Citation: *R. v. Bernhardt*, 2017 YKTC 28

Date: 20170328
Docket: 16-00259
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Lilles

REGINA

v.

TONY ROBERT BERNHARDT

Appearances:

Leo Lane	Counsel for the Crown
Vincent Larochelle	Counsel for the Defence

REASONS FOR JUDGMENT

[1] LILLES J. (Oral): This is the case of *R. v. Bernhardt*. Mr. Bernhardt has been charged with an offence contrary to s. 253(1)(b) of the *Criminal Code*, namely that he was operating a motor vehicle while concentration of alcohol in his blood exceeded 80 milligrams in 100 millilitres of blood.

[2] Two issues arise on the facts.

[3] First, whether the investigating officer Cst. Faulkner had reasonable grounds to make an approved screening device (ASD) demand pursuant to s. 254(2) of the *Criminal Code*.

[4] Secondly, if I find that there were no reasonable grounds to make the screening demand, should the breathalyzer readings taken at the police detachment be admissible for the purposes of establishing the offence contrary to s. 253(1)(b) of the *Criminal Code*. The relevant evidence was heard in *voir dire*.

Section 254(2) Screening Demand

[5] The Crown is relying on the following evidence to establish that Cst. Faulkner had reasonable grounds to suspect that Mr. Bernhardt had alcohol in his body and thus justifying the approved screening demand:

1. Erratic driving. Three civilian witnesses observed Mr. Bernhardt's vehicle driving fast and erratically. He passed one vehicle in the merge lane into 4th Ave., driving fast, and forcing one car to slow down and move closer to the curb. That speeding vehicle then moved into the left lane at a high rate of speed, and then moved back into the right lane, cutting off at least one vehicle and causing it to brake and slow down. One witness estimated that the Bernhardt vehicle was travelling 10 to 20 km/hr faster than the allowable speed limit. The driving was such that it caused two vehicles to follow Mr. Bernhardt's vehicle to the parking area near the Canadian Tire store and to call 9-1-1 to alert the police. This information was conveyed to Cst. Faulkner, who attended the scene some minutes after the 9-1-1 call was made.

2. Constable Faulkner described Mr. Bernhardt sitting in a lawn chair as "deeply seated" and "slumped" in the chair, and this contributed to her reasonable suspicion that he had alcohol in his system.

3. Constable Faulkner watched Mr. Bernhardt walk with Cst. Booth and said she saw a misstep or a stagger.

4. Constable Faulkner also stated that there was something about Bernhardt's eyes that contributed to a reasonable suspicion, but she was unable to remember what it was. I will give her the benefit of the doubt, since Cst. Booth also observed the accused, and both officers shared their observations with each other. Constable Booth said he observed glossy eyes.

[6] These four factors were the only ones relied upon by Cst. Faulkner to make the screening demand. She did not observe or rely on odour of alcohol on Mr. Bernhardt's breath, even though she was only a few feet away from him when she spoke to him. There was no evidence that he fumbled with his wallet when extracting information for the officer. There was no evidence about Mr. Bernhardt's speech, for example, that it was slurred.

[7] The erratic driving observed by the civilian witnesses were properly of concern, but not consistent with alcohol consumption or impairment alone.

[8] The Court had an opportunity to observe Mr. Bernhardt sitting in the lawn chair and walking with the officer in the video recording that was submitted as evidence. The

video showed Mr. Bernhardt sitting erect and quite normally in his chair, with his legs crossed and his hands in his lap. He was not slumped in his chair, as described by Cst. Faulkner. In the video, Mr. Bernhardt walked normally with no indications of impairment while handling and removing something from his wallet without fumbling.

[9] Police officers often report glossy eyes as indicia of impairment. I am concerned that this observation is a subjective one, largely dependent on the individual officer's understanding of what "glossy" means. I would add that I am not sure that I know what it means either, nor do I understand why or how it is an indication of alcohol consumption. In any event, there was no suggestion that only alcohol consumption could cause this condition.

[10] In the video, Cst. Faulkner can be observed searching Mr. Bernhardt's vehicle, first from the passenger side, later from the driver's side. She appears to be looking in the back seat, as the vehicle has only two doors. Her actions are consistent with looking for open liquor in the vehicle. Defence counsel suggests that this indicates that Cst. Faulkner herself is not confident that she has enough grounds to make a screening demand. I would also note that she conducted the search without a warrant.

[11] It is patently clear on these facts that there was no objective evidentiary foundation for the s. 254(2) *Criminal Code* demand for a breath sample. In fact, the objective evidence, considered as a whole, falls woefully short of establishing a reasonable suspicion that Mr. Bernhardt had alcohol in his body. In the circumstances, he was arbitrarily detained, contrary to s. 9 of the *Charter*. In the absence of an evidentiary basis for the demand, his detention was without legal grounds and arbitrary,

and thus triggers a violation of Mr. Bernhardt's s. 10(b) right to counsel.

(see *R. v. Jensen*, 2012 ONCJ 685, para. 35)

Admissibility of Breathalyzer Readings

[12] Notwithstanding my finding that there was no legal basis for the ASD demand, it remains to be decided whether the breath samples taken at the detachment should be excluded from evidence. Two decisions of the Supreme Court of Canada in 2009 revised the test for exclusion of evidence pursuant to s. 24(2) of the *Charter*: *R. v. Grant,* 2009 SCC 32, and *R. v. Harrison*, 2009 SCC 34. These cases were considered in detail and applied in *R. v. Loewen*, 2009 YKTC 116, a case with very similar charges and facts to the case at bar.

[13] In *Grant*, *supra*, the Supreme Court clarifies the criteria relevant to determining when in all of the circumstances admission of evidence obtained by a *Charter* breach would bring the administration of justice into disrepute and should therefore be excluded from evidence. The Supreme Court stated at paras. 67 to 71 as follows:

> [67] The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.
>
> [68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice

system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

[70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. 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 of 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. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

[14] This new approach to be applied in respect of s. 24(2) is summarized by Professor Don Stuart in a case comment ("Welcome Flexibility and Better Criteria for Section 24(2)", (2009) 66 C.R. (6th) 82):

> Much of the voluminous prior jurisprudence on section 24(2) will be of little moment. The Court has arrived at a discretionary approach to section 24(2), free of rigid categories but placing special emphasis on the seriousness of the breach rather than the seriousness of the offence or the reliability of the evidence. The same criteria are to be applied to all cases of *Charter* breach. (As read in)

[15] The first inquiry under the revised s. 24(2) framework of analysis requires an evaluation of the seriousness of the state conduct. The main concern is the preservation of public confidence in the rule of law and its processes. Minor and inadvertent breaches of the *Charter* on one end of the spectrum will have minimal impact on the repute of the justice system. Deliberate or reckless breaches at the other extreme will inevitably have negative impact on the administration of justice. In between these two extremes, the courts will be faced with a balancing of the seriousness of the violation with other relevant considerations. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from the conduct by excluding evidence linked to that conduct in order to preserve public confidence in and ensure state adherence to the rule of law.

[16] A number of factors may operate to reduce the need for the court to disassociate itself from police conduct, for example, the need to prevent the disappearance of evidence or good faith on the part of the police. However, ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness

cannot be equated with good faith. A good-faith inquiry examines not only the officer's subjective belief but also questions whether this belief was objectively reasonable. Good faith cannot be claimed if the *Charter* violation is based upon unreasonable error or ignorance.

[17] Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court disassociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence.

[18] The second line of inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected rights of the accused person. This requires an examination of the interests engaged by the *Charter* right infringed and the extent to which the breach impacted those interests. Obviously, the impact of the *Charter* breach can vary from minor, transient, and technical on the lower end of the range to extremely intrusive and substantive on the other. When the impact on the accused's interest is serious, admission of the evidence could send the message to the public that *Charter* rights are not available to all citizens. As stated in *Grant*, *supra*, this could breed public cynicism and bring the administration of justice into disrepute.

[19] The third line of inquiry is concerned with society's interests in an adjudication of the criminal charge on its merits. Society has an interest in ensuring that those who commit offences are dealt with in accordance with the law. The court must consider the impact of failing to admit the evidence on the administration of justice as well as the negative impact of admitting evidence on the administration of justice, both short-term

and long-term. It can only be resolved by a careful balancing of the interests involved: the interests of truth with that of the integrity of the justice system. In many if not most cases, these interests are contradictory. The evidence may be both reliable and essential to the Crown's case, but if it was obtained illegally it may still be excluded. It may be essential evidence to the Crown's case because of sloppy and incomplete investigation. Automatic inclusion would serve to encourage similar behaviour in future and bring the administration of justice into disrepute.

[20] Seriousness of the charge would be a valid consideration under the third line of inquiry. Failure to prosecute a serious charge due to excluded evidence may cause members of the community to question the effectiveness of the justice system. But there is a countervailing interest in having a justice system that is above reproach, especially in serious cases when the penal stakes for the accused are high.

[21] In *Grant*, *supra*, the Supreme Court of Canada has set out the procedural template for judges to follow when considering the application of s. 24(2) of the *Charter*. The three lines of inquiry — the seriousness of the charge or infringing state conduct, the impact of the breach on the *Charter*-protected rights of the accused, and the societal interest in the adjudication on the merits — encapsulate a consideration of all of the circumstances of the case. The trial judge must weigh the relevant factors identified by the three lines of inquiry and determine on balance whether the admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute. It is not a mathematical or accounting exercise; it is a qualitative one. Nor is it a contest between the degree of police misconduct and the seriousness of the

offence. Undue emphasis must not be given to any one line of inquiry, nor should any of the three lines of inquiry be neglected by the judge.

Application of *Grant* to the Facts

[22] The admissibility of the breath sample analysis will be considered as outlined in the *Grant* decision.

[23] The first step required a consideration of the police conduct and the reasons for it. Although Cst. Faulkner had reason to stop Mr. Bernhardt's vehicle and to ask for his driving particulars, there were insufficient grounds to establish a reasonable suspicion that he had alcohol in his body at the time of driving. In fact, this is an extreme example of absence of reasonable grounds. None of Cst. Faulkner's observations, taken in isolation or together, provided objective evidence of alcohol in Mr. Bernhardt's body. She ignored information and observations that were inconsistent with the conclusion she had apparently already reached shortly after stopping the vehicle and discovering that Mr. Bernhardt was a prohibited driver. Constable Faulkner's actions were deliberate. She ignored all the observations that suggested Mr. Bernhardt had not been drinking. The commonly observed symptoms associated with alcohol consumption were, as I have found, completely absent.

[24] I have concluded that Cst. Faulkner was not acting in good faith as that term has been defined in law. Some cases have defined "good faith" as a state of mind, an honestly held belief that is reasonably based. Where the police knew what they were doing was wrong or ought to have known, they cannot be said to have proceeded in

good faith. (*R. v. Washington*, 2007 BCCA 540, para. 78.) Good faith is an honest and reasonably held belief.

[25] In *Grant*, *supra*, at para. 75, the Court states:

> "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.

[26] The second branch of the *Grant* inquiry requires the court to consider the degree to which the *Charter* breaches intruded upon the privacy, bodily integrity, and human dignity of the accused. Breath samples taken at the roadside or at a police detachment only minimally intrude on the privacy, bodily integrity, and human dignity of the accused.

[27] The third branch, society's interest in adjudication on the merits, considers the importance of bringing law-breakers to trial and having them dealt with according to law. In this case, breath samples, as with other evidence obtained from the accused's body, are generally reliable and unaffected by *Charter* breaches. The analysis is made by machine. Provided the machine has been properly maintained and tested and the technician follows proper procedures, the results should be accurate. The breath sample analysis in this case is also essential to the Crown's case. In addition, society has an interest in prosecuting and removing impaired drivers from the highways and thus limiting the carnage caused by them. Detecting, arresting, and convicting impaired drivers have been proven to be effective tools in reducing impaired driving.

Conclusion

[28] As I mentioned earlier, the facts in this case are almost identical to those in the *Loewen* case, *supra*. In this case, I have adopted the analysis found there as well as the conclusion.

[29] The inquiries conducted pursuant to the second and third branches of the *Grant* analysis supports the admission of the evidence of the breath samples. The first line of inquiry, on the other hand, strongly supports exclusion. The officer ignored the statutory threshold for demanding a roadside screening device. This is not a technical, minor, or inadvertent deficiency. This is not a case where the law to be applied is ambiguous. It is well established, clear, and unambiguous. As stated in *Grant* at para. 75, "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith."

[30] Admitting the evidence on the facts in this case would send the message to law enforcement officers that the threshold test for a s. 254(2) *Criminal Code* breath demand can be ignored entirely. In other words, because there was effectively a total absence of grounds for believing that Mr. Bernhardt had alcohol in his body, any or all motorists could be stopped and forced to submit to screening demands at the roadside without the requisite reasonable grounds. The potential ramifications allowing the evidence to be admitted are far-reaching and could impact on all operators of motor vehicles in the Yukon. While random arbitrary stops of motorists for the purpose of testing for impairment may be a valuable and effective tool in reducing the scourge of deaths and injuries caused by drunk drivers, it is a policy decision to be made by

Parliament. Amending s. 254(2) to provide for random stops of motorists and breath testing without reasonable grounds is a legislative responsibility and not one to be made by the police or by the courts utilizing s. 24(2) of the *Charter*.

[31] Considering all of the circumstances and balancing the three branches of inquiry required by the Supreme Court of Canada in *Grant*, I conclude that to admit the evidence of the breath sample readings on the facts of this case does not enhance but rather undermines the long-term repute of the administration of justice, and for that reason it will be excluded.

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LILLES T.C.J.