Citation: *R.* v. *Loewen*, 2009 YKTC 116 Date: 20091029
Docket: 09-11005A
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

REGINA

v.

DEREK WADE LOEWEN

Appearances:
Jennifer Grandy Counsel for Crown
Edward Horembala, Q.C. Counsel for Defence

DECISION

[1] LILLES T.C.J. : Derek Wade Loewen has been charged that on or about the 23rd day of May, 2009, at or near Dawson City, Yukon Territory, did unlawfully commit an offence that he, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, did operate a motor vehicle contrary to s. 253(1)(b) of the *Criminal Code*.

[2] At counsel's request, I conducted a *voir dire* on a preliminary question, namely, whether Constable Hutton, the investigating police officer, had reasonable grounds to make a screening device demand pursuant to s.254(2) of the *Criminal Code*. After reviewing the evidence I concluded that Constable Hutton lacked the necessary

evidentiary foundation for the belief that Mr. Loewen had alcohol in his body. Crown counsel submits that although the breath samples are conscriptive evidence, on the basis of recent decisions from the Supreme Court of Canada, the screening breath sample and subsequent breath sample taken at the police detachment should not be excluded pursuant to s.24(2) of the *Charter*.

The Facts

[3] It would be helpful to review the facts again in some detail. On May 23, 2009, Constable Hutton was on duty in his police vehicle, “on patrol looking for offences”. At around one o’clock in the morning he made a traffic stop. He was travelling north on Fifth Avenue at a speed of about 40 kilometres an hour. He observed a vehicle coming towards him travelling south on Fifth Avenue. He saw it turn right into the back lot of Diamond Tooth Gertie’s. The vehicle then backed up into the Constable’s lane of traffic and proceeded to move forward. Constable Hutton said he had to slow down behind Mr. Loewen’s vehicle. There was no suggestion by him that he had to apply his brakes suddenly nor did he indicate how close he came to the vehicle.

[4] When Mr. Loewen’s vehicle proceeded forward, Constable Hutton observed a large cloud of smoke from the exhaust and that the vehicle fishtailed, indicating a rapid acceleration. It should be noted that all roads in Dawson City are dirt and gravel. The officer engaged his emergency lights. The vehicle continued north on Fifth for a short distance. It was apparent to Constable Hutton that the driver, Mr. Loewen, had not seen the police vehicle with its lights on. When Mr. Loewen turned right on King Street, Constable Hutton turned on his other emergency equipment, including the siren. The

Loewen vehicle pulled over and stopped. It is apparent that the distances involved were quite short.

[5] Constable Hutton decided to make a screening demand pursuant to s. 254(2) of the *Criminal Code*. That section states, in part:

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel … the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol …

The relevant paragraph is (b), which states:

> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[6] The test, obviously, is not a demanding or high level one. There must only be a reasonable suspicion that there is alcohol in the accused's body. A mere suspicion without a reasonable evidentiary basis or a hunch that the driver has had something to drink is insufficient to justify a demand to provide a screening sample.

[7] Constable Hutton relied on the following observations to make the demand of Mr. Loewen to accompany him to his police cruiser for the purpose of providing a screening sample. Mr. Loewen made a left turn into a parking lot and backed out in front of the police vehicle causing it to slow down. The Constable also observed Mr. Loewen's vehicle accelerating quickly. He apparently did not notice the police vehicle immediately when the Constable put its emergency lights on. When Constable Hutton put his siren

on, Mr. Loewen stopped. Constable Hutton observed “glossy” eyes - not glassy, but glossy eyes - and a kind of blank stare. At one point he said that the individual was looking through him with a blank stare. These observations were made in lighting conditions that were less than ideal, perhaps best described as “dusky”, consistent with Dawson City early morning lighting in the spring time. These were the only factors considered by Constable Hutton before making the screening demand pursuant to s. 254(2)(b) of the *Criminal Code*.

[8] The driving as described was not consistent with alcohol consumption alone: it was equally consistent with minor inadvertence. It did not constitute a violation of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153, and no ticket was issued to Mr. Loewen for any such violations.

[9] The observation of the “glossy” eyes was important to the officer, but he also admitted that there could be other reasons for that condition. The “blank stare”, not looking directly at the officer, not making eye contact or apparently “looking through the officer”, may be unusual behaviour in some cultures. It is also consistent with anxiety or nervousness as a result of being stopped by the police. It is not an observation that I have heard relied upon in connection with drinking and driving cases in the Yukon. No expert evidence was called with respect to the importance of these observations, and Constable Hutton’s own experience as a recent graduate from Depot and on his first posting is obviously limited.

[10] It is important to note what the Constable did not observe or rely upon in making the demand. When Mr. Loewen was asked by the officer if he had been drinking, Mr.

Loewen indicated to the officer he had not been drinking. The officer did not detect any odour of alcohol coming from the vehicle, from the person of Mr. Loewen, his clothes or his breath. There was no slurred speech; there was no fumbling of papers, no observed lack of coordination or fine motor skills, no red eyes, no flushed face or other symptoms commonly associated with alcohol consumption. The officer did not conduct any roadside sobriety tests.

[11] By Constable Hutton's own admission, he was on patrol that evening looking for impaired drivers. When he observed Mr. Loewen's driving as described above, he apparently made up his mind that he had detected an impaired driver. When talking to Mr. Loewen, he focussed only on several ambiguous observations, such as a blank stare and "glossy" eyes and ignored all of the other factors that were inconsistent with alcohol consumption and alcohol in Mr. Loewen's body. Constable Hutton's investigative duty was not to "cherry pick" observations that supported his predisposition or hunch, but rather to consider and evaluate all of his observations when determining whether there were reasonable grounds to suspect that Mr. Loewen had alcohol in his body. He failed to do so.

[12] I am satisfied that Constable Hutton subjectively suspected that Mr. Loewen had alcohol in his body. He was not trying to mislead the Court. On several occasions he indicated to the Court that he did not remember, could not remember, or could not be sure. His subjective suspicion, however, was not based on a proper objective evidentiary foundation. It resulted from his failure to properly consider several important observations such as an absence of alcohol odour on the person of Mr. Loewen. In fact, the objective evidence considered as a whole falls woefully short of establishing a

basis for a reasonable suspicion that Mr. Loewen had alcohol in his body at the time of driving.

[13] Although Constable Hutton is a recent graduate of Depot and Dawson City is his first posting, his lack of appreciation of the law and proper police investigative procedures cannot be excused.

[14] The requirements in s. 254 (2) of the *Criminal Code* that a suspicion based on reasonable grounds must exist before a person can be detained for the purpose of providing a roadside screening sample is not only a statutory prerequisite but also a constitutional requirement. In the circumstances, Mr. Loewen was arbitrarily detained, contrary to s. 9 of the *Charter*. The arbitrary detention automatically triggered a violation of his right to counsel at the roadside contrary to s. 10(b) of the *Charter*. The breath samples taken at the roadside and at the detachment were without legal authorization and also constituted an illegal search and seizure contrary to s. 8 of the *Charter*.

The Law

[15] Having found *Charter* violations, it remains to be decided whether the breath samples unlawfully seized should be excluded from evidence. Two recent decisions of the Supreme Court of Canada, *R. v. Grant*, 2009 S.C.C. 32 and *R. v. Harrison*, 2009 S.C.C. 34, have revised the *Collins/Stillman* test for exclusion of evidence pursuant to s. 24(2) of the *Charter*.

[16] The Supreme Court observed that *R. v. Stillman*, [1997] 1 S.C.R. 607, has been interpreted and applied as creating an almost automatic exclusionary rule for non-discoverable conscriptive evidence. This general rule of inadmissibility of all non-discoverable conscriptive evidence goes against the requirement of s. 24(2) of the *Charter* that the court determining admissibility must consider "all of the circumstances".

[17] 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.

[18] The Supreme Court stated at paras. 67 to 71:

> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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 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. 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.

[19] This new approach to be applied in respect to s. 24(2) is summarized by

Professor Don Stuart in a case comment, (2009) 66 C.R. (6th) 82 at 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 s. 24(2) free of rigid categories but placing special emphasis on the factor of 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.

[20] This change in the law was described in *R. v. Peacock,* 2009 ONCJ 479 at para.

14, as follows:

> …The new methodology is consistent with an historical transition in the Supreme Court's analytical approach to criminal law issues, moving from categoricalism to flexibility. It may not amount to a paradigm shift, but there can be little doubt that

> jurists entertaining ss. 9, 10(b) and 24(2) *Charter* claims have been handed a substantially new tool box.

[21] 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 a minimal impact on the repute of the justice system. Deliberate or reckless breaches at the other extreme will inevitably have a 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 that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[22] A number of factors may operate to reduce the need for the court to dissociate itself from the 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.

[23] 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 dissociate itself

from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It is important for the courts to distance themselves from this behaviour, so that where the conduct was part of a pattern of abuse exclusion of the evidence may be an appropriate remedy.

[24] 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 interests is serious, admission of the evidence could send the message to the public that *Charter* rights are not available to citizens. As stated in *Grant*, *supra*, this could breed public cynicism and bring the administration of justice into disrepute.

[25] The third line of inquiry is concerned with society's interest 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 the evidence on the administration of justice, both short and long term. It is in fact a double-edged sword that cuts both ways. 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.

[26] 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 a sloppy and incomplete investigation. Automatic inclusion would serve to encourage similar behaviour in the future and bring the administration of justice into disrepute.

[27] Seriousness of the charge will 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 where the penal stakes for the accused are high.

[28] 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 *Charter*-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.

[29] A helpful summary of the *Grant* criteria are found in the recent decision of *R. v. Beattie*, 2009 ONCJ 456 at para. 29:

- The new approach is more flexible than the *Collins/Stillman*, [1997] 1 S.C.R. 607, approach. There are no presumptions of admission or exclusion.
- The purpose is to maintain the good repute of the administration of justice by both maintaining the rule of law and upholding *Charter* rights.
- The focus is both long term and prospective, not on the immediate reaction to admission or exclusion in a particular case.
- The focus is also societal and systemic. It is not to punish the police or compensate the accused in any particular case but to further the long term interests of society and the justice system.
- The court must consider all of the circumstances which involves an assessment and balancing of 1) the seriousness of the *Charter*-infringing state conduct, 2) the impact of the breach on the *Charter*-protected interests of the accused, and 3) the societal interest in adjudication on the merits.
- The seriousness of *Charter* infringing conduct can be graded on a spectrum from trivial to blatant and flagrant.
- The impact of the police conduct on the appellant's *Charter*-protected interests is examined from the perspective of the accused. The degree of intrusiveness of the unconstitutional action of government agents ranges from impact which might be described as fleeting, transient or technical to profoundly intrusive.
- Society's interest in adjudication on the merits will almost always favour admission of the evidence. However the gravity of the charge should not be permitted to overwhelm the other factors.

Application of *Grant* to the Facts

[30] The admissibility of the breath sample analyses will be considered as outlined in the *Grant* decision. The first step requires a consideration of the police conduct and the reasons for it.

[31] Although Constable Hutton had reason to stop Mr. Loewen'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 Constable Hutton's observations taken in isolation or together provided objective evidence of alcohol in Mr. Loewen's body. Rather, he "cherry picked" several ambiguous observations such as "blank stare" and "glossy eyes" and ignored information and observations that were inconsistent with the conclusion he had apparently already reached before stopping the vehicle.

[32] Constable Hutton's actions were deliberate in the sense that he had made up his mind that Mr. Loewen had been drinking before he stopped the vehicle. He ignored Mr. Loewen's statement that he had not been drinking. He did not consider the absence of the odour of liquor from Mr. Loewen's person or vehicle, the absence of bloodshot eyes, slurred speech, and flushed face. He made no observations of lack of coordination or fine motor skills. The commonly observed symptoms associated with alcohol consumption were entirely absent.

[33] Although Constable Hutton subjectively suspected Mr. Loewen had alcohol in his body and was honest and forthright in giving his evidence, he was not acting in "good faith" as that term has been defined in law.

[34] The BC Court of Appeal in *R. v. Washington*, 2007 BCCA 540, notes at para. 78, that the concept of good faith is not fully defined in the jurisprudence. However, the court mentions the Supreme Court of Canada decision *R. v. Kokesch*, [1990] 3 S.C.R. 3, where Justice Sopinka discusses good faith. *Washington* held that Justice Sopinka,

> seemed to accept that "good faith" is a state of mind, an honestly held belief, but he also found that to constitute good faith the belief must be reasonably based. The evidence in *Kokesch* established that the police officers were mistaken about their authority to trespass on a homeowner's property. Either the police knew they were trespassing or they ought to have known. In either case, they cannot be said to have proceeded in good faith.

[35] The Court in *Washington* summarized good faith as “an honest and reasonably held belief”. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong” (para. 79).

[36] Additionally, Rowles J., in a dissenting opinion, provides at para. 117:

> When engaging in an analysis of "good faith", it is also important to clarify its meaning within the context of s. 24(2). It is a term of art that has been used to describe whether the authorities knew or ought to have known that their conduct was not in compliance with the law (see Sopinka at s. 9.116; *R*. v. *Silveira*, [1995] 2 S.C.R. 297, 23 O.R. (3d) 256 at para. 65; *R*. v. *Wise*, [1992] 1 S.C.R. 527, 133 N.R. 161 at para. 97; *R*. v. *Kokesch*, [1990] 3 S.C.R. 3, 121 N.R. 161 at para. 52). Therefore, an inquiry into good faith examines not only the police officer's subjective belief that he or she was acting within the scope of his or her authority, but it also questions whether this belief was objectively reasonable.

[37] In the Supreme Court of Canada decision of *R. v. Buhay*, 2003 SCC 30, the Court notes, at para. 59, “good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer’s unreasonable error or ignorance as to the scope of his or her authority.” Clearly, Constable Hutton’s honest subjective belief was based on ignorance of the law as established by a long line of court decisions. By “cherry picking” those observations which supported his predisposition, he failed in his

duty to properly investigate the matter. In many small Yukon communities, the limited complement of police officers will restrict opportunities for mentorship and supervision of recent graduates who may be on their first postings, as Constable Hutton was in Dawson. There is reason to believe that the *Charter* breaches in this case had systemic origins.

[38] When police officers act on “gut” feelings or “hunches”, they will sometimes be right. But the court is not provided with statistical information indicating how often they are wrong. This is what the Supreme Court had in mind when it stated, at para. 75 in *Grant*:

> “It should be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge”.

[39] The absence of reasonable grounds triggered breaches of s. 9 (arbitrary detention), s. 10(b) (right to counsel) and s.8 (illegal search and seizure). In my view, when considered together, the *Charter* breaches in this case were serious.

[40] 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 the police detachment only minimally intrude on the privacy, bodily integrity and human dignity of the accused.

[41] 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

[42] The inquiries conducted pursuant to the second and third branches of the *Grant* analysis supports 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. 74: "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith".

[43] Admitting the evidence on the facts in this case would send a 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. Loewen had alcohol in his body, any or all motorists could be stopped and breathalysed at the roadside without the requisite reasonable grounds. The potential ramifications of allowing the evidence to be

admitted are far-reaching and could impact on all operators of motor vehicles in the Yukon.

[44] 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.

[45] 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. The price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards.

[46] As the breath samples are the only evidence for the charges against Mr. Loewen, I find him not guilty.

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LILLES T.C.J.