Citation: *R. v. Roberts*, 2019 YKTC 2

Date: 20190131
Docket: 18-00139
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

KAREN DIANE ROBERTS

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Luke Faught — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

Introduction

[1] Karen Roberts has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

[2] The trial proceeded in Pelly Crossing on October 30, 2018. A *Charter* application was filed, alleging breaches under ss. 7 and 10(b). The application sought remedies under ss. 24(1) and (2).

[3] The trial commenced by way of *voir dire* on the *Charter* applications.

[4] Judgment was reserved on the *Charter* applications. On January 8, 2019, I advised counsel that I had concluded Ms. Roberts' s. 10(b) *Charter* right to counsel had

been breached and that I was excluding under s. 24(2) any evidence of the breath testing results that followed.

[5] I also advised counsel that I was excluding from evidence at trial any observations made by Cst. Anderson of Ms. Roberts after she exited her vehicle at the request of Cst. Anderson.

[6] I indicated that written reasons would follow. These are those reasons.

Evidence on the *Voir Dire*

[7] Cst. Samuel Anderson testified. He has been a general duty RCMP officer in excess of 10 years, often working in smaller communities. He estimated that he has been involved in over 100 impaired driving investigations.

[8] On May 28, 2018, Cst. Anderson responded to a complaint of a possible impaired driver. He located the described vehicle and followed it. He noted it to be encroaching on the yellow line and then moving back towards the white line on several occasions. He described the vehicle as swerving all over the road. Cst. Anderson activated his police cruiser's emergency equipment, resulting in the vehicle pulling over. The driver of the vehicle was Ms. Roberts.

[9] He noted her eyes to be glossy. Ms. Roberts explained that she had been crying after breaking up with her boyfriend.

[10] Cst. Anderson stated that he had seen Ms. Roberts both sober and impaired. He felt that she was between the two on this occasion.

[11] He felt that her speech was slower.

[12] Ms. Roberts admitted to having consumed four beers earlier. Although she was not sure of when she had consumed these, she said that the last one was about five hours earlier.

[13] Cst. Anderson was suspicious that Ms. Roberts may be impaired. He based his suspicion on:

- her manner of driving;
- her speech;
- her confusion;
- his knowledge of her as being a heavy drinker; and
- her admission to having consumed alcohol.

[14] Cst. Anderson directed Ms. Roberts to exit her vehicle. He did so for the purpose of having her provide a sample of her breath pursuant to a s. 254(2) demand.

[15] Ms. Roberts attempted to provide several samples of her breath into the roadside screening device. These samples were insufficient to allow for an analysis of Ms. Robert's breath to be made.

[16] However, after Ms. Roberts exited her vehicle, Cst. Anderson first smelled an odour of liquor. It was at this time that he also noted Ms. Roberts to have some issue with her balance. He noted her to be talkative and unable to follow the process for providing a breath sample.

[17] Based on these additional observations, Cst. Anderson formed the opinion that Ms. Roberts' ability to operate a motor vehicle was impaired by alcohol, and arrested her for impaired driving.

[18] After arresting Ms. Roberts, Cst. Anderson provided her with her *Charter* right to legal counsel, reading to her from the booklet he carried with him.

[19] Ms. Anderson stated that she understood her *Charter* right to counsel and said that she wished to speak to legal counsel. She said that she did not wish to speak to a Legal Aid lawyer, however she did not specify a particular lawyer that she wished to speak to. She also did not say that she wished to make a call to a lawyer right away. Ms. Roberts initial indication that she wished to speak to legal counsel took place at approximately 19:18 or 19:19 hours.

[20] Ms. Roberts was taken back to the RCMP Detachment, a drive of approximately three or four minutes. There was no discussion en route in regard to Ms. Roberts speaking to legal counsel.

[21] Upon pulling into the Detachment, Cst. Anderson told Ms. Roberts that he would take her to the interview room in order to allow her to contact counsel, Ms. Roberts stated that she did not want to call a lawyer anymore. Cst. Anderson then directed Ms. Roberts into the interview room. Cst. Anderson asked Ms. Roberts again whether she wished to call a lawyer. At 19:30 hours, Ms. Roberts stated for a second time that she did not want to speak to a lawyer. This was approximately one and one-half minutes after first stating that she did not wish to speak to a lawyer, and 11 or 12 minutes after initially stating that she wished to speak to a lawyer.

[22] There was no further discussion or comment by either Ms. Roberts or Cst. Anderson in regard to the issue of legal counsel. After the second time that Ms. Roberts said "no" to speaking to legal counsel, Cst. Anderson felt that she had made up her mind. He said that he did not feel like he should force legal counsel on her if she did not want it.

[23] Cpl. Boone then took over the custody of Ms. Roberts so that Cst. Anderson, as the breath technician, could prepare the testing instrument.

[24] Cst. Anderson testified that since the arrest of Ms. Roberts he has learned what a ***Prosper*** warning is (***R.*** v. ***Prosper***, [1994] 3 S.C.R. 236). He said that he did not know what a ***Prosper*** warning was on May 28, 2018. While he had encountered situations where individuals under arrest had changed their mind about speaking with legal counsel, this was the first case that he had faced this issue of the need to provide a ***Prosper*** warning. He said that he had never previously been instructed about the need to provide a ***Prosper*** warning when an individual under arrest changes their mind after making an initial request to speak with legal counsel. He said that it was his understanding that he was not the only police officer who was unaware of the need to provide a ***Prosper*** warning in such circumstances.

[25] In cross-examination, Cst. Anderson stated that while he believed Ms. Roberts possessed a cell phone, he did not ask her if she wanted to speak to a lawyer using her cell phone, nor did Ms. Roberts ask to do so. Cst. Anderson agreed that prior to arriving at the Detachment, Ms. Roberts did not have complete privacy at any time after she had been arrested.

Submissions of Counsel

Counsel for Ms. Roberts

[26] Counsel for Ms. Roberts submits that there is a clear violation of Ms. Roberts' s. 10(b) *Charter* right to counsel. As Ms. Roberts had initially stated she wished to contact legal counsel, once she subsequently indicated at the Detachment that she no longer wished to do so, there was an obligation upon Cst. Anderson to again advise her of her right to counsel in order to ensure there was a clear and unequivocal waiver by Ms. Roberts of that right. This was something Cst. Anderson failed to do.

[27] Counsel submits that the evidence of the breath certificates should be excluded under s. 24(2).

[28] Counsel further objects to the admission into trial of the observation evidence of Cst. Anderson about the odour of liquor emanating from Ms. Roberts and her balance issues, both made after she exited her vehicle at his direction. Counsel submits that this evidence was obtained from Ms. Roberts as a result of her compliance with the directions from Cst. Anderson, directions given so that he could continue his impaired driving investigation. Effectively these observations were the result of Ms. Roberts being compelled to provide this evidence, and, as such, are not admissible at trial for the purpose of proving impairment contrary to s. 253(1)(a).

Crown Counsel

[29] Crown counsel submits that the requirements to provide a ***Prosper*** warning did not exist in the circumstances of this case. There was no attempt by Ms. Roberts to assert her right to counsel, despite Cst. Anderson providing her the opportunity to do so.

[30] Counsel submits that even if there was a breach of Ms. Roberts' s. 10(b) *Charter* right, in these circumstances the breach does not warrant exclusion of the evidence under s. 24(2).

[31] Counsel further submits that the observations made by Cst. Anderson were not made in circumstances where he was directly compelling Ms. Roberts to participate in a process intended to elicit such evidence, such as roadside sobriety tests. He submits that these observations were incidental to what Cst. Anderson was lawfully entitled to do pursuant to making the s. 254(2) demand and, as such, were not as a result of him compelling Ms. Roberts to specifically produce incriminating evidence of impairment.

Analysis

Section 10(b) *Charter* Right to Counsel

[32] The relevant paragraphs in ***Prosper*** state:

> 43 In circumstances where a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the Charter-protected right to counsel is not too easily waived. Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his or her right to a

> reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.
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> 44 Given the importance of the right to counsel, I would also say with respect to waiver that once a detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing an unequivocal waiver will be on the Crown: Ross, at pp. 11-12. Further, the waiver must be free and voluntary and it must not be the product of either direct or indirect compulsion. This Court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high: Clarkson v. The Queen, [1986] 1 S.C.R. 383, Manninen, and Evans. As I said in Bartle, at pp. 192-94 and 206, a person who waives a right must know what he or she is giving up if the waiver is to be valid. That being said, it stands to reason that the right to counsel guaranteed under s. 10(b) must not be turned into an obligation on detainees to seek the advice of a lawyer.

[33] In ***Prosper***, the accused had stated that he wished to speak to a lawyer. Despite his efforts to do so, he was unable to speak with counsel due to institutional issues outside of his control. The trial judge found that, out of frustration, the accused then proceeded to provide breath samples without having spoken to a lawyer. The Supreme Court stated that in these circumstances there was no waiver by the accused of his s. 10(b) *Charter* rights, and that he had been diligent in trying to exercise them. The Court excluded the evidence of the breath testing results under s. 24(2) of the *Charter*.

[34] The ***Prosper*** principle was reaffirmed in ***R.*** v. ***Willier***, 2010 SCC 37 at para. 32:

> Thus, when a detainee, diligent but unsuccessful in contacting counsel, changes his or her mind and decides not to pursue contact with a lawyer, s. 10(*b*) mandates that the police explicitly inform the detainee of his or her right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning until then. This additional informational obligation, referred to in this appeal as the duty to give a

> "*Prosper* warning", is warranted in such circumstances so as to ensure that a detainee is informed that their unsuccessful attempts to reach counsel did not exhaust the s. 10(*b*) right, to ensure that any choice to speak with the police does not derive from such a misconception, and to ensure that a decision to waive the right to counsel is fully informed.

[35] On its face, what distinguishes the present case from ***Prosper***, is that there is no evidence that Ms. Roberts was diligent in attempting to exercise her right to counsel and only changed her mind because she was unable to do so. The evidence is clear that Cst. Anderson, even after being told by Ms. Roberts upon arriving at the Detachment that she no longer wished to speak to legal counsel, nevertheless took her into the interview room and provided her access to a telephone so that she could contact counsel.

[36] It was only after Ms. Roberts said for a second time that she did not wish to speak to legal counsel that Cst. Anderson proceeded to take the breath samples from her.

[37] Cst. Anderson did not put any pressure on Ms. Roberts to change her mind about speaking to legal counsel. Further, by his actions in placing her into the interview room, he allowed her the opportunity to contact counsel, even after Ms. Roberts had stated that she no longer wished to do so upon arriving at the Detachment. These actions demonstrate a willingness on Cst. Anderson's part to facilitate Ms. Roberts' opportunity to contact counsel.

[38] The question before me is whether, in these circumstances, anything more was required by Cst. Anderson with respect to advising Ms. Roberts of her right to legal counsel. In other words, was an informational obligation imposed upon Cst. Anderson

as a result of Ms. Roberts apparently changing her mind about speaking to legal counsel.

[39] This specific issue was addressed in ***R.*** v. ***Bailey***, 2018 ONCJ 266. In ***Bailey***, the accused initially indicated that he wished to speak to a lawyer and then told the police officer that he no longer wished to do so.

[40] Crown counsel in ***Bailey*** relied on the first sentence in paragraph 43 of ***Prosper***, and para. 32 of ***Willier***, as well as the decisions in ***R.*** v. ***Blackwood***, 2017 ONCJ 69 and ***R.*** v. ***Fountain***, 2017 ONCA 596. Crown submitted that there is an obligation on an accused to make diligent efforts in attempting to contact counsel before ultimately deciding to proceed without doing so, before a ***Prosper*** warning is required.

[41] The Court in ***Bailey*** disagreed, stating in paras. 29 and 30:

> 29 With respect for Ms. Dafoe's ably-presented argument, I do not regard the obligation on the state to provide the *Prosper* warning -- to advise the detainee of the right to a reasonable opportunity to contact counsel and to hold off in seeking to obtain incriminating evidence from the detainee during that opportunity -- as subject to the limitation urged by the Crown. The passage from *Prosper* highlighted by Ms. Dafoe in argument is immediately followed by another which describes the *Prosper* warning requirement generally, not only in the circumstance where the detainee has tried diligently to reach counsel but failed.
>
>> Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee

> who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.
>
> 30 I see no reason to distinguish, for *Prosper* warning purposes, between that class of detainees who have tried unsuccessfully to reach a lawyer and the class of those who have not. In either case, the objective of ensuring that a detainee "knows what he or she is giving up" prior to finalizing the change of mind needs to be met.

[42] The Court distinguished the comments in ***Willier***, ***Blackwood*** and ***Fountain*** on the basis that in the circumstances of those cases, the accused had been attempting to contact counsel and, as such, the comments of the Courts in these cases are limited to such circumstances.

[43] The Court in ***Bailey***, in para. 31, referred to the comments of Paciocco J.A. in ***Fountain***:

> As to what are said by the Crown to be affirmations in *Willier, Blackwood* and *Fountain* of the more limited circumstance calling for the warning, I note that in all three the facts were that the detainees *had* attempted to contact their counsel of choice unsuccessfully. It was that circumstance which the courts in those cases were addressing. The broader principle applicable to Mr. Bailey's situation is expressed by Paciocco, J.A. for the court in *Fountain*:
>
> > [45] As Rosenberg J.A. makes clear in *Smith*, [1999] O.J. No. 969 at p. 384, the obligation is placed on the police to give a *Prosper* warning "where the detainee has asserted the right [to counsel] and then apparently change[s] his mind" (emphasis added). This is so because the purpose of the *Prosper* warning is to ensure that an apparent waiver of the detainee's rights under s. 10(b) is a real waiver -- made clearly and unequivocally, with full knowledge of the detainee's s. 10(b) rights: *Prosper*, at pp. 274-275; *Smith*, at pp. 382-383.

[44] In conclusion, the Court states in para. 32:

> There is no real issue in this case whether Mr. Bailey initially asserted his s. 10(b) right. Even if P.C. Crowe's "call lawyer" note is *verbatim* and Mr. Bailey can fairly be seen as a man of few words, P.C. Crowe testified that he regarded Mr. Bailey as having expressed the desire to speak to a lawyer at the roadside. He also testified that he understood Mr. Bailey to have changed his mind based upon what he said in the cruiser and at the detachment. Such an inference, even in the absence of an objectively unequivocal expression of change of mind, is sufficient to trigger the *Prosper* warning obligation for the state: *Fountain,* paras. 46-47; *Prosper*, p. 287.

[45] In ***R.*** v. ***Sivalingham***, 2018 ONCJ 510, the circumstances were that the accused had asked to speak to counsel of choice. The Court held that when the officer was unable to contact this counsel, the officer effectively waived the accused's right to counsel and obtained breath samples. The Crown argued that the accused had not been diligent in exercising his right to counsel by failing to ask the police officer to contact other counsel. The Court rejected this argument and went on to state in para. 26 that:

> There is some irony to the Crown's argument that Mr. Sivalingam was not diligent. Had Mr. Sivalingham actually changed his mind in the breath room and said he did not want to consult counsel, Cst. Simmonds would have been required to give him a *Prosper* warning. Mr. Sivalingham should not be in a worse position because he did not speak up and ask to speak to a lawyer.

[46] I appreciate that in ***Sivilingham***, the accused had initially attempted to contact counsel before complying with the police officer's request to provide the breath samples, whereas Ms. Roberts did not make any attempt to contact counsel.

[47] In para. 159 of ***R.*** v. ***Dougherty***, 2018 ONCJ 633, (referring to ***R.*** v. ***Delaney***, 2014 ONCJ 83 at paras. 19-22 and 27), the Court stated:

159 The defence referred to the case of ***R.** v. **Delaney*** [2014] O.J. No. 844 (C.J.), where the accused had originally requested counsel of choice, but when that counsel could not be reached, the accused stated that he did not wish to speak to other counsel. The Crown in that case took the position that the defendant was not being reasonably diligent in the exercise of his right to counsel having turned down the offer to contact another lawyer when his lawyer of choice could not be reached. There was no *Prosper* warning in this case, in fact, the officer was not aware of the obligation to provide a *Prosper* warning. Harris J. stated:

> 19 The point is -- that if, as the officer says the defendant in fact declined an offer to speak with duty counsel or any other counsel, the logic of the two bedrock decisions noted above is that when the police cannot reach counsel of choice, and the defendant indicates he has changed his mind and no longer wants legal advice, the "*Prosper* duties" must be complied with and an unequivocal waiver obtained -- and only then will a defendant's failure to avail himself of duty counsel amount to a failure to exercise reasonable diligence. In my view, 'reasonable diligence' on the part of the defendant never comes into play in this case.
>
> 20 The only way that *Prosper* and all the 'reasonable diligence' cases can be reconciled is by giving effect to the case authorities noted above and placing the police duties and the accused's right to counsel obligations in their natural order. When counsel of choice cannot be reached after a reasonable waiting period, and an accused wishes to speak with alternate counsel, or duty counsel, an accused has to pursue that choice with reasonable diligence. Where an accused indicates that he or she has changed his or her mind and no longer wants legal advice, police must provide constitutionally sufficient information (the *Prosper* caution) in order to allow him or her to make a fully informed decision. This "additional informational requirement" on police "ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up," according to *R. v. Prosper*.
>
> 21 At this point, the police either have an informed, unequivocal waiver or a renewed interest in consulting counsel in respect to which, the accused must exercise reasonable diligence. This is a simple formula that could be reduced to print in the back of a memo book. As the Ontario Court of Appeal stated in *R. v. Devries*, [2009] O.J. No. 2421 (C.A.), "There is value in the use of a standardized s. 10 (b) caution which complies with the informational

requirements established in the Supreme Court of Canada jurisprudence." And police should be instructed to make careful notes of the accused's responses. Ideally, to avoid the perpetual contest about what information was conveyed and what answers were given, this information/waiver process should take place on video prior to any request to provide breath samples.

22 The essence of *Prosper* is the fact that it sets out the fundamental principles that marshal our understanding of the *Charter* right to counsel. The central concepts are clearly stated: (1) Courts must ensure that the Charter-protected right to counsel is not too easily waived, and (2) Given the importance of the right to counsel ... the standard required for an effective waiver of the right to counsel is very high: *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, *Manninen*, [1987] 1 S.C.R. 1233 and *Evans*, [1991] 1 S.C.R. 869 and (3)The evidentiary presumption under s. 258(1)(d) of the Code, which provides that readings taken within two hours of an alleged offence are proof of the blood alcohol level at the time of the offence, is not a sufficiently "urgent" factor to override a detainee's right to counsel under s. 10(b), and (4) It is now well accepted that s. 10(b) serves to protect the privilege against self-incrimination, a basic tenet of our criminal justice system which has been recognized by members of this Court to be a "principle of fundamental justice" under s. 7 of the Charter: *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, and R. v. Jones, [1994] 2 S.C.R. 229.

...

27 The final point to be made is that when an individual finds himself (or herself) in a police Division under arrest and in detention, the relationship between the individual and the police is not a level playing field. It stands to reason that a person in custody for the first time, under the influence of some level of alcohol and being required to make some very stressful choices about counsel and whether to provide a breath sample, is likely to feel quite overwhelmed. This is precisely why the *Prosper* informational/waiver process is so vitally important...

[48] In my opinion, the requirement to provide a ***Prosper*** warning is triggered when a detainee who has indicated that they wish to exercise their *Charter* right to counsel, then changes their mind.

[49] It is clear that a ***Prosper*** warning is required when a detainee who has asked to speak to legal counsel, has then taken further steps to contact counsel, but has been, through no fault of their own, frustrated in those attempts and then changes his or her mind.

[50] I find, however, that even in circumstances where the detainee changes his or her mind about speaking to legal counsel prior to making any actual efforts to do so, a ***Prosper*** warning is nonetheless required.

[51] As stated in ***Fountain*** in para. 37, 44 - 46:

> 37 …the purpose of a *Prosper* warning is to ensure that detainees know what they are giving up when they abandon their efforts to speak to counsel without delay. If a detainee is not advised that they will lose a constitutional protection if they choose an offered option, that offer can operate as a trap.
>
> …
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> 44 …Accordingly, if it is *apparent* that a detainee has changed his mind about wanting to speak to counsel without delay, and no other legal impediments to the right to a *Prosper* warning are operating, that warning must be given.
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> 45 As Rosenberg J.A. makes clear in *Smith*, at p. 382, the obligation is placed on the police to give a *Prosper* warning "where the detainee has asserted the right [to counsel] and then *apparently* change[s] his mind" (emphasis added). This is so because the purpose of the *Prosper* warning is to ensure that an apparent waiver of the detainee's rights under s. 10(b) is a real waiver -- made clearly and unequivocally, with full knowledge of the detainee's s. 10(b) rights: *Prosper*, at pp. 274-75 S.C.R.; *Smith*, at pp. 382-83.

> 46 While Lamer C.J. does refer in *Prosper*, at p. 274 S.C.R., to a detainee that "indicates that he or she has changed his or her mind", when he summarized the rules developed in *Prosper*, at p. 278, he said:
>
> > Upon the detainee *doing something which suggests he or she has changed his or her mind or no longer wishes to speak to a lawyer*, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee.
> >
> > (Emphasis added).

[52] The importance of the *Charter* right to speak to legal counsel upon detention or arrest cannot be overstated.

[53] Ms. Roberts stated that she wished to exercise her right to speak to legal counsel. She changed her mind once back at the Detachment and confirmed this change of mind when Cst. Anderson offered her a phone in order to contact counsel.

[54] Cst. Anderson was then required to ensure that he provided Ms. Roberts the additional informational component as required by ***Prosper*** to ensure that Ms. Roberts' change of mind and waiver of the right to speak to legal counsel was clear and unequivocal. This is not an onerous thing to do; it would likely have taken less than 30 seconds to provide this information to Ms. Roberts. Any delay subsequently resulting from Ms. Roberts then deciding to exercise her right to speak to legal counsel would be reasonable and in accord with the *Charter* right to counsel.

[55] As such I find that there was a breach of Ms. Robert's s. 10(b) right to legal counsel.

Section 24(2) of the *Charter*

[56] Section 24 of the *Charter* reads:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) 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.

[57] Once a breach of a *Charter*-protected right has been established, the sole question in deciding if the evidence obtained as a result of the breach should be excluded from trial is whether, in the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

[58] In para. 86 of ***R.*** v. ***Sakaraveych***, (referring to ***R.*** v. ***Pino***, 2016 ONCA 389 at para. 72), the Court stated that:

> In determining whether or not the evidence was "obtained in a manner that infringed or denied any rights or freedoms" of the applicant, the court should be guided by the following considerations:
>
> > (1) the approach should be generous, consistent with the purpose of s. 24(2);
> >
> > (2) the court should consider the entire "chain of events" between the accused and the police;
> >
> > (3) the requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct;

> (4) the connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections;
>
> (5) but the connection cannot be either too tenuous or too remote.

[59] The Court in ***Sakaraveych***, referring to the decision in ***R.*** v. ***Grant***, 2009 SCC 32, stated in para. 88 that:

> … a Charter breach in and of itself brings the administration of justice into disrepute. However, in their view, subsection 24(2) was concerned with the future impact of the admission/exclusion of the evidence on the repute of the administration of justice. In other words, the court was concerned with whether admission/exclusion would do further damage to the repute of the justice system. In doing so, the court noted that the analysis required a long-term view, one aimed at preserving the integrity of the justice system and our democracy.

[60] The three-part test established in ***Grant*** for assessing the impact of the admission of the evidence on society's confidence in the justice system requires a consideration of:

> (a) the seriousness of the *Charter*-infringing state conduct;
>
> (b) the impact of the breach on the *Charter*-protected interests of the accused; and
>
> (c) society's interest in the adjudication on the merits.

The seriousness of the Charter-infringing state conduct

[61] Underpinning the seriousness of the breach is the nature of the *Charter*-protected right to counsel. The significance of the right to speak with legal counsel once a person is detained by the State is of fundamental importance. It provides procedural

safeguards that maintain a balance between the individual and the State. It ensures, at the very outset of the State's intrusion into the liberty of the detainee, that the detainee is provided assistance to help them to navigate the process. It guards against unfairness and abuse. There is no more important *Charter*-protected right than the right to speak to counsel without delay upon detention or arrest. On its face, any breach of the s. 10(b) *Charter* right of a detainee should be taken seriously.

[62] While egregious or "bad faith" conduct on the part of a police officer in his or her actions will generally aggravate the seriousness of a *Charter* breach, it is not necessarily the case that "good faith" on the part of a police officer will result in a breach being considered not to be serious.

[63] As stated in para. 63 of ***Fountain***:

> While Det. Dellipizzi presented as being careful to ensure that he did not violate Mr. Fountain's right to counsel, and attempted to facilitate that right on more than one occasion, good faith requires more than good intentions. *Prosper* has been the law since 1994. It is not an obscure decision addressing a rare event. It is a long-standing precedent governing not only a ubiquitous investigative technique – the police interview – but every case where the police use a detained suspect as a source of evidence.
>
> (see also para. 90 of ***Pino***)

[64] In ***R.*** v. ***Berger***, 2012 ABCA 189, the Court stated in para. 12:

> In *Grant*, at paras 74-75, the Supreme Court noted that state conduct resulting in *Charter* violations varies in seriousness, from inadvertent or minor violations to wilful or reckless disregard of *Charter* rights. Good faith on the part of the police will reduce the need for the court to disassociate itself from the police misconduct; however, ignorance of *Charter* standards, negligence or wilful blindness cannot be equated with good

> faith. Deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence.

[65] Cst. Anderson's conduct was courteous and he was generally respectful of Ms. Roberts. He was not in any way attempting to override Ms. Roberts' *Charter* rights in order to further the case against her. He did not move from Ms. Roberts' comment indicating a change of mind with respect to contacting legal counsel, to then immediately obtaining the evidence of the breath samples. He provided Ms. Roberts a further opportunity to contact legal counsel, which she again declined to do. He was, in my opinion, at all times acting in good faith.

[66] However, by his own admission, Cst. Anderson was not, at that time, and with his experience, aware of the requirements set out in ***Prosper*** with respect to providing a ***Prosper*** warning after a detainee has changed his or her mind about contacting legal counsel. He has since taken steps to educate himself in this regard.

[67] ***Prosper*** has been the law since 1994. This was not a recent change in the law that could excuse ignorance of it. The expectation is that police officers will understand the law as it was stated in ***Prosper*** and act in compliance with the requirements of the law.

[68] To the extent that an individual police officer may be acting in "good faith", such as Cst. Anderson was in this case, such a "good faith" argument is undermined by the overriding expectation that police officers enforcing the laws in Canadian society have an acceptable level of understanding of the fundamental principles governing the actions of those acting on behalf of and in the name of the State.

[69] In my opinion, this is a serious breach and favours exclusion of the evidence.

The impact of the breach on the Charter-protected interests of Ms. Roberts

[70] I note that in paras. 23-25 of ***Berger*** the Court, in its 24(2) analysis of the impact of the breach, stated that:

> 23 In *Grant* at para 76, the Supreme Court of Canada described this line of inquiry as calling "for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed." The trial judge's only comment on this issue was to reprise his conclusion to the above issue, that the appellant was given a reasonable opportunity to exercise those rights. He also observed that the taking of breath samples is relatively unintrusive, in comparison with obtaining evidence from an accused's body through other methods. He failed to address the impact of the admission of the evidence on the appellant, the fact that the evidence would not have been harvested but for the *Charter* breach, and that it was essential to substantiate the charge. All of this led to his arriving at an unreasonable conclusion that the breach did not significantly impact the appellant's *Charter* rights.
>
> 24 While any lawyer contacted by the appellant would have told him that his options were limited with regards to non-participation in the face of a breathalyzer demand, that does not excuse a *Charter* violation. The lawyer could have provided other critical advice, including the importance of remaining silent, strategies for interrogation and practical advice about securing release from custody.
>
> 25 More importantly, to accept the argument that the *Charter* breach would not have mattered because both refusing to blow, and achieving a fail rating after blowing result in a criminal consequence, would be to insulate s. 10(b) *Charter* breaches in the course of an investigation of an over .08 charge from any consequence because the accused person has little choice but to eventually provide a breath sample in any event. That is not the law: *Prosper; R v Bartle*, [1994] 3 S.C.R. 173; *R v Cobham*, [1994] 3 S.C.R. 360; *R v Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310.

[71] Further, as stated in para. 67 of ***Fountain***:

> Specifically, this was not a technical violation. The *Prosper* warning is meant to ensure that individuals who have been frustrated in their attempts to enjoy their right to counsel do not give up the right to consult

> counsel without delay without a complete understanding of what is at stake. The *Prosper* warning is a substantial protection designed to preserve the integrity of a centrally important *Charter* right to secure legal advice when detained.

[72] Ms. Roberts was being asked to submit to a process through which she would provide Cst. Anderson the very evidence through which she could then be charged and prosecuted. Without the evidence of the breath test results, Ms. Anderson could not be prosecuted for having committed an offence under s. 253(1)(b). Therefore, the impact of the admission of the evidence has the potential to result in serious criminal consequences for Ms. Roberts.

[73] In my view, when police officers are in a position to require a detainee to provide evidence that will then be used to prosecute the detainee for a criminal offence, it is of critical importance that the detainee makes an informed decision with respect to his or her participation in the process. The *Charter* s. 10(b) right to counsel lies at the very core and foundation of a detainee's rights and interests at this point.

[74] The fact that refusing to provide this evidence could have resulted in a criminal charge, that at the time of Ms. Robert's arrest attracted very similar criminal consequences to blowing over 80 mg%, does not serve to undermine the value and importance of Ms. Roberts receiving her *Charter* s. 10(b) right to counsel, and therefore the *Charter* protection that existed for her. There is a bigger picture at play than seen if viewing the circumstances through a narrow lens.

[75] In my opinion, the second branch of the ***Grant*** test favours exclusion of the evidence.

Society's interest in the adjudication of the case on its merits

[76] Generally speaking, this branch of the ***Grant*** analysis favours the admission of the evidence obtained following a *Charter* breach, in particular if the evidence is critical to the Crown's ability to prosecute the case.

[77] However, as stated in ***R.*** v. ***McGuffie***, 2016 ONCA 365, (cited in para. 69 of ***Fountain***), where the first two steps of the ***Grant*** analysis make a strong case for exclusion, the third step will rarely if ever tip the balance in favour of inclusion. (see also ***Sivalingham***, at para. 33)

[78] It must also be remembered that the benefits of admission of the evidence in a particular case must be balanced against the impact upon the reputation of the administration of justice in the long term. (***Sakarevych***, para. 110)

[79] The negative impacts of impaired driving and the devastating impacts on individuals, families, and communities cannot be understated. Impaired driving is a serious offence with all-too-often tragic consequences. It is important to ensure that individuals who are committing the offence of impaired driving are brought before the courts and dealt with according to law.

[80] It is also important, however, that individuals who are accused of committing serious criminal offences are able to be arrested, prosecuted and held accountable for their actions. It is important that they do not escape being held accountable because their rights under the *Charter* have been infringed, and evidence necessary to the prosecution, such as in this case, is not excluded from trial.

[81] Therefore, it is important that police officers understand, when executing their duties, the importance of complying with the *Charter*-protected interests of individuals in Canadian society, which also means they must understand them.

[82] As stated in para. 71 of ***Fountain***:

> Still, the *Charter* right at stake here exists, in part, to ensure detainees have reasonable access to legal advice in order to rectify the disadvantage they have in preserving the right to silence, and so that they can learn about their legal rights relating to their detention. It enables detainees to get beyond learning they have a right to silence, to receiving advice on how to exercise that right. In my view, condoning the failure by the police to respect this well-entrenched *Charter* right by admitting Mr. Fountain's statements would do more harm to the long-term repute of the administration of justice than the exclusion of his statements.

[83] Given the significance of the *Charter* s. 10(b) right to counsel in question in here, the well-settled principle of law established in ***Prosper***, and the importance of maintaining confidence in the administration of justice in the long-term as well as in this one particular case, I find that the application of the ***Grant*** analysis on the facts of this case leads me to the conclusion that, in order to maintain confidence in the administration of justice, the evidence of the breath tests should be excluded from trial.

<u>Observations of Cst. Anderson</u>

[84] The next issue is the admissibility of the observations that were made by Cst. Anderson after he directed Ms. Roberts to exit her vehicle in order to provide a sample of her breath into the roadside screening device.

[85] In ***R.*** v. ***Milne***, [1996] 90 O.A.C. 348, the Court dealt with the issue of whether the evidence resulting from roadside co-ordination tests could be used to incriminate the

accused on a charge of impaired driving. The Court, in para. 30, referred to the judgment of Cory J. in ***R.*** v. ***Saunders*** (1988), 27 O.A.C. 184, and stated:

> … he determined that it was constitutionally permissible for a police officer to require a detained motorist to participate in roadside co-ordination tests before advising the motorist of his or her s. 10(b) Charter rights. The results of these tests were to be used solely as a means of confirming or rejecting the officer's suspicion that the detained motorist might be impaired.
>
> Assuming that the tests confirmed the suspicion, the officer would then have the grounds needed to justify a demand under s. 254 of the Criminal Code.
>
> These tests were not meant to provide the officer with a means of gathering evidence that could later be used to incriminate and convict the motorist of impaired driving at trial…

[86] The Court further stated in para. 40, however, that its conclusion with respect to not allowing such evidence into trial for the purpose of proving impairment:

> …applies only to evidence obtained from compelled direct participation by the motorist in the roadside tests authorized by s. 48(1) of the *HTA* [*Highway Traffic Act*, R.S.O. 1990, c. H.8], specifically designed to determine impairment or a blood-alcohol level exceeding 80 mg. I am not referring to observations the officer might make of the driver while carrying out other authorized duties. Thus, by way of example, an officer may observe signs of impairment in a driver, such as a strong odour pf alcohol, blood-shot and glassy eyes, dilated pupils, slurred speech, unsteadiness of gait upon the driver exiting the vehicle, or other similar signs. These observations would be admissible at trial to prove impairment…

[87] In ***Milne***, the Court was dealing with observations made by a police officer that directly resulted from the accused being compelled to participate in the process of co-ordination testing. Such, on its face, is not the case here.

[88] In the case of Ms. Roberts, the observations made by Cst. Anderson were incidental to Ms. Roberts exiting her vehicle at his direction to provide a sample of her

breath into an approved screening device. Cst. Anderson did not compel Ms. Anderson to submit to any action that was specifically intended to test whether she was impaired by alcohol or not, other than what he was legally able to do in requiring her to provide a breath sample into the approved screening device.

[89] In the summary conviction appeal of ***R.*** v. ***Kangas***, 2013 ABQB 383, paras. 23-54, Greckol J. considered how the judgment in ***Milne*** had been treated by subsequent courts. Greckol J. stated in paras. 49 and 50:

> 49 It is difficult to rationalize why evidence of observed stumbling or of a staggering gait after the driver is compelled under s. 254(32) of the Code or applicable provincial legislation to exit the vehicle has been held admissible to prove impairment when conscriptive evidence of admitting to alcohol consumption, of sobriety tests, or of roadside test results (prior to s 10(b) rights having been afforded) has been held to be admissible for that purpose. The logic behind the line drawing is not well explained in the case law and is difficult to discern, unless based on policy considerations.
>
> 50 The distinction the court appears to have made in ***Brode*** [2012, ONCA 140] is between compelling the driver to get out of the vehicle so the impaired investigation could continue and compelling the driver to provide evidence of sobriety by getting out of the vehicle. It is, perhaps, a fine distinction. In both cases, the driver has been detained and not afforded his s 10(b) rights. In both cases the driver is compelled to exit the vehicle so the police may further investigate whether reasonable grounds exist under s. 254(43 to require a breath sample.

[90] Greckol J. upheld the trial judge's decision to admit the evidence of the officer's observations of the accused as it had not been demonstrated that the trial judge's decision to do so was "incorrect or an overriding or palpable error".

[91] In ***R.*** v. ***Guillemin***, 2017 BCCA 328, however, the Court ruled such observational evidence inadmissible, citing the decision of ***R.*** v. ***Visser*** 2013 BCCA 393, stating in paras. 19-21:

19 This Court examined the case law which it summarized thus:

> 61 This overview of some post-*Orbanski* decisions demonstrates the difficult line-drawing exercise for trial judges in determining the purpose of police actions after a roadside stop: do they involve measures that amount to the compelled direct participation of a detained motorist in order to obtain evidence of impairment, which are only admissible at trial to establish reasonable grounds for the breathalyzer test, or are they measures that are undertaken while carrying out other authorized duties that incidentally produce evidence of impairment and therefore are admissible at trial to prove guilt. What is clear from the jurisprudence is that the authority under which police officers gather evidence at a roadside stop, is a critical finding in the analysis: *Orbanski* at para. 47. The line between evidence obtained for the purpose of a criminal investigation, and evidence obtained in the course of performing "other authorized duties", will require a careful examination of the facts of each case. This case is no different.

20 The focus of this Court's analysis of the evidence was then on the purpose of a police officer's direction to a motorist. If the only purpose was to investigate sobriety, any observations made were the functional equivalent of physical sobriety tests. The Court rejected the Crown submission that the doctrine should be limited to actual physical sobriety testing. The Court drew this distinction at para. 69 before applying the principles to the facts of the case:

> 69 A helpful way to apply the rationale of these decisions might be for a court first to determine the investigating officer's focus or purpose at the roadside stop. If the evidence establishes that the officer formed the opinion from his or her initial interaction with the motorist, that it was necessary to remove the driver immediately from the road for safety reasons, then the investigator's observations of the driver made thereafter would be available at trial to prove guilt on a subsequent criminal charge: *Chand.* [2006] B.C.J. No. 882. However, if the evidence establishes that the purpose of the investigator's direction to a motorist to exit his vehicle was to determine whether grounds existed to make a breathalyzer demand, then the observational evidence obtained thereafter would not be available to prove the guilt for a criminal offence: *Milne.* This might be a fine distinction but I would suggest an intelligible one.
>
> …

> 71 …I agree with the summary conviction appeal judge that the only reasonable inference to be drawn from the officer's request of Mr. Visser to exit his vehicle was in order to assess whether there was a basis upon which the officer could make a breathalyzer demand, as in ***Milne***.
>
> 72 …In these circumstances, I am of the view that Const. Lempinen's observational evidence from the moment he directed Mr. Visser to exit his vehicle should not have been admitted at trial as there was no other purpose for its admission than to prove Mr. Visser's guilt on the impaired driving charge.

> 21 I have quoted at length from *Visser* because it seems clear to me that nothing in the judgment detracts from the comments of Moldaver J.A., as he then was, in *Milne* endorsing the admissibility of observational evidence obtained while the officer is carrying out other authorized activities. The focus is on the limited use that can be made of evidence that could not have been gathered without compelled direct participation of a motorist in response to an impaired driving investigation.

[92] I agree with the reasoning of the Court in ***Visser*** and ***Guillemin***. Cst. Anderson's intent in having Ms. Roberts exit her vehicle was solely for the purpose of continuing his impaired driving investigation. While there was nothing inappropriate in Cst. Anderson's actions in doing so, and he had no ulterior motive or purpose, I am satisfied that the evidence of his observations is not admissible as it was part of a compelled process, and were not observations made while Cst. Anderson was conducting other investigational duties.

[93] As such, the evidence of Cst. Anderson's observations of Ms. Roberts after she exited her vehicle at his request is excluded from trial.

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COZENS T.C.J.