Citation: *R. v. Greenland,* 2024 YKTC 2

Date: 20240115
Docket: 22-00231
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

SEANA CATHY HELENA GREENLAND

Appearances:
Andreas Kuntz — Counsel for the Crown
Christiana Lavidas — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Seana Greenland is before the Court on a two-count Information alleging that on June 19, 2022, she committed offences contrary to s. 320.14(1)(a) and s. 320.14(1)(b) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Ms. Greenland alleging violations contrary to ss. 8, 9, and 10(b) of the *Charter*. The parties agreed to proceed with a blended *voir dire*. At the conclusion of the *voir dire*, Ms. Greenland abandoned her application with respect to s. 9 of the *Charter*.

[3] In these reasons I will address:

1. Facts;

2. Section 8 *Charter*;

    a. Did Ms. Greenland operate a conveyance?

    b. Did Cst. Dowling have Reasonable Grounds to make the s. 320.27(1)(b) demand?

3. Section 10(b) *Charter*;

    a. Informational Delay,

    b. Delay of Implementation at the Scene,

    c. Issues with Implementation at the Arrest Processing Unit,

4. Loss of Photographs taken by Cst. Dowling; and

5. Conclusion.

Facts

[4] At approximately noon on June 19, 2022, there was a single vehicle accident on Range Road in Whitehorse, Yukon, near McIntyre Creek. Cst. Anthony Dowling responded to the call on behalf of the RCMP. His vehicle was equipped with Watchguard video and audio recording equipment. The video depicts two views, being a view forward from the dashboard of the vehicle and a view showing the back seat of the vehicle. Audio recording was captured inside the vehicle as well as having the capability to capture audio on a portable microphone.

[5] Upon arrival at the scene, Cst. Dowling located a Dodge Ram pickup truck (the "truck") with a flat tire and Ms. Greenland in the process of setting up a jack to change the tire. There were clear tracks showing where the truck went off the road into the ditch, and then to the location back on the road where the truck was stopped. Initial observations included a flat front driver side tire and a broken mirror on the driver's side.

[6] Cst. Dowling requested Ms. Greenland's drivers license, vehicle registration, and insurance documents which she retrieved from inside the truck. She entered the truck through the rear driver side door, noting that the driver's side door had been damaged in the accident and would not open. When Ms. Greenland opened the rear door to the truck, the officer noted multiple beer cans inside the truck as well as both empty beer cans and other alcoholic beverage containers in the box of the truck. In addition to the beer cans inside the vehicle, the officer noted a similar beer can in the ditch near the truck. Photographs entered as exhibit 7 clearly depict multiple empty beer cans in the back seat area, including a partially collapsed and open beer box, some of which would have been visible to the officer.

[7] Cst. Dowling noted the following with respect to his interaction with Ms. Greenland:

- dried blood on her leg near the knee;
- the slight slur of her speech;
- she was slightly unsteady on her feet, swaying back and forth;
- a beer can on the ground that matched beer cans inside the vehicle;

- there were no other injuries noted.

[8] Cst. Dowling was initially conducting an investigation under the *Motor Vehicles Act*, RSY 2002 c.153, but at approximately 12:15 p.m. he formed the suspicion that Ms. Greenland had operated the vehicle with alcohol in her body. He had Ms. Greenland accompany him to the police vehicle for safety reasons given the location that they were parked on the road and the speed at which vehicles were passing them. He noted that they were near a sharp corner on the road further giving rise to his safety concerns.

[9] Cst. Dowling placed Ms. Greenland in the back seat of the vehicle and closed the door. He then moved the police vehicle off the roadway and out of the way of oncoming traffic. Once parked, he opened the door to the rear seat where Ms. Greenland was located and read her the demand pursuant to s. 320.27(1)(b) of the *Criminal Code*.

[10] The Watchguard video from the police vehicle has a time stamp and indicates that at 12:15 Cst. Dowling placed Ms. Greenland into the rear of the of the police vehicle, at 12:16:30 he opened the door to the rear seat of the police vehicle and read the demand to her, and at 12:20:20 she provided a sample resulting in a fail. Ms. Greenland was then placed under arrest.

[11] After being placed under arrest, Ms. Greenland asked Cst. Dowling if he could retrieve her cigarettes, wallet, and inhaler from the truck. The officer exited the police vehicle and approached the truck to look inside in an attempt to retrieve the items. As Cst. Dowling was looking in the truck, Ms. Greenland is noted on the Watchguard recording speaking on her cell phone.

[12] Cst. Dowling returned to the vehicle at 12:24 and asked Ms. Greenland if she required emergency medical services due to his observations of the accident scene, which she declined. He further advised her that he would have another officer attend the scene and get her items out of the truck on her behalf, noting that she could not have a cigarette until after she provides breath samples.

[13] At 12:25:30, Cst. Dowling advised Ms. Greenland of her rights. When asked if she wished to speak with a lawyer, she indicated that she did and that she wished to speak with Christiana Lavidas. They waited at the scene until 12:38 at which time they departed for the Arrest Processing Unit ("APU"). The delay in departing was to await the arrival of another police officer. They arrived at the APU at 12:42 p.m.

[14] At the APU, Ms. Greenland was escorted directly into the phone room and attempts were made to locate her counsel of choice, Christiana Lavidas. Ms. Greenland did not know the phone number for Ms. Lavidas, so the officers at the APU searched online and located some numbers to attempt contact. Cst. Dowling made note of the following attempts to reach Ms. Lavidas:

12:54 Call and voice mail left for Ms. Lavidas;

13:02 Another call to Ms. Lavidas also with a voice mail message left;

13:03 Call to Ms. Lavidas to a different number;

13:04 Call to Ms. Lavidas to a third number and a voice mail message left;

13:13 Call to Ms. Lavidas to the second number again;

13:18 Another call to Ms. Lavidas and another voice mail left;

13:20 Last call to Ms. Lavidas and a voice mail left.

[15] Ms. Greenland was updated on the efforts made to reach Ms. Lavidas and during the conversation indicated that she wished to speak with legal aid. In response to this she was advised that should Ms. Lavidas call she would have the opportunity to speak with her as well. The following attempts were made to try and locate legal aid duty counsel:

13:25 First call;

13:42 Second call as they had not received a call back;

13:44 Third call which rang busy;

13:48 Final call and reception advised that duty counsel was not answering.

[16] Ms. Greenland was updated again at this point and advised that the legal aid duty counsel lawyer was not responding. She was asked if she wanted to use a phone book or receive a list of lawyers so that she could make a decision regarding counsel. Cst. Dowling was clear in advising her that he could not give her a name of who to call because that was a choice she would have to make. Ms. Greenland responded that she did not want to pay for a lawyer, indicating that her preference was legal aid.

[17] The officers located a list of legal aid family lawyers which they presented to Ms. Greenland. She chose one of the lawyers off the list. At 2:09 p.m. Cst. Dowling proceeded to call the first number for the lawyer chosen by Ms. Greenland and left a voicemail message. He then called a second available phone number for that lawyer and left a voicemail message.

[18] At 2:19 p.m., Cst. Dowling called the legal aid duty counsel number again and requested that duty counsel call back.

[19] At 2:23 p.m., duty counsel called the APU. A police officer asked Ms. Greenland if she wished to speak with the duty council and she indicated that she did. The police officer involved in this conversation did not testify, and the conversation was not caught on audio. Ms. Greenland did not testify on her own behalf and there is no evidence before the Court regarding the conversation. She was provided privacy for a discussion with duty counsel.

Section 8 *Charter*

[20] Ms. Greenland advanced two arguments under s. 8 of the *Charter* in relation to the s. 320.27(1)(b) *Criminal Code* demand and subsequent breath sample. The first argument advanced is that there is no evidence that she operated a conveyance, which is a necessary finding for a valid demand. The second argument advanced is that Cst. Dowling did not have the requisite reasonable grounds to suspect that she had alcohol in her body.

Did Ms. Greenland operate a conveyance?

[21] Ms. Greenland argued that the Crown failed to prove that she "operated a conveyance", being the truck. This is a prerequisite to a valid s. 320.27(1)(b) *Criminal Code* demand. In order to decide this issue, it is helpful to consider the definition of "operate" set out in s. 320.11 of the *Criminal Code* in relation to a motor vehicle:

> "operate" means
>
> (a) in respect of a motor vehicle, to drive it or to have care or control of it;
>
> ...

[22] When Cst. Dowling first arrived at the scene, he exited his police vehicle and spoke to Ms. Greenland without having the portable microphone on. He interacted with Ms. Greenland for several minutes near the truck and his testimony at trial focussed primarily on the observations made with respect to indicia of impairment.

[23] Cst. Dowling confirmed that towards the end of their initial discussion near the truck he "formed the suspicion that she had operated the motor vehicle with a certain amount of alcohol in her body".

[24] Without evidence of driving, the finding of operation requires an analysis of the circumstantial evidence of care and control.

[25] The Ontario Court of Justice addressed the assessment of care and control on circumstantial evidence in *R. v. Rowell*, [2014] O.J. No. 2750 (ONCJ), at para. 19:

> I remind myself that before basing a verdict of guilty on circumstantial evidence, I must be satisfied beyond a reasonable doubt that the guilt of

> the accused is the only reasonable inference to be drawn from the proven facts...

[26] I have the evidence of Cst. Dowling before me, along with the Watchguard recording and photographs of the truck and the scene. The uncontradicted evidence is:

1. He arrived at the scene about three minutes after the call came in regarding the accident;

2. There was one male and one female at the scene. There were no other people at or near the scene, which was in a relatively remote location with no residential or commercial properties nearby;

3. He spoke to the male and was advised by him that he was driving the second vehicle parked near the truck and had stopped to assist with the tire. He left in his car after the exchange with Cst. Dowling;

4. Ms. Greenland had a jack and was beginning to set it up to change the tire as Cst. Dowling approached her;

5. Ms. Greenland provided him with registration and insurance documents for the truck that were in her name and which she retrieved from inside the truck;

6. The vehicle had the keys in the ignition and was running when Cst. Dowling spoke to Ms. Greenland. She turned off the truck at his request.

[27] The Ontario Court of Justice addressed what constitutes care and control, including where an individual is found outside of the vehicle, in *R. v. Boar*, 2015 ONCJ 483, at paras. 17 to 22:

> 17 *R. Symanski*, supra [(2009), 88 M.V.R. (5th) 182 (Ont. Sup. Ct.)], provides a helpful survey of how the leading cases define care and control:
>
> > 28 While instructive the *mens rea* and *actus reus* do not provide a definition for care or control. In *Toews*, [1985] 2 S.C.R. 119, McIntyre J. addressed the issue as follows:
> >
> > > As I have noted earlier, the offence of having care or control of a motor vehicle while the ability to drive is impaired by alcohol or a drug is a separate offence from driving while the ability is impaired. It may be committed whether the vehicle is in motion or not. This leaves the Court with the question: What will constitute having care or control short of driving the vehicle? It is, I suggest, impossible to set down an exhaustive list of acts which could qualify as acts of care or control, but courts have provided illustrations which are of assistance.
> >
> > ...
>
> 18 Based on the foregoing it appears that care and control could be found where an accused could cause the vehicle to become a danger by putting it in motion or *in some other way* - such as operating the equipment or controls of the vehicle or by acting in such a way with the vehicle that amounts to directing action by others in respect to the management of the vehicle.
>
> ...
>
> 19 For our purposes, it is essential to select comparable cases from which to distill relevant principles to apply to the instant case. In *R. v. Magagna* (2003), 173 C.C.C. (3d) 188 (Ont.C.A.) the Court of Appeal found a driver of a disabled vehicle who was outside the car and attempting to have it towed, in care and control:
>
> > There was care and control. It continued until the police arrived. If that is an issue, I find that she was engaged in

> extracting the very motor vehicle that she drove into that ditch. Clearly, it was drivable. It was apparent to everyone that all that had to be done is lift it away from the fence and it could have been driven back to [her uncle's] cottage. She clearly consumed alcohol and put herself in care and control of a motor vehicle.
>
> 20 In *R. v. Wilford*, [2004] O.J. No. 258 (Ont.C.A.) the Court of Appeal once again concluded that an accused who was found next to a vehicle was in care and control having arranged to have a tow truck pull the vehicle out of a ditch:
>
> > 11 With respect to the "care and control" issue, we see no error of law that would warrant the interference of this court. The appellant was found standing beside a vehicle that had just been driven into the ditch with the keys in the ignition. While the police were on the scene, a tow truck arrived to pull the vehicle out. The appellant produced documentation indicating that his father was the owner of the vehicle. In our view, it was open to the trial judge to infer care and control from these facts and to conclude that the conduct of the appellant in relation to the vehicle created a sufficient risk of danger: see R. v. Wren (2000), 144 C.C.C. (3d) 374 (Ont. C.A.); R. v. Magagna (2003), 173 C.C.C. (3d) 188 (Ont. C.A.).

[28] I find that there is strong circumstantial evidence that went unchallenged which establishes that Ms. Greenland was operating the motor vehicle when the single vehicle accident occurred, and subsequently when it was driven to the location where it was located by Cst. Downing. This includes the remote location of the accident, no other possible drivers of the truck in the area, her actions of starting to change the tire, and the noted blood on her leg.

[29] The facts also establish that Ms. Greenland was in care and control of the truck when Cst. Downing arrived. She was clearly intending to fix the flat tire, having the vehicle running as she did so, with the intention of driving it from the location. Both findings result in Ms. Greenland having operated a conveyance as required by

s. 320.27(1)(b) of the *Criminal Code*. I find that Ms. Greenland operated a conveyance in the preceding three hours before the demand was made, and that there was not a s. 8 *Charter* breach in relation to this first argument.

Did Cst. Dowling have Reasonable Grounds to make the s. 320.27(1)(b) Criminal Code demand?

[30] Ms. Greenland's second argument under s. 8 of the *Charter* is that Cst. Dowling did not have the requisite grounds to make a demand under s. 320.27(1)(b) of the *Criminal Code*, which states:

> If a peace officer has reasonable grounds to suspect that a person has alcohol...in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person...
>
> ...
>
> (b) to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose.

[31] The reasonable suspicion threshold is not onerous and, as stated by the Ontario Court of Justice in *R. v. Brisson*, 2022 ONCJ 523, at para. 37, "involves possibilities, rather than probabilities".

[32] The Ontario Court of Justice addressed the test to be applied regarding the demand under s. 320.27(1)(b) of the *Criminal Code* in *R. v. Campbell*, 2022 ONCJ 571, at paras. 12, 13, and 16:

> 12 To lawfully make the ASD breath demand, pursuant to s. 320.27(1)(b), the officer must have "reasonable grounds to suspect" that the person has

> alcohol in their body and that the person has, within the preceding three hours, operated a conveyance.
>
> 13 The authors of *Impaired Driving and Other Criminal Code Driving Offences, A Practitioner's Handbook* note that "[t]he reasonable suspicion must be established on both a subjective and objective basis". An officer's testimony that he had an honestly held suspicion that the person had alcohol in his or her body satisfies the subjective standard, and "[t]he objective standard is satisfied when the Crown can point to factors that establish that this suspicion was reasonable".
>
> ...
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> 16 Reasonable suspicion is a lower standard than reasonable and probable grounds, "as it engages the reasonable possibility, rather than probability, of crime." Reasonable suspicion is "assessed against the totality of the circumstances". This "inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation". It "must be fact-based, flexible, and grounded in common sense and practical, everyday experience".

[33] The indicia of impairment established on the evidence of Cst. Dowling includes:

- Slightly slurred speech;
- Slightly unsteady on her feet, including swaying back and forth;
- Empty beer cans inside the vehicle;
- An empty beer can on the ground outside the vehicle matching the empty beer can inside the vehicle; and
- An unexplained motor vehicle accident.

[34] Crown counsel filed the decision of *R. v. Scott*, 2015 ABPC 41, as authority that an unexplained motor vehicle accident can provide support to an officer’s reasonable belief under s. 320.27(1)(b) of the *Criminal Code*. I adopt the reasoning in *Scott* and find

that Cst. Dowling could rely on the unexplained single vehicle accident occurring in the middle of the day in dry conditions as evidence to form his reasonable belief.

[35] Defence counsel argued that there is no evidence on the Watchguard video of Ms. Greenland being unsteady on her feet. For a significant part of the face-to-face interaction between Ms. Greenland and Cst. Dowling during their initial interaction, Cst. Dowling is standing between the camera and Ms. Greenland, blocking her from view. When she can be seen exiting the truck and walking towards the police vehicle, the footage is brief and inconclusive. There is insufficient evidence depicted on the video to contradict the evidence of Cst. Dowling.

[36] I find on the evidence presented at trial that Cst. Dowling had the subjective reasonable belief to make the s. 320.27(1)(b) *Criminal Code* demand. I find that the facts relied on by Cst. Dowling were objectively reasonable and that there was no resulting s. 8 *Charter* breach established on this second argument.

Section 10(b) *Charter*

Informational Delay

[37] The allegation of a breach of Ms. Greenland's s. 10(b) *Charter* rights begins with the delay in excess of five minutes from the time of placing her under arrest to the time of advising her of her right to counsel. This is referred to in jurisprudence as an "informational" delay of the s. 10(b) right.

[38] The s. 10(b) informational delay was described in *R. v. Mason*, 2022 BCPC 285, at paras. 49 and 52:

> 49 Under s. 10(b) of the *Charter*, police officers are obliged to advise a person of his or her right to retain and instruct counsel without delay once that person has been detained for a criminal offence: *R. v. Suberu*, 2009 SCC 33. In *Suberu*, the Court held that "without delay" means "immediately", subject to concerns for officer and public safety (at para. 42).
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> ...
>
> 52 I agree with the Crown that the delay from the time of the vehicle stop to the time that Mr. Mason was placed in the back of the vehicle was not unreasonable. However, once Mr. Mason was secured in the back of the police vehicle by 8:15 p.m., there was no explanation for any further delay in advising Mr. Mason of his right to counsel. It would only take a moment for the officers to call for paramedics. By that point, at least four police officers were on scene, and only two officers were searching the vehicle. Cst. Galbraith did not have any reasonable explanation for failing to advise Mr. Mason of his right to counsel at 8:15 p.m., when he told him he was under arrest.

[39] A s. 10(b) Informational breach was addressed by Ruddy J. in *R. v. Burdek*, 2021 YKTC 41, at paras. 74 to 76:

> 74 A number of cases have considered delays in informing of the right to counsel in circumstances similar to those before me.
>
> 75 In *R. v. Pillar*, 2020 ONCJ 394, there was a delay of eight minutes between arrest and informing the accused of his right to counsel. In the intervening period, the officer cuffed the accused, searched him, took him to the police vehicle, then ran his licence on the onboard computer. The trial judge concluded that even if handcuffing and searching were necessary for officer safety, any safety concern ended when the accused was handcuffed. Furthermore, cuffing and searching the accused would have required no more than two and one-half minutes. The trial judge held that the remaining activities of taking the accused to the police vehicle and running the licence check were not necessary for officer or public safety, and concluded that the remaining delay of five and one-half minutes was a breach of the s. 10(b) right to be informed immediately of the right to counsel.
>
> 76 In *R. v. Hawkins*, 2013 ONCJ 115, (a different *Hawkins* from the case filed by the defence), there was a delay of 12 minutes between arrest and informing the accused of the right to counsel. Activities over the 12 minutes included allowing the accused to retrieve personal belongings from the vehicle, cuffing the accused and placing him in the police vehicle,

> and explaining the tow procedure to another officer. The trial judge concluded that while the officer was not acting in bad faith, neither retrieving belongings nor explaining the tow procedure were justifiable reasons for delaying the right to counsel and found the delay to be a breach of s. 10(b).

[40] After analysing the delay of 11 minutes in the matter before her, none of which she attributed to officer or public safety, Ruddy J. concluded in *Burdek,* at para. 80:

> Similarly, there is nothing to suggest that the various checks, calls for a tow truck and breath technician, and the almost four minutes writing notes were related in any way to officer or public safety, and could not have waited until after Cst. Talbot complied with Mr. Burdek's constitutional right to be advised immediately upon arrest of his right to counsel. The resulting delay is a clear breach of s. 10(b).

[41] In the case before me, Ms. Greenland was placed under arrest at 12:20:25. This was immediately followed by an offer from Cst. Dowling to retrieve any personal items from the truck that Ms. Greenland may want prior to the truck being towed. He then radios for assistance at the scene prior to exiting the car at 12:22:26. During this period of roughly two minutes, there was time spent on the radio updating on the circumstances of the investigation and seeking assistance at the scene. While a portion of the radio call could be attributed to officer safety, it was brief.

[42] Cst. Dowling is then depicted on the video spending time taking photographs of the truck as well as the scene.

[43] At 12:23:50, Cst. Dowling returns to the car and asks Ms. Greenland if she would like him to call emergency medical services to address any injuries she may have sustained in the accident. Ms. Greenland declined the offer for medical assistance.

[44] At 12:24:26, Cst. Dowling explained to Ms. Greenland that he would have a second officer retrieve her items from the truck.

[45] At 12:25:50, Cst. Dowling commences advising Ms. Greenland of her right to counsel.

[46] From 12:20:25 to 12:25:50, I find that there was five minutes of delay in advising Ms. Greenland of her *Charter* rights that were unexplained by concern for officer or public safety. Cst. Dowling acknowledged the importance of providing the *Charter* rights without delay and conceded that he could have done a better job of doing so. The delay was a breach of Ms. Greenland's s. 10(b) *Charter* rights.

Delay of Implementation at the Scene

[47] Ms. Greenland's s. 10(b) *Charter* argument in relation to the implementation at the scene relates to the fact that she had her cell phone on her at the scene and that she could have used the phone to call her counsel of choice immediately while in the police vehicle. The difficulty with this argument is that Ms. Greenland can be seen with the cell phone in the back of the police vehicle while Cst. Dowling is at her truck and can further be seen concealing the phone when he returns.

[48] During an exchange about calling counsel, Ms. Greenland is specifically asked if she has a cell phone and responded by stating "I thought you said you were going to provide one." Cst. Dowling advised that the phone would be provided at the APU and Ms. Greenland sounded satisfied with the process and kept her phone concealed. She

did not advise Cst. Dowling that she had a cell phone on her, and he did not learn about the phone until it was taken from her at the APU.

[49] I find that Ms. Greenland has failed to establish a breach of her s. 10(b) *Charter* rights in relation to the delay attributed to driving to the APU that could have been avoided by allowing her to use her personal cell phone at the scene.

Issues with Implementation at the APU

[50] Ms. Greenland's s. 10(b) *Charter* argument in relation to the APU relates to her assertion that she was "steered" by Cst. Dowling to duty counsel. She was not advised that Cst. Dowling had left messages for the legal aid lawyer picked from the list and that she could wait for him to call back rather than speaking to duty counsel.

[51] This issue was examined extensively in the recent decision from this Court in *R. v. Vittrekwa-Butler*, 2023 YKTC 9, wherein two significant cases were reviewed at para. 45:

> The Crown has relied on a number of cases. Two are of note, the first; *R. v. Keror*, 2017 ABCA 273, in which the Alberta Court of Appeal found at paras. 42 and 43:
>
> > 42 The police do not violate a detainee's right to counsel of choice when his preferred counsel is unavailable and the detainee voluntarily chooses to call a different lawyer. This case is similar to *Willier* and *McCrimmon*, in that the appellant initially told the police he wanted to speak with a specific lawyer, but when his preferred lawyer was unavailable, the appellant decided to speak with duty counsel instead. Like both *Willier* and *McCrimmon*, the appellant was "properly presented with another route by which to obtain legal advice," and he freely chose to speak with a different lawyer: Willier at para 43.

> 43 Having freely pursued the option of speaking with a different lawyer, "unless a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence an investigative interview": *Willier* at para 42. The appellant did not express any concerns about the advice he received. Nor did he express any continuing desire to speak with Mr. Chow. In fact, he told Det. Barrow that he was satisfied.

[52] The decision in *Vittrekwa-Butler* continues with a review of an Ontario summary conviction appeal decision *R. v. Rizvi*, 2023 ONSC 1443, quoting from the decision at para. 59:

> Justice Woollcombe, in *Rizvi*, stated at para. 48, after reviewing a number of cases:
>
> > These cases demonstrate an obvious point: that when a detainee asserts a desire to speak to a specific counsel, the detainee must be afforded a reasonable opportunity to do so. But, they also highlight that if counsel of choice is unavailable, there is nothing preventing police from offering the option of speaking with duty counsel. If a detainee decides to forego speaking with counsel of choice in favour of speaking with duty counsel, that person's s. 10(b) rights have not been violated. In such a situation, the Court declined to impose on police any requirement to explain to the detainee the consequences of choosing to speak to duty counsel, rather than continuing to wait for counsel of choice to call back. That is because choosing to speak to duty counsel is not a waiver of the right to counsel, it is a decision to exercise the right to counsel by speaking to duty counsel.

[53] The Judge in *Vittrekwa-Butler* applied the caselaw review to the matter before her, concluding at para. 71:

> While the grounds for the *Charter* violation contained in the Notice of Application are that Mr. Vittrekwa-Butler was never informed that he could wait a reasonable period of time for his counsel to call back, the caselaw dictates that the s. 10(b) *Charter* right only includes the obligation on an

> officer to wait a reasonable period of time and that is a determination of fact (with the exception of *Vernon*). Rather, (and most recently in *Fern*) the Supreme Court of Canada is clear, the s. 10(b) right only includes a right to be informed of the obligation of an officer to state to a detainee "I have to wait a reasonable time to call back", when the detainee is contemplating refusing to accept any legal advice. It is the actions of the officer, and now with the gift of audio recording, the tone of the conversation and the other circumstances referred to above that dictate whether the officer actually waited a reasonable time.

[54] As set out in the facts, Cst. Dowling made seven separate attempts to reach Ms. Lavidas before updating Ms. Greenland. At that point Ms. Greenland informed Cst. Dowling that she wished to speak with legal aid. Cst. Dowling then made four attempts to call duty counsel, being advised during the final call that assigned counsel was not responding to the calls. Ms. Greenland was updated again and continued to request a legal aid lawyer. She did not know who to call, so she was assisted through the provision of a list, and she chose from that list. Cst. Dowling was attentive to keeping her informed of his progress and careful to make sure that she understood that the choice of counsel was a decision for her to make.

[55] When duty counsel did call, it was after two messages had been left for the legal aid lawyer picked from the list. There is no evidence before the Court that she was advised of the calls to the legal aid lawyer picked from the list, but there is uncontradicted evidence that she chose to take the call from duty counsel. If she was confused about her options or dissatisfied with speaking to duty counsel instead of the legal aid lawyer picked from the list, there is no evidence of this before the Court.

[56] When Ms. Greenland was updated on the attempts to reach Ms. Lavidas, she requested to speak with a legal aid lawyer through the duty counsel program. She made

this decision based on her options and was clear about the decision. When duty counsel finally connected with the APU, she made the choice to speak to duty counsel.

[57] I find that Cst. Dowling made significant efforts to locate counsel of choice for Ms. Greenland and kept her informed of his efforts along the way. Based on the information provided, she chose to speak with duty counsel after Ms. Lavidas had not been reached. It was only due to the failings of the duty counsel calls that Ms. Greenland was assisted in choosing to speak with a legal aid lawyer off the list, and when duty counsel did call, she made the decision to speak to duty counsel. Cst. Dowling made great effort not to tell Ms. Greenland who to speak with and to assist her in making her own decisions. There is no evidence before the Court of steering Ms. Greenland to speak with duty counsel.

[58] Following the conclusions reached in *Vittrekwa-Butler*, there was no obligation on the RCMP to advise Ms. Greenland of an obligation to hold off for a reasonable time for the legal aid lawyer picked from the list to call back. Ms. Greenland was aware that she asked to speak with the legal aid lawyer picked from the list and as is her right, she decided to speak with duty counsel when the call came in.

[59] I find that the evidence does not establish a breach of Ms. Greenland's s. 10(b) *Charter* rights under this argument.

Loss of Photographs taken by Cst. Dowling

[60] It became clear during the testimony of Cst. Dowling that the photographs he is seen taking in the Watchguard video during the delay in providing Ms. Greenland her *Charter* rights after arrest were not preserved or disclosed.

[61] Cpl. Anderson arrived at the scene before Cst. Dowling departed with Ms. Greenland to attend at the APU. He testified to taking 34 photographs depicting the interior and exterior of the truck, the scene of the accident, markings on the road, and empty beer and alcohol containers in the ditch. These photographs were disclosed and were entered as exhibit 7 at trial.

[62] Given the extensive nature of the photographs contained in exhibit 7, taken very close in time to the photographs taken by Cst. Dowling, there is no evidence before the Court of prejudice to Ms. Greenland's right to make full answer and defence.

[63] While not strenuously argued at trial, this was raised as an issue on behalf of Ms. Greenland. Accordingly, I have considered the issue and I find that the failure to preserve photographs did not result in a breach of Ms. Greenland's s. 7 *Charter* rights.

Conclusion

[64] Having found that there was a breach of Ms. Greenland's s. 10(b) *Charter* rights in relation to the five-minute delay in informing her of her right to counsel after arrest, I must address the admissibility of the evidence pursuant to s. 24(2) of the *Charter*, which states:

> 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.

[65] The test to be applied when considering the admissibility of evidence under this section was set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, and summarized at para. 71:

> ...When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. ...

[66] I will consider each of the three lines of inquiry individually as I assess and balance the effect of admitting the evidence on society's confidence in the justice system.

[67] The Court in *Grant* expanded on the first line of inquiry at para. 74:

> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[68] In *Burdek*, Ruddy J. stated the following under this line of inquiry at para. 96 and 98:

> 96 The same cannot be said of the breaches of ss. 8 and 10(b) of the *Charter*. Both relate to statutory and constitutional requirements that have been the subject of continuous litigation for in excess of 30 years. Section 10(b), for example, has been incessantly litigated since the inception of the *Charter* in 1982. And the requirement that an accused be informed of their right to counsel immediately has been enshrined in the law almost that long. The *Debot* decision quoted above was rendered in 1989. It is unacceptable in this day and age for an officer to believe that more mundane investigatory matters could or should take precedence over well-established constitutional requirements.
>
> ...
>
> 98 It is important to note that there was no indication that Cst. Talbot was acting in bad faith. Rather, he appears to be a conscientious and diligent officer who is thorough and detailed in his approach. These characteristics are laudable and important ones in a police investigation, but such an approach cannot be taken at the expense of ensuring that constitutional rights and statutory requirements are respected, particularly not where the law of impaired driving is designed to allow for accused persons to be dealt with expeditiously to limit the necessary infringement on their liberty rights.

[69] *Burdek* involved breaches of ss. 8 and 10(b) of the *Charter* and a delay of approximately 11 minutes. The delay here is significantly shorter, does not include a s. 8 *Charter* breach, and it is clear on the evidence that Cst. Dowling acted in good faith.

[70] Regardless of the lack of bad faith, Cst. Dowling acknowledged that he should have given the *Charter* rights sooner, and this is a serious breach that supports the exclusion of evidence.

[71] The Court in *Grant* expanded on the second line of inquiry at para. 76:

> This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an

> evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[72] The breach here involved a five-minute delay during which Cst. Dowling was outside of the police vehicle where Ms. Greenland was sitting for the majority of the time. During the short time he was in the vehicle he was providing information to Ms. Greenland about what was happening to her truck and how she would retrieve her personal belongings. No information in relation to the investigation was elicited from her prior to being informed of her *Charter* rights.

[73] I find that the impact of the five-minute delay on the *Charter* interests of Ms. Greenland, in this case, to have been minimal and this supports the inclusion of the evidence.

[74] The Court in *Grant* expanded on the third line of inquiry at para. 79:

> Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

[75] In *Burdek,* Ruddy J. stated the following under this line of inquiry at para. 103:

> With respect to the s. 10(b) breach, I would echo the comments of Bovard J. in *Hawkins*, at para. 108:
>
> > 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.

[76] Ms. Greenland was not handcuffed during this investigation by Cst. Dowling and the investigation took place in the middle of the day. As a result, while unknown to Cst. Dowling, she was able to use her phone and speak to someone during the delay.

[77] There is significant societal interest in seeing impaired driving offences proceed to trial, and the truth-seeking function of the criminal trial process would be better served by admission of the evidence, being the breath samples collected from Ms. Greenland.

[78] I find on these facts that consideration under this factor supports the inclusion of the evidence.

[79] A balancing of the three *Grant* factors in this case favours the inclusion of the evidence obtained in the investigation following the five-minute delay in informing

Ms. Greenland of the s. 10(b) *Charter* rights. I conclude that the evidence obtained in the investigation after Ms. Greenland was advised of her right to counsel is admissible at trial.

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PHELPS T.C.J.