Citation: *R. v. Cockney*, 2022 YKTC 2

Date: 20220121
Docket: 20-00257
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Brooks

REGINA

v.

MEAGAN SHAYNE COCKNEY

Appearances:
Kevin Gillespie — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Ms. Cockney is charged with three offences: operating a motor vehicle while her ability to do so was impaired by alcohol; operating a motor vehicle while her blood alcohol level was equal to or exceeded 80 milligrams of alcohol in 100 millilitres of blood; and, resisting a peace officer. At the request of counsel, the trial proceeded as a blended *voir dire* in order to deal with issues of admissibility of evidence. More specifically, the accused alleges a breach of ss. 8, 9 and 10(b) of the *Charter of Rights and Freedoms.* The voluntariness of statements made by Ms. Cockney were not challenged.

[2] The argument regarding ss. 8 and 9 is based on an allegation that the investigating officer did not have reasonable grounds to suspect that Ms. Cockney had alcohol in her body at the time that he testified he formed his suspicion and,

accordingly, the screening device demand was unlawful. The s. 10(b) allegation is that the investigating officer failed in his information and implementation duties in his dealings with Ms. Cockney.

[3] In reviewing the helpful written submissions of counsel, it became clear that a central area of disagreement was with respect to the findings of fact that each urged on this Court. More specifically, as Cst. Parent was the only witness, there was no disagreement about the evidence that he gave but rather what inferences could or should be drawn from that evidence in order to make the findings of fact. There was not serious dispute about the applicable law.

[4] Given the centrality of findings of fact to the outcome of the defence application, I intend to go through the evidence and make those findings bearing in mind the submissions of counsel. With those facts in hand, I will then apply the law in order to determine the outcome of the application.

Facts

[5] On March 20, 2020, at approximately 2:00 a.m., Cst. Parent, an RCMP officer with four years' experience who was on duty in downtown Whitehorse, began to follow a grey Toyota with Northwest Territories licence plates on it. The tail lights were off. After following for approximately a kilometre, Cst. Parent pulled the vehicle over on Main Street.

[6] Cst. Parent went and spoke to the driver, Ms. Cockney. There were two other individuals in the car. She provided her Northwest Territories driver's licence. She

answered with her correct date of birth but could not remember her old address. During this conversation, there was a moderate odour of liquor coming from her breath. He was certain that the smell was coming from her and not from other occupants. There was also conversation about the odometer reading of her vehicle and at that time, Cst. Parent detected a light slur in her voice. He informed her that he could smell something from her breath and he wanted to make sure she was sober. It was approximately at this point that Cst. Parent formed his suspicion.

[7] Defence counsel's submission — which will be analyzed below — is that this evidence is insufficient to constitute reasonable grounds for a suspicion that Ms. Cockney had alcohol in her body.

[8] Defence did cross-examine on this evidence suggesting that the absence of notes on some of the details given by Cst. Parent undercut his evidence. In particular, Cst. Parent agreed that there was nothing in his notes about the odour of alcohol or about any physical observations. Nevertheless, he was not shaken in his recollection of Ms. Cockney's presentation. Despite his laxity with notes, I am of the view that Cst. Parent is reliable when he says that he smelled alcohol on Ms. Cockney and that she had a slur to her words. There was nothing incredible about this evidence and it conformed generally with the evidence of the video to which I will return. Accordingly, I find as a fact that Ms. Cockney did exhibit an odour of liquor from her breath and had a light slur in her speech.

[9] It was the evidence to this point that was the focus of defence counsel's submissions on the s. 8 issue.

[10] The investigation continued with further steps leading to presentation of the screening device. In response to Cst. Parent saying he could smell something on her breath, Ms. Cockney said that she had had a beer earlier. Cst. Parent brought Ms. Cockney back to the police vehicle and had her sit in the back seat with the door open. Cst. Parent prepared the device and explained how Ms. Cockney was to blow in to the device. She did so and the result was a fail.

[11] Cst. Parent gave evidence as to what happened from this point on. As well, a video was played of the interaction with Ms. Cockney including the words spoken. Of course that video provides a clarity and precision as to what was said and done that was beyond his ability to recall. Accordingly, I will place reliance on the evidence provided by the video. Indeed, it is critical to the next issue raised by the defence regarding compliance with s. 10(b) of the *Charter.* I have taken the liberty of underlining the portions that I consider to be most important to the resolution of the issue.

[12] After the failure of the screening device test, Cst. Parent arrested Ms. Cockney and read to her the s.10(b) rights. Ms. Cockney stated that she understood. He then asked her if she wanted to call a lawyer and she said, "[u]m I can actually email my lawyer, if need be, but I really don't want to have to." The exchange continues as follows:

> Parent: Okay. Um, like while you're in custody with us, like what's going to happen next, we're going to go back to the station and I'm going to get a breath sample from you. But, do you want to call a lawyer before you provide your breath samples at the office? Or, while you're in custody with us, do you want to call a lawyer?
>
> Cockney: <u>Yeah, why not?</u> Are you going to call a lawyer for me?

Parent: Well, you're going to call the Legal Aid or a lawyer of your choice.

Cockney: Yeah, no, I'd rather you call one for me.

Parent: Yeah, but do you want to call a lawyer? It's yes or no?

Cockney: I really don't want to have this go to Court, so probably not.

Parent: Okay so. . . I'm just going to repeat it again. It's a very simple yes or no question. You said sure, but. . .

Cockney: No, I'm fine thank you very much.

Parent: Do you want to call a lawyer before you provide your breath samples? Yes or no?

Cockney: But you have. . .You know what, if you have the right to ask questions, may I ask some questions now?

Parent: Yes.

Cockney: Okay. So, if I fail again, what are the repercussions?

Parent: There's no pass or fail for next one, there's going to be a number. Uh, the legal limit is 0.8. So, I don't know.

Cockney: Okay. So, what is the worst thing that comes out of all this?

Parent: If you're over the limit, you're going to get a Court date. If you're below the limit, then nothing happens.

Cockney: Okay, I'm good with a Court date.

Parent: But, before you provide those breath samples. . .

Cockney: No, I don't want to call a lawyer.

Parent: So, if you change your mind, just let me know, okay?

Cockney: Sure, thank you.

[13] Cst. Parent then read the police warning and caution and the breathalyzer demand. After the demand, Ms. Cockney asked if she could go for a cigarette and Cst. Parent testified he said she can not do that.

[14] It was at this point that Ms. Cockney had in her hand a cigarette as the result of a request that she had made. The following transcription of the exchange makes it clear almost immediately that there was a misunderstanding between Ms. Cockney and Cst. Parent.

> Parent: I'm just going to take that pen and the cigarette, if you don't mind. That cigarette that I've seen there.
>
> Cockney: Oh my heaven, the cigarette? No, I'm smoking it!
>
> Parent: No, no, no, no, you're staying in there.
>
> Cockney: No, you're telling me that I can smoke it.
>
> Parent: No, no, no, you're going to smoke it later, just give it to me. I won't let you put it in your mouth. Just give it to me.
>
> Cockney: Excuse me my friend! We have this thing, based on mutual trust and stuff, and you told me I could smoke a cigarette, so I'm going to go smoke a cigarette.
>
> Parent: I never said that.
>
> Cockney: Yes you did. You told me that I could go for a cigarette just now.
>
> Parent: No.
>
> Cockney: Yes you did.
>
> Parent: No.
>
> Cockney: Yes you did.
>
> Parent: I'm going to remove that cigarette from your hand.

[15] From this point on a struggle ensues that escalates to a degree that appears quite violent. Different interpretations were put on the altercation. For the purposes of this application, I find as a fact that Ms. Cockney would not give up the cigarette and Cst. Parent and another officer (Cst. Brochu) who attended at this time used their

strength to force open her hands. Ms. Cockney attempted to stop them from putting their hands on her. The result of the struggle was that she was taken to the ground outside the police vehicle face down into the snow at the side of the road. On the video she refers to blood and that he is making her bleed. She was later complaining about pain in her ear, arm and in her wrists.

[16] Cst. Parent was taken back to how the altercation started. He agreed in cross-examination that it was difficult to decipher if he says to Ms. Cockney that she can or she cannot have a cigarette. I confess that when I first heard the video I was surprised to hear that I thought he had said that she could have a cigarette. However, I accept Cst. Parent's evidence that he said that she could not have a cigarette. At the same time it is obvious, and was to Cst. Parent, that Ms. Cockney heard that she could have a cigarette.

[17] Ms. Cockney was picked up and placed in the back seat of the police car and kicked the rear passenger door and the shield between front and back seat in the car. She is screaming and swearing at the time. Once in the car the following exchange occurs:

> Cockney: I'm calling my lawyer! I am calling my lawyer!
>
> Parent: Okay.
>
> Cockney: I am calling my lawyer! I am calling my [unintelligible] what the fuck [unintelligible].
>
> Parent: Transporting one female to the office.

[18] Cst. Parent then left to drive to the detachment.

[19] As the above exchange is of critical importance to the determination of the s.10(b) issue I will return to it in order to make the necessary findings of fact. After hearing that Ms. Cockney wanted to talk to her lawyer, Cst. Parent did not get out of his car and walk to the Toyota right in front of him and get Ms. Cockney's phone. The reason he gave in his evidence was, "[b]ecause I wanted to get to the Whitehorse RCMP detachment because of the behaviour, she – the scene she was making in the vehicle, kicking the window. Because I have had people kick windows out, so". He was not asked why he did not have Cst. Brochu obtain the phone and bring it to the detachment. The drive to the detachment was a minute or so. Once at the office and after Ms. Cockney had been arrested for obstruction she was provided with her rights again (given the change of jeopardy) although the audio makes clear it was done with Cst Parent and Ms. Cockney talking over top of each other:

> Parent: You have the right to retain and instruct a lawyer without delay, you may call any lawyer you wish. A Legal Aid lawyer is also available 24 hours a day to give you free legal advice
>
> Cockney: Can I get your name?
>
> Parent: <u>I can provide you with a private phone and phone numbers for Legal Aid or for any lawyer of your choice.</u>
>
> Cockney: [Unintelligible.]

[20] In cross-examination Cst. Parent agreed (as the video did clearly show) that he was speaking faster than he had previously because he was quite frustrated. He also did not ask her if she understood her rights. At another point he did say, however, that she appeared to understand her rights. As to injuries, Crown counsel submitted that at no point did Cst. Parent notice injuries and that Ms. Cockney did not show him any

injuries. That may be the case but he did also testify that he did not look. On the video Ms. Cockney can be heard to say that the officers are making her bleed and she complains of arm pain.

[21] The exchange continued:

> Parent: If you are later charged with an offence, you may also apply to Legal Aid for assistance. Do you want to call a lawyer?
>
> Cockney: I don't have a lawyer on call. But I [unintelligible] call my lawyer.
>
> Parent: Do you want to call Legal Aid?
>
> Cockney: Yes!
>
> Parent: Cuz, you mentioned in the car that you wanted to call, after the fight happened. Right?
>
> Cockney: Can I have my phone back, I'm sure I can call somebody.

[22] The 'unintelligible' portion noted above is clarified by the evidence of Cst. Parent. He testified in examination-in-chief that after being read s. 10(b) Ms. Cockney said that she wanted to call her lawyer. With regard to Ms. Cockney's reference to her phone, Cst. Parent testified that he knew that she had a cell phone and he had assumed that it was in the Toyota. When it was suggested that he ignored Ms. Cockney's request for her phone, he responded, "I didn't answer her or anything about that." He testified that he was aggravated during this conversation.

[23] The exchange continued:

> Parent: Do you want to phone Legal Aid, or do you want to phone your own lawyer?
>
> Cockney: You can phone Legal Aid. What, are you charging me?

Parent: I'm asking you Legal Aid or your own lawyer?

Cockney: I want to phone Legal Aid.

Parent: You want to phone Legal Aid? Okay.

[24] Although another officer dealt with Ms. Cockney's access to counsel, Cst. Parent had in his notes that at 2:41 a.m. her call with Bob Dick commenced and finished at 2:50 a.m.

[25] In cross-examination he agreed that he never suggested she could look at a phone book, offered a list of lawyers, offered a Google search, or asked her the name of her lawyer or if there was another lawyer that she wanted to talk to. He had testified in-chief that if he had a name for a lawyer he would usually

> …look into it a little bit for them, like on just using Google. We do have the Northwestel phone book, but it's pretty limited. Like there's not all the lawyers are in there. So pretty often we have to look at, like the Law Society website in Yukon and do a little search with just a name, yeah.

[26] As I alluded to at the outset, the submissions of counsel focused, appropriately, on the inferences to be drawn and the facts to be found from this evidence. I have made the findings that are important with respect to the ss. 8 and 9 argument and it now remains to make the findings with respect to the s.10(b) argument. I will focus on the information given to Ms. Cockney and then what was said and done to get contact with counsel. With respect to this aspect of the evidence much emphasis was placed on what Cst. Parent knew and understood as the investigation continued.

[27] There was no contest that Ms. Cockney was given appropriate s 10(b) rights by the reading from the standard card on the first occasion that her rights were read. The

next consideration, however, was about her understanding of her rights. In response to that direct question she stated that she did understand. However, the level of that understanding and its communication to Cst. Parent is important to a number of issues, not the least of which is the issue of waiver.

[28] The following exchange that occurred made it clear that she did not appreciate the purpose of a call to a lawyer. Her statement in response to the direct question of calling a lawyer, "I really don't want to have to go to Court, so probably not" is difficult to make sense of. Indeed throughout her dealings with Cst. Parent it is clear that Ms. Cockney does not understand the process that is occurring: for example, after being arrested she suggests that she can leave. Therefore, I find as a fact that she did understand that she had a right to call a lawyer but her understanding went no further than that. I also find as a fact that Cst. Parent knew or ought to have known that this was an individual who simply had no understanding of her jeopardy or what she might need to speak to a lawyer about.

[29] Leaving those concerns aside, Ms. Cockney's answer to whether she wanted to call a lawyer was clear: "[y]eah, why not?" I therefore find that Ms. Cockney asserted her request to contact counsel. This was heard by Cst. Parent who in two exchanges later says about calling a lawyer, "[y]ou said sure. . ." I therefore find that Cst. Parent knew at that stage that Ms. Cockney wanted to receive the advice of counsel.

[30] Ms. Cockney then asked about how that call was to occur: "[a]re you going to call a lawyer for me?" Cst. Parent replied that she was going to have a call, but the only

question was whether it was Legal Aid or a lawyer of her choice: "[w]ell, you're going to call the Legal Aid or a lawyer of your choice".

[31] In those circumstances, it is problematic that Cst. Parent then went on to respond to Ms. Cockney's question about the repercussions of a failed breath test and "the worst thing that comes out of all of this." I have described what he said as a response as opposed to an answer. I find as a fact that Cst. Parent purported to answer Ms. Cockney's legal questions but his responses did not do so.

[32] Crown counsel submitted that Cst. Parent's questions were only to obtain "a clear and unambiguous" answer as to whether she wanted to speak with counsel. With respect (assuming that a citizen can only respond in a clear and unambiguous way in order to receive access to counsel), Ms. Cockney did give a clear and unambiguous answer when she responded "[y]es, why not?" From this answer I find as a fact that Ms. Cockney asserted her right to speak with counsel. The implications of Cst. Parent almost immediately thereafter saying "[i]t's yes or no?" will be reviewed below.

[33] Of course, the descent from this cooperative, calm encounter into a violent altercation effected a significant additional set of arguments by counsel. My findings of fact are as follows. Ms. Cockney misunderstood what Cst. Parent had said about smoking a cigarette. Therefore Cst. Parent knew that simple statements by himself – much simpler than the reading of her s.10(b) rights – had been misunderstood by her. With the change of jeopardy, Cst. Parent, obviously, had to read her rights to her again. He did so quickly because of his own emotional state, namely, he was agitated without

any regard to the fact that Ms. Cockney was speaking over top of him and not listening. He did not ask her if she understood.

[34] Ms. Cockney, while at the scene and in the back of the police car, asserted her desire to contact her lawyer – not a Legal Aid lawyer – on four occasions. Cst. Parent was aware that she had a cell phone and, although he equivocated on this issue, he knew that the phone had to be in the Toyota. After all, he had just searched her after the struggle and the phone was not on her. He did nothing to have that cell phone retrieved and brought to the detachment. At the detachment Ms. Cockney was read her rights and in response to that I find as a fact that she said, "I don't have a lawyer on call. But I want to call my lawyer." This was her fifth assertion. To this request of Ms. Cockney to access counsel of her choice, Cst. Parent said, "Do you want to call Legal Aid?"

[35] I find as a fact that Ms. Cockney then requested access to her phone in order to contact her counsel. I find as a fact that Cst. Parent, who knew she had a cell phone and that it was in the Toyota, took no steps for the phone to be brought to the detachment although the detachment was about one minute away from the scene of the incident. His speculation that the car may have been towed by that point is just that. He did not take any steps to find out. Cst. Parent also agreed in cross-examination that he accepted that Ms. Cockney had a specific lawyer in mind when she referred to "my lawyer" and accordingly I make that finding of fact as well.

[36] One further finding of fact is necessary given what was put in issue in submissions. It was submitted by the Crown that Ms. Cockney's statements on the

video, regarding being injured, were hearsay statements and could not be taken for their truth. Ms. Cockney did not testify on the *voir dire* and therefore the statements, if they are to be considered for their truth are, as Crown submitted, hearsay. That does not, however, make these statements inadmissible for their truth. It is trite law that contemporaneous statements of bodily sensations are an exception to the exclusionary rule. Ms. Cockney's statements were clearly that type of statement. Cst. Parent's evidence that he did not look for injury is not sufficient to raise any question about the statements made. Crown submitted that the context of "the abusive and volatile manner in which the accused behaved towards police" meant that the statements should not be used for their truth. It is not clear to me what the logical connection is between her complaint of injuries and her kicking actions in the back of the police car and swearing at the police. Obviously using her feet did not cause her injuries to her upper body. If the suggestion is that the injuries only occurred because of her response to being wrestled to the ground, face first into the snow, by two larger RCMP officers then there are two obvious responses. First, how the injuries occurred, if there is any doubt, is not what the statements are relevant for but the fact of their existence. Second, the video of what happened is very disturbing and not at all due to any alleged abusive and volatile manner of the accused. That is as far as I need go to deal with the argument so I will not further characterize what occurred.

[37] I find that these statements of injury by Ms. Cockney are within the exception to the hearsay rule and accordingly are admissible for their truth.

[38] These are the findings of fact that are necessary to commence dealing with the issues raised in this application. There will be more findings of fact that will need to be

made as the submissions of counsel are analyzed, however, they are ones which involve detail that is not necessary at this point. I now turn to the issues.

Issues

1. Did Cst. Parent have reasonable grounds for a suspicion that Ms. Cockney had alcohol in her body?

2. Did Cst. Parent breach Ms. Cockney's s. 10(b) rights by restricting counsel options and steering her to duty counsel?

3. If either of those breaches are made out is there to be the exclusion of evidence pursuant to s. 24(2)?

Analysis

Issue 1 – Reasonable Grounds

[39] The defence submission, as I understand it, is that Cst. Parent's evidence that he could smell "something" and there was a light slur to her speech created nothing more than a hunch that she had alcohol in her body and did not satisfy the objective component of the reasonable grounds for suspicion requirement. Some reliance is placed on the fact that Ms. Cockney was in a vehicle with others from whom the odour of alcohol may have come. Defence submits that, if this first point is accepted, the administration of the screening device was therefore unlawful and reliance on the failure in order to arrest Ms. Cockney was also unlawful. Thus a finding on the question of reasonable grounds for suspicion has a cascading impact on Ms. Cockney's rights.

[40] I have found as a fact that the "something" that Cst. Parent smelled was the odour of alcohol. I have also accepted his evidence that the odour was coming from Ms. Cockney and not the other occupants of the vehicle. I have also accepted as a fact that there was a light slur to her speech. I appreciate that there are cases which have analyzed in detail the significance of this kind of indicia and that the result in those cases have gone both ways. I attribute that to the particular factual scenario in each case. For Ms. Cockney's case it is essential that I consider the particular facts of her case. The smell of alcohol coming from her in the early morning hours and a light slur are, in their totality, sufficient to satisfy me that there were reasonable grounds for suspicion on the part of Cst. Parent. Accordingly, his subsequent steps of demanding and receiving a fail result on the screening device are lawful. The submission that ss. 8 and 9 of the *Charter* were breached is rejected.

Issue 2 – Section 10(b) Breach

[41] Counsel agreed that the central authority on this issue is *R. v. Bartle*, [1994] 3 S.C.R. 173. That case established that there were two components to the s. 10(b) right: an informational component and an implementation component. These components create duties for the investigating officer and can be summarized into three propositions:

1. The duty to inform the accused of his or her right to retain and instruct counsel without delay and to inform the accused of the existence of the availability of Legal Aid duty counsel;

2. The duty, once the accused asserts the right, to provide the accused a reasonable opportunity to exercise the right; and

3. Refrain from seeking to elicit evidence from the accused until the accused has had a reasonable opportunity to exercise that right.

[42] It was accepted that once the accused asserts their right (assuming diligence on their part) the police are to take reasonable steps to facilitate that access.

[43] It is the application of these principles to the facts of this case which separates the submissions in this matter. While I have referred to some issues regarding Ms. Cockney's understanding of her rights, I am satisfied that she understood that she had a right to a phone call. Accordingly, the contested question is related to the implementation aspect of her right to counsel.

[44] With respect to that question Crown had several arguments. First, Crown argued that Cst. Parent, prior to the struggle, was under no duty to implement access to counsel as Ms. Cockney ultimately declined to contact counsel. It was submitted that her assertion of wanting to contact counsel was because "she was interested in exploring the option of contacting her own lawyer – however, the Accused ultimately declined the right to speak with counsel." With respect, I disagree. Ms. Cockney said, as I have found as a fact, that she wanted to contact counsel. Cst. Parent heard her. Therefore the question had been answered and Cst. Parent's duty of implementation was required. It was no exploration, it was an assertion. That was the end of the matter.

[45] However, Cst. Parent did not fulfill his duty. Instead he asked two more times if she wanted to call a lawyer when she had already said yes. It should be noted that this occurs at a time when Ms. Cockney connects contacting counsel with whether the case will go to court or not, a connection that would attract the attention of any one who was listening to her. This was a person who did not understand at all the process that she was involved in. If that were not enough, Ms. Cockney then asks questions which obviously are ones that are to be asked of a lawyer: what are the repercussions of a failed breath test and what is the worst that comes out of this, i.e. the worst case scenario. Instead of Cst. Parent drawing the painfully obvious conclusion that Ms. Cockney has questions that need to be answered by a lawyer, he provides responses that are not answers to the questions asked.

[46] It is not necessary to draw a conclusion from Cst. Parent's fending off her assertion of her rights rather than facilitating them because the sequence of events overtakes that analysis.

[47] Cst. Parent ends the exchange just referred to with the words, "[s]o, if you change your mind, just let me know, okay?" After the altercation, Ms. Cockney let Cst. Parent know. She yelled out four times, "I want to call my lawyer" as she sat in the back of the police car. She did not ask to speak to Legal Aid. Ms. Cockney wanted to talk to her lawyer. As I have found, Cst. Parent knew that she had a cell phone and that the cell phone was in the Toyota. In this day and age, it is common knowledge that cell phones contain a contact list from which one can retrieve a phone number. In those circumstances, as Cst. Parent sat in his police car facing the Toyota just in front of him

and with the assistance of Cst. Brochu available, what did he do to fulfill his implementation duty? He drove to the detachment.

[48] Crown's written submission recognized that this was a "decision by Cst. Parent not to retrieve the Accused's phone" as opposed to mere inadvertence. That recognition is fully supported by the evidence of Cst. Parent: he routinely asks accused if they want anything from the car but did not do so here. However he also testified that he left as soon as he could, "[b]ecause I wanted to get to the Whitehorse RCMP detachment because of the behaviour, she – the scene she was making in the vehicle - kicking the window. Because I have had people kick the windows out, so." Assuming that the one or two minutes, at most, to obtain the phone to fulfill his implementation duty was too much time to spend, his answer is no answer to why he did not directly, or by radio as he drove, communicate to Cst. Brochu to obtain the phone. I find that this was a viable and obvious option to fulfill his implementation duty. Cst. Parent's decision, therefore, can only be described not as him not retrieving the phone, but that the phone would not be retrieved.

[49] Crown counsel's submission invited the Court to find that Ms. Cockney was to blame for the "missing phone" and for any *prima facie* breach due to her behaviour. I do not view the issue as one of assigning blame for how this investigation turned from a cooperative citizen complying with the requests to accompany the officer to his car, to taking the screening device test, and then to a struggle on the frozen ground all over an unclear communication. Certainly, I find there is no basis to conclude that Ms. Cockney's own conduct contributed to the breach: there is simply no connection between Ms. Cockney's behaviour and a failure to facilitate her access to counsel of her

choice. Cst. Parent had many opportunities to facilitate contact with her counsel and he took none of them.

[50] The Crown submission does raise whether Ms. Cockney used diligence in assertion of her right to contact her counsel. Given the totality of the circumstances that I have summarized and - given her vociferous statements in that regard - I conclude that she did use reasonable diligence. I will explain why shortly.

[51] At the detachment, Ms. Cockney was given a fast-paced repetition of her rights. It is to be remembered that she was told, "I can provide you with a private phone and phone numbers for Legal Aid or any lawyer of your choice." Having been told four times that she wants to call her lawyer it is beyond obvious what Cst. Parent's duty of implementation is at this point. It is, as he has testified he has done on other occasions, to do the necessary search for her lawyer. In short, he tells her that he can do it, but in fact he just does not do it.

[52] The defence submission was that Cst. Parent steered Ms. Cockney to legal assistance that she had not chosen, that is Legal Aid. To assess that submission, it is important to consider the continuation of the exchange. Cst. Parent asks if she wants to call a lawyer. I have found as a fact that Ms. Cockney responds, "[b]ut I want to call my lawyer." This is simply a reiteration of what she has already said. He specifically does not respond to that. His response is, "[d]o you want to call Legal Aid?" This is an offer that has already, in the clearest terms been rejected by her.

[53] However she does respond yes to the suggestion of Legal Aid. Given her extremely poor understanding of the processes she is undergoing as outlined above, I

am not satisfied that she understood that this meant she still had a choice to get access to her lawyer. I am bolstered in drawing that inference and the conclusion that she still wanted to call her lawyer, because she next asks "[c]an I have my phone back, I'm sure I can call somebody." She would not have talked of calling "somebody" if she had made the choice to talk to Legal Aid.

[54] As I have noted, when asked about his response to this request from Ms. Cockney for her phone, Cst. Parent testified, "I didn't answer her or anything like that". He did ask her two more times if she wanted to call Legal Aid or her own lawyer. When she said, "I want to phone Legal Aid", he did answer that statement. He said "okay" and arranged for her to speak to a Legal Aid lawyer.

[55] It should be remembered that this all occurs in a context in which Ms. Cockney at the outset said she wanted to call a lawyer and Cst. Parent asked her two more times if she wanted to call a lawyer.

[56] Crown counsel makes several arguments in response to the specific suggestion of steering and to the more general submission (and what I view as the central issue), the failure of the implementation duty. As the Crown submission followed the chronology of Cst. Parent's interaction with Ms. Cockney, I will do the same.

[57] First, the Crown submitted that at the roadside there was no failure of the implementation duty as Ms. Cockney was only "interested in exploring the option" of contacting counsel. This interpretation of Ms. Cockney's thought processes are, with respect, inconsistent with the words she used. She was asked if she wanted to call a lawyer and she said, "[y]eah why not?" That is clear language and it must be respected.

Cst. Parent continued asking her if she wanted to call a lawyer even after saying to her, "[w]ell you're going to call the Legal Aid or a lawyer of your choice." He knew he was asking a question that had already been answered. To go back and forth as he did injects unnecessary confusion into the dialogue as one reads it on the printed page. The confusion created for Ms. Cockney that night can only have been greater. It is important to bear in mind that context and these particular facts. This is a citizen, who, on the evidence before me, is clearly unsophisticated as to this legal process, who is speaking to a person in authority. It is naïve and unrealistic to not realize that when the citizen makes a choice and that is overridden by further questions, they will be likely to relent to the person in authority.

[58] This of course is only context because of what happened thereafter. After the struggle there can be no question that she asserted her right to contact her lawyer at least four times. Crown submits that she did not provide Cst. Parent with her lawyer's name or specifically request that police assist her in contacting another lawyer.

[59] With respect, this suggests that there is no duty on the police to implement right to counsel until they are specifically told the name of the lawyer or a specific demand is made that they facilitate access to counsel. I disagree. I accept that the police not being told the name of the lawyer or receiving specific requests to do more to assist are factors. However, they are only factors. Those factors should not obscure the clear facts of this matter. She asserted the desire to speak to her own lawyer four times. In response to that Cst. Parent did absolutely nothing to assist her. He is the one in position to do something. He is the one who can navigate the practicalities of a phone, a phone book etc. What he did do, the Crown accurately states in their written

submission, is “press” her. With respect, that is the one thing he ought not to have done but it is what he did do.

[60] Crown counsel submits that the actions of Ms. Cockney ought to be the focus of the analysis. Specifically, it is submitted that Ms. Cockney’s failure to inform Cst. Parent of her lawyer’s name (which assumes she knew and remembered that name) or to make an explicit request that Cst. Parent attempt to contact her lawyer and her choice to contact Legal Aid means the following:

- first, she made her choice and it was Legal Aid;
- second, she failed to invoke her counsel of choice;
- third, she showed a lack of diligence in exercising her right to counsel of choice; and
- fourth, that she clearly and unequivocally waived her right to counsel of choice.

[61] As I have been at pains to make clear, Ms. Cockney’s choice of Legal Aid was after she had asserted her right to speak to her lawyer. She did not fail to invoke her counsel of choice. On Cst. Parent’s own evidence, he did nothing in response to follow up on those requests, including the one for access to her phone. She made her choice. It was not respected. That she went on to make another choice is of no assistance to Cst. Parent’s failure in his duty.

[62] A lack of diligence has not been shown on these facts. Ms. Cockney asked to speak to her lawyer. As Cst. Parent "pressed" her at the detachment she asked for her phone so she could get access to counsel. Citizens need not show a steely persistence in order to receive their rights. They should request what they want and that request should be respected and facilitated. That did not happen here.

[63] As to clear and unequivocal waiver, that must be done with a full knowledge of the rights the individual is waiving. From the very outset, Ms. Cockney exhibited her lack of knowledge of the processes she was involved in. I am satisfied that Cst. Parent knew that this was a person who was not understanding what was happening in this investigation. The situation of contacting counsel became urgent after the struggle judging by her expressed desire to speak to her lawyer. I cannot conclude that there was a waiver of rights by Ms. Cockney.

[64] I have already concluded that Ms. Cockney did use diligence in the assertion of her rights.

[65] Crown's submission responded to the submission of steering of Ms. Cockney away from her own lawyer to Legal Aid by advancing the proposition that the evidence must show that "the accused's personal will is overborne by the police". To make such a finding, the Crown submission continued, "there must be evidence of coercion".

[66] In support of that submission, Crown relied on *R. v. Lee,* 2019 ABQB 354. As that was language which I had not heard before in this context, I reviewed that decision and the ones on which it relies in support of its conclusions. I am unable to conclude that the decision is of any bearing to the matter before me. In support of the "will is

overborne" test, the Crown submission indicates that *Lee* relied on *R. v. Willier,* 2010 SCC 37, at para. 47. Paragraph 47 of *Willier* contains one sentence that does not refer to the concept of the will being overborne. What the Crown submission must have been referring to was para. 43 which notes that in the case before the Court there was no evidence of coercion. That single sentence located in the midst of a lengthy paragraph was given in a very different fact pattern and context. That sentence was not set out in order to establish a test for the facts I am dealing with here.

[67] The "will is overborne" reference, in fact, comes from *R. v. Wolbeck,* 2010 ABCA 65. The factual issue in that case was whether the police had assisted the accused in getting a lawyer or had "taken over". In giving judgment, the Court listed eight errors made by the Summary Conviction Appeal judge and, in one of those errors, the Court said that there would not be a "taking over", ". . .unless the accused's personal will is overborne by the police, and his attempts to contact counsel thwarted". It is far from clear that the Court was setting out a new legal test to be applied to all cases involving the implementation duty of the police. It was a description made in passing. Even if the Court was establishing a new test it is, in my view, to be applied when there was an allegation that the police took over, which is not the fact pattern here. To repeat, this case is the opposite: Cst. Parent did nothing in response to Ms. Cockney's request to speak to her counsel. As to *Lee*, it was a case in which the analysis was set out after the matter had been sent back for trial and was intended as an exposition to assist the next trial judge. As such, what was said in *Lee* was *obiter dicta*. With the greatest of respect, I do not find it helpful on these facts.

[68] Crown counsel relied on a number of other authorities. I have read all of them. I am aware that the burden of proof is on the applicant. I am aware of the principle of diligence to be shown by the accused and the issue of waiver. It is clear that each case is dependent on its own facts. Indeed, I take from the cases provided that it is essential to analyze this case on the basis of its unique facts. I find the facts here to be markedly different from those in *R. v. Ruscica*, 2019 ONSC 2442. I find that this case is resolved by paying close attention to the principles set out in *Bartle*.

[69] I am satisfied that when these circumstances are looked at in their totality, Cst.Parent steered Ms. Cockney away from calling her own lawyer in favour of having her call Legal Aid.

[70] In summary, I have found that Cst. Parent breached the s.10(b) rights of Ms. Cockney by:

1. Ignoring Ms. Cockney's initial request to contact counsel when she said, "[y]eah, why not?" There was no need to act as if that had never been said and ask her again if she wanted to contact counsel.

2. Although it is a minor point, the fact that Cst. Parent answered questions that should have been referred to the lawyer Ms. Cockney contacted, tended to lead Ms. Cockney away from contacting counsel and undermined her decision.

3. After Ms. Cockney asserts her right to contact her counsel four times while at the scene, Cst. Parent does nothing but radio to the

detachment that he is coming. This is while he has knowledge that Ms. Cockney has a cell phone, it is not on her person so must be in the vehicle that he is parked behind and while he has at least one other officer, Cst. Brochu, at the scene who can assist.

4. At the detachment he makes no effort to determine if Ms. Cockney understands her rights as he speaks quickly and over top of her. In spite of all of the lack of understanding on Ms. Cockney's part up to this point, he does not ask her if she understands.

5. He does not make any effort to find out who her lawyer is that she wants to contact. This is despite the fact that he tells her that he can do so.

6. In response to a statement that she wants to call her lawyer, he says, "[d]o you want to call Legal Aid?"

7. He ignores her request for her phone and asks her again if she wants to call Legal Aid or her own lawyer.

8. When the totality of these circumstances are considered the conclusion is inevitable that Ms. Cockney was steered away from calling her lawyer and on to calling Legal Aid. In so doing she was deprived of her counsel of choice.

Issue 3 - Exclusion of Evidence – s.24(2)

[71] In determining whether the administration of justice would be brought into disrepute, I am to consider:

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

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

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

[72] Once I have considered those three factors, I balance these three factors to determine whether the admission of evidence would bring the administration of justice into disrepute.

[73] Crown counsel submitted that the breach in this case was a minor breach and had at its source the good faith attempt by Cst. Parent to clarify whether Ms. Cockney wanted to talk to her lawyer or Legal Aid.

[74] I disagree. As I have attempted to set out, the breach of Ms. Cockney's rights occurred repeatedly through Cst. Parent's dealings with Ms. Cockney. There were many opportunities for Cst. Parent to get this right and he took none of them. The breaches went to the heart of Ms. Cockney being able to make her own choice as to who she spoke with. She was ignored and ultimately thwarted in her effort to speak with her counsel. All Cst. Parent had to do was listen to Ms. Cockney and respond to what she was saying. Instead he went through the motions of reading cards and asking

questions without listening and using his common sense. None of what I have found breaks new legal ground. This is well worn turf. Cst. Parent should know it. This is a serious breach.

[75] As to the second consideration, Crown submitted that the impact of the breach on the protected interests of Ms. Cockney were minimal. Crown quite properly pointed out that Ms. Cockney did get access to counsel and she expressed no dissatisfaction with that consultation. Crown also submitted that the impact on her interests was as a result of her own volatile behaviour.

[76] I have already expressed that I do not accept that Ms. Cockney is the author of her own breach given that the breach is facilitating access to counsel and steering her away from counsel. I do accept however that the impact of the breach is mitigated somewhat by Ms. Cockney actually speaking with counsel. At the same time, the altercation and the additional charge of obstruction that she was advised of, created a complicated legal scenario. It created the prospect of a reasonable excuse for refusing to provide a breath sample. It created the necessity of explanation of an obstruction charge. It created an issue of how she ought to interact with the police from this time on and the exercise of her right to silence. This was no longer a “garden variety” impaired driving case. In addition, Ms. Cockney, by the questions she had already asked of Cst. Parent did not understand the processes that she would have to face. Being in a territory that she did not live in could only add to the need for her to speak with her own lawyer. In short, there was a great deal to go over with her lawyer, an opportunity which she never received. I cannot agree that the impact was minimal. The impact was not minimal and it favours exclusion.

[77] The third factor is society's interest in adjudication on the merits. I accept Crown's submission that society has a clear and obvious interest in enforcing Canada's impaired driving laws. The breath test results are crucial evidence to prove infringement of those laws in this case.

[78] It is rare that a case in which the first two factors favour exclusion would have the evidence included as a result of this third factor. That is a recognition that it is the long-term reputation of the administration which must be borne in mind and not the result in any single case.

[79] The third factor does not favour exclusion.

[80] Balancing these factors I conclude that the reputation of the administration of justice would be brought into disrepute if a serious breach impacting a significant right of the accused had no consequences. The right to counsel for citizens can never be allowed to become a hollow right. The long-term reputation of the administration of justice ought not to be harmed in order to obtain a result in this case.

[81] The defence application is granted. The certificate of analysis is not admitted into evidence.

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BROOKS T.C.J.