Citation: *R. v. K.J.H.*, 2022 YKTC 39

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Docket: 21-00397
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REX

v.

K.J.H.

Appearances:
Kimberly Eldred — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] The accused is charged with offences of impaired operation and a blood alcohol charge from an event that occurred on August 1, 2021. On that date, shortly after 12:30 a.m., the pickup truck (the "truck") that she was operating failed to completely stop at a stop sign. The truck turned right onto the highway. A police officer was watching. He pulled onto the highway behind the accused, signalling her to stop. The truck pulled off the roadway and came to a stop almost immediately. As a result of speaking to the accused, the police officer determined that he would require that she provide a sample into an approved screening device. She did so, resulting in a fail reading.

[2] The police officer arrested her. The officer then returned the screening device to its case. He called for a tow truck and someone to wait for the tow truck. He made some

notes. He then told the accused of her right to counsel. The accused argues that the delay was a breach of her right to counsel. She was taken to the Arrest Processing Unit ("APU") at the Whitehorse Correctional Centre ("WCC"). She asked to use a washroom. She was allowed to do so. However, the toilet was located in a group-holding cell. The cell was otherwise unoccupied, but all the activity in that room was recorded on video. She argues that the act of recording her was a breach of her rights to be free from unlawful search.

[3] The case proceeded on a *voir dire* into these issues. This is the decision on that *voir dire*.

The Stop

[4] The accused was driving a truck. The event was recorded on a video camera recording system in the police car. The accused appears to slow and roll through a stop sign at a road intersecting with the highway. The officer also testified that a headlight was out. For those reasons, he pulled onto the highway behind the truck and used his emergency lights to stop it. The accused braked and properly pulled the vehicle off the road onto the shoulder.

[5] The officer approached the driver. He suspected that she may have alcohol in her system and told her to come to the police car. She got out of the truck and walked to the police car. Nothing about her movements or gait indicated impairment.

[6] The timing of the events was recorded by the video recording system. I shall use those times, which are all in the hour after midnight.

[7] The truck had driven through the stop sign at 12:35:02. By 12:37:12, she was at the police car. The officer read the demand at 12:37:30 and she agreed to provide a sample.

[8] There was some conversation between the two. It included the accused saying that the vehicle belonged to her boyfriend. She told the officer “I am on my monthly and that’s why I need to get to a bathroom.”

[9] At 12:39:30, the officer had the screening device ready for use. The accused began to blow at that time. At 12:39:51, the officer told her that the result was a fail. At 12:39:52, the officer told her that she had to get in the back of the police car. She was detained at that point. When she asked about whether the back door could be kept open, she was told to get her feet in, as she did not have a choice. She asked about her telephone, but there did not seem to be a clear response. In any event, she did not get her phone.

[10] The officer then did some other things. He communicated with someone about getting a tow truck. He made some notes to record what had happened. He put the screening device back into the case. Then he turned to her right to counsel.

[11] At 12:41:48, he said, “I’m going to give you your rights first.” He then asked her if she wanted her phone. He testified that some people want their phone to get contact information for a lawyer. It is not clear why he had refused to give her the phone minutes earlier, when she had asked for it. He then read to her the notice from his card. That started at 12:42:34. She did not want to call a lawyer. She was crying. She was then taken to the APU at WCC.

The Right to Counsel Issue

[12] An accused is to be told of the reason for arrest and the right to speak to counsel. That should be done immediately upon arrest. The earlier detention at roadside was pursuant to legislation and she did not have the right to speak to counsel before the screening device was used. That period was brief.

[13] The officer did not tell her of the right to counsel immediately upon arrest. Instead, he arranged for a tow truck and another officer to remain with the vehicle. He put the screening device back into the container. He made some notes. He also had some brief conversation with her about her telephone and she asked whether a friend could drive the truck.

[14] The tow truck was necessary as the truck could not be left sitting on the shoulder. There was no reason why he did not tell her of her rights before calling the tow truck. While the truck could not be left there for hours, it presented no danger to anyone, especially with a police car sitting behind it. There was no evidence to suggest that it was a busy night for tow trucks. The weather was fine. It was summer. There is nothing to suggest that a delay of minutes in calling for a tow truck would have had any impact whatsoever. He could as easily have called after he had told her of her right to counsel.

[15] The officer put the screening device away. He was in the police car, presumably with the container for the device. It could not have taken long to put it away. The device was not at risk of harm or of being lost. No potential hazards, such as moisture, snow, smoke or dirt were identified as being present. It seems to be strictly habit on his part to

put it away after use. While that is a laudable way to treat government property, there was no reason why he could not have put it away after telling her of her rights. He did not tell us what was required, but it is hard to imagine that it was a task that could not have been performed while he was talking.

[16] The officer made notes. These are an important record of events. They are required for disclosure to the accused as well as forming a basis to later recall events in testimony. Sometimes, the notes provide the only record. Here, everything was being recorded on audio and video. The officer had easy access to all the times, activities, and conversation. Even if he forgot the time of an event, such as the demand, he had a reliable source of the information.

[17] The period between detention and telling the accused of her rights was not long. It was two minutes and 42 seconds until he actually started the rights. It was less time, about two minutes, until he started the process by telling her that he would now give her the information.

[18] The issue of delay between detention or arrest and giving an accused the notice seems to arise regularly in courts across this land. Often, the delay is based upon solid grounds: the need to search for weapons, the need to secure a scene, the need to pursue another suspect, the need to keep the public safe, and the need to deal with injuries or even death. Some things are just more urgent than taking the many seconds to read someone their rights. Fortunately, none of those circumstances was present here. Instead, the officer just decided to do other, non-urgent things first. Although the

time was short, the rights were not given immediately or as soon as practicable or once all other urgent matters had been dealt with. No matter what the test, this was a breach.

[19] Crown counsel points out that the officer acknowledged that he has since changed his approach. He has done this as a result of this same issue arising on other cases where he was the arresting officer. The Crown urges the Court to find that this breach should not result in exclusion. The Crown also points out that no statement was obtained that could be excluded. Realistically, only the breath test results came into existence after the breach. The time was short and the Crown says the breach was minor, at worst.

[20] The test for exclusion is as set out in *R. v. Grant*, 2009 SCC 32. The breach was because the officer determined that other, routine matters, had priority over telling the accused of her rights. The evidence was not extensive, but I conclude that he did not really consider the other course of action, that is, the rights first, until it arose in a trial involving another arrest. A breach that occurs because of adherence to a routine, followed without consideration is troubling. I consider this serious. This was not a case where an officer made a judgment call that is later found to be an error. Sometimes, an officer will assess a situation and give priority to one thing over another. If, in the course of assessment in a courtroom, the officer is found to be wrong, it may be found to be a minor breach. The troubling aspect here is that there is no evidence that any thought went into the procedure.

[21] The impact on the accused must include an analysis of the timing. It would have been difficult, if not impossible, for her to contact counsel from the police car. Even if

she had had her telephone, the ability to have privacy would have been limited. It would be impractical to require the officer to stay outside the car to allow her to speak to counsel. Maybe that would be tolerable in August, but it would not be tolerable in January. Moreover, forcing the officer to give her privacy at roadside would have delayed any breath tests. Here, the delay in informing her of her rights was less than three minutes. It did not have a significant impact upon her. She was upset, but I am unable to conclude that the failure to be told of her rights was more significant than being told she was under arrest.

[22] The last part of the analysis requires consideration of whether the evidence obtained should be excluded, considering the long-term impact upon the administration of justice. I do not agree that no evidence came into existence because of the breach. The breath tests were obtained later. However, the administration of justice is not brought into disrepute by the failure of the officer to notify her of her rights immediately. The delay of less than three minutes did not have any significant consequence and the evidence obtained is reliable. The evidence is not excluded for this breach.

Events at WCC

[23] The officer took the accused to the APU at WCC. The evidence concerning what happened came from the police officer, recordings of the event, and from a deputy superintendent in charge of operations.

[24] The background is that the APU is located in part of the WCC, a territorial facility. Correctional staff are present. There are cells. Officers can use an approved instrument to conduct breath tests. There was not much evidence about the facility, but the

efficiencies of such a facility are not hard to imagine. WCC has to be staffed around the clock. There was no evidence about how busy the facility was on August 1, 2021.

[25] The accused had asked to use a washroom. The officer involved in the arrest had a female correctional officer assist. The correctional officer did not testify, but her words were recorded on the police officer's recording device.

[26] The accused was taken to a cell, described as a "group cell" on a video recording. The cell had two benches along the walls. It had one door, with a window to allow a view inside and presumably outside the cell. Near the door, in plain view, was a toilet. It appears to be metal. There is no toilet seat. The toilet has a basin with a faucet at the top of what might have been the toilet tank.

[27] The correctional officer told the accused that the cell had a camera that was recording what took place in the cell. For privacy reasons, there was a "black box" over part of the camera angle of view. Initially, this was confusing, at least to me, but ultimately it became clear that there was no actual black box. Rather, the officer meant that the field of view of the camera was obscured by a solid black rectangle on the viewing screen. That rectangle on the screen meant that someone watching the screen would not see what was happening at the toilet. The video record would only show the black rectangle, not the person at the toilet.

[28] The correctional centre staff could see several television screens that showed them what was happening in each cell. The recordings are kept for two years and may be viewed by supervisors or others with a reason to view them. The purpose of the

black box on the screen was to give a person some privacy when they were using the toilet.

[29] Of course, the information from the correctional officer was wrong. There was no black box. Nothing obscured what the cameras showed and what they recorded.

[30] To enhance her privacy, the accused had also been asked if she wanted a "privacy blanket". The blanket could be used to obscure what would be seen. The accused accepted the offer.

[31] She entered the cell. She was alone, once the correctional officer closed the door. She wrapped the blanket around part of her lower body, then dropped her underwear and sat on the toilet. She was wearing a shorter skirt, which she must have lifted up, under the blanket. When she was finished, she removed the blanket and placed it on the floor. She took some toilet paper and wiped herself. She discarded the paper into the toilet and stood. Her underwear was near her ankles. As she stood, part of her buttocks on one side was visible. She flushed the toilet. The contents of the bowl of the toilet were visible. She washed her hands. The correctional officer then came to the door and gave her some paper towels to dry her hands. Then, she left the cell.

[32] There was no evidence about officers watching the screens as she was on the toilet. There was no evidence about male or female officers being present. There was at least one female correctional officer and one male police officer, but it is unknown if either was watching the accused. The timing of the paper towels given to the accused is consistent with that, but might have been the officer responding to the sound of the toilet flushing.

[33] Counsel for the accused suggested that telling the accused about the “black box” was a lie. With respect, I do not come to that conclusion. Rather, the only conclusion is that the correctional officer and the police officer had no idea what was being done to obscure the view or recording. Had anyone looked at the screen, they would have known. If whoever was monitoring the screen said something, the true state of affairs would have been obvious.

[34] The accused testified. I accept all of her evidence on this aspect of the case. She was 21 years old at the time. It was the first time that she had been arrested. She was upset over what was happening. She had been crying.

[35] She wanted to use a toilet. Her period had started and she was bleeding. She did not have any menstrual products with her. She thought that she had privacy while using the cell toilet. She used the blanket, but placed it on the floor while she was on the toilet because she believed that the camera could not show or record what she was doing.

[36] She later saw the disclosure and was humiliated. Part of her buttocks was shown. She could clearly be identified as she sat on the toilet and later wiped herself. She could see the contents of the toilet bowl before she flushed. She had no idea that any of this recording existed. She had no idea who else had seen this. An extremely private bodily function had been watched and recorded.

[37] I accept that she was humiliated by the recording. She appeared to be humiliated yet again as the video was played for the court. This should never have had to happen. Everyone has bodily functions. Most people treat them as private. She thought it had been private, until the recording showed up with the disclosure.

The Surveillance System

[38] The evidence of the correctional superintendent was that the APU was run pursuant to a memorandum of understanding between the RCMP and the Territory. In May, 2021, when he started his job, he understood that RCMP policy had changed and they should no longer watch or record as a person used a toilet. He thought the changes were made over the next couple of months. Some cameras needed to be changed. Apparently, that had not been done by the time this accused used that toilet.

[39] He said there are cameras recording what goes on in all locations at WCC. There are several reasons for that. It is easier for staff to keep watch over the inmates, when all of the cells can be seen on television screens from one location. The officers are on the alert for issues affecting inmate safety. The cameras would show if an inmate had a health issue, or an altercation. Often the consumption of intoxicants leads to problems. He said the recording system makes it safer for everyone.

[40] I accept that cameras and recordings can make a location safer. It can lead to faster responses. It can alert staff to medical issues such as seizures or falls. It can alert staff to an inmate who is harming themselves or attempting suicide. The history of deaths in correctional facilities has often shown that an inmate may suffer medical distress and die before being checked by staff. Often, new arrivals are intoxicated by alcohol, drugs or both. Many are suffering from mental illness. Many inmates may wish to harm other inmates. Keeping watch over them makes lots of sense. A person who is arrested or an inmate in a correctional facility has a reduced expectation of privacy. That is in the nature of being a prisoner.

Why Record Her?

[41] The broad rationale for video-recording inmates really does not exist in this case. There is no evidence of intoxication. She may have been under the influence of alcohol, to some extent, but even the arresting officer arrested her only after she had failed a test on a screening device. There was no medical distress or suggestion of an overdose.

[42] She was crying, but there is nothing to suggest that she might have tried to harm herself. There was no evidence that she had been handcuffed, which would seem to be a minimum if the officer thought she might harm herself. There was no evidence that she had been searched. From the video, it is obvious that there were not many places to conceal something in her clothing. She was not wearing a jacket. She did not have a purse or bag with her.

[43] She was not violent. There was no evidence that there was even the slightest possibility that she might cause a problem. There was no need to separate her from anyone.

[44] All of this raises an issue. Why did she have to use a cell to go to the washroom? She was not in a cell while waiting for the observation periods or each of the breath tests. She was sitting on a bench. That would not have been allowed if there were any concern about her or her behaviour. What caused the surveillance video to be created was her desire to use a washroom. Given that needing to use a washroom is part of being alive, should that suddenly change the nature of custody?

[45] She was not about to be remanded into custody. This was not part of a process that would end up with her spending time in custody after breath tests and service of documents.

[46] The only reason why she was in a cell was because she needed a washroom. I fail to understand why the level of control over her had to be increased, so she could urinate. There was no evidence about other washroom facilities. It is hard to imagine that the correctional staff or police are required to be watched and recorded if they wish to use a toilet. There is no explanation as to why she had to be put in a cell and recorded as she used the toilet. It was just routine.

[47] The misinformation about her actions being visible and being recorded is very troubling. Even if I accept that the correctional officer thought that a “black box” was in use, there is no basis to say that her thought was reasonable. This is not a situation where the “black box” had been there and then some part of the software failed and it disappeared. There is simply no way that the police officer or correctional officer could have been satisfied that a non-existent system was working. No one looked at the screen to see if there was a “black box”. No one bothered to ask the officer overseeing the screens if the system was working. It is not possible to conclude that there was any good faith involved in misinforming the accused. While there is no basis to find that she was lied to, there is also no basis to find that anyone involved actually knew what he or she were talking about. It was careless.

Expectation of Privacy

[48] An examination of a reasonable expectation of privacy requires consideration of what the person thought and whether that expectation of privacy was reasonable in the circumstances.

[49] See *R. v. Jarvis*, 2019 SCC 10. There the Supreme Court listed a number of factors to consider in determining if there was a reasonable expectation of privacy. This was in a different context, but is still helpful for an analysis. The list is not exhaustive, but looks at the type of factors to consider.

[50] Here, the accused was under arrest. She knew that the interior of the cell had a camera that allowed surveillance of what was happening in the cell. She accepted the use of a “privacy blanket” to shield her from the view of the camera. All of those factors point to a greatly reduced expectation of privacy.

[51] Then, she was told that a “black box” prevented her actions on the toilet from being seen or recorded. That created a reasonable expectation that when she was at the toilet, her actions could not be seen and would not be recorded. She was not hoping it was private. She was not ignoring the issue. She was acting in good faith based on information given to her by those who were controlling her.

[52] A person who is under arrest must have a reduced expectation of privacy. The police are allowed to search, to seize items and to control their movements and actions. Even more intrusive actions may be permitted, either by warrant or because of the circumstances.

[53] A person under arrest does not lose all expectation of privacy. For example, strip searches are not allowed unless there are grounds for such a search and appropriate safeguards.

[54] Although the events here did not include a strip search, the privacy issues are similar. Watching someone remove some clothing, perform a private function, expose part of their buttocks, pull up their underwear and flush their waste down the toilet is an invasion of their privacy. A strip search has the added element of the arrested person being forced to participate, passively or otherwise. Here, the accused learned about it because a copy of the recording was sent as disclosure to her counsel. Much later, she learned what they had done. She had the added distress of wondering how many others had watched this. I have no doubt that she was humiliated and degraded by the recording.

[55] That expectation of privacy was objectively reasonable. There could be no way for her to question what she was told.

Was this Recording a Search?

[56] Although this event might have been considered under s. 7 of the *Charter*, it has also been considered in the context of s. 8 in other cases. Recording her on the toilet created a record which has been viewed by others, provided to the police, provided to the Crown, provided to her counsel, provided to a court and watched by a few people in a courtroom. (The video was filed as an exhibit, but has been sealed to reduce the potential for further humiliation.)

[57] The creation of this record amounts to a search.

Analysing a Search

[58] The Supreme Court of Canada has determined that a search will be reasonable within the meaning of s. 8 of the *Charter* where (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search is conducted in a reasonable manner (See *R. v. Collins,* 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265*; R. v. Debot,* 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140*; Cloutier v. Langlois,* 1990 CanLII 122 (SCC), [1990] 1 S.C.R. 158*; R v. Stillman* 1997 CanLII 384 (SCC), [1997] 1 SCR 607*; R. v. Caslake,* 1998 CanLII 838 (SCC), [1997] 1 SCR 51)*.*

Was the Search Authorized by Law?

[59] There was no evidence on the point, but the *Corrections Regulation,* O.I.C. 2009/250, at least refers to surveillance recordings at s. 16.

> A surveillance recording of a female inmate or police prisoner must be viewed or listened to only by a female staff member if knowledge that a male staff member had viewed or listened to the recording would likely subject that inmate or police prisoner to undue embarrassment or humiliation.

[60] Of note, that is inconsistent with the evidence of the supervisor, who did not express any limitation on supervisory staff watching videos of females. It is also noteworthy that the Territorial Legislature specifically addressed the very issue which arose in this case. Knowledge that a male staff member had viewed a recording could lead to undue embarrassment or humiliation. Here, the list of those watching the recording must include the lawyers and those present in the courtroom while it was

played. The disclosure came from police, but there is no evidence as to whether any officer watched this disclosure.

Is the Law itself Reasonable?

[61] Assuming that the surveillance is lawful, there is no reason to conclude that video surveillance in a jail is inherently unreasonable. There are many reasons why it is appropriate for prisoners.

Was the Search Conducted in a Reasonable Manner?

[62] There was nothing reasonable about what happened to this accused. There was no reason to compel this accused to enter into a higher level of confinement, simply because she needed to use the facilities.

[63] Even if no other washroom was available and even if the staff could not turn off the camera, the loss of privacy flowed in part from the correctional officer telling the accused about the “black box”. There was no fault in the accused dropping the blanket to the floor. It was a reasonable way to deal with what she needed to do after finishing on the toilet. She thought that her privacy was still secured by the camera screen not being able to show or record activity near the toilet.

[64] There was no explanation for the misstatement. There was no explanation for why the correctional officers did not alert the accused to the true state of affairs. There was no explanation for the apparent failure of the correctional staff to comply with the regulation.

[65] A correctional officer, in the presence of the arresting police officer, made the statement about the “black box”. Each had different responsibilities.

[66] However, I see no reason to distinguish between the loss of privacy caused by a correctional officer and a loss of privacy caused by a police officer. The police officer chose to take the accused to the WCC for the breath samples. He did so pursuant to an agreement between the Territory and the RCMP. The RCMP policy specifically forbid recording surveillance of this sort. Accordingly, at best, the RCMP had not determined that WCC was complying with the policy. The police officer knew in advance that the accused wished to use a washroom. While he may have also relied on the misstatement by the correctional officer, it does not change the fact the breach occurred because no one inquired about the true state of affairs.

[67] There was no evidence to attempt to justify the act of forcing the accused to use a toilet in a monitored cell rather than a toilet in a washroom with a female present to monitor her. It would make sense that a person about to give breath samples be monitored to ensure that they did not drink something. It would also make sense to monitor a person so that they do not run away. However, recording her actions was not called for. Nothing in her behaviour, her physical condition or her need to provide samples called for a recording of her use of the toilet. If, for example, it had been necessary to watch to ensure that she did not drink anything that might affect her breath tests, it would have meant that someone watching the screen would have known immediately that the “black box” did not exist. There is no justification for the recording of this private action. The evidence, while limited, leads only to an inference that this was just the way WCC and the RCMP did it.

[68] This is a breach of the right of the accused to be free from unreasonable search and seizure pursuant to s. 8 of the *Charter*.

Should the Evidence be Excluded?

[69] The accused bears the burden of establishing what remedy should flow from a breach. The test for exclusion is well established (see *Grant).*

[70] This situation is complicated. Under s. 7 of the *Charter*, a stay of proceedings would be a reasonable remedy. It is harder to grant such a remedy in this case as it involves s. 8 instead. At first glance, excluding breath samples because the accused was recorded on the toilet seems to be stretching the facts to justify a remedy.

[71] However, there is precedent for such an argument. The process of arresting the accused and requiring her to provide breath samples necessarily meant that she would have to be under arrest for the time required to ready the approved instrument, conduct the observation period, obtain a sample, conduct the second observation period, and obtain a second sample. The samples must be separated by an interval of at least 15 minutes (s. 320.31 (1)(b) of the *Criminal Code*). This is never an instantaneous procedure.

[72] The officer knew that the accused needed to use a washroom. No other reason was advanced for her being put in a cell. No recording of her time in the room with the approved instrument was filed. No recording of her time on the bench was filed. That leads only to the inference that she did nothing else that required the use of a cell. In

these circumstances, the event, from arrival at WCC to release after the breath samples were taken, should be viewed as one transaction.

[73] This event is different from a strip search, but attracts a similar analysis. In part, recording the event and creating a record that is then distributed may be as or more humiliating than strip-searching an individual in private, with no recording.

[74] The Supreme Court looked at the privacy issue in *R. v. Golden,* 2001 SCC 83:

> 79 In *R. v. Flintoff* (1998), 1998 CanLII 632 (ON CA), 16 C.R. (5th) 248 (Ont. C.A.), the accused was arrested for impaired driving and taken to the police station for a breathalyzer test. Prior to the breathalyzer test, the accused was strip searched as part of the routine policy of the police department and not on the basis of any circumstances related to the particular case. After the strip search, the appellant was taken to the breathalyzer room and failed the test. The Ontario Court of Appeal concluded that it was unreasonable to strip search the appellant and that the breach of s. 8 was serious. Accordingly, the court held that the breathalyzer evidence should be excluded and the decision of the trial judge dismissing the charge restored.

[75] Later, the Court stated:

> 89 Given that the purpose of s. 8 of the *Charter* is to protect individuals from unjustified state intrusions upon their privacy, it is necessary to have a means of preventing unjustified searches before they occur, rather than simply determining after the fact whether the search should have occurred (*Hunter*, *supra*, at p. 160). The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy. Furthermore, strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any *post facto* remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched. Thus, the need to prevent unjustified searches before they occur is more acute in the case of strip searches than it is in the context of less intrusive personal searches, such as pat or frisk searches. As was pointed out in *Flintoff*, *supra*, at p. 257, "[s]trip-searching is one of the most intrusive manners of searching and also one of the most extreme exercises of police power".

> 90 Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy. The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating", "degrading", "demeaning", "upsetting", and "devastating" (see *King*, *supra*; *R. v. Christopher*, [1994] O.J. No. 3120 (QL) (Gen. Div.); J. S. Lyons, Toronto Police Services Board Review, *Search of Persons Policy -- The Search of Persons -- A Position Paper* (April 12, 1999)). Some commentators have gone as far as to describe strip searches as "visual rape" (P. R. Shuldiner, "Visual Rape: A Look at the Dubious Legality of Strip Searches" (1979), 13 *J. Marshall L. Rev.* 273). Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault (Lyons, *supra*, at p. 4). The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse (Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *The Prison for Women in Kingston* (1996), at pp. 86-89). Routine strip searches may also be distasteful and difficult for the police officers conducting them (Lyons, *supra*, at pp. 5-6).

[76] I do not confuse a strip search with what occurred here. Rather, I note that the recording of her use of the toilet humiliated and degraded this accused. That was entirely foreseeable.

[77] A case involving a record of an accused on a toilet was *R. v. Mok*, 2014 ONSC 64. At trial, the Court had found a breach and granted a remedy. On appeal, the breach was upheld, but the remedy was overturned. On further appeal to the Ontario Court of Appeal, leave was refused on the basis that the finding of a breach had been sustained and the overturning of the remedy was appropriate. I refer to the summary conviction appeal decision only for the consideration of whether a breach existed.

> 81 I agree with the trial judge's conclusion that the monitoring and videotaping of detainees using the cell toilet by police officers of either gender is a "highly intrusive invasion of privacy". On the other hand, the

> state's legitimate interests in monitoring cells for safety and preservation of evidence are not so compelling that they ought not to give way to at least a modesty screen that partially blocks the camera's view of the toilet. The detainee's expectation of privacy in the cell area is not so significant as to warrant a finding that any surveillance is inappropriate. But it is sufficient to require that the police do not monitor and record the use of the toilet by detainees.
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> 82 In the result, I find, as the trial judge did, that Ms. Mok's s. 8 right was violated when the police videotaped her using the toilet in her cell. I find that she had a subjective expectation of privacy and that her subjective expectation was reasonably held in all the circumstances. The reasonableness of her expectation is supported by a balancing of her individual interest in privacy, dignity, integrity and autonomy, against the state's legitimate interests in monitoring the cell area for safety concerns and the preservation of evidence.

[78] The factual basis of *Mok* is very different from this case. Ms. Mok was highly intoxicated. She was held in custody because of her level of intoxication and because an officer in charge did not think she could understand the release documents. This accused was in the cell only to go to the washroom.

[79] A similar issue arose in *R. v. Moondi*, 2019 ONCJ 293.

[80] There, the Court stated:

> 18 Since **Mok**, other courts have made similar findings. See for example **R. v. Deveau**, 2014 ONSC 3756, **R. v. Singh**, 2016 ONSC 1144, **R. v. Rowan**, 2018 ONCJ 777, **R. v. Lacku**, 2019 ONCJ 88 and **R. v. Wijesuriya**, 2018 ONCJ 211. As a result of this jurisprudential guidance, many police services began to take steps to balance these competing interests between the detainee's expectation of privacy and the state's legitimate need to monitor persons in its custody. For instance, the use of privacy gowns as mentioned here, or privacy screens or the pixilation of the videos themselves are some of the methods used to attempt to strike an appropriate balance in this situation.
>
> 19 Once a s. 8 breach is established in these circumstances the focus turns to the appropriate remedy. Initially stays were sought, but courts

> have shied away from granting this remedy. See **Mok** for instance. Now it is becoming more established to seek an exclusion of the results of the breath samples pursuant to s. 24(2) of the Charter. The resort to this remedy was initially resisted by the Crown on the basis there was no casual connection between the breach and the obtaining of the breath samples. However, it is clear a causal connection is not required. A temporal connection sufficient so that the breach and the breath samples can be said to be part of the same transaction or course of conduct is all that is required to make the exclusion of the evidence an available remedy (see **Deveau** paragraphs 15 to 19).

[81] Based upon that analysis, I am satisfied that exclusion of the evidence can be an appropriate remedy in such a case.

[82] The Crown argues that exclusion is not an appropriate remedy. The equipment needed to be upgraded to fit with the new policy. The process just had not been finished. The breath tests are not related to the recording. The officers did not realize that there had been a breach. The impact upon the accused only came into existence when her lawyer told her what was on the disclosure. Since the system has been changed, the remedy of exclusion is not appropriate, says the Crown.

[83] I do not agree. The *Charter* breach was very serious. The routine aspect of what occurred speaks to an utter indifference on the part of those involved. No one asked why she had to go in a cell to have access to a toilet. No one asked why she had to be recorded. No one checked to see if the “black box” really existed. No one seems to have considered the regulation limiting who can watch the recording. If only a female officer had been watching that night, it would have been immediately apparent that the “black box” was not working. If a male officer was watching, it would have been immediately apparent that the “black box” was not working, and that they were not complying with the regulation.

[84] If no one was watching, then what was the point of putting her in that room?

[85] There was no good faith basis for the correctional officer to tell her that the “black box” assured privacy. The inescapable conclusion is that no one really gave any thought to it.

[86] The impact on the accused was profound. She was humiliated to learn that the recording existed. She was degraded as she watched it. She was obviously humiliated as it was played in court. Nothing that she had done, including driving and being arrested, justified the profound impact upon her.

[87] Impaired driving offences have a profound impact on all communities. The carnage on our roadways caused by impaired drivers is an all too common event. The police and courts cannot lose sight of the misery caused by impaired driving.

[88] Similarly, routine invasions of privacy can demean all of us. Too often, the line between acceptable surveillance and unacceptable invasions of privacy is overstepped with a claim of necessity. We hear the argument that we need to be safe. We need to be secure. The surveillance is for the inmates’ protection. What safety concern motivated placing this accused in a cell, carelessly telling her that she had privacy and then recording her on a toilet?

[89] The Crown’s argument that things have changed was accepted by the Summary Conviction Appeal Court in *Mok*. I do not accept that reasoning in this case. The evidence in this case provided no justification for this level of intrusion into her privacy. This accused was not held for the night because of her level of intoxication.

[90] The administration of justice would be brought into disrepute by not excluding the evidence obtained that night. Accordingly, everything that occurred after she walked into the cell is excluded

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KILLEEN T.C.J.