Citation: *R. v. Rumbolt,* 2024 YKTC 24

Date: 20240828
Docket: 23-00357
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

AUSTIN DAVID RUMBOLT

Appearances:

Leo Lane	Counsel for the Crown
Christiana Lavidas	Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Austin David Rumbolt is before the Court on a three-count Information alleging that on or about July 29, 2023, he committed two offences contrary to s. 320.14(2) of the *Criminal Code* for causing bodily harm to another person while committing offences contrary to ss. 320.14(1)(a) and 320.14(1)(b), and one offence contrary to s. 320.16(2) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Mr. Rumbolt alleging violations contrary to ss. 7 and 10(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of

the *Constitution Act, 1982* (the "*Charter*"). The parties agreed to proceed with a blended *voir dire*.

[3] The allegations are that on July 29, 2023, at approximately 1:38 a.m., Whitehorse RCMP received a call from an individual reporting that there was an accident in the subdivision of Copper Ridge in Whitehorse, Yukon, involving a blue truck with branches protruding from the back that left the scene, leaving an individual injured with a possible broken leg. RCMP responded with patrols of the area and at approximately 1:50 a.m., Cst. Beglaw located a truck matching the general description of the vehicle that left the scene of the accident nearby.

[4] Cst. Beglaw advised dispatch that he located a truck he believed to be the suspect vehicle with a male driver and a female passenger. He approached the vehicle and identified the driver as Mr. Rumbolt. After a brief interaction, Cst. Beglaw read the s. 320.27 *Criminal Code* demand to Mr. Rumbolt requiring a breath sample in an approved screening device ("ASD"). The ASD test was conducted immediately thereafter, resulting in a fail. The investigation continued and Mr. Rumbolt provided samples of his breath pursuant to a s. 320.28 *Criminal Code* demand.

[5] The Crown called three witnesses, all RCMP officers, on the *voir dire* and the defence did not present any evidence. At the conclusion of the *voir dire*, Mr. Rumbolt abandoned his s. 7 *Charter* argument.

[6] Mr. Rumbolt has asserted five distinct violations of his s. 10(b) *Charter* rights. Section 10(b) of the *Charter* states:

10. Everyone has the right on arrest or detention:

    b. to retain and instruct counsel without delay and to be informed of that right;

[7] Each distinct breach asserted by Mr. Rumbolt will be addressed as follows:

1. Did the RCMP attempt to elicit evidence from Mr. Rumbolt regarding the motor vehicle collision prior to advising him of his right to counsel?

2. Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by not advising him of his right to counsel immediately after his arrest?

3. Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by denying him access to a trusted third party?

4. Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by failing to obtain a valid waiver from him?

5. Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by failing to provide him with adequate resources to pursue his right to counsel?

[8] The onus is upon the person asserting a violation of his or her s. 10(b) *Charter* right to establish that the right as guaranteed has been infringed or denied.

Did the RCMP attempt to elicit evidence from Mr. Rumbolt regarding the motor vehicle collision prior to advising him of his right to counsel?

[9] Mr. Rumbolt asserts that while he was detained for the impaired driving investigation, Cst. Beglaw attempted to elicit evidence from him regarding the motor vehicle collision investigation, prior to providing him with his s. 10(b) *Charter* rights.

While the s. 10(b) *Charter* rights were suspended for the limited purpose of the impaired driving investigation, he submits that the RCMP cannot take this opportunity to elicit evidence from him in relation to a separate investigation.

[10] The exchange in question between Cst. Beglaw and Mr. Rumbolt was shortly after Cst. Beglaw arrived at the driver side door of the vehicle and engaged Mr. Rumbolt in conversation. The Watchguard audio and video recording from the RCMP police vehicle driven by Cst. Beglaw was filed by the Crown. The Watchguard has a portable microphone that Cst. Beglaw had on him during the investigation. It also has a timestamp on the video.

[11] Cst. Beglaw engaged Mr. Rumbolt and immediately advised him that the purpose of the stop was in relation to a motor vehicle matching the description of his truck having been in a collision nearby and fleeing the scene. Cst. Beglaw then asked Mr. Rumbolt for his driver's licence, insurance, and registration.

[12] Cst. Beglaw asked Mr. Rumbolt: "have you had anything to drink tonight, sir." Mr. Rumbolt responded that he had, stating that his last drink was about two hours prior.

[13] During the exchange between Cst. Beglaw and Mr. Rumbolt, it is difficult to understand the words uttered by Mr. Rumbolt given his proximity to Cst. Beglaw and the portable microphone. However, he can next be heard spontaneously uttering words consistent with "the guy pull in and..."

[14] Cst. Beglaw said “the guy pulled in. What were you saying sir, are you going to finish that sentence?” Mr. Rumbolt responded with words consistent with “He pulled in front man, and I didn't know what to do.” In response to this statement, Cst. Beglaw said “ok” and then continued with the impaired driving investigation.

[15] This is the exchange that Mr. Rumbolt asserts violated his s. 10(b) *Charter* rights. After this point in the investigation, Mr. Rumbolt complied with an ASD demand, which was promptly followed by his arrest for impaired driving.

[16] Cst. Beglaw was not questioned in cross-examination about the exchange with Mr. Rumbolt giving rise to this specific allegation of a s. 10(b) *Charter* breach, and there is an absence of evidence before the Court regarding the purpose for asking the question. Mr. Rumbolt did not provide evidence on this application and there is a lack of evidence from him regarding his exact words, and what they pertained to.

[17] I am unable to conclude on the audio alone that Cst. Beglaw was questioning Mr. Rumbolt for the purpose of investigating a motor vehicle collision. Mr. Rumbolt made a spontaneous utterance and Cst. Beglaw asked if he wished to finish his sentence.

[18] Defence relied on *R. v. Ndaye*, 2019 ONSC 4967, to support this argument. In *Ndaye* there was a four-minute period of questioning “about the collision and forming his grounds for arrest” (*Ndaye* at para. 62). The circumstances are clearly distinguishable from the case before this Court of clarifying a spontaneous utterance of the accused with one simple question, then moving on with the impaired driving investigation immediately after hearing the response.

[19] The Court in *Ndaye*, at para. 73, clarified that questioning about the motor vehicle accident itself may be permissible, depending on the purpose of the questioning:

> In these circumstances, the only police investigative conduct by Cst. Ali that went beyond what was permitted by the authority of *R. v. Orbanski*; *R. v. Elias* was the brief questioning of the appellant by Cst. Ali about the motor vehicle collision - assuming that this questioning was not undertaken by Cst. Ali to try to "assess whether the driver's speech [was] slurred" as part of his assessment of the appellant's level of impairment." See *R. v. Orbanski*; *R. v. Elias*, at para. 48; R. *v. Ratelle*, at p. 74. Accordingly, as I have already noted, this violation of s. 10(b) of the *Charter*, as found by the trial judge, was a very minor one.

[20] In the case before this Court, the officer was not given the opportunity to explain the purpose of the question in cross-examination and that evidence is not before the Court.

[21] I find that there is insufficient evidence before the Court to conclude that Cst. Beglaw was questioning Mr. Rumbolt about the motor vehicle accident, and further, that if he was intending to elicit evidence about the motor vehicle accident, that it was not for the purpose of assessing sobriety. I find that Mr. Rumbolt's s. 10(b) *Charter* rights were not breached by this exchange.

Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by not advising him of his right to counsel immediately after his arrest?

[22] Mr. Rumbolt was detained for the purpose of an impaired driving investigation up to the moment of his arrest, and he agrees that Cst. Beglaw was not required to inform him of his s. 10(b) *Charter* rights immediately upon his detention as the impaired driving investigation unfolded.

[23] Mr. Rumbolt asserts that his s. 10(b) *Charter* rights were breached when Cst. Beglaw failed to inform him of those rights without delay at the time of his arrest at 1:58 a.m. Cst. Beglaw did not inform him of his rights until 2:07 a.m., nine minutes after the arrest.

[24] The Supreme Court of Canada assessed the meaning of "without delay" in s. 10(b) of the *Charter* in *R. v. Suberu*, 2009 SCC 33, at paras. 41 and 42:

> 41 A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10*(b)* seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10*(b)* right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.
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> 42 To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10*(b)* creates an ill-defined and unworkable test of the application of the s. 10*(b)* right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10*(b)*. Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

[25] Mr. Rumbolt was rearrested and informed of his s. 10(b) *Charter* rights by Cst. Beglaw nine minutes after the initial arrest. In accordance with the decision in *Suberu*, an analysis of the purpose of the delay is required.

[26] The Ontario Court of Justice decision of *R. v. Foster*, 2017 ONCJ 624, addressed the delay of informing an accused person of their s. 10(b) *Charter* rights at paras. 24 to 28:

> 24 There is also no doubt that s. 10(b) obligates the police to provide a detainee with rights to counsel "without delay". In *Suberu*, [2009] 2 S.C.R. 460, at para. 42, the Supreme Court expanded on the meaning of "without delay", and made it clear it means immediately. This immediacy requirement is subject only to concerns for officer or public safety.
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> 25 I have carefully reviewed the cases relied upon by defence, and the cases Schreck J. cites within them. The majority of those cases can be easily distinguished from this case. In some instances (i.e. *Kraus*, 2015 ONSC 2769 *Grewal*, 2015 ONCJ 691, *Lam*, 2014 ONSC 3538, *Volkov*, [2014] O.J. No. 5346 (Ont. C.J.), the pre-rights delay far exceeded the four minutes in this case. In other instances (i.e. *Soomal*, 2014 ONCJ 220, *Sandhu*, 2017 ONCJ 226, and *Ahmad*, 2015 ONCJ 620), the arresting officers performed purely administrative tasks before getting around to furnishing rights to counsel. In my view, handcuffing and searching a detainee incident to arrest, are not administrative tasks.
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> ...
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> 27 Recently, in *R. v. Rossi*, 2017 ONCJ 443, Henschel J. considered whether a seven-minute delay between arrest and the provision of rights to counsel breached Mr. Rossi's 10(b) rights. The arresting officer spent those seven minutes searching Mr. Rossi incident to his arrest, ensuring that Mr. Rossi was settled in the rear of the cruiser and situated in such a way that he could properly hear, and retrieving Mr. Rossi's cell phone at his request. While acknowledging the obligation of the officer to confer rights to counsel immediately upon detention, Henschel J. also acknowledged the coinciding need to take certain safety precautions prior to providing those rights. Henschel J. concluded that notwithstanding the seven-minute delay, Mr. Rossi's s. 10(b) rights were not violated.
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> 28 I have come to a similar conclusion in this case. Having regard to all of the circumstances, I have not been persuaded that the four-minutes which elapsed between arrest and rights to counsel, ran afoul of *Suberu's* immediacy requirement, and it follows that I have not been persuaded that it violated Mr. Foster's s. 10(b) rights.

[27] At the time of the arrest Mr. Rumbolt was seated in his vehicle. He was required to exit the vehicle after which he was placed in handcuffs, escorted to the police vehicle,

searched, and placed in the rear seat of the police vehicle. He was seated in the police vehicle approximately two minutes and thirty seconds after the arrest. Applying *Suberu* and *Foster*, the time lapse from the arrest to placing Mr. Rumbolt into the police vehicle was for officer safety reasons and did not violate his s. 10(b) *Charter* rights.

[28] Once Mr. Rumbolt was seated in the police vehicle, there were periods of time during which Cst. Beglaw was writing notes. Crown counsel argued that this Court should not be critical of an officer pausing to take contemporaneous notes given the importance of proper note-taking in the investigative process. This issue was addressed in some detail by this Court in *R. v. Stuart*, 2022 YKTC 46, at paras. 24 to 26:

> 24 For her part, Crown counsel notes the relatively brief time required to see to the majority of administrative or logistical tasks and the reasonableness of each, noting, in particular, that securing the truck was seemingly in response to an earlier concern raised by Mr. Stuart about the open window. In addition, with respect to the time the officer took to update his notes before reading the right to counsel, Crown counsel asks that I consider the importance of the obligation on police officers to take contemporaneous notes, citing para. 65 of *Wood v. Schaeffer*, 2013 SCC 71, out of the Supreme Court of Canada...
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> 25 The difficulty I have with the Crown's position is that the test for assessing delay in informing an accused of their right to counsel is not whether the activities were reasonable, brief in duration, or important police obligations like note-taking. As noted in the aforementioned passage from *Suberu*, the Supreme Court of Canada has made it clear, in multiple cases, that officer or public safety are the only justifiable reasons to delay informing an accused of the right to counsel...
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> 26 None of the activities falling within the administrative or logistical category in this case relate in any way to public or officer safety. This is not to suggest that Cst. MacNeil ought not to have done the various things listed. The issue is one of priority. Per the Supreme Court of Canada, the right to counsel, and being advised thereof, arises immediately upon detention. Hence, informing an accused of their right to counsel must take priority over any administrative or logistical tasks and must be done first, subject only to questions of officer or public safety.

[29] The Ontario Court of Justice in *R. v. Danyliuk*, [2024] O.J. No. 844 (Ont. C.J.), came to a similar conclusion at paras. 115 and 116:

> 115 Once the defendant was secured in the car, PC Mayer continued to delay the s. 10(b) informational component. This confirmed that the preceding delay had no root in safety concerns. With the scene and the defendant firmly under control, PC Mayer went onto various administrative, organizational tasks. He did not feel they were unreasonably lengthy tasks, so he did them before telling the defendant about her s. 10(b) right.
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> 116 The mindset that led to this delay, and that led to similar delay in cases like *R. v. Bogdanic* and *R. v. Davis*, must change. *Suberu* was decided fifteen years ago. Rights to counsel must be provided immediately upon arrest or detention. Not as soon as practicable. Not after short administrative tasks. Immediately.

[30] I reject the position of the Crown regarding the delay to the informational component of s. 10(b) *Charter* rights being justified if done while the police officer is taking contemporaneous notes. At least to the extent that, as established in the facts before me, the activity extends into minutes, not seconds.

[31] Cst. Beglaw's note-taking and an analysis of the other activities during the period of delay is required. In doing so, I must consider the time taken to conduct a background check on Mr. Rumbolt, as addressed by the Ontario Court of Justice in *R. v. Singh*, 2017 ONCJ 386, at paras. 18 and 19:

> 18 I am familiar with these cases. I do not disagree with the legal principles relied on by Justice Schreck; however, I am not satisfied that the application of those principles to the facts of this case, support a finding of a s.10 breach. In *Ahmed*, the arresting officer chose to brief other officers with respect to the investigation and conduct an inventory search of Mr. Ahmed's car rather than providing Mr. Ahmed with his rights to counsel immediately upon arrest. In *Sandhu*, the officer having arrested the defendant, left her in his cruiser, while he interviewed other witnesses and then prepared his notes.

> 19 In this case, there was a delay of 5 minutes between the time of arrest and the provision of rights to counsel. The arresting officer explained that during those 5 minutes, he conducted a pat down search of Mr. Singh and handcuffed him, prior to placing him in the cruiser, as well as running Mr. Singh on the police computer. Although I believe it would have been preferable to have provided Mr. Singh with his rights to counsel before checking his background on the computer, I am not satisfied that that particular delay is such as to constitute a breach of his s.10 rights.

[32] Once Mr. Rumbolt was placed in the police vehicle, Cst. Beglaw proceeded to update his notes outside the vehicle for one minute and fifteen seconds. He then entered the police vehicle as Cst. Cairns informed him that the offence Mr. Rumbolt is facing should be "impaired causing". In the police vehicle he continued taking notes for another minute. The total time spent note-taking to this point was two minutes and 15 seconds.

[33] Cst. Beglaw next asked Mr. Rumbolt to confirm his full name, his date of birth, and then requested dispatch to run a background check. It was important for Cst. Beglaw to know who he was dealing with, and I find that the process of confirming Mr. Rumbolt's name, the correct spelling of his name, and date of birth, which took about one minute, did not constitute a breach of his s.10 *Charter* rights.

[34] The background check on Mr. Rumbolt could have waited until after he advised Mr. Rumbolt of his s. 10(b) *Charter* rights despite being appropriate policing activity. Unlike the circumstances in *Singh*, where the police check was conducted on a computer in the police vehicle immediately following a search of Mr. Singh, there is intervening time in this case spent by Cst. Beglaw updating his notes. I find in the circumstances of this case that the steps to request the background check, which took 55 seconds, were not urgent and were administrative in nature.

[35] Cst. Beglaw then continued with his notes, during which time Mr. Rumbolt engaged him in brief conversation. This lasted for approximately 50 seconds.

[36] The background check was then provided over the radio by dispatch, after which Cst. Beglaw can be overheard "thinking out loud" as he formulates the charge, considering possible infractions to both the *Motor Vehicles Act*, RSY 2002, c. 153, and the *Criminal Code*, for Mr. Rumbolt. He then re-arrested Mr. Rumbolt for "impaired operation causing bodily harm" followed immediately by reading him the s. 10(b) *Charter* informational component. The time spent sorting out what charge Mr. Rumbolt would be facing was to ensure he understood his current jeopardy. Cst. Beglaw can clearly be overheard thinking this through out loud, and I find that this process was necessary and appropriate in the circumstances amounting to justifiable delay. This time amounts to the remaining one minute and 30 seconds.

[37] In total, I find that Cst. Beglaw spent four minutes conducting administrative tasks that could have waited until after he informed Mr. Rumbolt of his s. 10(b) *Charter* rights, constituting a breach of those rights.

Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by denying him access to a trusted third party?

[38] Mr. Rumbolt asserts that his s. 10(b) *Charter* rights were breached by the RCMP because they failed to let him speak with his wife to obtain contact information for a lawyer.

[39] The right of an accused person to contact a third party to exercise their s. 10(b) *Charter* rights is well settled, as set out by the Supreme Court of Yukon in *R. v. McNeilly* (1988), 3 Y.R. 214, as follows:

> Thus, in the Tremblay case the Supreme Court of Canada was prepared to accept that it is not unusual for a person who has been detained to telephone his or her spouse in the exercise of his s. 10(b) rights to retain and instruct counsel without delay. Similarly, in the Playford case the Ontario Court of Appeal recognized that the contacting of counsel by a person in custody may be accomplished by telephoning a friend or speaking to a lawyer's secretary. Indeed, the realities of arrest suggest that it is only logical that the detainee may require the assistance of a friend, a relative, a spouse, a lawyer's secretary, an articled law student - in short, some other person - to contact a lawyer. ...

[40] The Alberta Court of Queen's Bench decision *R. v. Hughes*, 2014 ABQB 166, addressed the right to contact a third party while exercising the s. 10(b) *Charter* right at paras. 11 and 12:

> 11 [5] This case is distinguishable from ***Top***, since it was found as a fact by the trial judge that the request by the appellant was a legitimate request to contact a third party conduit (at para 14). A detainee may use a third party conduit, such as a family member, in the course of exercising his or her right to counsel: ***R. v. Tremblay***, [1987] 2 S.C.R. 435 and ***R. v. Oester*** (1989), 97 AR 389, 17 M.V.R. (2d) 46 (ABQB). The refusal of the officer to respond or seek clarification of the question from the appellant had the effect of misleading the appellant as to who he could call. As a result, the officer interfered with the appellant's right to counsel of choice.
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> 12 [6] The reasoning of the trial judge is reproduced at paragraph 16 of the decision:
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>> I have found that after the accused indicated he understood his rights and in response to a question concerning a free lawyer or any other lawyer, the accused asked about his wife. This was a legitimate inquiry based on the accused's testimony as to the reason why he wished to contact his wife. Constable Radford ignored this question. From his evidence it is clear that Constable Radford did not believe an individual had the right to contact a third party. The

> Constable believed that a detained individual could only contact a lawyer. As pointed out in ***R. v. Willier***, 2008 ABCA 126 (Alta. C.A.), a police officer does not have a duty to provide legal advice, but by not responding to Mr. Hughes' question concerning contacting his wife, the constable provided misleading information to the accused. As noted in ***Willier*** at paragraph 40, a detained person has a right to counsel of his choice. A police officer must allow this choice even when it involves contacting a third party. This is not the case of a detained individual who makes no request as in ***Willier***. Mr. Hughes made the request and received no answer from the constable leading the accused to believe that he had only a choice to contact "any lawyer" or a "free lawyer" [aff'd 2010 SCC 37, [2010] 2 S.C.R. 429].

[41] There are several instances on the recording of the interactions between Cst. Beglaw and Mr. Rumbolt where Mr. Rumbolt references his wife. These references include statements early in the investigation which include:

> "I just lost my marriage tonight"; and
>
> "My wife is a child protection social worker here. I fucked up."

[42] Later, at the detachment, there is an audio recording of the attempts by the RCMP to get Mr. Rumbolt to understand his s. 10(b) *Charter* rights, for close to 30 minutes, including the following exchange approximately 10 minutes into the discussion:

> Cst. Beglaw: You have the right to call a lawyer, the police are not allowed to take a statement from you or collect any other evidence like those breath samples that I mentioned until you have either talked to a lawyer or decided not to talk to a lawyer, like if you do or don't want to. And that is what we're clarifying here.

[43] Mr. Rumbolt speaks over Cst. Beglaw towards the end of the explanation, which is indiscernible, in response to which Cst. Beglaw continues:

Cst. Beglaw: I can't give you the answer to that question. It is a question I am posing to you and it's your decision, Austin. And I just need a yes or no from you. So, do you understand?

A: Yes.

[44] Shortly after this exchange, and some more indiscernible comments by Mr. Rumbolt, the exchange continues:

Cst. Beglaw: Do you want to call a lawyer?

A: Well, I can't call one now.

Cst. Beglaw: You can call one now.

A: I don't know any lawyers, man, I don't know...

Cst. Beglaw: So, Austin, if you don't know lawyers, I have a list of lawyers that we can go over or I.

A: My wife has a list of lawyers.

Cst. Beglaw: Ok. This isn't about your wife, Austin. This is about you and your access to a lawyer right now.

A: Yeah . . . I don't know what to say to you, I don't know what to say to you. I fucked up. I'm not going to fucking lie to you.

Cst. Beglaw: Ok. Its not about that. I just need to know if you want to talk to a lawyer or not.

A: (Indiscernible)

Cst. Beglaw: Do you want to talk to a lawyer or not?

A: I don't know what to say to him . . .(indiscernible).

Cst. Beglaw: Austin, it's not about what you talk to the lawyer about, it's if you want to call one or not?

A: I fucked up man, I fucked up. You gotta, no matter what you do in life, deal with consequences. Nobody's fucking perfect and, uh, we all make fucking choices in our life, and I fucked up.

Cst. Beglaw: Ok, but that's not what I'm trying to.

> A: No, no, I fucked up . . . You don't have to try to question me no more.
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> Cst. Beglaw: I'm not trying to question you. Do you want to call a lawyer, yes or no?
>
> A: What the fuck good is it to call a lawyer, I fucked up.
>
> Cst. Beglaw: It's just an option. If you want to then great, if you don't want to.
>
> A: I don't know what to say to a lawyer, I never talked to one in my life, b'y.

[45] This exchange continues with Mr. Rumbolt seemingly switching from wanting to speak to a lawyer to not wanting to speak to a lawyer. At one point he said he cannot afford a lawyer, then when advised that there is a free lawyer available, he talked about having friends with lots of money. In another exchange when saying he would speak to a lawyer, he clarifies that he will talk to a lawyer "on Monday".

[46] He also stated, "I want my wife to take care of it, she knows the angles and all that"; "My wife could talk to them for me"; and "I want my wife to deal with it".

[47] Cst. Beglaw confirmed that at the time of the investigation he did not understand that Mr. Rumbolt could access a third party as part of implementing his s. 10(b) *Charter* rights. However, in the circumstances before him, he believed that Mr. Rumbolt wanted to speak to his wife because "his marriage was over" and wanted to repair the relationship. He formed the opinion that the statement, if considered a request, was not for assistance with contacting counsel.

[48] Cst. Moore, the breath technician in attendance to deal with Mr. Rumbolt, offered her assistance and attempted to explain the right to counsel to Mr. Rumbolt. That exchange included:

> A: “I want to talk to my wife before I talk to a lawyer.”
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> Cst. Moore: So you can’t talk to your wife, but if you want us to call your wife we can to ask her who your lawyer is, if that’s what you want?
>
> A: I’ve never had a lawyer.
>
> Cst. Moore: Ok, so...
>
> A: I never got in trouble girl...I fucked up.

[49] Cst. Moore continued to try and explain the s. 10(b) *Charter* rights to Mr. Rumbolt, but he did not answer her, instead making comments like “what would you say to a lawyer” and “I fucked up”.

[50] After the unsuccessful attempt by Cst. Moore to get a response from Mr. Rumbolt about whether he wished to speak with a lawyer, Cst. Beglaw again engaged with Mr. Rumbolt, with no further discernible reference by Mr. Rumbolt to his wife.

[51] While it is concerning that Cst. Beglaw was unaware of the right, in the appropriate circumstances, for Mr. Rumbolt to call his wife, it is clear that Cst. Moore was aware and offered to contact his wife for him. Mr. Rumbolt did not take the opportunity to have the assistance from his wife with the information for a lawyer.

[52] The absence of evidence from Mr. Rumbolt regarding these exchanges and how it impacted him at the time leaves only the words exchanged as set out regarding the mention of his wife. There is the additional interpretation of the statement by Cst. Beglaw in evidence, wherein he explained that he did not understand Mr. Rumbolt to be asking to speak to his wife in relation to exercising his s. 10(b) *Charter* rights.

[53] Mr. Rumbolt at no time asked to speak to his wife in relation to exercising his s. 10(b) *Charter* rights, and I cannot infer from the recordings what, if anything, the impact was on him regarding the initial exchange about his wife having a list of lawyers. In this context, I find the following helpful from the Ontario Court of Justice in *R. v. Frook*, 2008 ONCJ 622, at para. 14:

> With respect to the Section 10(b) complaint, due diligence is a problem for the accused. He was asked on three separate occasions, by two different police officers, as to whether or not he wanted to exercise his rights to counsel, and on each occasion he said no without any explanation. If I accept his evidence that he expressed to the officers that he wanted to call his mother, I would find that does not help his position for two reasons. The first is that calling his mother was consistent with his initial concern about looking after his cattle. He did not say to the police officers anything about calling his mother for the purpose of obtaining assistance with respect to finding out the name of the family lawyer. The police are not mind-readers and could have no ability to know what was in his mind with respect to private counsel; he has to say something. ...

[54] I agree with the statement that the police are not mind-readers and find that Mr. Rumbolt was required to assert his request clearly, if that is, in fact, what he was attempting to do. Again, unlike in *Frook*, I do not have the benefit of evidence from Mr. Rumbolt on this point. Instead, he would have me draw inferences from a recording and certain utterances he made about his wife.

[55] Two separate police officers tried to assist Mr. Rumbolt in understanding his s. 10(b) *Charter* rights, and one offered to call his wife to obtain the contact information for his lawyer. On this point, *Frook* is of assistance at para. 16:

> In the context of Section 10(b) rights, it seems to me that individuals who are adults and suffer from no obvious emotional or developmental difficulties, simply have to stand up on their own and say what it is they mean. This, Mr. Frook did not do, and in my view he did not show due

> diligence with respect to indicating to the police what he wanted to do about counsel. These officers were considerate of this young man and were very careful to make multiple inquiries about whether he wanted to call a lawyer, and he failed on three occasions to give any indication what he wanted to do even after he says he was alive to the question of calling the family lawyer. In my view, the defence has not established the Section 10(b) breach.

[56] Mr. Rumbolt failed to state clearly to the officer that he wished to speak to his wife for assistance in contacting a lawyer. I find that Mr. Rumbolt has failed to meet the burden of proof to establish that there was a breach of his s. 10(b) *Charter* rights by failing to permit him to contact his wife.

Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by failing to obtain a valid waiver from him?

[57] Mr. Rumbolt asserts that his s. 10(b) *Charter* rights were breached by the RCMP because they failed to obtain a valid waiver of the right to counsel from him before proceeding to administer the breathalyzer tests.

[58] This issue was addressed by this Court in *R. v. Stuart*, 2022 YKTC 46, at paras. 36 to 39:

> 36 The Crown is quite right in terms of when a *Prosper* warning is required. The warning lets an accused person know that police must "hold off" on eliciting evidence from the accused until such time as the accused has exercised their right to counsel or waived their right. As noted by Cozens J. in *R. v. Roberts*, 2019 YKTC 2, "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".
>
> 37 However, in my view, the issue in this case is not whether the *Prosper* warning was required but whether there was a valid waiver of the right to counsel by Mr. Stuart before the breath samples were taken. While choosing to read the warning is a relevant consideration in assessing whether Cst. MacNeil did enough to meet his obligations under s. 10(b) of the *Charter*, the mere reading of the *Prosper* warning by a police officer

> does not in and of itself validate a waiver of the right to counsel by an accused person.
>
> 38 The Crown is also correct in her assertion that there is a corresponding obligation on an accused to be diligent in exercising their right to counsel. As noted by the Supreme Court of Canada in *R. v. Bartle*, [1994] 3 S.C.R. 173, at para. 18:
>
>> Importantly, the right to counsel under s. 10(b) is not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duty on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended.
>
> 39 Thus, there are three factors for consideration in assessing whether Mr. Stuart waived his right to counsel: whether Mr. Stuart, by words or conduct, waived his right to counsel; whether Mr. Stuart was diligent in exercising his right; and whether Cst. MacNeil met his obligations in ensuring that Mr. Stuart was advised of, and understood, his right to counsel.

[59] After the exchange between Cst. Moore and Mr. Rumbolt, Cst. Beglaw reengaged with Mr. Rumbolt about whether he wanted to speak to a lawyer. At approximately 24 minutes into the recording Mr. Rumbolt appears to respond with a definitive “no” to calling a lawyer followed by:

> Cst. Beglaw: You have the right to call a lawyer, the police are not allowed to take a statement from you or collect any other evidence from you until you have either talked to a lawyer or decided not to, like you just said to me, do you understand? You’re nodding, is that a yes?
>
> A: Yes, I fucked up b’y, that’s my life.
>
> Cst. Beglaw: Do you want to call a lawyer?
>
> A: For what? Because I fucked up?
>
> Cst. Beglaw: So, earlier, you said yes, then a couple moments ago...
>
> A: I don’t want to call a lawyer, no.
>
> Cst. Beglaw: You said you don’t want to call a lawyer?

> A: no, not ... (indiscernible)
>
> Cst. Beglaw: So, I just need a very concise answer, that's why I have to repeat this. Do you want to call a lawyer, yes or no?
>
> A: No.
>
> Cst. Beglaw: No, got it.
>
> A: I'm sorry man.
>
> Cst. Beglaw: That's ok, that's why we go through and clarify.

[60] Throughout the almost 30-minute exchange between Cst. Beglaw and Mr. Rumbolt, and between Cst. Moore and Mr. Rumbolt, there are numerous instances when Mr. Rumbolt purports to waive his right to counsel. It is important to note that Cst. Beglaw would not accept the response without clarifying the intent with Mr. Rumbolt. Even when he clearly received the response "I don't want to call a lawyer, no", Cst. Beglaw again sought confirmation from Mr. Rumbolt before accepting his response.

[61] Cst. Beglaw was very careful and patient with Mr. Rumbolt in the process of explaining his s. 10(b) *Charter* rights, offering to assist Mr. Rumbolt in doing so, and giving many opportunities to Mr. Rumbolt to answer in the affirmative.

[62] Addressing the first factor as set out in *Stuart*, did Mr. Rumbolt explicitly or implicitly waive his right to counsel, I am of the view that there was an explicit waiver. After considerable effort on the part of Cst. Beglaw, as well as the attempts by Cst. Moore, to make sure Mr. Rumbolt understood his rights, including reading the *Prosper* warning on multiple occasions, Mr. Rumbolt gave a clear and explicit response that he did not want to speak to a lawyer.

[63] The second question is whether Mr. Rumbolt was diligent in exercising his right, which clearly, he was not. He was repeatedly advised of his s. 10(b) *Charter* rights, offered assistance in doing so, and he did not comply. Mr. Rumbolt continuously talked over the officers and interrupted them, but the officers remained calm and continued in their attempts to explain the rights to Mr. Rumbolt.

[64] The final question is whether the police officers met their obligation in ensuring that Mr. Rumbolt was advised of, and understood, his right to counsel. Cst. Beglaw spent almost 30 minutes trying to ensure that Mr. Rumbolt understood his s. 10(b) *Charter* rights, including assistance by Cst. Moore to do so and was very careful not to accept a waiver from Mr. Rumbolt without ensuring that it was clear. I am satisfied that Cst. Beglaw did all that is required of a police officer to ensure that Mr. Rumbolt understood his rights.

[65] I find that Mr. Rumbolt has failed to meet the burden of proof to establish that there was a breach of his s. 10(b) *Charter* rights in relation to the validity of the waiver of the right to counsel before proceeding to collect evidence.

Did the RCMP breach Mr. Rumbolt's s. 10(b) *Charter* rights by failing to provide him with adequate resources to pursue his right to counsel?

[66] Mr. Rumbolt asserts that his s. 10(b) *Charter* rights were breached by the RCMP because they failed to acknowledge that he had certain disabilities that prevented him from picking his counsel of choice. The RCMP knew about his limitations and should have made efforts to accommodate him.

[67] Throughout his interactions with Cst. Beglaw, Mr. Rumbolt made statements about not being an educated man, having dyslexia, not being able to read or write, and not understanding what to say to a lawyer. There is no evidence before the Court from Mr. Rumbolt to verify any of these utterances from the recordings.

[68] Cst. Beglaw was cross-examined about the utterance regarding dyslexia, and it is clear from the exchange that he has significant knowledge of the condition and that he did not consider it to be a concern in his dealings with Mr. Rumbolt. Without evidence to contradict that of Cst. Beglaw, I accept his evidence and find that specific steps were not necessary in this case to assist Mr. Rumbolt based on the utterance.

[69] There is also insufficient evidence before me to conclude that Mr. Rumbolt is unable to read or write. The Crown argued that they should have had the opportunity to cross-examine Mr. Rumbolt on this assertion if it was going to be relied on by the Court, and that it should be given little weight. I find that I am unable to conclude that Mr. Rumbolt cannot read or write, or that his ability to exercise his s. 10(b) *Charter* rights were impeded by such an inability.

[70] Cst. Beglaw clearly offered to assist Mr. Rumbolt should he wish to speak with a lawyer, and Mr. Rumbolt did not accept the assistance. He stated to Mr. Rumbolt that "I have a list of lawyers *that we can go over.*" This is an example of how Cst. Beglaw was trying to help Mr. Rumbolt through the process of implementing his s. 10(b) *Charter* rights.

[71] The Alberta Court of King's Bench considered the ability of an accused person to understand their s. 10(b) *Charter* rights in *R. v. Campbell*, 2022 ABKB 663, at para. 62:

> The "special circumstances" relied upon by the accused in the present case are, to borrow the words used in ***Bartle***, "a known or obvious mental disability" and the Guardianship Order that was issued to address that disability. These circumstances bring into play the "operating mind" test established in ***R v Whittle***, [1994] 2 SCR 914. In that case, Sopinka J. held that a detainee's ability to understand his or her s. 10(b) rights is governed by the "operating mind" test, which is equivalent to the test for capacity to stand trial:
>
> > 49 The operating mind test, which is an aspect of the confessions rule, includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he or she is saying and what is said. This includes the ability to understand a caution that the evidence can be used against the accused.
> >
> > 50 The same standard applies with respect to the right to silence in determining whether the accused has the mental capacity to make an active choice.
> >
> > 51 In exercising the right to counsel or waiving the right, the accused must possess the limited cognitive capacity that is required for fitness to stand trial. The accused must be capable of communicating with counsel to instruct counsel, and understand the function of counsel and that he or she can dispense with counsel even if this is not in the accused's best interests. It is not necessary that the accused possess analytical ability. The level of cognitive ability is the same as that required with respect to the confession rule and the right to silence. The accused must have the mental capacity of an operating mind as outlined above.

[72] The utterances on an audio recording by Mr. Rumbolt that he is “uneducated” and “does not understand” fall far below the threshold necessary to conclude that he did not have an operating mind and the mental capacity to make the necessary choices regarding his s. 10(b) *Charter* rights.

[73] I find that Mr. Rumbolt has failed to meet the burden of proof to establish that there was a breach of his s. 10(b) *Charter* rights by failing to provide him with adequate resources to pursue his right to counsel.

Section 24(2) *Charter* Analysis

[74] Having found that there was a breach of Mr. Rumbolt's s. 10(b) *Charter* rights in relation to the four-minute delay in informing him of his right to counsel after arrest, I must address the admissibility of the evidence pursuant to s. 24(2) of the *Charter*, which states:

> 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.

[75] The test to be applied when considering the admissibility of evidence under this section was set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, and summarized at para. 71:

> ...When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. ...

[76] The focus of this analysis will be in relation to samples of breath taken from Mr. Rumbolt further to a s. 320.28 *Criminal Code* breathalyzer demand. Counsel agreed that the utterances of Mr. Rumbolt to Cst. Beglaw throughout the investigation and captured on the recordings were voluntary and admissible, subject to this ruling. I will

address the evidence collectively, with the exception of statements made to Cst. Beglaw during the four-minute delay which will be addressed separately below.

[77] I will consider each of the three lines of inquiry individually as I assess and balance the effect of admitting the evidence on society's confidence in the justice system.

The Seriousness of the Charter-Infringing State Conduct

[78] The Court in *Grant* expanded on the first line of inquiry at para. 74:

> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[79] A decision of this Court in in *R. v. Burdek*, 2021 YKTC 41, addressed the lack of knowledge on the part of police officer’s regarding s. 10(b) of the *Charter* under this line of inquiry at para. 96:

> The same cannot be said of the breaches of ss. 8 and 10(b) of the *Charter*. Both relate to statutory and constitutional requirements that have been the subject of continuous litigation for in excess of 30 years. Section 10(b), for example, has been incessantly litigated since the inception of the *Charter* in 1982. And the requirement that an accused be informed of their right to counsel immediately has been enshrined in the law almost that long. The *Debot* decision quoted above was rendered in 1989. It is unacceptable in this day and age for an officer to believe that more mundane investigatory matters could or should take precedence over well-established constitutional requirements.

[80] The delay here is significantly shorter than in *Burdek*, does not include multiple *Charter* breaches, and it is clear on the evidence before the Court that Cst. Beglaw acted in good faith.

[81] Regardless of the lack of bad faith, Cst. Beglaw appeared to lack the requisite understanding to ensure that the informational component of an accused's s. 10(b) *Charter* rights is met, and this is a serious breach that supports the exclusion of evidence.

The Impact of the Breach on the Charter-Protected Interests of the Accused

[82] The Court in *Grant* expanded on the second line of inquiry at para. 76:

> This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[83] The breach here involved a four-minute delay during which Cst. Beglaw was updating his notebook and conducting a background query on Mr. Rumbolt. No information in relation to the investigation was elicited from him prior to being informed of his *Charter* rights.

[84] I find that the impact of the four-minute delay on the *Charter* interests of Mr. Rumbolt in this case to have been minimal and this supports the inclusion of the evidence.

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

[85] The Court in *Grant* expanded on the third line of inquiry at para. 79:

> Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis 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 reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.

[86] The duration of the s. 10(b) *Charter* rights breach here was short and there was little impact on Mr. Rumbolt. There is significant societal interest in seeing impaired driving offences proceed to trial, and the truth-seeking function of the criminal trial process would be better served by admission of the evidence, specifically the breath samples collected from Mr. Rumbolt.

[87] I find on these facts that consideration under this factor supports the inclusion of the evidence.

Conclusion on s. 24(2) Charter Analysis

[88] A balancing of the three *Grant* factors in this case favours the inclusion of the evidence obtained in the investigation.

[89] Regarding the statements made by Mr. Rumbolt during the four minutes of administrative delay, I find that the third factor of the *Grant* analysis heavily favours exclusion. He was intoxicated and detained without the benefit of knowing about his

right to counsel during this period, and statements he did make, elicited or not, should not be admitted against him.

[90] I conclude that the evidence, other than Mr. Rumbolt's utterances made during the four minutes of administrative delay in advising Mr. Rumbolt of his s. 10(b) *Charter* rights, is admissible at trial.

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PHELPS T.C.J.