Citation: *R. v. Holbein,* 2023 YKTC 10

Date: 20230417
Docket: 21-00769
21-05569
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

BYRON RONALD JAMES HOLBEIN

Appearances:
Neil Thomson — Counsel for the Crown
Lee Kirkpatrick — Counsel for the Territorial Crown
Amy Steele — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] PHELPS T.C.J. (Oral): Byron Holbein is before the Court on two separate Informations for offences contrary to both the *Criminal Code* (the *"Code"*), and the *Motor Vehicles Act*, RSY 2002, c. 153 ("*MVA*"). The Information alleging offences contrary to the *Code* include six counts from February 2, 2022, contrary to ss. 320.18 (x3), 320.16(1), 320.15(1), and 320.13(1). The Information alleging offences contrary to the *MVA* include six counts from February 2, 2022, contrary to ss. 39(1)(b), 87(2), 94(1)(a), 266, 186(a), and 59(b).

[2] The matter proceeded with a *voir dire* on application by Mr. Holbein alleging violations in contravention of ss. 8, 9, and 10(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* ("*Charter*").

Facts

[3] On February 2, 2022, at approximately 9:30 in the morning, Rachel Guay was driving in a blue Honda Fit and turning left from the Alaska Highway onto the Two Mile Hill heading into downtown Whitehorse when her vehicle has struck by a grey Ford F150 (the "truck") traveling through the intersection northbound on the Alaska Highway. The front passenger side of the truck collided with the rear passenger side of the car. The impact was significant and caused the Honda Fit to collide with a third vehicle waiting to turn onto the Alaska Highway. The truck continued northbound on the Alaska Highway without stopping.

[4] Several kilometers north of the scene of the accident Scott Smeeton observed a grey Ford F150 driving northbound on the Alaska Highway slowly and swaying back and forth as though the driver was unable to control it, and at one point drifting into the oncoming lane. He noticed significant damage to the front passenger side of the truck and that the front passenger tire was pointed inward while the driver was attempting to drive straight, describing it as "pigeon toed". Mr. Smeeton called the RCMP and followed the truck until it veered across the oncoming lane and into the snowbank on the far side of the highway a short distance passed the intersection of the Alaska Highway and the North Klondike Highway. The truck was stopped with the front end in the snowbank and the rear end protruding into the southbound lane of the Alaska

Highway. Mr. Smeeton then observed a male in a “puffy red jacket” exit the truck and walk northbound on the Alaska Highway.

[5] The truck was stopped in a position that was dangerous to vehicles travelling southbound on the Alaska Highway. Shortly after the driver left on foot, a highway plow operator stopped next to the truck with its lights flashing to warn oncoming traffic of the hazard.

[6] Cpl. Anderson of the Whitehorse RCMP attended the scene of the motor vehicle accident at approximately 9:40 a.m. While on scene, he learned over the radio that a damaged truck matching the description of the truck involved in the accident was followed by a civilian and stopped near the intersection of the Alaska Highway and the North Klondike Highway. He further learned that the driver of the truck had left on foot in a “puffy red jacket”. RCMP members were requested to assist in locating the driver. Cpl. Anderson attended at the location of the truck which was approximately 13 kilometers from the scene of the motor vehicle accident. By that time, he had learned that the license plate on the truck was expired and belonged to Mr. Holbein, and that Mr. Holbein was subject to a driving prohibition.

[7] Cpl. Anderson proceeded to drive northbound on the Alaska Highway from the location of the truck and at 10:23 a.m. located a male in a red winter jacket walking northbound on the highway approximately 2.5 to 3.0 kilometers from the truck. Cpl. Anderson had not seen any other pedestrians on the highway that morning. He stopped and identified the male individual as Mr. Holbein. He then proceeded to arrest

Mr. Holbein, at a time he estimated to be 10:24 a.m. or 10:25 a.m., for leaving the scene of an accident under the *MVA* and for driving while prohibited under the *Code*.

[8] Following the arrest, Cpl. Anderson proceed to conduct a safety search of Mr. Holbein during which he located a couple of knives, a bottle of morphine pills, and a set of keys later confirmed to be for the truck. He was still on the side of the highway with Mr. Holbein about one to two minutes after the arrest when Cpl. Dunmall arrived. At this point Cpl. Anderson had not advised Mr. Holbein of his rights. His intention was to place Mr. Holbein in the police vehicle, and out of the cold, to provide him his rights. He had not yet done so when Cpl. Dunmall arrived.

[9] Cpl. Dunmall had been at the scene where the truck was left prior to attending at the location where Cpl. Anderson located Mr. Holbein. The truck was left in a dangerous position and would be towed. She proceeded to conduct a cursory search of the truck and noted:

- The truck was turned off and the keys were not in the ignition;
- The truck was unlocked;
- There were no signs of distress in the truck, such as a deployed airbag, damaged windshield, blood, or other bodily fluid;
- She did not locate registration or insurance documents for the truck;
- She did not locate any keys in the truck;

- She located court documents belonging to Mr. Holbein in the glove box, along with a can of unopened alcoholic beverage called "Hey Y'all"; and

- She located two opened and empty cans of Hey Y'all in the rear seat of the truck.

[10] Cpl. Dunmall testified that it was approximately -30 Celsius outside during the investigation. Upon approaching Mr. Holbein, Cpl. Dunmall leaned into him and observed the smell of alcohol on his person. Mr. Holbein objected to her proximity to him, and in light of the prevalence of the Omicron variant of COVID-19 in the Yukon at that time, she respected his objection. She was unable to confirm if the smell of alcohol was coming from his breath. Her observations of Mr. Holbein included:

- The odor of alcohol on his person;

- Long eye blinks;

- Relaxed facial muscles.

- Constricted pupils;

- White buildup on the corners of his mouth, referred to as "cotton mouth"; and

- Possible slurred speech.

[11] In addition to these observations, she had observed the unopened and empty cans of Hey Y'all alcoholic beverages in the truck. She was aware of the significantly

damaged truck being driven approximately 13 kilometers from the scene of the accident in a manner that was such a marked departure from the norm that the RCMP had received complaints from more than one civilian, including Mr. Smeeton, who was concerned enough to follow the truck as he reported his concern. She had observed the manner in which the truck was left front first in the snowbank and protruding dangerously into the lane of oncoming vehicles. She further believed that the driver had a clear intention of separating himself from the truck by leaving on foot.

[12] Based on all the information she had learned in relation to the truck ownership, the driving, the dangerous abandonment, and her observations of Mr. Holbein, Cpl. Dunmall formed the suspicion that Mr. Holbein had committed an alcohol related driving offence and issued him an Approved Screening Device ("ASD") demand from memory. Mr. Holbein was placed into the back seat of the police vehicle driven by Cpl. Anderson at 10:27 a.m., and then read the demand verbatim from the card at 10:28 a.m. Mr. Holbein was handcuffed in his front after the arrest by Cpl. Anderson, but before being placed into the police vehicle by Cpl. Dunmall.

[13] Cpl. Dunmall proceeded to make eight separate attempts to obtain a suitable sample from Mr. Holbein. During this time, Mr. Holbein was coughing, complaining about pain in his head and in his chest. Cpl. Dunmall noted that the health concerns only arose after she made the ASD demand and believed that he was being non-compliant as opposed to not being able to provide the sample. She observed his ability to take deep breaths, exhale, and speak, all of which led her to believe he was able to provide the sample. She observed him blocking the air flow, biting the breath tube, intentionally withholding breath, and not providing a consistent sample. After the eighth

unsuccessful attempt to provide a sample of his breath, Cpl. Dunmall placed Mr. Holbein under arrest for driving while prohibited and the refusal to provide a breath sample.

[14] Mr. Holbein, at this time, requested to seek medical attention. He was transferred to Cpl. Dunmall's police vehicle at 10:45 a.m. and provided the police warning and his *Charter* rights at 10:47 a.m. Mr. Holbein had difficulty understanding his rights, so Cpl. Dunmall proceeded to explain them to him in plain language which he seemed to understand. At 10:52 a.m., he advised that he understood his s. 10(b) *Charter* rights and wished to speak with a lawyer.

[15] Cpl. Dunmall transported Mr. Holbein to the Whitehorse General Hospital where she waited with him at general intake until they could see a doctor. He was able to see a doctor and was medically cleared by at 12:19 p.m. Mr. Holbein was then transported to the RCMP Arrest Processing Unit ("APU") where he was given the opportunity to call legal counsel. He had his lawyer's phone number in his cell phone and a voice mail message was left at 12:44 p.m. Further inquiries with the lawyer's office resulted in him speaking to one of the lawyer's legal aid colleagues at 1:12 p.m.

[16] Cpl. Dunmall explained that access to legal counsel was not available at the hospital due to the COVID-19 protocols that were in place requiring staff to fully sanitize all rooms after each use. She explained that she learned of the protocols in December or January while there with a different individual and believed that the restrictions were in place. She did not make any inquiries on February 2, 2022, about accessing a phone in a private location for Mr. Holbein to speak with a lawyer.

Issues

[17] The following issues require consideration on the *voir dire*:

1. Section 8 of the *Charter* – Did the Warrantless Search of the truck Result in a *Charter* Breach;

2. Section 9 of the *Charter* – Was There an Arbitrary Detention of Mr. Holbein;

3. Section 10(b) of the *Charter* – Was There an Informational Breach;

4. Section 10(b) of the *Charter* – Was There an Implementational Breach; and

5. Section 24(2) of the *Charter* – Analysis.

Section 8 – Did the Warrantless Search of the Truck Result in a *Charter* Breach

[18] Cpl. Dunmall did search Mr. Holbein's truck without a warrant when she located it on the side of the Alaska Highway. This requires an analysis of the circumstances of the search as set out in *R. v. Collins* [1987] 1 S.C.R. 265 at paras. 22 and 23:

> 22 …This shifts the burden of persuasion from the appellant to the Crown. As a result, once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.
>
> 23 A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. …

[19] Mr. Holbein's argument was based on a search incident to arrest and the decision of the Supreme Court of Canada in *R. v. Caslake,* [1998] 1 S.C.R. 51. The Crown submits that the authority to search is derived from the *MVA* and that the search was not a search incident to arrest. In support of this argument, the Crown filed the case of *R. v. Strilec*, 2010 BCCA 198, in which the British Columbia Court of Appeal addresses the *Caslake* decision at paras. 50 and 51 as follows:

> 50 On this point, counsel for the Crown began his submissions with the observation that in *R. v. Caslake*, [1998] 1 S.C.R. 51 the Supreme Court of Canada (at para. 31), declined to decide whether there exists a "general inventory search" exception to s. 8 of the *Charter*. In *Caslake* the accused had been stopped in his vehicle and arrested for possessing marihuana. He was taken into custody and his vehicle towed to a garage. The police later attended the garage and searched the vehicle, discovering other drugs. The officer who searched the vehicle said he had done so on the basis of a police policy that all seized vehicles were to be inventoried. Since *Caslake* dealt mainly with the doctrine of search incident to arrest, the Court declined to decide the inventory search issue saying that it was "not an appropriate case" to decide the issue.
>
> 51 Counsel for the Crown submitted that subsequent to the *Caslake* decision there have been several courts which have recognized the authority of the police to conduct inventory searches in connection with the impoundment of vehicles under provincial motor vehicle legislation. He referred in particular to *R. v. Nicolosi* (1998), 110 O.A.C. 189, 127 C.C.C. (3d) 176, which concluded that the Ontario *Highway Traffic Act*, R.S.O. 1990, c. H8 ("*1990 HTA*") authorized such a search.

[20] The Court in *Strilec* went on to consider the Ontario Court of Appeal decision of *R. v. Nicolosi* (1998), 110 O.A.C. 189, finding at para. 57:

> The appellant says that the reasoning in *Nicolosi* has little application to the *Motor Vehicle Act* as the wording of the two statutes is quite different. I accept that the wording is different, but the purpose of the statutes is similar. Both authorize the impoundment of vehicles for traffic safety reasons. In both cases, the police can take possession of the vehicle and require that it be stored in a particular place. I agree with the submissions

> of the Crown that it is implicit in the legislation that the police have the duty and responsibility under the *Motor Vehicle Act* to ensure the safety of the vehicle and its contents, and to do that they must be entitled to conduct an inventory of the vehicle's contents.

[21] The authority of the RCMP to remove Mr. Holbein's truck from the highway is derived from two applicable sections of the *MVA*:

> 109 Removal of vehicle from highway
>
> When a vehicle
>
> (a) is left unattended on a highway in such a manner as to obstruct the normal movement of traffic;
>
> …
>
> an officer may cause the vehicle to be removed and taken to and stored in a suitable place, and all costs for the removal and storage are a lien on the vehicle which may be enforced in the manner provided by section 110.
>
> 110 Abandoned vehicles
>
> (1) If an officer has seized a vehicle under section 109 or 113, or if an officer, on reasonable and probable grounds believes that a vehicle
>
> …
>
> (b) is situated unattended at such a location or in such a condition as to constitute a present or potential hazard to persons or property,
>
> the officer may cause the vehicle to be removed from its location, whether on private or public property or a highway, and to be stored at what is in the officer's opinion a suitable place for the vehicle.

[22] The Alaska Highway is a major roadway connecting the Yukon and Alaska to Northern British Columbia. It supports significant traffic of all types, both private and commercial. The manner in which the truck was stopped, protruding into the southbound lane of the highway, was obstructing traffic and constituted a significant safety hazard.

[23] The Court in *Strilec* reviewed the decision of *R. v. Wint*, 2009 ONCA 52, and concluded at para. 62:

> I would apply the same reasoning to the case at bar. In my view the authority to impound provided by s. 104.1 of the *Motor Vehicle Act* carries with it the duty and responsibility to take care of the vehicle and its contents, and to do that the police must be able to conduct an inventory of the vehicle's contents.

[24] I find that the reasoning for this conclusion is supported by the following statement from the Supreme Court of Canada in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, at para. 52:

> Thus, the Court does not require that the limit be prescribed by a "law" in the narrow sense of the term; it may be prescribed by a regulation or by the common law. Moreover, it is sufficient that the limit simply result by necessary implication from either the terms or the operating requirements of the "law". (See also *Irwin Toy*; *B.C.G.E.U. v. British Columbia (Attorney General*), [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; and *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3.)

[25] I find that ss. 109 and 110 of the *MVA* provide for the impoundment of Mr. Holbein's truck and that there is an accompanied duty and responsibility to take care of the truck and its contents, and to do that the police must be able to conduct an inventory of the truck's contents.

[26] Cst. Dunmall testified that she conducted the search for the purposes of an inventory search, a search to determine if there were any signs of injury to the missing driver, and for the continuance of a likely *Code* investigation. Dual purpose searching

was addressed by the British Columbia Provincial Court in *R. v. Cooper*, 2016 BCPC 259, at paras. 26 and 27:

> 26 The law is clear that there is nothing improper with a search having dual or multiple purposes. So long as one of the purposes for the search is proper and the search does not go beyond the proper scope of that lawful search, the police are free to carry out the search. The police are not required when carrying out a lawful search to ignore other legitimate aspects of their general duties and powers when so engaged (*R. v. Annett*, (1984) 17 CCC (3d) 332 (Ont.C.A.) and *R. v. Sewell* 2003 SKCA 52).
>
> 27 In *R. v. Wint*, *supra*, the Ontario Court of Appeal accepted the principle that when conducting an inventory search the fact the officer may have another reason for conducting the search (looking for a gun) does not render the search unlawful.

[27] I find that the truck search by Cpl. Dunmall was under the authority to conduct an inventory search and that the nature of her search, looking in the center console of the truck, in the glove box of the truck, and a visual scan of the inside of the truck to be reasonable. The search of the truck did not go beyond the proper scope of the lawful search. I am unable to conclude that Cpl. Dunmall acted improperly or that the search constituted a breach of Mr. Holbein's s. 8 *Charter* rights.

Section 9 – Was there an Arbitrary Detention of Mr. Holbein

[28] The Supreme Court of Canada addressed arbitrary detention under s. 9 of the *Charter* in *R. v. Storrey*, [1990] 1 S.C.R. 241, wherein the Court addresses the requisite subjective belief of reasonable and probable grounds required at para. 14:

> Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to

> safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. …

[29] The Court in *Storrey* goes on to adopt the reasoning in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at para 15:

> …The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction. …

[30] Mr. Holbein was detained and arrested by Cpl. Anderson at about 10:24 a.m. or 10:25 a.m. At the time, Cpl. Anderson was aware that:

- There was a serious motor vehicle accident involving the truck and that the truck failed to remain at the scene;
- The truck travelled approximately 13 kilometers from the scene of the accident to the point where it was located stopped on the Alaska Highway in a manner dangerous to oncoming traffic;
- The driver left the truck on foot in a northbound direction on the Alaska Highway wearing a “puffy red jacket”;
- The truck had an expired license plate belonging to Mr. Holbein;
- Mr. Holbein was prohibited from driving under the *Code*; and

- He had not seen any other pedestrians on the highway that day and did not see any sign of tracks in the snow leaving the highway into the forested area on either side.

[31] While there was the passage of time between the driver of the truck leaving on foot and the time Cpl. Anderson located Mr. Holbein, I am satisfied on the totality of the information, including the remote area on the Alaska Highway where the truck was located, that Cpl. Anderson had the requisite subjective reasonable grounds that Mr. Holbein was the driver of the truck that failed to remain at the scene of the accident and that he was prohibited from driving at the time.

[32] The Court in *Storrey*, at para. 16, addressed the requirement that it must also be objectively established that there are reasonable and probable grounds for arrest:

> There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. …

[33] Based on the evidence available to Cpl. Anderson at the time of the arrest, I find that a reasonable person standing in his shoes, at the time of the arrest, would have believed that there were reasonable grounds to arrest Mr. Holbein.

[34] Given my finding that there were both subjective and objective reasonable and probable grounds to arrest Mr. Holbein, I find that there was not a breach of Mr. Holbein's s. 9 *Charter* rights.

Section 10(b) – Was there an Informational Breach

[35] Mr. Holbein was stopped by Cpl. Anderson at approximately 10:23 a.m. and arrested at approximately 10:24 a.m. or 10:25 a.m. At 10:27 a.m., Mr. Holbein was placed in the rear seat of the police vehicle. This represents two to three minutes from the time of arrest by Cpl. Anderson that Mr. Holbein was detained without being informed of his s.10(b) *Charter* rights.

[36] When considering the timing of the s. 10(b) informational component, I find the approach applied by the Ontario Court of Justice in *R. v. Fisk*, 2020 ONCJ 88, at para. 51 helpful:

> In my view, the applicant did not prove on a balance of probabilities that there was a further section 10(b) violation as a result of a delay of four (4) minutes between the time of the "fail" and the arrest, to the time that the right to counsel was provided to the applicant seated inside the cruiser. The right to counsel is to be provided 'immediately not instantaneously'. Police officers are not required to hand cuff the accused with one hand and with the other hand read the right to counsel from their notebooks. Besides, the police did not attempt to elicit any evidence from the applicant during this period that would have been admissible. (See: *R. v. Culotta*, [2018] O.J. No. 3946 (Ont. C.A.) at para. 35)

[37] In *R. v. Braich*, 2022 ONCJ 81, the Ontario Court of Justice addressed a five-minute delay and concluded at paras. 28 and 29 as follows:

> 28 The situation before me is similar that in *R. v. Agnihotri*, [2019] O.J. No. 4133 (O.C.J.) where Rahman J. found no breach in a four-minute delay where the officer took time to deal with the Defendant's car and where the officer testified that he wanted to place the applicant in the cruiser where there was some peace and quiet to read his rights.
>
> 29 Based on the constellation of factors in this case, I find that the Defendant has not shown on a balance of probabilities that the delay of five minutes between his arrest and receiving rights to counsel resulted in a breach of his s.10(b) *Charter* rights. If the postponement in reading his

> rights was sufficient to shift the burden to the Crown to show that the delay was reasonable, they have done so for the reasons I have stated: *R. v. Taylor*, [2014] 2 S.C.R. 495 at para. 24.

[38] During the 4 minutes that Mr. Holbein was detained by Cpl. Anderson, the following steps were taken:

- The identity of Mr. Holbein was confirmed by Cpl. Anderson;
- Mr. Holbein was arrested for failing to remain at the scene of an accident under the *MVA* and for driving while prohibited under the *Code*;
- Cpl. Anderson conducted a safety search of Mr. Holbein, locating a couple of knives, some prescription medication, and the keys to the truck;
- Cpl. Dunmall arrived on the scene;
- Mr. Holbein was placed in handcuffs;
- Mr. Holbein was engaged briefly by Cpl. Dunmall in relation to the impaired driving investigation, suspending the s. 10(b) informational component; and
- Cpl. Dunmall concluded the roadside impaired driving investigation and made the ASD demand to Mr. Holbein from memory.

[39] Cpl. Anderson stated that it was cold outside when Mr. Holbein was arrested on the side of the Alaska Highway, prompting him to decide to place Mr. Holbein in the

police vehicle to provide him with his *Charter* rights. Given the steps taken by Cpl. Anderson and the intervening roadside impaired driving investigation, I find the brief delay between the time of arrest and when the roadside impaired driving investigation commenced, did not breach Mr. Holbein's s. 10(b) *Charter* rights.

[40] I find the authority for the suspension of the s. 10(b) *Charter* rights during the roadside impaired driving investigation, after an arrest, is made in *R.B. v. British Columbia (Superintendent of Motor Vehicles)*, 2020 BCSC 1496; *R. v. Brideau*, 2013 NBPC 22; and *R. v. Howe*, 2013 ONCJ 166.

[41] Mr. Holbein challenged Cpl. Dunmall's grounds for making the ASD demand which would impact the reasonableness of the delay in implementation of the s. 10(b) *Charter* rights. I note that the reasonable suspicion threshold is low and rely on the following statement form the Ontario Court of Justice in *R. v. Brisson*, 2022 ONCJ 523, at paras. 34 and 37:

> 34 Based on her observations and information available to her at the time, Cst. McDade believed she had the requisite grounds to make the demand that included a mild odour of alcohol, but in addition, a multitude of other factors: the single vehicle collision; the report that firefighters believed the defendant was impaired; Mr. Brisson's unsteadiness; the strong smell of cologne; his avoidance of eye contact; his pupils were constricted; and that he did not retrieve his driver's licence when asked to do so. In addition, the officer noted that the defendant seemed to want the interaction to be over and refused medical attention that might reveal indicia of impairment.
>
> …
>
> 37 Moreover, the reasonable suspicion threshold is low and involves possibilities, rather than probabilities. I am satisfied that on the constellation of facts known to Cst. McDade at the time she made the ASD demand, those facts permitted an inference that there was a distinct possibility of alcohol in Mr. Brisson's body. …

[42] I have outlined the observations of Cpl. Dunmall and the information available to her when she made the demand in the facts. I find that she had an abundance of evidence to form the requisite grounds to make the demand.

Section 10(b) – Was there an Implementational Breach

[43] Mr. Holbein advised Cpl. Dunmall that he understood his rights and wished to speak to a lawyer at 10:52 a.m., while still at the roadside on the Alaska Highway. Evidence was not produced to explain whether access to counsel could be accommodated at the roadside. In the circumstances, I am unable to find that the decision to drive to the hospital before attempting to facilitate access to counsel was unreasonable.

[44] Mr. Holbein had requested the opportunity to see a doctor and Cpl. Dunmall immediately escorted him to the hospital where they remained until 12:19 p.m. The drive to the hospital and the intake procedure would account for at least 20 minutes of this time, meaning that they were at the hospital for about one hour. Cpl. Dunmall testified that during this time Mr. Holbein's personal cell phone had been left in the police vehicle. As set out in the facts, she did not make any inquiries about access to a private phone at the hospital due to previous knowledge about COVID-19 protocols in place.

[45] Mr. Holbein's medical condition was not considered to be an emergency by Cpl. Dunmall. In her testimony, she clearly stated, on several occasions, that she did not believe that he was in medical distress and justified her continued attempts to obtain a breath sample from him at the roadside. In the circumstances, there was an

opportunity at the hospital, while they awaited access to a doctor, to consider options for access to counsel. This would include allowing Mr. Holbein to use his own cellphone in a private area of the hospital, if one could be located.

[46] As stated by the Supreme Court of Canada in *R. v Taylor*, 2014 SCC 50, at para. 31:

> There may well be circumstances when it will not be possible to facilitate private access to a lawyer for a detained person receiving emergency medical treatment. As this Court noted in *Bartle*, a police officer's implementational duties under s. 10*(b)* are necessarily limited in urgent or dangerous circumstances. But those attenuating circumstances are not engaged in this case. As the trial judge found, the paramedic "did not feel there was anything wrong with the Accused", but took Mr. Taylor to the hospital only "out of an abundance of caution, and in accordance with normal practice". And once at the hospital, it was 20 to 30 minutes before the hospital took any blood from Mr. Taylor, more than enough time for the police to make inquiries as to whether a phone was available or a phone call medically feasible.

[47] The Court continued at paras. 34 and 35:

> 34 An individual who enters a hospital to receive medical treatment is not in a *Charter*-free zone. Where the individual has requested access to counsel and is in custody at the hospital, the police have an obligation under s. 10*(b)* to take steps to ascertain whether private access to a phone is in fact available, given the circumstances. Since most hospitals have phones, it is not a question simply of whether the individual is in the emergency room, it is whether the Crown has demonstrated that the circumstances are such that a private phone conversation is not reasonably feasible.
>
> 35 The result of the officers' failure to even turn their minds that night to the obligation to provide this access, meant that there was virtually no evidence about whether a private phone call would have been possible, and therefore no basis for assessing the reasonableness of the failure to facilitate access. In fact, this is a case not so much about delay in facilitating access, but about its complete denial. It is difficult to see how this ongoing failure can be characterized as reasonable. Mr. Taylor's s. 10*(b)* rights were clearly violated. With respect, the trial judge erred in concluding otherwise.

[48] I accept the evidence of Cpl. Dunmall that she understood from a visit to the hospital a month or two prior, that access to a telephone for a private conversation would not be available. However, in this case, Mr. Holbein had a private cell phone and there were no attempts made to determine if there was a place at the hospital to afford him private access to counsel using his phone. Further, there was no attempt to determine if the hospital policy had change since her last experience.

[49] I find that the failure to make efforts to facilitate access to counsel while at the hospital resulted in a violation of Mr. Holbein's s. 10(b) *Charter* rights.

Section 24(2) Analysis

[50] Section 24(2) of the *Charter* reads:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[51] In this case, the evidence collected by the RCMP on the offences before the Court was obtained prior to the breach of Mr. Holbein's s. 10(b) *Charter* rights. There was no causal connection between the *Charter* breach and obtaining the evidence on the offences before the Court. The investigation was completed prior to departing the side of the Alaska Highway for the Whitehorse General Hospital. Were this not the case, an analysis as set out in *R. v. Grant*, 2009 SCC 32, would be necessary to determine if evidence collected after the breach should be excluded.

[52] Counsel for Mr. Holbein relies on the decision of this Court in *R. v. Hendrie*, 2021 YKTC 11, wherein Cozens C.J. excluded evidence discovered before the *Charter* breach occurred. That case addressed a s. 9 *Charter* breach by detaining Mr. Hendrie at the RCMP APU and delaying his release for an additional three and two-thirds hours from the time of the decision to release.

[53] In *Hendrie*, Cozens C.J. refers to there being a systemic issue with overholding at the APU at paras. 147 and 148:

> 147 Were this to be a one-off overholding, the case for exclusion of the evidence of the breath samples would not serve the long-term interests of justice. Rather it would be more in the line of "punishing" the RCMP for this one particular incident, with no backdrop of trying to correct a systemic issue that was, or should have been, brought to the attention of the RCMP so that future such breaches do not occur.
>
> 148 However, here there was an unaddressed systemic issue of overholding as a result of inadequate RCMP policies and procedures with respect to ensuring the timely release of individuals detained at the APU, who must remain in custody pending further RCMP action.

[54] Cozens C.J. goes on at paras. 152 to 154 to conclude:

> 152 I would think that the public perception of the administration of justice would be negatively impacted by the lack of a meaningful remedy for the s. 9 *Charter* breach in this case.
>
> 153 I think this negative impact would be enhanced because of the prior judicial admonition in the Yukon about the systemic problems that have contributed to such overholdings of individuals in RCMP custody in the past, and what appears to be the failure of the RCMP to heed these admonitions and take any action to rectify them.
>
> 154 In my opinion, in a balancing of the three ***Grant*** factors, the systematic flaws that contributed to the s. 9 *Charter* breach in Mr. Hendrie's case are sufficiently significant that the impact upon the administration of justice requires that the evidence of the breath samples be excluded.

[55] The breach of Mr. Holbein's s. 10(b) *Charter* rights was not a result of a larger systemic issue within the RCMP. The impact of COVID-19 on the heath care system worldwide is well documented, and the strain on the Whitehorse General Hospital personnel is no exception. I accept that the ability of the RCMP to navigate the COVID-19 protocols at the hospital while addressing Mr. Holbein's *Charter* rights impacted the decisions made. While I found a breach of his s. 10(b) *Charter* rights, I am unable to conclude it was the result of any bad faith on the part of the RCMP or a result of a systemic issue within the RCMP.

[56] Accordingly, I find that the reasoning in *Hendrie* for an extraordinary remedy under s. 24(2) of excluding evidence obtained prior to a *Charter* breach has no application in this case. I would not exclude any evidence obtained by the RCMP prior to the breach of Mr. Holbein's s. 10(b) *Charter* rights in this case.

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PHELPS T.C.J.