the Supreme Court of Canada decision in *R. v. Grant*, 2009 SCC 32, 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.

[73] 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

[74] In terms of seriousness, in my view, the s. 10(b) breach relating to the delayed reading of the right to counsel is not a particularly serious one given the chaotic situation created by the multiple questions, interruptions, and people talking over each other. On its own, I would not have been satisfied that exclusion would be warranted.

[75] The same cannot be said of the remaining breaches. Each involve failures to comply with statutory and constitutional requirements that are firmly entrenched in Canadian law. I would echo the comments of Matsalla J. in *R. v. Roy*, 2020 SKPC 1, a case involving very similar circumstances:

> 20 Dealing firstly with the first inquiry, it is apparent that the failure to make the breath demand in a timely fashion was not deliberate but was unintentional. The police officer simply forgot to make the demand. Nonetheless, s. 320.28(1) of the *Criminal Code* places significant authority in the hands of a police officer to require a person to provide potentially conscriptive evidence. The law places a responsibility on the officer to initiate that process promptly because the individual has been detained. The officer, in this case, may have been careless or he may have been distracted by the arrangements that he was making before leaving the scene or he may have thought that making the demand was simply a technical requirement but, in any event, he did not focus on the importance of complying with his obligation under the *Criminal Code*. The breach is a serious one in this case because the accused's ability to retain and instruct counsel was affected (*Pavey* at para 66, *Lester* at para 40). The admission of evidence obtained in violation of *Charter* rights may send a message that the justice system condones serious state misconduct rather than requiring that the police uphold the rights granted by the *Charter* (*Grant* at para 23).

[76] The seriousness of the breaches, and the number of breaches, would support exclusion of the evidence.

Impact on Charter-protected Interests

[77] With respect to the impact of the breaches on Ms. Brewster's *Charter*-protected interests, this second *Grant* factor requires consideration of the impact of the breach on the accused's privacy interests, bodily integrity, and human dignity.

[78] Again, in my view, the first s. 10(b) breach, for reasons already stated, had minimal impact on Ms. Brewster's *Charter*-protected interests.

[79] The s. 9 breach flowing from the delayed breath demand had a somewhat more significant impact on Ms. Brewster, particularly given her obvious inexperience and confusion about the proceedings.

[80] The s. 8 breach resulted in Ms. Brewster being compelled to provide incriminating evidence through the provision of breath samples, a significant intrusion on her privacy interests and right against self-incrimination.

[81] With respect to the s. 10(a) breach and the second s. 10(b) breach, again I would note the critical importance of the right to counsel in our justice system, particularly important for individuals, like Ms. Brewster, who do not have experience navigating the system and are confused about the process. In the circumstances, the impact on her *Charter*-protected interests is significant.

[82] On balance, the impact of the breaches on Ms. Brewster's *Charter*-protected interests would militate in favour of exclusion.

Society's Interest in Adjudication on the Merits

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

Balancing the Three Factors

[84] A balancing of the three *Grant* factors would favour exclusion, particularly given the well-entrenched law in relation to ss. 8, 9, and 10(b). To find otherwise would, in my view, bring the administration of justice into disrepute. Accordingly, the Certificate of Qualified Technician must be excluded.

[85] Having so concluded, there is no admissible evidence with respect to Ms. Brewster's blood alcohol readings an essential element in proving the charge of operating a conveyance with a blood alcohol concentration equal to or exceeding 80 mg/%. Accordingly, an acquittal must be entered with respect to count 2.

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RUDDY T.C.J.