

Citation: *R. v. Barnie*, 2017 YKTC 8

Date: 20170217
Docket: 16-00272
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

GRAHAM EVANS BARNIE

Appearances:
Leo Lane
Amy Steele

Counsel for the Crown
Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Graham Barnie has been charged with having committed the offence of refusal to provide a sample of his breath for analysis contrary to s. 254(5) of the *Criminal Code*.

[2] Counsel for Mr. Barnie has filed a *Charter* application alleging breaches of Mr. Barnie's ss. 8, 9 and 10(b) *Charter* rights. She seeks a remedy for these *Charter* breaches under ss. 24(1) or 24(2) of the *Charter*.

[3] I dismissed this application on February 13, 2017 in an oral judgment with the written reasons to follow. These are those reasons.

[4] Cst. Kidd was the only witness who testified on the *Charter voir dire*. He testified that he has been involved in approximately 50 to 60 investigations involving the use of a roadside screening device in which impaired driving charges had been laid.

[5] He testified that on July 17, 2016, shortly after midnight at 00:01 a.m., he was in his police cruiser at the corner of Range Road and Two Mile Hill when he observed a van driving west up Two Mile Hill make a left-hand turn onto Range Road, heading south. He testified that he considered the van to be travelling at a high rate of speed and to tilt significantly to the right as it executed the turn. As a result of what he believed was an unsafe turn and a potential traffic safety issue, he activated the lights of the police cruiser and after a few seconds the van pulled to a stop on Range Road.

[6] Cst. Kidd states that he pulled the van over in order to speak to the driver about what he considered to be an “out of the ordinary” and unnecessarily quick turn. He also intended to check for possibly defective vehicle suspension and impairment of the driver.

[7] Cst. Kidd testified that, in his mind, the driver, subsequently identified as Mr. *Barnie*, was detained from the time that he was pulled over and that he was not free to leave while he was being investigated.

[8] Cst. Kidd did not observe any unusual driving pattern beyond the turn that he was concerned about.

[9] After pulling the vehicle over Cst. Kidd called dispatch with the plate number and learned that the plate was expired and had been previously registered to a different vehicle, and, as later determined, to a different individual than the driver.

[10] After checking with dispatch, Cst. Kidd approached the driver-side window and spoke with the driver. Cst. Kidd advised him that the reason for the stop was based on how the left-hand turn had been made.

[11] Mr. Barnie responded by stating words to the effect of “Yeah, I know, I saw that.” He further stated that he was “doing alright” and that he was “a little tired and sluggish”, along with other comments.

[12] Cst. Kidd considered Mr. Barnie’s response to be abnormal and different than what he expected.

[13] He testified that when he asked Mr. Barnie for his driver’s license he could smell a faint odour of liquor although he could not tell where it came from. He noted later that there was a musky smell inside the vehicle that could have masked the odour of liquor. Cst. Kidd testified that he did not lean into the vehicle and that he was approximately two feet away from Mr. Barnie’s face at this time. I note that the video from the police cruiser Video Information Recording System (“VICS”) shows Cst. Kidd leaning as far as the vertical plane of the window, but without crossing the threshold into Mr. Barnie’s vehicle.

[14] Cst. Kidd agreed in cross-examination that at this point in time he was conducting an impaired driving investigation, as well as investigating the registration of the vehicle under the *Motor Vehicles Act*, RSY 2002, c.153.

[15] Mr. *Barnie*, who possessed a valid driver's license, provided an explanation for the apparent registration and insurance documentary irregularities. Cst. Kidd found this explanation to be convoluted and confusing and left him with a concern about Mr. *Barnie* not possessing the proper registration and insurance for the vehicle. Cst. Kidd had not made up his mind at this point about whether he would be issuing any tickets for *Motor Vehicle Act* infractions.

[16] Cst. Kidd stated that the odour of liquor kept reappearing. As a result, he asked Mr. *Barnie* to blow in his direction. Cst. Kidd was unable to smell any liquor on Mr. *Barnie's* breath. Cst. Kidd stated that it was windy outside.

[17] Cst. Kidd asked Mr. *Barnie* to exit his vehicle and walk to the rear of it. He did so in an attempt to try to determine where the odour of liquor was possibly coming from. At the rear of the vehicle he asked Mr. *Barnie* to blow in his face. Mr. *Barnie* did so twice. Cst. Kidd testified that he was very, very close to Mr. *Barnie's* face at this time. He stated that he was unable to smell any liquor at all coming from Mr. *Barnie*. He testified that this occurred in an open area and it was slightly windy. In watching the video taken from the police cruisers VICS, I note that there is little in the way of movement in the long grass that is visible. I conclude that to the extent that there was any wind, it would appear to be minimal or slight, as Cst. Kidd testified to. Cst. Kidd asked Mr. *Barnie* how much he had had to drink and Mr. *Barnie* stated that he did not drink.

[18] Cst. Kidd agreed in cross-examination that he was trying to obtain evidence that Mr. Barnie may have alcohol in his body.

[19] Cst. Kidd then directed Mr. Barnie back to Mr. Barnie's vehicle. Cst. Kidd ran the VIN number of the vehicle and learned that its registration had expired and that it had been registered to an individual other than Mr. Barnie.

[20] Cst. Kidd then ran a check on Mr. Barnie and was advised that he was bound to abide by a curfew between the hours of 8:00 p.m. to 7:00 a.m. and that he was also bound by a condition of a probation order to abstain from the consumption of alcohol, as well as a number of other conditions. Cst. Kidd was satisfied that Mr. Barnie was in breach of the curfew condition of the probation order. He stated, however, that he had no reason to believe at this time that Mr. Barnie was in breach of the abstain condition of this order. (As it turned out, Mr. Barnie was in fact bound by a conditional sentence order at the time and not a probation order. I note from watching the VICS video that the dispatcher indicated both a probation order and a conditional sentence order. She also told Cst. Kidd that Mr. Barnie's order was in relation to *Controlled Drugs and Substances Act* offences).

[21] At this point, Cst. Kidd stated that he intended to arrest Mr. Barnie for breaching his probation order for being outside of his residence after his curfew.

[22] Cst. Kidd then returned to Mr. Barnie's vehicle and advised Mr. Barnie that he was in breach of the curfew term of his probation order. Mr. Barnie responded that he had been informed by his probation officer that his order had expired. He also mentioned that he had been convicted for having a bag of "grass". Regardless, Cst.

Kidd arrested Mr. Barnie for breaching the terms of his probation order. Mr. Barnie requested to speak with a lawyer. Cst. Kidd testified that this request was made at 00:22 hours.

[23] Cst. Roberts arrived on scene in his police cruiser. Cst. Kidd could not recall whether this was before or after he had read Mr. Barnie his *Charter* rights. I note from the VICS recording that it appears Cst. Roberts arrived just after Cst. Kidd had arrested Mr. Barnie for the curfew breach. Cst. Kidd is observed looking back towards where Cst. Roberts logically would have parked his vehicle, about 30 seconds after Mr. Barnie had been arrested. Mr. Barnie is then placed into Cst. Kidd's police cruiser approximately one and one-half minutes later, after being searched. Then, approximately 12 seconds afterwards, Cst. Kidd's audio recording stopped for approximately 23 seconds. From his testimony this is when Cst. Kidd turned off his audio in order to have a private discussion with Cst. Roberts. Cst. Kidd then returned to his police cruiser and read Mr. Barnie his *Charter* rights.

[24] While this was happening, Cst. Roberts went to Mr. Barnie's vehicle and began to conduct a search from the outside and through the open driver's door with the use of a flashlight. This search lasted approximately one minute.

[25] Cst. Kidd stated that when he placed Mr. Barnie in the rear of the police cruiser he had no suspicion that Mr. Barnie had consumed any alcohol. However, while speaking to Mr. Barnie in the rear of the police cruiser, Cst. Kidd testified that he began to smell an odour of liquor from Mr. Barnie's breath. He testified that the smell was stronger than he had previously observed. I note from the audio recording that Cst.

Kidd first mentioned the smell of alcohol approximately two minutes and 45 seconds after Mr. Barnie was seated in the police cruiser

[26] Cst. Kidd testified that he had intended to take Mr. Barnie to the Arrest Processing Unit (“APU”) after his arrest for the curfew breach in order to allow him to speak to counsel. However, he decided not to provide Mr. Barnie an opportunity to speak to counsel right away because he had now re-embarked upon an impaired driving investigation as a result of smelling liquor coming from Mr. Barnie’s breath while he was seated in the police cruiser.

[27] Based upon this odour of liquor, Cst. Kidd formed the suspicion that Mr. Barnie had been consuming liquor. He stated that he believed he was able to smell the odour of liquor coming from Mr. Barnie’s breath because he was now seated in a more confined space and out of the wind. Cst. Kidd testified that he formed this suspicion at 00:23 hours. There is a bit of a time discrepancy between the testimony of Cst. Kidd, that he formed the suspicion Mr. Barnie had been consuming alcohol approximately one minute after Mr. Barnie asked to speak to counsel, and the VICS video which shows that a somewhat longer period of time had elapsed.

[28] Cst. Kidd testified that there had not been a smell of liquor from inside the police cruiser prior to placing Mr. Barnie there. He also testified that he did not observe any liquor spilled either in back of the police cruiser or on Mr. Barnie’s clothing, nor did he observe any stains on Mr. Barnie’s clothing.

[29] He also testified that Mr. *Barnie* was not slurring any of his words, he was not swaying or staggering, and that Mr. *Barnie*'s eyes were not bloodshot. He stated that Mr. *Barnie*'s physical appearance was unremarkable.

[30] Cst. Kidd then read Mr. *Barnie* the breath demand for the roadside screening device.

[31] Mr. *Barnie* did not provide a suitable sample for analysis into the roadside screening device despite being provided 12 opportunities to do so.

[32] Cst. Kidd noted the following in respect of each opportunity to blow:

1. Very light breath – no sample (Mr. *Barnie* stated: "That's it, that's all I've got");
2. Blew with teeth pressed against mouthpiece producing a whistling sound – no sample (Mr. *Barnie* stated that he has asthma);
3. (mouthpiece replaced) pursed lips resulting in air escaping around mouthpiece – no sample;
4. Same as three above with air blowing out the right side of Mr. *Barnie*'s mouth – no sample;
5. (mouthpiece replaced) lips just touching mouthpiece and air blowing out of corner of his mouth – no sample;
6. .5 second blow – inconsistent (not steady) sample;
7. Pursed lips and blew out of corner of mouth – no sample (Mr. *Barnie* stated that handcuffs were interfering. Cst. Kidd offered to let Mr. *Barnie* blow outside of the vehicle. He also switched the handcuffs to the front)
8. Light one second blow – flow was too low for a sample;
9. Touched mouthpiece to mouth only – insufficient or improper sample on three attempts;

10. (mouthpiece replaced) blew but broke seal around mouthpiece – flow was too low for a sample;
11. Blew three – four seconds very lightly – no flow;
12. Lips pursed and air was blown around mouthpiece – no sample.

[33] Cst. Kidd testified that he explained to Mr. Barnie on several occasions how to provide a proper breath sample and of the criminal consequences of failing to do so.

[34] Cst. Kidd testified that later that day he successfully used the same roadside screening device in order to obtain a breath sample from an individual.

[35] Cst. Kidd stated that it was his belief that Mr. Barnie was trying not to blow into the roadside screening device and that he was making no efforts to comply with the breath demand.

[36] He agreed that he was trained to conduct field sobriety testing and that Mr. Barnie had mentioned to Cst. Kidd that he would participate in such testing. Cst. Kidd stated that he chose not to conduct field sobriety testing, however, as he believed he had the grounds to charge Mr. Barnie with refusing to provide a breath sample. I note from the VICS recording that Mr. Barnie only suggested field sobriety testing while he was behind his van at the request of Cst. Kidd and asked to blow in his face. He did not do so after the breath demand had been made to him. However, I am satisfied because of the way the question was put to him that Cst. Kidd was responding to why he did not subsequently take Mr. Barnie up on his suggestion to have field sobriety testing done, and not referring to when he was speaking to Mr. Barnie while getting him to blow in his face behind Mr. Barnie's van.

[37] As a result of Mr. *Barnie* failing to provide a breath sample, Cst. Kidd formed the opinion that Mr. *Barnie* had committed an offence under s. 254(5) and he was arrested for refusing to provide a breath sample. Cst. Kidd testified that he provided Mr. *Barnie* with the police caution and his *Charter* right to counsel at 00:43-00:45 hours.

[38] He recalls advising Cst. Roberts that he had formed the suspicion that Mr. *Barnie* had been consuming alcohol. Cst. Kidd stated that he turned off his audio recording device when he was talking to Cst. Roberts in order to have privacy, although the audio remained on inside the police cruiser where Mr. *Barnie* was seated. He believes that he was likely simply filling Cst. Roberts in as to what had transpired to this point in the investigation involving Mr. *Barnie*. No further information was obtained at trial as to what the content of this conversation was.

[39] Cst. Kidd testified that Cst. Roberts searched Mr. *Barnie*'s vehicle at about the same time he was reading the breath demand to Mr. *Barnie*. Cst. Roberts told Cst. Kidd that he had observed liquor in Mr. *Barnie*'s vehicle. As a result Cst. Roberts and Cst. Kidd together conducted a search of Mr. *Barnie*'s vehicle incident to arrest. I note from the VICS recording that Cst. Roberts did not begin to search the van for a second time until approximately four minutes and 45 seconds after Mr. *Barnie* had been arrested for refusing to comply with the breath demand. Cst. Roberts searched the inside of the vehicle. Approximately four minutes later Cst. Kidd joins Cst. Roberts, however, Cst. Kidd does not enter the vehicle but speaks to Cst. Roberts, who indicates that he found a cell phone, that he knows Mr. *Barnie* is not entitled to possess one, and that Mr. *Barnie* is a dealer.

[40] Cst. Kidd goes back and forth between his police cruiser and the van.

Unfortunately the CD filed as an exhibit is defective at this point and so I am unable to determine how many times this occurred.

[41] Cst. Kidd stated that he was searching for evidence in relation to the offences he believed had been committed, being an impaired, the curfew breach and, in particular, he said he was searching for alcohol. He was also seeking evidence of other possible offences that may have been committed, in particular whether there was a cell phone or electronic device, as Mr. Barnie was on a condition that he not be in possession of such a device.

[42] Seized in this search was a cellphone and four empty beer cans. There was also an open iced tea in the cup holder. Cst. Kidd was advised by Cst. Roberts that Mr. Barnie had a prior drug charge. He testified that this occurred while they were both searching Mr. Barnie's vehicle together after Mr. Barnie had been arrested. This is consistent with the VICS. Cst. Kidd believed that he was entitled to search the vehicle incident to arrest. He testified that the search took approximately 16 minutes.

[43] Mr. Barnie was then transported to the APU, arriving at 1:06 a.m. He was placed in a private room at 01:11 and spoke to counsel at 01:20.

[44] Cst. Kidd stated that he did not provide Mr. Barnie with a cell phone to contact counsel while the search was being conducted as he did not have a work phone with him and Mr. Barnie did not have a cell phone.

[45] When asked if there was any urgency to search the vehicle, Cst. Kidd stated that if the vehicle was impounded then it could no longer be searched incident to arrest and he had concerns about continuity.

[46] When he was asked about whether he could have obtained a warrant, Cst. Kidd testified that he was not sure and that he had never obtained one in a case such as this.

Analysis

[47] The first issue to deal with is whether Mr. Barnie was arbitrarily detained when Cst. Kidd pulled his vehicle over on Range Rd.

[48] I find that he was not. I have observed the turn executed by Mr. Barnie's vehicle on the VICS recording, and I agree that the turn was of such a nature that Cst. Kidd was acting within his lawful authority when he stopped Mr. Barnie's vehicle. Further I am satisfied that the irregularities associated with the licence plate and the vehicle's registration justified the further detention of Mr. Barnie while Cst. Kidd attempted to ascertain the circumstances associated with the vehicle.

[49] I am also satisfied that Cst. Kidd had sufficient grounds to conduct an impaired driving investigation based upon the turn that was executed and the smell of liquor, notwithstanding that he was unable to determine where the smell was coming from.

[50] Further, once Cst. Kidd was informed that Mr. Barnie was bound by a curfew condition that required him to be in his residence at the time that Cst. Kidd encountered him, this provided grounds for the arrest of Mr. Barnie and his continued detention. The fact that Cst. Kidd was misinformed that the curfew condition was in respect of a

probation order rather than a conditional sentence order does not change my opinion. It is not the same as a situation in which an individual is detained erroneously when the individual is not bound by the terms of any court order.

[51] I appreciate that there was a lengthy period of time between the arrest of Mr. *Barnie* on the allegation of breach of curfew and the time that he was actually able to speak to counsel. This amounted to a delay of approximately 53 minutes.

[52] A major reason for this delay was the time it took for Cst. Kidd to attempt to obtain a breath sample from Mr. *Barnie*.

[53] I am satisfied that Cst. Kidd had a reasonable basis for making the demand that Mr. *Barnie* provide a sample of his breath for the purposes of analysis. I find his evidence that he smelled alcohol on Mr. *Barnie*'s breath while Mr. *Barnie* was seated in the police cruiser to be credible.

[54] As stated in *R. v. Lindsay* (1999), 134 C.C.C. (3d) 159 (ONCA) in para. 2:

...An officer may make an ALERT demand where she reasonably suspects that a person who is operating a motor vehicle has alcohol in his or her body...There need only be a reasonable suspicion and that reasonable suspicion need only relate to the existence of alcohol in the body. The officer does not have to believe that the accused has committed any crime. ...

[55] I do find it odd that Cst. Kidd did not notice the smell of alcohol on Mr. *Barnie*'s breath when he spoke to him through the open driver's side window and, in particular, when Mr. *Barnie* blew in Cst. Kidd's face twice outside of Mr. *Barnie*'s van, but then was able to detect this when Mr. *Barnie* was speaking to him through the open door of the

police cruiser while seated in the rear seat. I am satisfied that there was a slight wind which may have been a factor, however I am certainly not convinced that this was the reason.

[56] In order to disregard the evidence of Cst. Kidd that he smelled liquor on Mr. Barnie's breath, though, I would have to have concerns about the reliability and credibility of his testimony on this point. To the contrary, I find that Cst. Kidd was a reliable and credible witness. I accept his evidence that he had abandoned the impaired driving investigation prior to placing Mr. Barnie in the rear seat of the police cruiser. Cst. Kidd was candid that, although suspicious that Mr. Barnie had consumed alcohol, his observations did not make this suspicion reliable enough to make a roadside screening device breath demand. As such he had ceased to continue this investigation.

[57] Nothing, however, precluded Cst. Kidd from re-commencing the impaired driving investigation upon making additional observations, even after the arrest of Mr. Barnie for another offence. This is not a circumstance where Cst. Kidd delayed providing Mr. Barnie his right to speak to counsel (triggered by the arrest for the curfew breach allegation), in order to look for evidence in order to form the suspicion that Mr. Barnie had been consuming alcohol. The observation of the smell of alcohol on Mr. Barnie's breath arose coincidentally while Cst. Kidd was in the process of dealing with Mr. Barnie after he had been lawfully arrested.

[58] I find that Cst. Kidd was not mistaken in his observation of the smell of alcohol coming from Mr. Barnie's breath, nor was he embellishing or fabricating his evidence. I

expect that he would have testified differently than he did as to what he observed prior to the arrest of Mr. *Barnie*, were he intending to fabricate a case against Mr. *Barnie*.

[59] It is also clear in law that Cst. Kidd was entitled to delay in providing Mr. *Barnie* his right to speak to counsel after the curfew breach arrest in order to conduct an intervening impaired driving investigation

[60] I am further satisfied on the evidence that Mr. *Barnie*, despite the repeated efforts and instruction of Cst. Kidd, deliberately refused or failed to provide an adequate breath sample into the roadside screening device for the purpose of analysis. I accept the evidence of Cst. Kidd on this point.

[61] I note after reviewing the video evidence, that this recording is consistent with Cst. Kidd's testimony.

[62] The arrest of Mr. *Barnie* for refusal to provide a breath sample was in accordance with law.

[63] Here, however, is where the circumstances become somewhat problematic.

[64] I find that Cst. Kidd breached Mr. *Barnie*'s s. 10(b) *Charter* right during the then approximately 20 minutes between the arrest of Mr. *Barnie* for the refusal offence and leaving for the APU. It is unclear what Cst. Kidd was doing for some of this time. It took him approximately two and one-half minutes to read Mr. *Barnie* his rights after his arrest for the refusal charge. Then it is unclear what he was doing for several minutes before he joined Cst. Roberts in his search of Mr. *Barnie*'s vehicle. Several more minutes passed.

[65] In the end, Mr. Barnie was handcuffed with his hands behind his back for approximately 20 minutes after his arrest for the refusal. This was in addition to the other 25 minutes after his arrest for the curfew breach (other than when they were briefly handcuffed in front while Mr. Barnie was provided the opportunity to provide a breath sample outside the police cruiser standing up).

[66] Certainly there exists a right for a police officer to conduct a search incident to arrest, not only of the person but of a vehicle occupied by the person, if the circumstances warrant it. Such a search, however, must be connected to officer safety or to obtaining evidence of the offences for which the person has been arrested. In this case there was no concern about officer safety. In addition, Mr. Barnie had been arrested for a curfew breach and a refusal to provide a breath sample. There was no reason for Cst. Kidd to believe that a search of Mr. Barnie's vehicle would provide any evidence that related to these charges. There was minimal, at best, evidence of impaired driving, certainly insufficient to lay such a charge.

[67] Cst. Kidd testified that he was searching for a cell phone as Mr. Barnie was bound by a condition not to possess one. However, the right to search incident to arrest did not extend so far as to allow a search for a cell phone without a warrant being procured. At best, the smell of alcohol on Mr. Barnie's breath and knowledge that Mr. Barnie was on a condition not to possess or consume alcohol may have allowed a search for alcohol. However, the scope of the search went well beyond that.

[68] Cst. Kidd testified that Cst. Roberts told him that Mr. Barnie had a prior drug charge and was a dealer, which knowledge was passed onto Cst. Kidd, although he

could not recall exactly when, surmising that it may have been while he was searching the van with Cst. Roberts. It was clear from the VICS recording that Cst. Kidd was advised of Mr. Barnie's CDSA convictions at the time he called dispatch. He was also told again by Mr. Barnie while he was being arrested for the breach charge. It is clear from the video evidence that Cst. Roberts also told him while they were searching the van. Cst. Kidd denied that any of his actions were in relation to obtaining an opportunity to search Mr. Barnie's vehicle for drugs. While I appreciate defence counsel's questions in this regard, I cannot say that the testimony of Cst. Kidd raised this from any more than speculation. I note that Cst. Roberts did not testify on the *voir dire*. As such, any evidence that he could have provided was not available to me.

[69] Cst. Kidd denied that he decided to form the suspicion that Mr. Barnie had consumed alcohol in order to allow Cst. Roberts to search the van. Cst. Kidd testified that Cst. Roberts was searching the van at the same time as he was making the breath demand to Mr. Barnie. I understand from the evidence that this was after Cst. Kidd had spoken with Mr. Barnie while he was in the rear seat of the police cruiser and after Cst. Kidd smelled alcohol on Mr. Barnie's breath. As noted, the video evidence shows two occasions that Cst. Roberts searched Mr. Barnie's van, the first from outside of the van and the second from the inside.

[70] In addition, even if a search of Mr. Barnie's vehicle was warranted, this is something that required only one police officer, not two. The delay in taking Mr. Barnie to the APU, which I am aware is very close by on Range Rd., and therefore delaying his right to speak to counsel, occasioned by both officers participating in a search of Mr. Barnie's vehicle, was unjustifiable and a breach of his s. 10(b) *Charter* right.

[71] In addition, although not an argument raised by defence counsel, in my view the search of Mr. *Barnie*'s vehicle in these circumstances was in breach of his s. 8 *Charter* right not to be subject to an unreasonable search and seizure.

[72] However, there is no remedy under s. 24(2) of the *Charter* as there is no evidence flowing from the breach that can be excluded. The law is clear that evidence obtained before the occurrence of a *Charter* breach cannot be excluded under s. 24(2). Had Mr. *Barnie* provided samples of his breath into the ASD and then, had a fail been registered, into a breathalyser unit, I may have come to a different conclusion in considering whether breath samples from a breathalyser unit should be excluded.

[73] I have also considered whether the remedy of a stay of proceedings under s. 24(1) would be appropriate. I have concluded that it is not. As well, to exclude the evidence of the fail or refusal to provide a breath sample under s. 24(1), I would have to "...reach the conclusion that admission of the evidence would undermine the integrity of the justice system, or result in an unfair trial, and conclude that a less intrusive remedy could not be fashioned", as was stated by Fradsham J. in *R. v. Gorzen*, 2014 ABPC 6 at para. 70. I cannot reach such a conclusion in Mr. *Barnie*'s case.

[74] I find that Cst. Kidd, while mistaken about the scope of his right to search Mr. *Barnie*'s vehicle incident to arrest and failing to provide Mr. *Barnie* his right to speak to legal counsel in a timely fashion, thus breaching his s. 8 and 10(b) *Charter* rights, did so while otherwise reasonably acting within the scope of his lawful authority. There was no bad faith involved in his actions, or any intentional and reckless disregard of Mr. *Barnie*'s rights.

[75] The threshold for a s. 24(1) stay is a high one and in my opinion, notwithstanding the concerns I have expressed, that threshold has not been reached in this case.

COZENS T.C.J.