Citation: *R. v. Stuart*, 2022 YKTC 46

Date: 20221115
Docket: 21-11036
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REX

v.

ROGER JOHN STUART

Appearances:
Adrienne Switzer — Counsel for the Crown
Jennifer Budgell — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Roger Stuart has entered not guilty pleas to offences of impaired operation and operating a conveyance while the concentration of alcohol in his blood was equal to or exceeded the legal limit contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code* (the "*Code*"). Both offences are alleged to have occurred on October 13, 2021, in Dawson City, Yukon. On August 8, 2022, Mr. Stuart filed a Notice of Application seeking exclusion of all evidence relating to breath samples taken during the investigation, including the Certificate of Qualified Technician, on the basis of alleged violations of ss. 8, 9, and 10(b) of the *Charter*. The trial proceeded on August 24 and 25, 2022, by way of a *voir dire* on the *Charter* issues. This is my ruling on the defendant's application.

Facts

[2] Much of the factual background is not in dispute. Cst. MacNeil was on duty in the early morning hours of October 13, 2021. At 1:55 a.m., he observed a truck parked in front of the Drunken Goat Taverna, with the engine running. Cst. MacNeil indicated that while the Drunken Goat Taverna was not then open, the only establishments that were open at that hour were bars, including the bar in the nearby Westminster Hotel, commonly referred to as "The Pit". As it was not unusual for people in Dawson City to park a vehicle and bar hop, when the truck pulled away, Cst. MacNeil decided to initiate a traffic stop for the purpose of conducting a sobriety check on the truck's driver.

[3] By the time Cst. MacNeil had turned his own vehicle around to follow the truck, he noted that the truck had advanced several blocks ahead, leading him to believe that the truck was travelling at a high rate of speed. Cst. MacNeil activated his lights and sirens, but the driver of the truck did not initially respond. Upon reaching 5th Avenue, Cst. MacNeil says the truck made a sharp left turn and continued to York Street, where the driver turned and pulled over.

[4] Cst. MacNeil approached the truck and advised the driver, later determined to be Mr. Stuart, that he had been stopped for a sobriety check. Cst. MacNeil read Mr. Stuart the mandatory alcohol screening demand pursuant to s. 320.27(2) of the *Code*. Mr. Stuart provided a suitable sample at 1:58 a.m. which registered a fail reading.

[5] Cst. MacNeil instructed Mr. Stuart to turn over his keys and informed him that, as a result of the fail reading, Cst. MacNeil believed that Mr. Stuart's blood alcohol content

was in excess of the legal limit, and Cst. MacNeil would therefore be conducting an arrest for impaired operation of a conveyance.

[6] Cst. MacNeil had Mr. Stuart get out of the truck, asked for, and was given, identification, and conducted a search of Mr. Stuart. Mr. Stuart provided a knife to Cst. MacNeil and Cst. MacNeil also removed a lighter. Cst. MacNeil could not recall the type of knife, though from the WatchGuard video it appears to have been a pocket or utility knife attached to Mr. Stuart's belt.

[7] Mr. Stuart was placed in the back of the police vehicle. Cst. MacNeil returned to the truck where he raised the window and shut the door. Another officer then arrived, and he and Cst. MacNeil had a brief discussion. Cst. MacNeil then entered the police vehicle and proceeded to update his notebook, before reading Mr. Stuart his right to counsel, the police warning, and the breath demand.

[8] Mr. Stuart was transported to the RCMP detachment where he ultimately provided a total of three samples. The first registered 180 milligrams percent, the second showed the presence of mouth alcohol, and the third registered 160 milligrams percent.

Issues

[9] Pursuant to the defendant's *Charter* application, there are four issues for determination on the *voir dire*:

1. Whether the delay in advising Mr. Stuart of his right to counsel amounted to a breach of s. 10(b) of the *Charter*;

2. Whether the delay in making the breath demand resulted in an unlawful demand rendering the detention arbitrary contrary to s. 9 and the taking of breath samples an unlawful seizure contrary to s. 8;

3. Whether or not there was a valid waiver by Mr. Stuart of his s. 10(b) right to counsel; and

4. If Mr. Stuart establishes one or more of the alleged breaches of his rights under the *Charter*, whether all evidence of the breath samples, including the Certificate of Qualified Breath Technician, should be excluded pursuant to s. 24(2) of the *Charter*.

Delay in Advising of Right to Counsel

[10] Turning to the first issue, delay in advising Mr. Stuart of his right to counsel, s. 10(b) of the *Charter* states that “Everyone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right”. In *R. v. Suberu*, 2009 SCC 33, the Supreme Court of Canada addressed the question of timing of the informational component of the right to counsel 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*. …

[11] Defence counsel argues that there is a breach of s. 10(b) in this case as Cst. MacNeil made a deliberate choice to prioritize logistical steps over the right to

counsel. Crown counsel argues that a stringent parsing of every second and every decision does not recognize the multiple variables that police officers must deal with during an impaired investigation. She further maintains that Cst. MacNeil's approach was both efficient and reasonable in all the circumstances.

[12] Determination of this issue requires consideration of what happened between the fail reading and the provision of the right to counsel. By my calculation, the total delay is roughly six minutes and 10 seconds. The breakdown of what occurred during that time period is as follows:

- Cst. MacNeil has Mr. Stuart get out of the truck, asks him to provide identification, has a brief radio interaction, and provides a brief overview of the process to Mr. Stuart. This takes approximately 50 seconds;

- Cst. MacNeil conducts a search of Mr. Stuart and then puts Mr. Stuart in the police vehicle. This takes approximately one minute and 30 seconds;

- Cst. MacNeil goes to the truck to close the window and door. This takes approximately 25 seconds;

- Cst. MacNeil has a discussion with the second officer about why he had asked him to come to the scene and next steps. This takes approximately 45 seconds;

- Cst. MacNeil gets in the police vehicle, asks control to generate a file, and updates his notebook. This takes approximately two minutes and 30 seconds;

- Cst. MacNeil then confirms Mr. Stuart is under arrest and reads him the right to counsel from the *Charter* card.

[13] The activities during the roughly six-minute delay can be broken into two categories: firstly, potential security issues, including the search and placing Mr. Stuart in the police vehicle; and secondly, administrative or logistical activities, including explaining the process, securing the truck, speaking to the other officer, opening a file, and taking notes.

[14] Assessing the first category, the one and one-half minutes spent searching Mr. Stuart and placing him in the police vehicle, the question is whether this time was spent in what the Supreme Court of Canada, in *R. v. Debot*, [1989] 2 S.C.R. 1140, referred to as "legitimate self-protection". In making this assessment, I am mindful of the comments of the Ontario Court of Appeal in *R. v. La,* 2018 ONCA 830, at para. 39, which held that concerns for officer or public 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".

[15] In the case at bar, Cst. MacNeil testified that he undertook the search of Mr. Stuart for the purposes of officer safety and to search for consumables. Based on the evidence, I have two concerns in assessing the validity of Cst. MacNeil's assertion that the search was done at least in part for officer safety reasons.

[16] Firstly, Cst. MacNeil never articulated the particular nature of his safety concerns, nor were they readily apparent on the WatchGuard video. Mr. Stuart was entirely

cooperative throughout his interaction with Cst. MacNeil. Nothing in his behaviour can be said to have raised a concrete safety concern.

[17] The only time Cst. MacNeil testified to anything remotely suggestive of a safety concern was when he replied to a question on cross-examination about whether securing the truck could have waited until after he advised Mr. Stuart of his right to counsel to which he replied:

> No, if I am going to leave that vehicle unattended, I have no idea what's inside the vehicle, he could have firearms there for all I know, hidden under the seats. If I left it unattended, unlocked, windows down, and take him back to the detachment, because I can't delay his right to counsel, if I leave that vehicle unlocked, it puts me at risk of him saying, well, you left my vehicle unlocked and I had a gold brick under the seat that's missing now, so I can't leave those windows unlocked.

[18] Setting aside the fact that Cst. MacNeil's extremely defensive response seems to have missed the point of the question, I found his reply to be somewhat outlandish rather than indicative of any valid safety concern.

[19] Secondly, Cst. MacNeil's actions and words as recorded in the WatchGuard video do not suggest that Cst. MacNeil actually had any particular safety concern; rather he is clearly focussed on anything Mr. Stuart may have in his possession that could affect the validity of breath readings. When Cst. MacNeil begins the search he starts by asking Mr. Stuart if he has "anything in your pockets right now, <u>any consumables</u>". In response, Mr. Stuart pulls the pocketknife from his belt and shows it to Cst. MacNeil who says, "I'll relieve you of that; not that I think you're going to do anything with it". Later, just before the pat down search, Cst. MacNeil asks Mr. Stuart to turn out his pockets. Mr. Stuart makes mention of having some condoms in his pocket to which

Cst. MacNeil replies, "you can keep those; I'm more or less looking for anything consumable".

[20] In my view, there is little to support a conclusion that there was any concern for officer safety that can be said to be "circumstantially concrete". As a result, I find that the minute and a half delay in relation to the search of Mr. Stuart is delay in breach of Mr. Stuart's s. 10(b) right. That being said, I recognize that police officers can and should take prudent steps to ensure their own safety and that of members of the public. A brief search and lodging of an accused in a police vehicle can certainly be said to be prudent even in the absence of concrete safety concerns, something that will obviously be a relevant consideration in making the s. 24(2) assessment regarding appropriate remedy, if any.

[21] Turning to the second category of delay, defence counsel has provided two cases in support of her contention that administrative or logistical activities are not justifiable reasons for delaying the right to counsel, even where those activities are reasonable and/or for the benefit of the accused.

[22] In *R. v. Hawkins*, 2013 ONCJ 115, the 12-minute delay included the officer allowing the accused to retrieve personal belongings and explaining the tow procedure to a junior officer. The trial judge found that neither retrieving belongings nor explaining the tow procedure amounted to a justifiable reason for delaying informing the accused of his right to counsel and concluded the delay amounted to a breach of s. 10(b).

[23] In *R. v. Brewster*, 2022 YKTC 6, a decision of mine, there was a delay of approximately eight minutes between the arrest and the right to counsel. The delay

involved the accused retrieving her belongings and the officer managing the accused and passengers. Per *Hawkins*, I found the retrieving of belongings not to be a justifiable reason for delay, and I concluded that dealing with the accused and passenger behaviour, while requiring some proactive management, did not justify delaying the right to counsel.

[24] For her part, Crown counsel notes the relatively brief time required to see to the majority of administrative or logistical tasks and the reasonableness of each, noting, in particular, that securing the truck was seemingly in response to an earlier concern raised by Mr. Stuart about the open window. In addition, with respect to the time the officer took to update his notes before reading the right to counsel, Crown counsel asks that I consider the importance of the obligation on police officers to take contemporaneous notes, citing para. 65 of *Wood v. Schaeffer*, 2013 SCC 71, out of the Supreme Court of Canada, which reads:

> In another instance, the Honourable R. E. Salhany considered the significance of police notes in the course of a public inquiry into a death caused by an off-duty officer. He explained the importance of notes in this way:
>
> > [Note-making] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. <u>The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator.</u> [Emphasis added.]
>
> (Report of the Taman Inquiry (2008), at p. 133)

[25] The difficulty I have with the Crown's position is that the test for assessing delay in informing an accused of their right to counsel is not whether the activities were reasonable, brief in duration, or important police obligations like note-taking. As noted in the aforementioned passage from *Suberu*, the Supreme Court of Canada has made it clear, in multiple cases, that officer or public safety are the only justifiable reasons to delay informing an accused of the right to counsel. In *Debot*, the Court further expounded on the "without delay" requirement noting at para. 42:

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

[26] None of the activities falling within the administrative or logistical category in this case relate in any way to public or officer safety. This is not to suggest that Cst. MacNeil ought not to have done the various things listed. The issue is one of priority. Per the Supreme Court of Canada, the right to counsel, and being advised thereof, arises immediately upon detention. Hence, informing an accused of their right

to counsel must take priority over any administrative or logistical tasks and must be done first, subject only to questions of officer or public safety.

[27] In the result, I find that the time spent on these tasks, roughly four and one-half minutes also constitutes a breach of Mr. Stuart's rights under s. 10(b) of the *Charter*.

Delay in Reading Breath Demand

[28] Turning to the second issue, the timing of the breath demand, s. 320.28 of the *Code* requires that a demand for a breath sample be made "as soon as practicable" once there are reasonable grounds to believe that a person has been operating a conveyance while impaired. Unlike the right to counsel, the breath demand does not require the use of any particular language. An informal explanation which makes it clear that the accused will have to give breath samples may suffice.

[29] In this case, there was no informal explanation given before the formal reading of the breath demand. After advising Mr. Stuart of the fail reading, Cst. MacNeil refers to taking him back to the detachment where they would "go through a little process", but makes no mention of breath samples. Accordingly, as grounds are established through the fail reading on the Approved Screening Devise ("ASD"), the relevant time period in assessing delay begins with the ASD fail and ends with the reading of the breath demand. This includes the six minutes and 10 seconds itemized in relation to the right to counsel issue, plus the additional time spent advising Mr. Stuart of his right to counsel and reading the police warning, by my calculation an additional two minutes and 41 seconds, for a total delay of eight minutes and 51 seconds.

[30] The “as soon as practicable” requirement to making a breath demand has not been interpreted as stringently as the “without delay” requirement with respect to the right to counsel. It does not mean immediately or even as soon as possible. Rather, it has been consistently interpreted to mean “within a reasonably prompt time”.

[31] In *R. v. Pillar*, 2020 ONCJ 394, the trial judge summarized the law in relation to the “as soon as practicable” requirement in the context of whether the samples themselves were taken “as soon as practicable” noting:

> 95 The Court of Appeal held in R. v. Vanderbruggen (2006), 206 C.C.C. (3d) 489 at paras. 12-13, that the words "as soon as practicable" in s. 258(1)(c) do not mean that the tests must be taken as soon as possible. Nor does the provision require an exact accounting of every moment in the chronology. As the Court stated:
>
> > The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably. In deciding whether the test were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the *Criminal Code* permits an outside limit of two hours from the time of the offence to the taking of the first test. The "as soon as practicable" requirement must be applied with reason. (emphasis added)
>
> 96 In R. v. Singh, 2014 ONCA 293, the Court of Appeal reiterated the Vanderbruggen decision, holding that the requirement that the samples be taken as soon as practicable means "nothing more than that the tests should be administered within a reasonably prompt time in the overall circumstances."

[32] In *Hawkins*, the trial judge considered whether the delay resulting in a breach of s. 10(b) also invalidated the breath demand for failure to comply with the “as soon as practicable” requirement. While the trial judge noted the officer was being considerate in allowing the accused to retrieve his belongings and held that everything done during the delay was legitimately connected to the investigation, the trial judge, nonetheless,

found that the demand was invalid on the basis that these steps could and should have been done after the breath demand.

[33] Applying the standard of reasonableness to the approach taken by Cst. MacNeil in this case, the two minutes and 41 seconds spent advising Mr. Stuart of his right to counsel and responding to his questions was not only reasonable, but was, as already noted, a major priority. The 50 seconds spent identifying Mr. Stuart and providing him with a brief overview of the process was reasonable, particularly in light of the findings of Gower J. of the Yukon Supreme Court in *R. v. Smarch,* 2014 YKTC 51*,* wherein he held that delay resulting from an officer performing routine background checks and establishing the identity of an accused person was delay that was "reasonably necessary to enable the officer to discharge his or her duty". While I am not satisfied that there was a concrete officer safety issue, the one minute and 30 seconds spent searching Mr. Stuart and placing him in the police vehicle was arguably both prudent and reasonable in all of the circumstances. Taking 25 seconds to secure Mr. Stuart's truck by closing the window and door was not unreasonable, in my view, in light of the weather visible on the WatchGuard video and the very brief time required to rectify the issue. Similarly, the 45 seconds to explain to the other officer that he no longer required him on the scene was not particularly unreasonable given the brevity of the exchange.

[34] This then leaves the two minutes and 30 seconds Cst. MacNeil spent asking that control generate a file and updating his notebook. This time was not, in my view, reasonable. Notwithstanding the importance of taking contemporaneous notes, Cst. MacNeil could and should have updated his notes following the reading of the breath demand rather than before. That being said, a delay of two minutes and 30

seconds is not sufficiently long to persuade me that the demand was not made "within a reasonably prompt time". Accordingly, I am not satisfied that the demand was invalid on the basis of unreasonable delay.

Waiver of Right to Counsel

[35] Turning to the third issue, defence counsel asserts that the breath samples were taken from Mr. Stuart in the absence of a valid waiver of his right to counsel thereby amounting to a breach of s. 10(b) of the *Charter*. Conversely, Crown argues that Cst. MacNeil not only met his obligations but exceeded them by reading the *Prosper* warning even though he was not required to do so in the circumstances as Mr. Stuart never actually invoked his right to counsel only to then change his mind. She argues that

Mr. Stuart is a sophisticated adult and the onus is on him to assert his right, an onus he was not diligent in meeting.

[36] The Crown is quite right in terms of when a *Prosper* warning is required. The warning lets an accused person know that police must "hold off" on eliciting evidence from the accused until such time as the accused has exercised their right to counsel or waived their right. As noted by Cozens J. in *R. v. Roberts,* 2019 YKTC 2*,* "a *Prosper* warning is triggered when a detainee who has indicated that they wish to exercise their *Charter* right to counsel, then changes their mind".

[37] However, in my view, the issue in this case is not whether the *Prosper* warning was required but whether there was a valid waiver of the right to counsel by Mr. Stuart before the breath samples were taken. While choosing to read the warning is a relevant

consideration in assessing whether Cst. MacNeil did enough to meet his obligations under s. 10(b) of the *Charter*, the mere reading of the *Prosper* warning by a police officer does not in and of itself validate a waiver of the right to counsel by an accused person.

[38] The Crown is also correct in her assertion that there is a corresponding obligation on an accused to be diligent in exercising their right to counsel. As noted by the Supreme Court of Canada in *R. v. Bartle,* [1994] 3 S.C.R. 173, at para. 18:

> Importantly, the right to counsel under s. 10(b) is not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duty on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended.

[39] Thus, there are three factors for consideration in assessing whether Mr. Stuart waived his right to counsel: whether Mr. Stuart, by words or conduct, waived his right to counsel; whether Mr. Stuart was diligent in exercising his right; and whether Cst. MacNeil met his obligations in ensuring that Mr. Stuart was advised of, and understood, his right to counsel.

[40] It is trite law to say that any waiver of the right to counsel must be clear and unequivocal. As noted in *Bartle*, "the standard for waiver will be high, especially in circumstances where the alleged waiver has been implicit" (para. 18). In addition, any valid waiver is predicated on the accused understanding the nature of the right and appreciating the consequences of waiving it. At para. 20 of *Bartle*, the Court quoted from its earlier decision in *R. v. Evans*, [1991] 1 S.C.R. 869 on this point as follows:

> Indeed, the pivotal function of the initial information component under s. 10(b) has already been recognized by this Court. For instance, in Evans, McLachlin J., for the majority, stated at p. 891 that a "person who does not understand his or her right cannot be expected to assert it"… Likewise, this Court has stressed on previous occasions that, before an accused can be said to have waived his or her right to counsel, he or she must be possessed of sufficient information to allow him or her to make an informed choice as regards exercising the right: R. v. Smith (Norman MacPherson), [1991] 1 S.C.R. 714, at pp. 724-29, and Brydges, at p. 205.

[41] In making a determination about the validity of any waiver in this case, the exchanges between Cst. MacNeil and Mr. Stuart in relation to the right to counsel are critical. For this reason, I am including the transcription of both exchanges in their entirety.

[42] The initial exchange in the police vehicle, as captured by the WatchGuard video, was as follows:

> Officer: Reads the right to counsel from the *Charter* card. Do you understand?
>
> Accused: Yeah. What do I do now?
>
> Officer: Basically, I'm going to read you your rights then after that we'll go forward from there.
>
> Accused: What does that mean?
>
> Officer: I'll explain it all to you here, Roger; bear with me, okay.
>
> - (10 second pause)
>
> Officer: So, do you want to call a lawyer?
>
> Accused: Well, I don't have one.

Officer: I'm looking for a yes or no answer. I can also give you access to Duty Counsel who is a lawyer and they're available 24 hours a day. So, I'll ask again –

(Accused interrupts at this point; he seems to be repeating "I don't have one", but unclear as both the accused and officer are speaking at the same time)

Officer: I'm looking for a yes or no on this one; do you want to call a lawyer?

Accused: What are my choices? I don't have a lawyer.

Officer: Okay, well I've kind of told you your choices there. I can ask you again back at the detachment if you're unsure; if you want to think about it.

Accused: I'll just wait, I guess.

[43] The second exchange between Cst. MacNeil and Mr. Stuart on the right to counsel, which occurs at the police detachment and is captured on a handheld recording device, is as follows:

Officer: Back at the car, I asked you for a yes or no answer in regards to whether or not you wanted to contact a lawyer and you said, "I'll wait"

Accused: I don't have one.

Officer: That's neither here nor there, whether you have a retained lawyer or not. I'm not asking you to have a lawyer.

Accused: I don't.

Officer: I'm not asking for your trial lawyer or anything like that. I'm just asking now if – I'm giving you the opportunity to contact a lawyer or Legal Aid, or Duty Counsel rather, to have someone give you legal advice for this situation you're in. I just want you to make an informed decision, that's all.

Accused: Well, I don't have a retained lawyer, so –

Officer: So, there's no one that you'd like to call?

Accused: No.

Officer: I'm going to read you something and just remember, I'm looking for a yes or no answer to the questions that I ask following it, okay? You do have the right to call a lawyer. The police are not allowed to take a statement from you or collect any other evidence from you until you've either talked to a lawyer or decided not to talk to a lawyer. Do you understand?

Accused: Uh, yes.

Officer: So, remember, yes or no, do you want to call a lawyer?

Accused: I don't know who to call, so, I guess, no.

Officer: Alright, again, so like I said, I was looking for more or less a yes or no answer on that. I don't think you're trying to be difficult. I think you're genuinely confused about who you want to call. I can't recommend any specific lawyers to you, but I do want you to know – have you been arrested before, just out of curiosity?

Accused: No.

Officer: So, I do want you to know that there is the option to contact Legal Aid. I would contact them right now. They're a 24-hour service and they would be available to give you legal advice if you so desire. Did you want me to get in touch with Legal Aid for you?

Accused: I guess not. I don't know. I don't know what the recommendation is.

Officer: Well, unfortunately, Roger, I'm not allowed to recommend anything in particular to you. You have to make the choice yourself.

Accused: I just want to make it quick and easy.

Officer: So, you don't want to call any sort of lawyer?

Accused: I guess not.

Officer: Okay.

[44] Addressing the first question or factor, did Mr. Stuart explicitly or implicitly waive his right to counsel, I am of the view that there was no explicit waiver in the circumstances. The replies made by Mr. Stuart's when pressed about whether he

wished to contact a lawyer that must be considered in assessing whether there was a waiver are the following:

- I'll wait, I guess;
- I don't know who to call, so I guess no;
- I guess not. I don't know. I don't know what the recommendation is;
- I just want to make it quick and easy; and
- I guess not.

[45] Each of these statements is equivocal at best, and none of them amount to a clear waiver of the right to counsel, in my view. In addition, the overall tenor of Mr. Stuart's comments when taken together indicate that he did not know if he should contact counsel, largely because he did not know who to call. This falls well short of meeting the clear and unequivocal standard required for a valid waiver.

[46] In assessing whether there was an implicit waiver, the only basis upon which I could find an implicit waiver would be if I were satisfied that Mr. Stuart implicitly waived his right to counsel by failing to be diligent in asserting his right.

[47] That was certainly the view of Cst. MacNeil who testified that he believed that Mr. Stuart was not being diligent in listening to him and by failing to provide him with a yes or no answer. Indeed, Cst. MacNeil went so far as to say that he believed Mr. Stuart was deliberately trying to avoid answering Cst. MacNeil's questions, something the officer referred to as a common tactic of accused persons, particularly on impaired driving investigations. Though when reminded that he had earlier testified that he did not believe that Mr. Stuart was being malicious or deliberately avoiding

answering questions, Cst. MacNeil then amended his evidence to say it was “certainly a possibility” that Mr. Stuart was avoiding his questions.

[48] With respect, these assertions are not in any way supported by the video and audio evidence of what actually happened. Firstly, Cst. MacNeil’s evidence at trial that Mr. Stuart was deliberately attempting to delay the process is at odds with his comment to Mr. Stuart at the detachment that he did not believe Mr. Stuart was trying to be difficult and that he believed that he was genuinely confused about who to call. Secondly, Cst. MacNeil was inconsistent in his evidence by first asserting that Mr. Stuart was trying to avoid answering questions to delay the process, only to later testify that it was Mr. Stuart and not Cst. MacNeil that was trying to rush the process by saying he wanted it quick and easy. Thirdly, both exchanges about the right to counsel are relatively brief in duration, no more than a few minutes in total, which makes it hard to conclude that Mr. Stuart’s responses were a deliberate attempt to delay the process. Finally, there is nothing in what Mr. Stuart says in either exchange that suggests he was trying to avoid answering questions to delay the process. Rather, it is obvious to me that Mr. Stuart was genuinely confused about his options and what he should do in the circumstances. This is particularly so when one considers his replies in light of the fact that this was the first time that he had ever been arrested.

[49] Based on these factors, I am not satisfied that Mr. Stuart implicitly waived his right to counsel by failing to be diligent in asserting his right, primarily because I am not satisfied that he understood his right.

[50] This leaves the question of whether Cst. MacNeil fully met his obligation to ensure that Mr. Stuart understood his right to counsel, as the mere fact that an accused may not, at the end of the day, fully comprehend the nature of their right to counsel is not determinative of whether a police officer has met their obligations with respect to the informational component of the s. 10(b) right.

[51] The *Bartle* decision is the starting point in terms of the minimum information that must be conveyed to an accused person to meet the informational requirements of s. 10(b), including the 24-hour availability of free Legal Aid Duty Counsel. In this case, there is no doubt that Cst. MacNeil met this minimum threshold as he read Mr. Stuart his right to counsel and the *Prosper* warning verbatim from a *Charter* card drafted to conform to the law as set out in *Bartle*.

[52] However, the law is also clear that a rote recitation from the *Charter* card may not be sufficient in every case to meet the informational threshold of s. 10(b). In *Bartle*, the Supreme Court affirmed the law in this regard, again by reference to their earlier decision in *Evans*, at para. 20:

> In that case, it was held that, in circumstances which suggest that a particular detainee may not understand the information being communicated to him or her by state authorities, a mere recitation of the right to counsel will not suffice. Authorities will have to take additional steps to ensure that the detainee comprehends his or her s. 10(b) rights.

[53] Defence counsel has provided the decision of *R. v. Guyett*, 2010 ONSC 4575, on appeal to the Ontario Superior Court of Justice in support of her contention that Cst. MacNeil failed to meet the informational requirements of s. 10(b) of the *Charter*.

[54] *Guyett* involved two separate officers who dealt with the appellant and his right to counsel. The first informed the appellant of his right to counsel including the availability of free Legal Aid Duty Counsel, but took the appellant's comments that his lawyer would be sleeping and that he would call his lawyer on his own to indicate that the appellant intended to waive his right to speak to counsel. The second officer asked if the appellant would like to speak to counsel. The appellant said "no, I don't have anyone available to me now". The second officer took a number of steps in trying to assist the appellant, including offering him a phone book, and reiterating the availability of Duty Counsel on four occasions. In response, the appellant stated "no, nobody would answer their phone right now".

[55] The appellate judge found that the appellant's responses indicated "that the appellant had not absorbed the information given to him about the availability of immediate legal advice from another lawyer", and that the officer "did not listen carefully to the appellant's responses, which made obvious that he did not in fact understand the immediate availability of a lawyer other than his own".

[56] In finding that the appellant had not waived his right to counsel, the appellate judge noted:

> This case in my view highlights the pitfalls of the police falling into a rote or automatic statement of rights in a standardized caution, without remaining alive to the issue of whether the individual to whom such information is given has truly absorbed and understood it.

[57] In the case at bar, there were, similar to the *Guyett* case, indicators that Mr. Stuart had not absorbed and fully understood his right to counsel. Most notably, the

fact that, when asked if he wished to speak to a lawyer, he kept repeating that he did not have a lawyer.

[58] While Cst. MacNeil was adamant that he did everything possible to ensure that Mr. Stuart understood his right to counsel, other than reiterating the availability of Legal Aid Duty Counsel on two occasions, Cst. MacNeil did little to address Mr. Stuart's obvious confusion.

[59] This can be seen throughout the two exchanges on the right to counsel. From the outset, Mr. Stuart expresses confusion. In the police vehicle, after being read the right to counsel Mr. Stuart says, "what do I do now". Cst. MacNeil says he will read Mr. Stuart his rights and they'll go from there. When Mr. Stuart asks, "what does that mean?", Cst. MacNeil tells him to bear with him and he will explain it all. There is then a pause of 10 seconds before Cst. MacNeil simply asks Mr. Stuart if he wants to call a lawyer, without the promised explanation. As noted, Cst. MacNeil does reiterate the availability of Legal Aid Duty Counsel, but when Mr. Stuart then says, "what are my choices? I don't have a lawyer", Cst. MacNeil responds that he has already told Mr. Stuart his choices but offers no further explanation of those choices.

[60] The second exchange at the police detachment follows a similar pattern. Mr. Stuart keeps expressing confusion about what he should do as he does not have a lawyer and does not know who to call. In response, Cst. MacNeil, other than reiterating the availability of Legal Aid Duty Counsel, really offers no other explanation or assistance to Mr. Stuart to try to understand or address his obvious confusion. For instance, Cst. MacNeil never tells Mr. Stuart that he does not need to have his own

lawyer to access immediate legal advice. Similarly, notwithstanding, Mr. Stuart's indication that he does not know who to call, Cst. MacNeil never offers him the available list of lawyers or a telephone book as an option for Mr. Stuart to find a non-Legal Aid lawyer to contact. Indeed, Cst. MacNeil testified that he does not typically offer the list of lawyers to accused persons unless and until an accused gives him a definitive answer that they wish to speak to a lawyer, which makes little sense as a practice, particularly in the face of someone clearly saying they do not know who to call, as in this case.

[61] Cst. MacNeil asserted, as did the Crown in submissions, that the reading of the *Prosper* warning indicates that Cst. MacNeil went beyond what was necessary to ensure that Mr. Stuart fully understood his right to counsel. In my view, the reading of the *Prosper* warning, while not strictly speaking required in these circumstances, did not, in any way, address Mr. Stuart's confusion. The warning simply reiterates that an accused has the right to counsel and that police must hold off on eliciting evidence until the person has exercised or waived their right. It does not offer any further explanation of the right or offer any assistance to Mr. Stuart regarding lawyers he could contact.

[62] Rather, the reading of the *Prosper* warning is, in my view, indicative of the fundamental problem with Cst. MacNeil's approach in this case. Specifically, that his focus was on meeting his own needs as the investigating officer and not on facilitating Mr. Stuart's understanding of his right to counsel. This is most evident in Cst. MacNeil's repeated insistence that Mr. Stuart give him a yes or no answer to the question of whether or not he wants to call a lawyer. When asked in cross-examination why he kept insisting on a yes or no answer, Cst. MacNeil's response was telling. He indicated

that it was because Mr. Stuart was not answering the question that Cst. MacNeil wanted the answer to; instead Cst. MacNeil testified that "what [Mr. Stuart] was giving me was no answer to my question whatsoever. He was just stating something that didn't really matter to me, it was, 'I don't know a lawyer'."

[63] While Mr. Stuart's repeated comments that he did not have a lawyer or know who to call clearly indicate confusion about his understanding of his right to counsel and how to exercise it, to Cst. MacNeil the information was entirely unimportant, even though the audio recording indicates that he had, at the time, appeared to recognize on some level that the response was indicative of confusion when he said to Mr. Stuart "I think you're genuinely confused about who you want to call".

[64] Although it should be noted that Cst. MacNeil, at trial, suggested in making this statement he had not meant that he believed Mr. Stuart to be confused about his right to counsel; he believed Mr. Stuart to be confused about what a yes or no answer means, a response which, quite frankly, is ludicrous in all the circumstances, though perhaps not surprising considering Cst. MacNeil's extreme defensiveness while testifying, a level of defensiveness which made it appear that Cst. MacNeil was taking personal offence that anyone would question the appropriateness of his actions in this investigation.

[65] Ultimately, I am satisfied that Cst. MacNeil, in his single-minded quest for a yes or no answer, failed to note obvious cues indicating that Mr. Stuart did not fully understand his right to counsel, and failed to take appropriate steps to alleviate Mr. Stuart's confusion. Even upon learning that this was Mr. Stuart's first arrest, Cst. MacNeil appeared not to recognize that what would be obvious to him as an

experienced police officer, would not necessarily be obvious to Mr. Stuart. In failing to offer any additional explanation to Mr. Stuart beyond repeating information included in the *Charter* card, Cst. MacNeil failed to meet his obligation to ensure Mr. Stuart actually understood his right to counsel. Mr. Stuart, in turn, cannot be said to have waived a right that he did not understand.

[66] In the result, I find that there was no valid waiver of the right to counsel in this case, resulting in a breach of Mr. Stuart's s. 10(b) *Charter* rights.

Section 24(2) of the *Charter*

[67] As the defence has established two breaches of s. 10(b), for failure to advise of the right to counsel without delay and for failure to ensure that Mr. Stuart was provided sufficient information to understand his right to counsel, the remaining question is that of appropriate remedy. As noted, defence counsel seeks exclusion of any evidence relating the breath readings, including the Certificate of Qualified Technician pursuant to s. 24(2) of the *Charter*.

[68] The test for exclusion has been articulated by the Supreme Court of Canada in a trilogy of cases released in 2009, including the oft-cited *Grant* decision, and requires consideration of the following 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.

[69] The Court's findings on these three factors must be balanced in determining whether the admission of the evidence would bring the administration of justice into disrepute.

Seriousness of the *Charter*-infringing Conduct

[70] In terms of the seriousness of the *Charter*-infringing conduct, as previously alluded to, I am not of the view that the one and one-half minute delay in advising Mr. Stuart of his right to counsel occasioned by the search of Mr. Stuart and placing him in the police vehicle would warrant exclusion. As noted, even in the absence of a clearly articulated safety concern, the steps taken were nonetheless prudent and reasonable, and did not cause undue delay.

[71] However, the same cannot be said of the remaining four and one-half minutes of delay resulting from prioritizing administrative and logistical tasks over the right to counsel. It must be remembered that a police officer's obligations in relation to the requirement to advise an accused person of their right to counsel without delay has been long entrenched in the law. Indeed, the *Debot* decision quoted above was rendered in 1989.

[72] Similarly, with respect to the second s. 10(b) breach for eliciting evidence in the form of breath samples in the absence of a clear waiver of the right to counsel, the law is similarly well entrenched, with the *Bartle* decision being released in 1994.

[73] In the face of such established law, there is absolutely no excuse for a police officer failing to comply with their constitutional obligations with respect to

s. 10(b). Cst. MacNeil's conduct in this case, and his adamant insistence that he did meet his obligations under the *Charter*, is indicative of either a concerning lack of understanding of, or a disregard for, *Charter* norms. Consideration of this factor would weigh in favour of exclusion.

Impact on *Charter*-protected Interests

[74] With respect to the impact of the breaches on Mr. Stuart's *Charter*-protected interests, as I did in the *Burdek* case filed by the Crown, I would echo the comments of Bovard J. in *Hawkins*, at para. 108, regarding the critical importance of the right to counsel:

> The impact on Mr. Hawkins of these breaches is serious. The right to counsel is one of the hallmarks of a democratic and free society. It distinguishes us from regimes in which persons are routinely stopped by the authorities and are helpless to defend themselves. It is a serious thing for the ordinary citizen to be detained, arrested, handcuffed and put in a police cruiser on the side of the road in the middle of the night without being told that they have the right to speak with a lawyer who can advise them and assuage their fears by explaining to them the jeopardy in which they find themselves and what they should do about it.

[75] Considering the critical importance of the right to counsel, particularly in circumstances where an accused is being compelled to provide incriminating evidence such as breath samples, I am satisfied that the impact of the breaches on Mr. Stuart's *Charter*-protected interests in this case was significant and would militate strongly in favour of exclusion of the breath readings.

Society's Interest in Adjudication on the Merits

[76] Consideration of the final factor, society's interest in adjudication on the merits, as is generally the case in impaired driving prosecutions, would clearly favour inclusion in light of the strong societal interest in addressing the longstanding problem of impaired driving, the high reliability of the evidence of the breath readings, and the critical importance of the readings to the Crown's case.

Balancing the Three Factors

[77] A balancing of the three *Grant* factors would favour exclusion, particularly in light of Cst. MacNeil's blatant disregard for the longstanding law in relation to s. 10(b) and the consequent impact on Mr. Stuart's *Charter*-protected interests. To find otherwise, would, in my view, bring the administration into disrepute. Accordingly, I find that any evidence of the breath samples taken following the two breaches and the resulting readings, including the Certificate of Qualified Technician, must be excluded.

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RUDDY T.C.J.