Citation: *R. v. Vaillancourt,* 2023 YKTC 17

Date: 20230515
Docket: 21-00663
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REX

v.

RYAN ALLEN VAILLANCOURT

Appearances:
Leo Lane — Counsel for the Crown
Luke Faught — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Ryan Vaillancourt has been charged with having committed offences contrary to ss. 320.14(a) and (b) of the *Criminal Code*.

[2] The evidence at the trial was heard in a *voir dire*. RCMP officer Cst. Cook was the sole witness called on the *voir dire.*

[3] Cst. Cook testified that he was working the night shift in downtown Whitehorse on December 1, into the morning of December 2, 2021. At approximately 2:30 a.m., he observed an older Ford van, with a burnt-out taillight, that he believed turned wide on a curve.

[4] Cst. Cook, after speaking with the driver, Mr. Vaillancourt, obtained a “Fail” result on an approved screening device. Mr. Vaillancourt was arrested for impaired driving, handcuffed, and placed in the rear seat of the police cruiser. After waiting for a tow truck to arrive, Cst. Cook and Mr. Vaillancourt left the scene of the arrest, arriving at the Detachment at approximately 02:55:00.

[5] Cst. Cook attempted to put Mr. Vaillancourt in contact with legal counsel. He conducted a web search on his phone. It was his idea to do so. Cst. Cook located the Yukon Law Society website and let Mr. Vaillancourt look at the list of lawyers on the website. As Cst. Cook scrolled down the phone, Mr. Vaillancourt selected a lawyer, Sarah Bird.

[6] Cst. Cook made a total of five phone calls to three different phone numbers in an attempt to reach Ms. Bird. The first call to Ms. Bird was made at approximately 02:59:00, (according to the video-recording, which is within two minutes of the times in Cst. Cook’s notes).

[7] Cst. Parent arrived after the first of these calls. Mr. Vaillancourt’s handcuffs were removed at this time.

[8] A total of approximately 20 minutes passed between the first and the last phone call to counsel. The observation period started at approximately 03:30:00 – 03:35:00, which was approximately 30 to 35 minutes after the first call was made to Ms. Bird.

[9] The first breath sample was obtained at 03:58.00.

[10] Cst. Cook stated that he was concerned about the accuracy of the breath sample results if he waited a significant amount of time to try to obtain the breath samples from Mr. Vaillancourt.

[11] Mr. Vaillancourt had not spoken to any legal counsel prior to the breath samples being obtained. Mr. Vaillancourt had not indicated that he wished to speak to any counsel other than Ms. Bird, nor had he waived his right to speak to counsel.

[12] Excerpts from the audio recording of events at the RCMP Detachment are as follows:

> Q: (Cst. Cook) Would you like to speak with a lawyer?
>
> A: (Mr. Vaillancourt) Yep
>
> Q: Who would you like to speak with
>
> A: I don't have a personal lawyer
>
> Q: I can give you a list, or I can set you up with legal aid.
>
> A: I don't know, um…
>
> Q: I can give you a list with names to choose from, or set you up with the on-call legal aid lawyer
>
> A: Uh for tonight
>
> Q: Just for tonight.
>
> A: Um, give me a list.
>
> …
>
> A: My life is in your hands right now.
>
> Q: Just have a seat, I'll get you a lawyer list, okay?

[13] Cst. Cook conducts a web search on his phone.

Q: Alright, here you are. Looked on the law society directory page. And that's how you scroll.

A: What do you want me to…

Q: These are lawyer names. And I want you to choose one. Or chose to speak to legal aid.

A: I have no idea like.

Q: You have to choose one.

A: There's uh three or four?

Q: Keep scrolling if you don't like these names.

A: Scroll. They're all in Whitehorse, or…?

Q: These are all people that practice in the Yukon.

A: Scroll

Q: You can choose one of these names or you can speak with the on-call legal aid lawyer. Up to you.

A: I know it's up to me, but like how is it my choice if I have no idea who any of those people are?

Q: Honestly, I can see where you're coming from. However, it's up to you. So you can pick one at random.

A: So why is it my choice if I have no idea? I understand what you're doing right now, but I have no clue.

Q: OK I'm not going to search them up and get you their credentials. You got their name, their phone number, or you can speak with the on-call legal aid lawyer, which I can get on the phone in five minutes for you. Would you like to speak with Legal Aid?

A: How about Sarah Bird? I don't know.

Q: Sarah Bird, I'll try her.

A: I have no idea.

Q: You can always speak to Legal Aid if you like.

[14] Cst. Cook then dialed the phone number for Ms. Bird. He received a voice mail greeting and left his name, the name of Mr. Vaillancourt and a phone number where Ms. Bird could call back.

> Q: So, I'll wait ten minutes, if she doesn't call back, I'll call her again, if she doesn't call back, I'll have to ask you to choose a different lawyer.
>
> …
>
> Q: Want to keep going through the list, in case she doesn't answer?
>
> A: No, I'll wait for her.
>
> Q: We'll give it ten minutes.
>
> Q: …well I suspect it will take a while to get a lawyer.

[15] Cst. Cook then places another call to Ms. Bird, again receives a voice mail greeting and leaves a second message.

[16] Subsequently Cst. Cook engages in a discussion with Cst. Parent, who provides a different phone number for Ms. Bird. Cst. Cook calls this number, receives a voice mail greeting which provides him with a third phone number for Ms. Bird. He does not leave a message at this second phone number because he felt that it would not be useful, as he had been directed to a third phone number. Cst. Cook calls this third number as well and leaves a message. He calls this third number back shortly afterwards after realizing that he had forgotten to leave the area code.

[17] Cst. Cook advises Cst. Parent that the voice mail greeting from the third phone number indicates that Ms. Bird is out of the office from September to January 6. Neither Cst. Cook or Cst. Parent specifically told Mr. Vaillancourt this fact. Cst. Cook testified

that Mr. Vaillancourt could have overheard this, however, as they were only approximately three metres apart from each other, and in the same room.

[18] Cst. Cook then speaks to Mr. Vaillancourt again.

> Q: Hey Ryan, I left a few messages for Sarah, I think there were three different numbers I had to call, she hasn't called back yet, so we'll get started. Do you want to speak to a different lawyer?
>
> A: No, she's fine.
>
> Q: She's fine? OK, we'll get started with the process, and if she calls at anytime during that, I'll get you set up with that call, OK? That sound good?
>
> A: Yeah, as long as I can speak to her, yeah. Before we get too far into this.
>
> Q: Honestly, I understand where you're coming from, but it really depends on when she calls back. They're supposed to answer when we call them but it all depends on when she calls back, but we have to get started with the process.
>
> A: That's the lawyer I picked, so that's the one I wanna talk to.
>
> Q: If you want to pick a different one, you can.
>
> A: No, she's fine.
>
> Q: OK
>
> …
>
> Q2: (Cst. Parent) You wanted to talk to Sarah Bird, right?
>
> A: Yeah
>
> Q2: …but it has to be a lawyer of your choice. I can't make you change your mind. It seems like she's not phoning back. Do you want to try a different one? We can phone a different one, or you can call legal aid as well. We can give you a phone book, it's right here…if you want to try a different lawyer.
>
> A: Well, that's the lawyer I picked like you went through your phone…
>
> Q2: We tried two different numbers

Q: Three.

Q2: We tried three, yeah…Ultimately it's up to you, but we can't wait for her to call back forever, right? So.

A: No, I understand but do you want me to pick and choose until we find a lawyer, or?

Q2: No, I mean, if you want to talk with her, like, I can't force you to call a different lawyer, does that make sense?

A: No, 100%, but I was forced to find a lawyer, I picked her, you guys can't get a hold of her, so…how is that my fault?

Q2: It's not your fault, but if you want to look and try another one, you can.

A: No, I'll stay with her.

Q2: Ok

[19] Cst. Cook then begins the observation period, and Cst. Parent subsequently obtains two breath samples of 130 mg%.

Submissions of Counsel

[20] Counsel for Mr. Vaillancourt raises the following issues:

- Mr. Vaillancourt was not provided a reasonable opportunity to contact counsel of his choice.

[21] Counsel submits that the approximately 30 to 35 minute period between the first call to Ms. Bird and the commencement of the observation minute period was insufficient. Even if the observation period is included, there was no urgency that required the breath sample to be obtained without waiting longer to allow Mr. Vaillancourt the opportunity to speak with counsel of choice. Less than one and

one-half hours had passed from the time of the traffic stop and the obtaining of the first breath sample.

- Mr. Vaillancourt was not properly informed of his right to counsel.

[22] In particular, after Ms. Bird had not called back within approximately 30 minutes from the first message left for her, Mr. Vaillancourt was not told that he did not have to provide a breath sample until he had spoken to a lawyer, but that the police could still require him to do so after he had had a reasonable opportunity to do so, even if he had not yet spoken to a lawyer. Cst. Cook failed to inform Mr. Vaillancourt that he was required to try to find another lawyer after a reasonable period of time had passed. The effect was to lull Mr. Vaillancourt into a wrong understanding of his rights. The police usurped Mr. Vaillancourt's right to counsel with misinformation. He should have been told that he had to try another lawyer before the police begin the process of obtaining breath samples. A consultation during the breath sampling process if Ms. Bird called back was not what the s. 10(b) *Charter* right to counsel guaranteed him.

- The breach is a serious one with a significant impact upon Mr. Vaillancourt, and the evidence should be excluded pursuant to s. 24(2) of the *Charter*.

[23] Crown counsel submits that Mr. Vaillancourt was not reasonably diligent in exercising his right to legal counsel. In the event that the Court finds that there was a breach of Mr. Vaillancourt's s. 10(b) *Charter* right to counsel, the balancing of the ***Grant*** factors (***R.*** v. ***Grant***, 2009 SCC 32) should result in the evidence being admitted into trial.

Analysis

[24] The right for a detained or arrested individual (“Detainee”) to contact legal counsel, including counsel of choice, was discussed in ***R.*** v. ***Willier***, 2010 SCC 37. The Court stated at para. 35:

> 35. Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(*b*) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation: *Black*. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended: *R. v. Ross*, [1989] 1 S.C.R. 3; and *Black*. As Lamer J. emphasized in *Ross*, diligence must also accompany a detainee's exercise of the right to counsel of choice, at pp. 10-11:
>
> > Although an accused or detained person has the right to choose counsel, it must be noted that, as this Court said in *R. v. Tremblay*, [1987] 2 S.C.R. 435, a detainee must be reasonably diligent in the exercise of these rights and if he is not, the correlative duties imposed on the police and set out in *Manninen* are suspended. Reasonable diligence in the exercise of the right to choose one's counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy. Nevertheless, accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.

[25] The determination of what constitutes a reasonable opportunity for a Detainee to contact counsel is dependent on the circumstances that exist. In ***R.*** v. ***Wijesuriya***, 2020 ONSC 253, at paras. 75 and 76, the Court stated:

> 75 The facts and circumstances of each case are unique. The factors at play in what constitutes reasonable efforts in the circumstances to provide the detainee a "reasonable opportunity" to facilitate contact counsel of choice will require and be dependent on a consideration of all relevant circumstances including:
>
> a) The time of the detention;
>
> b) The type of day of the detention;
>
> c) The status and next steps of the investigation;
>
> d) The information provided by the detainee;
>
> e) The efforts of the police made to contact counsel of choice;
>
> f) The results of the police efforts; and
>
> g) The elapsed time since the detention.
>
> 76 The court applies a contextual analysis of all the relevant facts and circumstances against the steps reasonably available and taken by the police to facilitate the detainee with a "reasonable opportunity" to contact counsel of choice.

[26] In the case of ***R.*** v. ***Fern***, 2023 SKPC 27, Anand J. provides a brief overview of the s. 10(b) jurisprudence in paras. 32 to 34 as follows:

> 32 The Supreme Court has held that the right to counsel places a duty on the police that is both informational and, if the detainee invokes his or her right, implementational (*R v Bartle*, [1994] 3 SCR 173 at 203-204). In *R v Willier*, 2010 SCC 37 at para 29, [2010] 2 SCR 429 [*Willier*], the Court states as follows:
>
> Section 10(b) requires the police

(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise this right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

If detainees elect to exercise their rights to counsel by speaking to specific lawyers, section 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time will depend on the circumstances as a whole and may include factors such as the seriousness of the charge and urgency of the investigation (*Willier* at para 35). The police have not only a duty to provide a reasonable opportunity to contact counsel of choice, they must also facilitate that contact (*R v Traicheff*, 2010 ONCA 851 at paras 2-3 and *Willier* at para 41).

33 An examination of the case law governing the extent of the duty to facilitate contact makes clear that the investigating officer did breach Mr. Fern's section 10(b) *Charter* rights by not being reasonably diligent in connecting him with his counsel of choice. Where, as here, the police assume the responsibility of contacting the detainee's counsel of choice, rather than providing him or her with direct access to a phone or internet connection, they are obligated to pursue the detainee's constitutional right to access counsel as diligently as he or she would have done. In other words, in such a situation the police must take reasonable steps to contact counsel of choice. (See *R v Brouillette*, 2009 SKQB 422 at paras 8-13, 351 Sask R 295 [*Brouillette*] and *R v Edwards*, 2022 ONSC 3684 at para 74 [*Edwards*]).

34 In *Brouilette*, the summary conviction appeal court held that placing a single unsuccessful phone call outside of business hours to counsel of choice at his law firm number does not satisfy the reasonable steps requirement. The appeal court endorsed the conclusion of the trial judge that, having not received an answer, the least that the officer could have done was to take further steps to locate a home number for the lawyer.

> In *R v Maciel*, 2016 ONCJ 563 at paras 44-50, the Court sets out a number of reasonable steps an officer could take to try and connect a detainee with counsel of choice, including reviewing the lawyer's website for a cell phone number, after-hours phone number, or email address, or asking the detainee if he or she knows anyone who has a contact number for the desired lawyer.

[27] It must be kept in mind that the right to contact legal counsel is not a matter of form only; it is a matter of substance. Legal counsel is to be made available so that the Detainee, who is a position of criminal legal jeopardy, can choose to obtain legal advice that will assist them in understanding the jeopardy they face, and what their options are. This is clearly an access to justice issue.

[28] In the case of impaired driving, the fact that the Detainee may be legally required to provide a breath sample for analysis by an approved instrument, does not diminish the Detainee's s. 10(b) *Charter* rights.

[29] The fact that the Detainee has been advised of the availability of legal aid duty counsel by the police, does not deprive them of the right to attempt to contact counsel of choice, rather than legal aid duty counsel.

[30] The difficulty arises, and I appreciate that this is a difficulty for both the Detainee and the police, when the Detainee does not know any lawyers who can provide immediate legal assistance for them in their current circumstances, declines to speak to a legal aid duty lawyer, and then reaches out somewhat blindly, to try to choose a lawyer from a phone book, web-search, or other analogous means, whether on their own or with the assistance of the police. Oftentimes, a message is left at an office number, and then everyone waits for a call-back which, again, quite often does not

occur, even after leaving messages at every number for that lawyer that can be located.

[31] The police have to find the appropriate balance in such cases, between affording the Detainee a reasonable opportunity to contact counsel of choice, holding off on the process of obtaining breath samples from the Detainee until this has occurred, and fulfilling their duty to continue and complete their investigation. Finding this balance can difficult at times, in particular when the counsel who has been contacted has been left a message and is not returning the phone call as time continues to pass and the detention of the Detainee in police custody continues.

[32] The police officer has an obligation in such cases to remind the Detainee of the availability of the option of contacting other counsel, including legal aid duty counsel, in order to comply with their portion of the implementational aspect of the s. 10(b) *Charter* right. They have to do so, however, without steering the individual towards counsel, in particular legal aid duty counsel, in such a way that it denies the Detainee the reasonable opportunity to contact counsel of choice.

[33] It is not only the police who have an obligation; as stated in ***Willier***, the Detainee also has an obligation to be diligent in attempting to speak to legal counsel (see also ***R.*** v. ***McCrimmon***, 2010 SCC 36 at para. 17).

[34] I have presided over many impaired trials where applications alleging breaches of the Detainee's s. 10(b) *Charter* rights have been brought on the basis that the police officer has steered the Detainee towards legal aid duty counsel, and thus violated the Detainee's right to counsel of choice. There is, however, a distinction between simply

providing legal aid duty counsel information to the Detainee, in particular at times on those occasions where counsel of choice is not answering the phone and not returning messages, and doing so in a manner that violates the right to counsel of choice. Each situation, of course, must be decided on its own circumstances.

[35] From a purely common sense point of view, a Detainee seeking legal advice in an impaired driving investigation is unlikely to obtain it directly from a lawyer who practices exclusively in the area of real estate transactions, or family law, or corporate commercial law, etc. Even if such a lawyer was contacted, whether randomly from a directory, or because of a prior unrelated social or legal connection, the most such a lawyer would likely be able to do would be to refer the Detainee to a lawyer with sufficient expertise. That, of course, could still be useful information, assuming that the Detainee is able to speak with a lawyer.

[36] Frankly, however, contacting lawyers, and in particular non-criminal law practitioners, from a web-search, directory, or list, at an office number in the late evening or early morning hours, when most impaired driving investigations are taking place, leaving a message, and expecting a return call within a reasonable period of time, is just not, in my opinion, something that accords with the ability to exercise the substantive rights guaranteed in s. 10(b) of the *Charter*. It makes no practical sense. The need for immediate legal advice in a time-sensitive impaired driving investigation differs from trying to find a lawyer for a trial or other matter that is not as time-sensitive. The right to legal counsel means the right to get legal advice, from counsel who are able to provide it, at the time that you need it.

[37] This said, the law is clear that the police are not to inquire into or express an opinion as to the expertise or qualifications of the lawyer that a Detainee has chosen to speak to (***R.*** v. ***Does***, 2019 ONCJ 410, at para. 17). So while the police, especially in a small jurisdiction like the Yukon, may have knowledge of the particular lawyer a Detainee chooses to call, and what the lawyer's area of practice is, they are not able to impart this information to the Detainee.

[38] The right to speak with legal counsel is a critical and fundamental right, and it should not be given, effectively, "lip service"; otherwise, it is an illusion. A Detainee on an impaired driving investigation is entitled to have access to meaningful legal advice within a reasonable time, and the police are obliged to hold off seeking to obtain further evidence from the Detainee until this reasonable opportunity has been realized, while yet required to continue their investigation. However, the lines of the Detainee's right to counsel of choice and the police's obligation to continue to meet their investigative obligation converge at some point, and the police end up moving forward to obtain breath samples, whether the Detainee has been able to speak with legal counsel or not. The police decision to move forward then often becomes the subject of a s. 10(b) *Charter* challenge, which may or may not ultimately prove to be successful.

[39] It would perhaps certainly be helpful, in particular with respect to impaired driving investigations, if there was a directory or list available that was easily accessible to a Detainee, whether on their own or with the assistance of the police, that allows them to contact counsel who have indicated that criminal law is within their area of practice, and that they are, or are not, available for after hour calls. That would not preclude the Detainee from contacting other counsel, as such a complete list or

directory should also be available to them, but it would, at a minimum, facilitate the Detainee's ability to, if they choose to do so, obtain advice from a lawyer with expertise in the area of criminal law, and to do so within a reasonable time.

[40] There is an advantage to this, both for the Detainee and for the police. There is a legal obligation upon the police to detain an individual under investigation for as little time as is necessary. Having Detainees further detained for a substantial period of time, waiting for a call back from a lawyer that is unlikely to occur any time soon, thus increasing the length of their detention, is something that should be avoided if possible.

[41] It would also allow the Detainee to obtain meaningful and relevant legal assistance at the time when the Detainee initially needs it, and at a time when the Detainee is likely under considerable personal stress.

[42] There is a further benefit, in that the police would be able to more effectively discharge their responsibility to facilitate the Detainee's s. 10(b) *Charter* right to counsel, once counsel has been requested, and then continue their impaired driving investigation within a time frame that minimizes the time that the Detainee is detained in police custody and deprived of their liberty.

[43] This said, the reality is what it is, and I must consider this case on the evidence before me, and not on the basis of what I consider to be a process by which the s.10(b) *Charter* right to contact legal counsel could be more readily and efficiently handled, to the benefit of everyone involved.

Review of Facts for Legal Analysis

[44] In the present case, Mr. Vaillancourt had expressed a desire to speak with legal counsel. Cst. Cook, with the assistance of Cst. Parent, made a total of four phone calls to try to reach the lawyer, Ms. Bird, who Mr. Vaillancourt selected from the list shown to him (the fifth phone call simply being an informational area code add-on to the fourth). Mr. Vaillancourt did not have any personal knowledge of Ms. Bird, or of any particular lawyer.

[45] Three messages were left with Ms. Bird on two different phone numbers (three phone numbers were called but no message was left at the second one). The voicemail greeting from Ms. Bird at the last phone number stated that she was out of the office until January 6. Mr. Vaillancourt was not specifically told this.

[46] Shortly after the last phone call, and after Cst. Cook asks Mr. Vaillancourt if he wishes to call a different lawyer, and he declines to do so, Cst. Cook tells Mr. Vaillancourt that they were going to get started with the process [of obtaining breath samples]. He advises Mr. Vaillancourt that if Ms. Bird called back during this period, Mr. Vaillancourt would have an opportunity to speak with her, and Mr. Vaillancourt says that is fine as long as he gets to speak with Ms. Bird <u>before they got too far into the process</u>.

[47] Mr. Vaillancourt was reminded by Cst. Parent of the option of calling a different lawyer or a legal aid lawyer and told he could have a phone book if he wished to try a different lawyer. Mr. Vaillancourt asked whether the police wanted him to “pick and

choose until we find a lawyer". He was told by Cst. Parent that the police can't force him to. Mr. Vaillancourt then stated that he would stay with Ms. Bird.

[48] Cst. Cook began the observation period following this exchange, which was approximately 10 - 15 minutes after the last message was left with Ms. Bird. Prior to the observation period commencing, Cst. Parent briefly spoke to Mr. Vaillancourt regarding the details concerning both the observation period and his role as a breath technician. This included asking Mr. Vaillancourt whether he was "ill, injured, or on any medication".

[49] Following the observation period, breath samples were obtained from Mr. Vaillancourt. The first breath sample was obtained just under one hour from the time of the first phone call to Ms. Bird, and just under one and one-half hours from the time Cst. Cook initially detained Mr. Vaillancourt at roadside.

[50] The issues in this case are whether Cst. Cook provided Mr. Vaillancourt a reasonable opportunity to contact legal counsel of choice, holding off on the obtaining of the breath samples until Mr. Vaillancourt had done so, or, having been given this reasonable opportunity, Mr. Vaillancourt had not been diligent in trying to contact legal counsel, or whether Mr. Vaillancourt had unequivocally waived his right to speak with legal counsel.

Role of the Police

[51] I appreciate that the case law in some jurisdictions is divided on whether police officers should be directly involved in contacting legal counsel on behalf of a Detainee,

or should take a hands-off approach to contacting legal counsel, leaving the mechanics to the Detainee after ensuring that they have access to a telephone, and a means by which to search up the names and contact information for lawyers, whether a web-based search, phone book, or otherwise.

[52] In my opinion, leaving possibly intoxicated persons in varying degrees to figure this out on their own, in particular if they are not familiar with any lawyers, is potentially problematic. As a general proposition, I do not have any concerns about a police officer providing the Detainee general information as to how to access a list of lawyers and search for one, to take the phone number of counsel provided by the Detainee, to call this number, and to either leave a message or speak briefly to the lawyer to explain the circumstances of the detention or arrest, before allowing the Detainee the opportunity to speak with counsel in private.

[53] The same is true with respect to contacting legal aid duty counsel if that is the Detainee's choice. This is all, of course, on the basis that the police are simply facilitating the Detainee's s. 10(b) *Charter* right to speak to legal counsel, and not inserting themselves in a directive manner into the process of "choosing" the legal counsel the Detainee will speak to.

[54] Further, there is a potential benefit to the Detainee if the police officer can explain to counsel the legal situation the Detainee is in, and the jeopardy the Detainee faces, such as whether they would be released or detained for show cause, so that the advice legal counsel can provide the Detainee is useful and relevant to the situation. A police officer who handles, where appropriate or necessary, the mechanics associated

with facilitating the s. 10(b) *Charter* right to counsel, and provides relevant information to counsel as requested, is simply discharging their legal obligation to the Detainee to facilitate the implementational component of the s. 10(b) *Charter* right to counsel.

[55] As noted above in para. 33 of ***Fern***, Anand J. references case law which states that when:

> …the police assume the responsibility of contacting the detainee's counsel of choice, rather than providing him or her with direct access to a phone or internet connection, they are obligated to pursue the detainee's constitutional right to access counsel as diligently as he or she would have done. In other words, in such a situation the police must take reasonable steps to contact counsel of choice.

[56] This concept of the police being required to exercise the same diligence as the Detainee would is discussed in the case of ***R.*** v. ***Boe***, [2023] O.J. No. 870 (Ont. C.J.), at paras. 149 to 157. Graham J. notes that there is not agreement in the jurisprudence in Ontario on this notion of an expanded duty upon the police with respect to their duty to facilitate contact with counsel of choice.

[57] In ***R.*** v. ***Persaud***, in paras. 83 to 101, Akhtar J. rejected the notion of an “equal diligence” obligation upon the police, although stating in para. 95 that:

> 95 I agree with Ricchetti J. in *R. v. Wijesuriya*, 2020 ONSC 253, at para. 73, that when evaluating police conduct in a s. 10(b) context "the focus should be whether the police took reasonable steps in the circumstances to facilitate a reasonable opportunity for the detainee the right to speak with their counsel of choice". As pointed out, at para. 59:
>
> > The Supreme Court has not established one standard of police conduct if the detainee is given direct access to a phone (including the detainee's phone) and/or computer to use as they see fit and a different standard if the police take steps to facilitate the detainee's *Charter* right when the police

> choose to locate/dial the lawyer's telephone number on a police telephone. What constitutes reasonable steps by the police in the two situations will no doubt differ, but the standard remains that the police must take reasonable steps to provide the detainee a reasonable opportunity to speak with counsel of choice.

[58] I appreciate that it is hard to determine the extent to which any particular Detainee would have been diligent in trying to contact counsel of choice. However, from an objective perspective, and independent from how any particular Detainee may subjectively act, there is certainly a positive obligation on the police to take reasonable steps to allow the Detainee to contact counsel of choice, in particular when the police are controlling the mechanics of the process. If the Detainee is required to be reasonably diligent in obtaining legal advice, the police, who are in control of the situation, should also be required to take all reasonable steps to allow the Detainee to do so.

[59] In this case, insofar as Cst. Cook and Cst. Parent were involved in controlling the process of Mr. Vaillancourt's attempts to contact counsel of choice, I do not generally have any particular concerns about their actions, with one caveat. There is nothing that is indicative of any attempts to dissuade Mr. Vaillancourt from pursuing his right to counsel of choice, or to steer him towards any particular counsel, including legal aid duty counsel. Unlike some of the case law which has found only one phone call made by the police officer to be insufficient for the police officer to discharge this obligation, there were five phone calls made to three different phone numbers.

[60] The one caveat is that there is no evidence upon which I could be satisfied that Mr. Vaillancourt was aware that Ms. Bird was out of the office on the date that he was

trying to reach her. He was clearly not directly informed of this, and I find that it would be improper to assume that he overheard this, either from the voice mail greeting, or from when Cst. Cook was speaking with Cst. Parent. Objectively speaking, had Mr. Vaillancourt received this information, it is reasonable to think that he may possibly have tried to seek to contact different legal counsel, including legal aid duty counsel. If not, objectively speaking, he would run the risk of being found not to be diligent in exercising his right to counsel of choice.

[61] In my opinion, Mr. Vaillancourt should have been directly told that Ms. Bird's voice mail greeting said that she was out of the office, and then, based upon this additional information, asked if he now wished to contact a different lawyer, including legal aid duty counsel. Mr. Vaillancourt could then exercise his right to speak to legal counsel by choosing different counsel than Ms. Bird, although I would expect that if she called back, he would likely be given the opportunity to speak with her.

[62] It is apparent that there is no clear and unequivocal waiver by Mr. Vaillancourt of his desire and right to contact his counsel of choice, Ms. Bird, or to waive his right to speak to legal counsel. He had also made it clear that he wanted to speak to her before to getting too far into the breath sampling process. This was made clear in the following exchange:

> Q: …Do you want to speak to a different lawyer?
>
> A: No, she's fine.
>
> Q: She's fine? OK, we'll get started with the process, and if she calls at anytime during that, I'll get you set up with that call, OK? That sound good?

A: yeah, as long as I can speak to her, yeah. Before we get too far into this.

[63] The exchange with Cst. Parent that followed did not result in Mr. Vaillancourt resiling from his position that he wanted to speak to Ms. Bird before getting too far into the process, which was the obtaining of breath samples from him.

[64] So, what was Cst. Cook expected to do? The law is clear that a Detainee has the right to a reasonable opportunity to contact legal counsel, and that the police are only required to hold off on the obtaining of breath samples until the individual has exercised this right, or is not diligently attempting to do so within a reasonable time. Once this reasonable opportunity has been provided, and a reasonable period of time to contact legal counsel has passed, the police can obtain breath samples. To reiterate what was stated in ***R.*** v. ***Tremblay***, [1987] 2 S.C.R. 435, at para. 9:

> Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this Court's decision in R. v. Manninen, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath.

[65] In ***R.*** v. ***Smith***, [1989] 2 S.C.R. 368, after referencing in para. 32 the above passage from ***Tremblay***, the Court in para. 37 stated that the need for a Detainee to be diligent in exercising his or her right to consult with counsel is to prevent the Detainee from "…delaying needlessly and with impunity the investigation and, in certain cases, to allow for an important piece of evidence to be lost, destroyed, or for whatever reason, made impossible to obtain."

[66] I note the submission of counsel for Mr. Vaillancourt that the focus of Cst. Cook when he decided to commence the breath sampling process, was primarily founded, at least on the evidence, on his concern about the need to do so in order to prevent the evidence of the breath samples being compromised. Cst. Cook did not expressly state that it was because he had concluded that Mr. Vaillancourt had waived his right to consult with counsel, or that he was not being diligent in attempting to speak with legal counsel.

[67] This submission is borne out on the evidence, and blurs somewhat the foundation for Cst. Cook's decision to proceed with the breath sampling process. It appears that it was more because of Cst. Cook's concern about effect of the passing of time on the reliability of the breath samples, and not because he had concluded that Mr. Vaillancourt was not being diligent in pursuing legal counsel, and a reasonable amount of time for him to do so had passed.

[68] Counsel for Mr. Vaillancourt submits that Cst. Cook should have further stated to Mr. Vaillancourt that, as they had waited approximately 30 minutes and Ms. Bird had not called back, that Mr. Vaillancourt was <u>expected</u> to call someone else, before a reasonable time to wait for her to call had passed. If Mr. Vaillancourt did not, then, when the police felt that a reasonable time had passed, they would consider Mr. Vaillancourt's s. 10(b) *Charter* right to be suspended, and the police would then proceed to obtain the breath samples.

[69] I agree with counsel. Simply doing this one simple thing would have made it very clear to Mr. Vaillancourt that the police were drawing a "line in the sand", so to

speak, with respect to the time afforded him to speak to counsel of choice, and letting him know that if he did not choose to exercise the options provided to him to try to contact other counsel, including legal aid duty counsel, the police were going to obtain breath samples from him without him being able to speak to legal counsel at all, unless Ms. Bird called back within the window afforded by the observation period.

[70] To the extent that there was any misunderstanding or ambiguity in Mr. Vaillancourt's mind, with respect to what his s. 10(b) *Charter* right to speak with counsel at that time was, as linked to the police's ability to proceed to require him to undergo the breath sampling procedure, this simple step would have cleared it up. This is a much better process than just moving ahead and taking the breath samples in any event, based upon Cst. Cook's belief that he needed, and was able, to do so.

[71] I appreciate that there can be no specific timeline of general application as to what constitutes providing a reasonable opportunity for a Detainee to contact counsel of choice, in particular when there is an ongoing delay between the initial contact(s) with counsel and messages left, and a call back from counsel. Each case is to be decided on its own circumstances.

[72] In ***R.*** v. ***Rizvi***, 2023 ONSC 1443, Woollcombe J, on summary conviction appeal of an acquittal, dealt with the submission of Crown counsel that the Court should draw a bright line as to "…how much time the police need to wait between leaving a message with counsel of choice and insisting that a detainee either speak to duty counsel or provide a breath sample" (para. 2).

[73] Woollcombe J., in rejecting Crown's counsel's request for the creation of a "bright line rule" to let police officers know just how long they must allow a Detainee to speak with counsel of choice before proceeding to obtain breath samples, cited para. 35 of ***Willier*** and other jurisprudence, stating:

> 32 In my view there are compelling reasons not to accede to the Crown request for a "bright line rule".
>
> **...**
>
> 35 The Supreme Court of Canada's unambiguous direction is that what amounts to a reasonable opportunity for a detainee to contact counsel of choice is fact and context specific and so must be flexible, in accordance with the particular circumstances. It is reasonableness, rather than rigidity, that grounds the analysis. In my view, it is antithetical to this approach for the Court to attempt set out precise timelines that would be reasonable in all circumstances of detentions for drinking and driving offences. The Crown's request for me to do so flies in the face of clear Supreme Court of Canada direction. If specific timelines are to be rigidly set, it falls to Parliament. Certainly, in my opinion, it is not for the summary conviction appeal court to do so, particularly when this specific issue was never litigated at trial.
>
> 36 I observe that when tasked with determining whether a detainee had a reasonable opportunity to speak with counsel of choice, other courts have recognized the wisdom of a flexible standard of reasonableness. Particularly noteworthy is *R. v. Wijesuriya,* 2020 ONSC 253, a summary conviction appeal court decision in which Ricchetti J. concluded, at para.79:
>
> > In my view, there is good reason the law requires the police to take reasonable steps to afford the detainee a "reasonable opportunity" to speak with counsel of choice without specifying exactly or setting minimum standards of what police steps and conduct satisfied a "reasonable opportunity" in any particular case. The standard described by the Supreme Court of "reasonable opportunity" provides the much-needed flexibility in any particular case.
>
> **...**
>
> 38 See also: *R. v. Persaud,* 2020 ONSC 3413 at para. 95; *Jhite,* at para. 68. These cases reinforce that it would be ill-advised to set a fixed time period for what is reasonable in all circumstances. In summary, there are

> compelling reasons not to draw the bright line rule sought by the Crown and I decline to do so.

[74] Woollcombe J. found that the police officer making duty counsel available was not an attempt to steer the accused away from counsel of choice towards duty counsel. That would have been wrong (para. 50). This was also not a waiver of the right to counsel of choice, but rather a decision by the accused to speak to duty counsel, without foregoing his right to speak to counsel of choice if they called back, therefore not requiring a ***Prosper*** warning (paras. 44 to 49) (***R.*** v. ***Prosper***, [1994] 3 S.C.R. 236). Woollcombe J. found that the trial judge had erred in considering that the issue of the doctrine of waiver applied.

[75] Woollcombe J. further considered the obligation on the police officer to obtain a breath sample "as soon as practicable" in light of the timelines at play in the case. The first breath sample was obtained 44 minutes after the call had been placed to the first lawyer. Woollcombe J. stated as follows:

> 66 The onus was on the respondent to establish a violation of his *Charter* right. In my view, the trial judge's finding of a s. 10(b) breach because the police did not wait longer for counsel of choice to call back was in error. I reach this view because:
>
> * The police had attempted to contact not one, but two different counsel of choice, neither of whom had returned the call;
>
> * These events took place during the night, between 2:49 and 3:33 a.m.;
>
> * The respondent was told that if counsel of choice returned the call, he would be afforded an opportunity to speak with them;
>
> * When counsel of choice had not called back between 2:49 a.m. when the first call was made, and 3:17 a.m. when

duty counsel called back (28 minutes later), the respondent accepted the offer made by the police to speak to duty counsel. He had a conversation with duty counsel and indicated that he understood the advice he received;

* There is no evidence that the respondent was pressured or coerced in any way to speak to duty counsel. The only evidence is that he decided to speak to duty counsel after a reasonable and practical suggestion was made by the police that his counsel might not call back. He did not testify and so there is no evidence that he subjectively felt like he had no option but to speak to duty counsel: *R. v. Bukin* 2021 ONSC 3347 at paras. 72-73. Nor does the record support such a finding in this case, an important factor that distinguishes the circumstances here from those in other cases such cases as *R. v. Vernon*, at para. 56; *R. v. Doherty*, 2022 ONSC 5546 at paras. 33-40;

* A total of 44 minutes passed from the time the first call was placed to counsel of choice until the first breath sample was taken: *Wijesuriya*, at para. 88; *R. v. Wilson*, 2016 ONCJ 25; *Bukin* at paras. 9-14;

* There is a statutory obligation on the police to take the breath sample "as soon as practicable", which means "within a reasonably prompt time under the circumstances": *R. v. Vanderbruggen*, 208 OAC 379 (C.A.) at para. 12; *Wijesuriya,* at para. 89;

* By the time the first sample was taken at 3:33 a.m., the police were already at the point where waiting longer might jeopardize the Crown's case. The evidence suggested that the collision might have been as early as 1:00 a.m. Any fair assessment of the evidence meant that the Crown could prove only that the driving was more than two hours earlier. Over the more than two hours that had elapsed since the respondent had been driving, his blood alcohol concentration was declining. While the prosecution had available to it the statutory read back provisions in s. 320.31(4), and could prosecute the case without a toxicologist, the passage of more than two hours since the driving could be proven had to be considered and the impact of the read-back provision was highly relevant.

[76] In ***Rizvi***, the accused was able to speak with legal counsel prior to the breath samples being obtained, unlike what occurred in Mr. Vaillancourt's case. This was considered by Woollcombe J. to have been a voluntary choice made by the accused, that did not preclude the right of the accused to speak with counsel of choice should counsel return the call.

[77] In the ***Fern*** case, it would appear that Anand J. addresses situations which involve essentially an "abandonment" of previously chosen counsel of choice by an accused, still within what would be considered to be a reasonable time to wait for counsel of choice to call back. In such a case, Anand J. finds that a warning along the lines of the ***Prosper*** warning is required in order to ensure that there has been a clear and unequivocal "abandonment" by the Detainee to seek to speak to the Detainee's previous counsel of choice, and to now instead speak to different counsel. As he states in para. 47:

> Consequently, I conclude that courts in Saskatchewan should now recognize a new informational obligation under section 10(b) of the *Charter*. This new informational obligation on the police arises where the detainee has clearly expressed his or her desire to speak to a particular lawyer who cannot be immediately contacted, and where, within a reasonable waiting time, the police choose to present the detainee with the idea of speaking to duty counsel or another lawyer. In such a situation, police must tell the detainee that he or she is also entitled to wait a reasonable time to connect with counsel of choice and that the police have a duty to hold off on questioning or attempting to elicit evidence from the detainee during this time.

[78] ***Prosper*** dealt with a decision by the Detainee to forego speaking to counsel at all, and does not apply to a decision by the Detainee to speak to counsel other than the original counsel of choice. In ***Rizvi***, Woollcombe J. found that the Detainee chose to speak to other counsel, in other words voluntarily changing their counsel of choice, and

thus no ***Prosper*** warning was required. In ***Fern***, Anand J. finds that such a warning is required to ensure, I expect, that the Detainee's decision to change counsel is a voluntary and fully informed decision, free from actual, or the appearance of, police pressure.

[79] From a ***Charter***-protection point of view, it would seem that there is some benefit in proceeding as Anand J. suggests, to provide that extra layer of assurance that the Detainee is making a voluntary decision to speak to counsel other than the originally chosen counsel. Whether this approach becomes a legal requirement will likely await a decision by a higher court on a different day.

[80] In the present case, the situation is that Mr. Vaillancourt had indicated a desire to speak to a particular counsel of choice, Ms. Bird, attempts had been made, unsuccessfully, to put him in contact with this counsel, he was not advised that Ms. Bird had left a voice mail message indicating that she was away from the office at this particular time, Cst. Cook said that he was going to get started with "the process", and Mr. Vaillancourt said "okay" but he wants to talk to his lawyer before they get too far along in the process. Cst. Parent then becomes further involved. I repeat his exchange with Mr. Vaillancourt:

> Q2: …but it has to be a lawyer of your choice. I can't make you change your mind. It seems like she's not phoning back. Do you want to try a different one? We can phone a different one, or you can call legal aid as well. We can give you a phone book, it's right here…if you want to try a different lawyer.
>
> A: Well, that's the lawyer I picked like you went through your phone…
>
> Q2: We tried two different numbers

Q: three.

Q2: we tried three, yeah…Ultimately it's up to you, but we can't wait for her to call back forever, right? So.

A: No, I understand but do you want me to pick and choose until we find a lawyer, or?

Q2: No, I mean, if you want to talk with her, like, I can't force you to call a different lawyer, does that make sense?

A: No, 100%, but I was forced to find a lawyer, I picked her, you guys can't get a hold of her, so…how is that my fault?

Q2: It's not your fault, but if you want to look and try another one, you can.

A: No, I'll stay with her.

Q2: Ok

[81] Cst. Parent was correct in what he told Mr. Vaillancourt at the outset of this exchange, and later when he says that he can't force Mr. Vaillancourt to call a different lawyer. However, while perhaps not being able to force Mr. Vaillancourt to call a different lawyer, in my opinion, if the police were going to require him to provide breath samples without him speaking to legal counsel, on the basis that a reasonable opportunity to do so had passed, this information as to their intentions should have been clearly communicated to Mr. Vaillancourt. If he had been told that, while the police could not force him to choose a different lawyer, they were about to take breath samples from him regardless, maybe the opportunity to speak immediately to legal aid duty counsel before the police did so would have been considered by Mr. Vaillancourt in this context, rather than him waiting for a call back from the out-of-the office Ms. Bird.

[82] Certainly, Mr. Vaillancourt should have been told that Ms. Bird's voice mail greeting said that she was out of the office at this time.

[83] Additionally, the problem with telling Mr. Vaillancourt that the police can't wait forever for Ms. Bird to call back, does not provide Mr. Vaillancourt any clarity with respect to what will be happening next. What does "forever" mean? When does "forever" end; 15 minutes, 30 minutes, an hour?

[84] In this case, based on the police moving directly into the observation period, the explanation of the breath sampling process, and then followed by the obtaining of the breath samples, "forever" basically meant that the police were not going to wait any longer.

[85] So, without Mr. Vaillancourt speaking to legal counsel, the breath samples were taken. While Mr. Vaillancourt declined other offers to speak to different counsel, including legal aid duty counsel, I am concerned that he did so without a clear understanding that he would end up providing breath samples without speaking to the counsel he had chosen, Ms. Bird. In my opinion, this is a significant problem with respect to the s. 10(b) *Charter* right.

[86] The following comment in ***R.*** v. ***Berger***, 2012 ABCA 189, is somewhat relevant:

> 17 It may be that the officer took a sample because the appellant was prepared to give him one, but that does not equate to a waiver of his right to counsel in these circumstances. Rather, it suggests that the officer seized an opportunity to gather evidence when it presented itself, even where a *Charter* right had to be breached to obtain that evidence.

[87] The s. 10(b) *Charter* right to counsel is not intended to be a game of strategy, like chess, or some form of dance between the police, the Detainee, legal counsel, and the law; it is a substantive right that everyone involved in the process should do their best to ensure is provided clearly and with certainty.

[88] I appreciate the sentiment expressed by Mr. Vaillancourt, after being told at the outset that he had the right to contact counsel of choice, when he stated:

> A: I know it's up to me, but like how is it my choice if I have no idea who any of those people are?
>
> …
>
> A: So why is it my choice if I have no idea? I understand what you're doing right now, but I have no clue.

[89] Importantly, ensuring that the process is clear enough that Detainees have more than even a clue, is essential to ensuring the Detainee's s. 10(b) *Charter* right to counsel is fully complied with. The Detainee should be clearly informed of their *Charter* right to counsel, of how to exercise this right, of their obligation to be diligent in doing so, and of the implications once a reasonable period of time has passed, in particular the fact that breath samples are going to be obtained by the police.

[90] In my opinion, before a police officer proceeds to obtain breath samples from a Detainee who has not been able to speak with counsel of choice, and, in particular, is waiting for counsel to return a phone call, it would be advisable if the officer did the following:

1. Advise the Detainee that, in the officer's opinion, time is running out, and indicate how much longer the officer is prepared to wait before the officer intends to proceed with obtaining the breath samples;

2. Advise the Detainee, prior to the end of the reasonable period of time that the police officer has determined that the Detainee is entitled to wait to consult with counsel of choice, of the option of attempting to contact another lawyer, including the immediate availability of legal aid duty counsel;

3. If the Detainee indicates agreement to chose another lawyer, instead of their initially chosen counsel of choice, including legal aid duty counsel, then first remind the Detainee of the police's obligation to provide them a reasonable amount of time to contact counsel, and of the obligation to hold off on obtaining breath samples until that reasonable opportunity has been provided. This situation arises when the Detainee is still within the window of time where it would be appropriate to wait longer to see if counsel of choice will call back.

4. In those situations where, in the police officer's opinion, the Detainee has exhausted the window of time where it would be appropriate to wait to see if counsel of choice will call back, the Detainee should be advised of this, and told that the officer intends to proceed with the obtaining of breath samples. The Detainee should then be offered the opportunity to speak to immediately available legal aid duty counsel.

The opportunity to contact other counsel should not be extended by the police officer, unless that counsel is immediately available, as this would simply continue the cycle of waiting for a lawyer call-back, and result in the further detention of the Detainee. Where the Detainee, without waiving the right to speak to counsel of choice should counsel call back, agrees to speak with immediately available legal aid duty counsel, then the police officer will have discharged their s. 10(b) *Charter* responsibility. In my opinion, once the officer has decided to move forward to obtain breath samples without the Detainee having spoken to counsel, deciding to provide them an opportunity to contact immediately available legal aid duty counsel is not steering them to counsel; it is giving the Detainee a likely last-ditch chance to speak to counsel. This is preferable than the Detainee not speaking to counsel at all. Of course, the decision by the officer to provide the Detainee a deadline *per se* will, of course, still need to have been a reasonable decision in the circumstances, something that, if challenged, a judge will consider and assess; and

5. If the police have provided the Detainee with clear information as to the time line they are no longer prepared to wait past, after which they will commence the breath sampling process, and have provided the Detainee one last opportunity to speak to immediately available legal aid duty counsel, and the Detainee has declined to do so, then the police officer can proceed with the process of obtaining of breath

> samples. If required to do so, the police officer can provide testimony and evidence in court as to the basis for their decision to proceed in this manner without the Detainee speaking with counsel beforehand.

[91] This suggested course of action provides guidance to police officers that would impart sufficient information to the Detainee, and thus allow the Detainee to decide whether they wish to at least have the opportunity to speak to other counsel, or to legal aid duty counsel, rather than the originally chosen private counsel that they have attempted, unsuccessfully, so far, to contact, including immediately before the police obtain breath samples from the Detainee.

[92] What the timeline is, of course, depends on the circumstances of each case. There is no specific timeline that can be said to fit all cases. Whether the timeline the police decide upon is reasonable may, of course, ultimately be scrutinized by a judge, based upon the specific circumstances of the case, regardless. However, by following this fairly simple procedure, a police officer, acting reasonably, will likely find that their actions are subjected to less negative scrutiny by the courts on a s. 10(b) *Charter* application. Some Detainees will likely be able to speak to counsel and obtain the advice that is sought, and not end up providing breath samples without having done so.

[93] In this case, I am concerned that Mr. Vaillancourt was required to provide breath samples without having spoken to legal counsel, despite having expressed a desire to do so. Mr. Vaillancourt was not told that the counsel he was waiting to speak to had a voice mail greeting that stated she was out of the office for an extended period of time, including the date on which Mr. Vaillancourt was attempting to reach her. Before

placing an expectation upon Mr. Vaillancourt to, as stated in ***Willier***, exercise his right to counsel by calling another lawyer, then, in my opinion, it was incumbent upon Cst. Cook or Cst. Parent to clearly advise him of Ms. Bird's out-of-the-office message.

[94] Cst. Cook's concerns about the passing of time did not justify proceeding to take breath samples without Mr. Vaillancourt having further opportunity to speak with legal counsel. It was still well within the time limits established in the *Code*. In my opinion, the taking of the breath samples without Mr. Vaillancourt speaking to legal counsel was premature in the circumstances.

[95] I find that Mr. Vaillancourt exercised a reasonable level of diligence in the circumstances, in particular given his apparent uncertainty about how to go about the process of speaking to legal counsel, and what his and the police's role in this process was.

[96] Based upon the evidence, I am satisfied that Mr. Vaillancourt was not properly afforded the implementational component of his s. 10(b) *Charter* right to counsel, and, as such, I find that his s. 10(b) *Charter* rights were breached.

Section 24(2) Analysis

[97] 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.

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

[99] The Court in ***R.*** v. ***Sakharevych***, 2017 ONCJ 669, referring to the decision in ***Grant***, 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 our justice system and our democracy.

[100] The three factors as set out in ***Grant*** are as follows:

1. the seriousness of the breach;
2. the impact of the breach on the *Charter*-protected interests of the individual; and
3. society's interest on an adjudication of the case on its merits.

The Seriousness of the Breach

[101] As stated in ***R.*** v. ***McColman***, 2023 SCC 8, at para. 57:

> 57 The first line of inquiry focuses on the extent to which the state conduct at issue deviates from the rule of law. As this Court stated in *Grant*, at para. 72, this line of inquiry "requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct". Or as this Court phrased it in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22: "Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?"

[102] I find that the breach in this case is a serious one. The *Charter* right to counsel is critical to the administration of justice. As I stated in para. 61 of ***R.*** v. ***Roberts***, 2019 YKTC 2:

> 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.

[103] Mr. Vaillancourt, clearly, was unsure of the process involved in speaking to legal counsel. He never waived the right to speak to legal counsel. Although indicating that he did not want to get too far into the process [of providing breath samples] without speaking to the lawyer he had chosen, he ended up providing breath samples without speaking to any legal counsel. At times, it was clear that he was looking for advice on how to do so from Cst. Cook and Cst. Parent.

[104] There was no bad faith on the part of Cst.'s Cook and Parent in this case. They made several efforts to contact Ms. Bird. They did not try to steer Mr. Vaillancourt towards any particular legal counsel. However, the lack of bad faith on their part does not equate to good faith. As stated in ***Berger***, 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.

[105] While Cst.'s Cook and Parent did not deliberately, or with improper intentions, interfere with Mr. Vaillancourt's s. 10(b) *Charter* right to speak with legal counsel, however, by proceeding to obtain breath samples from Mr. Vaillancourt without him speaking to legal counsel, or him expressly waiving the right to do so, in circumstances where it cannot be said that Mr. Vaillancourt was not being diligent in his efforts to contact legal counsel, particularly given his lack of understanding of the process, they ended up doing so.

[106] As I stated, I find this to be a serious breach that favours exclusion of the evidence.

The Impact of the Breach on the Charter-protected Interests of the Mr. Vaillancourt

[107] On this branch of the test, the Court in ***McColman*** stated in para. 66:

> 66 The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the

> public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para. 76.

[108] The fact that Mr. Vaillancourt was legally required to provide a breath sample, or otherwise face a charge for refusing to provide a breath sample, does not mean that there was a minimal or negligible impact on his *Charter*-protected interests.

[109] As stated in ***Berger*** in paras. 24 and 25:

> 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.

[110] It is hard to measure the impact upon Mr. Vaillancourt of being arrested and handcuffed, providing breath samples and being charged as a result, without him having spoken to a lawyer, despite his apparent belief that he would have the opportunity to do so, and his expressed desire not to get too far into the process without first speaking to a lawyer. Not surprisingly, he simply ended up going along

with what the police officers were doing and requiring of him. I would think that this would be a somewhat confusing and uncertain set of events.

[111] I find that the s. 10(b) *Charter* breach had a significant impact upon Mr. Vaillancourt's *Charter*-protected interests, and that this branch of the test also favours exclusion of the evidence.

Society's Interest on an Adjudication of the Case on its Merits

[112] The third branch of the ***Grant*** inquiry was explained in ***McColman***, in paras. 69 and 70 as follows:

> 69 The third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry requires courts to consider both the negative impact of admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence: *Grant*, at para. 79. In each case, "it is the long-term repute of the administration of justice that must be assessed": *Harrison*, at para. 36.
>
> 70 Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this Court has recognized that the final factor can cut both ways: *Grant*, at paras. 81 and 83-84. While the public has a heightened interest in a determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach: para. 84.

[113] Failing to admit the evidence of the breath test results will prevent the Crown from successfully prosecuting this case.

[114] Impaired driving is a very serious societal problem. The tragic consequences of impaired driving leaves a legacy of destroyed lives, with a devastating ripple effect on families and communities. Legislative changes through the recent years reflect

society’s desire and intent to address the offence of impaired driving with increasingly severe sanctions for offenders. Courts have recognized the importance of imposing sanctions which reflect the concerns of society, through increasingly severe sentences.

[115] Not surprisingly, this third factor generally tends to militate in favour of the inclusion of the evidence, although it cannot be lost that letting in evidence that accompanies a failure by the police to ensure that, in their exercise of powers, they have respected the *Charter*-protected interests of individuals, can have a broader and longer-term impact on society’s perception of the administration of justice. Truth is important; so is Justice. The long-term interests of justice may be greater served by excluding the evidence in an impaired simpliciter case, with the possibility of encouraging greater *Charter* compliance in a future case, one that may involve an impaired offence where death and/or bodily harm has resulted.

Impact upon the Public Confidence and the Administration of Justice

[116] The balancing of the ***Grant*** factors requires that both a short and long-term view view of the justice system, and the public's perception of it, be taken into account.

[117] As stated in ***Grant*** at para. 84: "Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus". At para. 86 it is made clear that there is no "overarching rule" or "mathematical precision" governing how a trial judge is to balance the three factors.

[118] The *Charter*-protected interests of individuals need to be recognized by the remedies that are granted when these interests are breached. If police actions fail to

recognize these *Charter*-protected interests, yet the evidence that is obtained is routinely admitted into the trial, then this undermines the confidence can society have that their *Charter*-protected interests truly matter. Neither should evidence be routinely excluded, however, as each case must be assessed on its own circumstances.

[119] In ***R.*** v. ***Thompson***, 2020 ONCA 264, the Court stated the following:

> 106 The final step under the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision: *Harrison*, at para. 36.
>
> 107 If, however, the first two inquiries together make a strong case for exclusion, the third inquiry "will seldom if ever tip the balance in favour of admissibility": *Le*, at para. 142; *Paterson*, at para. 56; and *McSweeney*, at para. 81.

[120] Impaired driving trials where counsel are bringing *Charter* applications arising from police investigative actions are becoming quite commonplace in the Yukon. I have commented on more than a few occasions about the deficiencies in the police investigative procedures in impaired driving cases here. To the extent that there is a somewhat of a pattern of *Charter* breaches in impaired driving cases in the Yukon, this is factor that I can take into account in assessing the impact of this breach upon public confidence in the administration of justice (***R.*** v. ***O'Brien***, 2023 ONCA 197, at para. 25).

[121] While s. 24(2) *Charter* remedies are not to be used to punish police officers for breaching the *Charter*-protected interests of individuals, the exclusion of evidence is a remedy to be applied when merited. I am satisfied that this is one of those cases.

[122] With power comes responsibility. Our police officers, quite necessarily, have been granted considerable power. This power intrudes, again quite necessarily, into the privacy and liberty interests of individuals. It is to be expected in a fair and just society that police officers carry out their investigative duties in a manner that complies with the *Charter*-protected interests that Canadian society has deemed sufficiently important to merit constitutional protection.

[123] While it would be unfair to expect perfection from the police, due to the often dynamic nature of policing, and the varied contexts in which the police are involved, it is reasonable to expect that long-standing *Charter* rights, such as s. 10(b) *Charter* rights, are not overridden for investigative purposes, where there is no urgent or exigent reason for doing so.

[124] In this case, I am satisfied that a balancing of the ***Grant*** factors requires that the evidence of the breath test results be excluded.

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COZENS C.J.T.C.