Citation: *R. v. Edzerza-MacNeill*, 2019 YKTC 3

Date: 20190228
Docket: 18-00108
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

SETTEA JENELLE EDZERZA-MACNEILL

Appearances:
Leo Lane — Counsel for the Crown
Sean P. Hume — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

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

[2] The trial commenced November 19, 2018. Crown counsel indicated at the outset of trial that he would only be seeking to obtain a conviction on the s. 253(1)(b) offence.

[3] The evidence at trial was provided within a *voir dire*, as an application had been filed by counsel for Ms. Edzerza-MacNeill alleging that her s. 10(b) *Charter* rights were breached. Counsel was seeking a remedy under s. 24(2) excluding the evidence of the breath tests sample results from the trial.

[4] Judgment on the *Charter* application was reserved until January 14, 2019 with written reasons to follow. These are those reasons.

Evidence

[5] Cst. Smee testified for the Crown in the *voir dire*. Also introduced as evidence was a DVD of the roadside arrest and Cst. Smee's interactions with Ms. Edzerza-MacNeill in the back of the police cruiser after she was placed in there by Cst. Smee. While there is audio recording in the back of the police cruiser, there is no audio recording of Cst. Smee's interactions with Ms. Edzerza-MacNeill at roadside.

[6] Cst. Smee has six years experience as an RCMP officer, with at least four and one-half of those years involved in traffic enforcement duties. He testified that he has been involved in approximately 300 cases of impaired or *Motor Vehicle Act* investigations, including check stops. He stated that he has considerable experience in dealing with and making observations of impaired individuals.

[7] Cst. Smee stated that he received a call from dispatch at approximately 10:55 a.m. on April 26, 2018 about an impaired driver operating a red-coloured Dodge Charger and heading southbound towards Whitehorse. He presumed that the impairment was alcohol-related.

[8] He observed the described vehicle pass by him on the Alaska Highway just north of the intersection of the Alaska Highway and Two-Mile Hill. He followed the vehicle briefly through the intersection before activating the police cruiser's lights and sirens. The vehicle pulled over without incident at 11:12 a.m.

[9] Ms. Edzerza-MacNeill was the driver and sole occupant of the vehicle. Cst. Smee advised her that he had pulled her over following a complaint that she may be impaired.

[10] Cst. Smee was able to confirm that Ms. Edzerza-MacNeill had a valid driver's license.

[11] He noted that she was dressed in a housecoat.

[12] He noted a slight odour of liquor on her breath and coming from the inside of the vehicle.

[13] Cst. Smee noted Ms. Edzerza-MacNeill's cheeks to be red. As she began to cry, he noted her cheeks to become more red. He testified that he did not think she had been crying before he stopped her as she did not have red, watery eyes when he was first dealing with her.

[14] Ms. Edzerza-MacNeill told Cst. Smee that she had been drinking the night before and had gone to bed late. She assumed that her mother had called in the complaint as there had been an incident involving her mother at her residence and, in the course of this incident, she had fled the residence. It may be, in fact, that she received this information about who called in the complaint from Cst. Smee.

[15] Cst. Smee suspected that there was alcohol in Ms. Edzerza-MacNeill's body and read her the Approved Screening Device ("ASD") demand at 11:14 a.m. Ms. Edzerza-MacNeill provided a breath sample while sitting in the front seat of her vehicle and a "Fail" reading resulted. Cst. Smee then advised Ms. Edzerza-MacNeill that she was

under arrest for impaired driving. She exited her vehicle shortly thereafter and entered the police cruiser.

[16] Once Ms. Edzerza-MacNeill was in the rear seat of the police cruiser, Cst. Smee read her *Charter* rights to her from the card that he carried with him, as well as the police warning and the breath demand.

[17] Ms. Edzerza-MacNeill stated that she understood what Cst. Smee read to her.

[18] Following having been read the *Charter* right to counsel, Cst. Smee asked Ms. Edzerza-MacNeill if she wished to speak to a legal aid duty lawyer, Ms. Edzerza-MacNeill stated that "I'll deal with that later". After being read the police warning and being asked whether she understood it, she responded: "I understand that, just like you said that we'll discuss the issue later. But the reason that I left…". At that point in time, I note that the person on the other end of the phone Ms. Edzerza-MacNeill was holding said: "Don't say anything".

[19] Cst. Smee initially testified in cross-examination that he believed Ms. Edzerza-MacNeill had said, "No, not at this time" when asked if she wished to speak with legal counsel, but agreed when it was put to him, that from the video it was clear that she had said "I'll deal with that later".

[20] In Cst. Smee's General Occurrence report that was written proximate to the time of the offence he had written down "No, not at this time" as being Ms. Edzerza-MacNeill's response. In his handwritten notes made at the time he wrote that she had said "I take care later".

[21] Cst. Smee formed the opinion, based upon her responses, that she did not wish to speak with a lawyer.

[22] I note from the video that was played of the interactions of the parties in the police cruiser that Ms. Edzerza-MacNeill was typing on her phone with her thumb, talking on it and otherwise holding it.

[23] Cst. Smee stated that Ms. Edzerza-MacNeill had her phone out and someone was connected to her at the time that he was reading the *Charter* right to counsel, police warning and breath demand to Ms. Edzerza-MacNeill. He believed that Ms. Edzerza-MacNeill made this phone call while he was retrieving the ASD from the police cruiser. Ms. Edzerza-MacNeill had access to her telephone at all times throughout. Cst. Smee said that he allowed this because he was aware that there were other issues at play beyond the impaired driving complaint he was investigating.

[24] Cst. Smee testified that in the police cruiser he also explained to Ms. Edzerza-MacNeill what was going to take place once they left the scene and were at the RCMP Detachment.

[25] Once in the Detachment, Cst. Smee took Ms. Edzerza-MacNeill into the cellblock area where she was told to sit on a bench. He explained the process to her with respect to the taking of the breath samples from the approved instrument. He started the 15-minute observation period while she was sitting on the bench.

[26] As was his practice, Cst. Smee also reminded her of her right to contact a legal aid or duty lawyer, stated that this was a free service, and asked her if she wished to

speak to legal aid or duty counsel. He said that this was his practice because he recognized that people in this situation could be stressed and not understanding what was happening. He felt that in the circumstances, he should broach the subject of speaking to legal counsel with Ms. Edzerza-MacNeill. She had not raised the subject herself.

[27] Cst. Smee testified that he could not recall exactly the conversation between them and what Ms. Edzerza-MacNeill said in response. He agreed that he had asked her if she wanted to contact legal aid. He testified that he did not recall Ms. Edzerza-MacNeill specifically asking to speak to a legal aid lawyer and said that he broached the subject.

[28] When Ms. Edzerza-MacNeill said she would speak to legal aid duty counsel, Cst. Smee placed her in the private interview room. He then contacted the legal aid duty counsel line and explained why Ms. Edzerza-MacNeill was under arrest. He told Ms. Edzerza-MacNeill to answer the telephone when it rang in the interview room so that she could speak with legal aid duty counsel.

[29] Ms. Edzerza-MacNeill was placed in the interview room at 11:40 a.m., Cst. Smee's contact with legal aid duty counsel started at 11:42 a.m., and Ms. Edzerza-MacNeill spoke with counsel between 11:45 a.m. and 11:57 a.m. After this phone call was concluded, she told Cst. Smee that she would be contacting her own lawyer after she was done.

[30] After Ms. Edzerza-MacNeill spoke to counsel, she stated to Cst. Smee that she was done with legal aid and that she would get a lawyer afterwards. He recalls that she may have said that she would contact her lawyer after.

[31] Cst. Smee testified that Ms. Edzerza-MacNeill never asked to speak to a specific lawyer. If she had, he would have attempted to facilitate that call.

[32] He testified that Ms. Edzerza-MacNeill never expressed any dissatisfaction with her call with duty counsel.

[33] Cst. Smee testified that he was aware that there was something else going on at the time involving the incident at the house Ms. Edzerza-MacNeill had left from, and that she was very upset. He stated that throughout his investigation he attempted to obtain more information from her about the incident at the residence. At one point in the police cruiser, after Cst. Smee had read Ms. Edzerza-MacNeill her *Charter* rights, police warning and the breath demand, he said to her that when the impaired driving investigation was concluded they would discuss the incident further. He provided her his contact information but Ms. Edzerza-MacNeill did not contact him further to discuss the incident.

Ms. Edzerza-MacNeill

[34] Ms. Edzerza-MacNeill also testified in the *voir dire*.

[35] She stated that she had been drinking alcohol the night before into the morning hours, and only had managed to get three to four hours of sleep. Her mother, who had been at the hospital, returned home at 9:00 that morning. She and her mother began to

argue. Her mother's boyfriend became angry at her and forcefully threw her down the stairs. She continued to argue with her mom. The boyfriend then came downstairs and threw Ms. Edzerza-MacNeill down a hallway where she fell against a bench at the wall. She sustained bruises as a result. The boyfriend then threw her out the door.

[36] Ms. Edzerza-MacNeill stated that she was in fear so, as her mother's boyfriend ran towards her outside the residence, she drove away in the car. She intended to drive to her boyfriend's home in the Wolf Creek subdivision of Whitehorse, a drive of approximately 20 – 25 minutes.

[37] Ms. Edzerza-MacNeill said that this was the first time she had ever been stopped by the police and the first time she had ever been arrested for anything.

[38] After being provided her right to legal counsel in the police cruiser, she said that she would deal with this at a different time. She agreed that she understood her legal rights as they had been read to her. She knew, to an extent, that she had a right to speak to any lawyer that she wished.

[39] In cross-examination, when asked whether what she said meant that she would speak with a lawyer at a later date, Ms. Edzerza-MacNeill stated when she said this she was wasn't really sure, as she had never been in this kind of situation before. She said that she was just going to see how things went down at the police station.

[40] When crown counsel then put to her that she really meant "sometime down the road" after seeing what went down at the station, she responded "Yes". She said that at that time she didn't really know if she needed a lawyer or not

[41] Once in the cellblock area of the Detachment, Ms. Edzerza-MacNeill was texting with her grandmother. She agreed that Cst. Smee told her in the Detachment that she had a right to contact a lawyer or legal aid. Her grandmother told her that she needed to talk to a lawyer. She also told her not to say anything and to have the police take photographs of her injuries. This was the deciding factor for her, that while Cst. Smee kept asking her questions in the Detachment, her grandmother told her that she needed to speak to a lawyer. It was then that she said "sure" in regard to speaking to a lawyer.

[42] As a result, Ms. Edzerza-MacNeill told Cst. Smee that she would talk to a lawyer now. She did not specify a particular lawyer. She said she assumed she would be talking to a legal aid person. He said okay and told her to give him a few minutes.

[43] She said that Cst. Smee was asking her questions such as how much she had to drink. She told him that she did not have to answer those questions.

[44] Ms. Edzerza-MacNeill said that Cst. Smee placed her in the interview room and told her to talk to the lawyer who would ring into the room. She stated that all there was in the room was a clean desk and a phone. She said that she was not provided a list of phone numbers for lawyers and was not provided access to any phone numbers.

[45] She agreed that she had a smart phone with internet access and could have looked up lawyers' numbers on her phone.

[46] When asked in cross-examination whether she was okay with speaking to a legal aid lawyer, Ms. Edzerza-MacNeill said that, with what was going down she knew that she wanted to hire her own lawyer to represent her in court, and would go that route if

necessary. She also said that, at the Detachment, there was really no choice given. After speaking to legal aid duty counsel Ms. Edzerza-MacNeill stated that she was certain that she wanted to hire her own lawyer to represent her. She agreed that she did not tell Cst. Smee that.

Case Law

Principles

[47] Section 10(b) of the *Charter* provides that:

> 10. Everyone has the right on arrest or detention
>
> …
>
> (b) to retain and instruct counsel without delay and to be informed of that right;
>
> …

[48] A recent review of s. 10(b) jurisprudence is found in ***R.*** v. ***Ector***, 2018 SKCA 46 in paras. 39 – 59 and 63, 64. The following are excerpts from paras. 41, 42 and 46:

> 41 The purpose of s. 10(b) is to ensure that an accused person or a detainee is made aware of his or her right to counsel and is given an opportunity to obtain legal advice relevant to his or her legal situation…It is established law that s. 10(b) imposes three defined, positive duties on police officers who make an arrest or detain a person:
>
> (a) 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;
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> (b) if the detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent or dangerous circumstances); and

> (c) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity.
>
> …
>
> 42 The first duty is informational in nature. The second and third duties are implementational and are only triggered when the detainee indicates a desire to exercise his or her right to counsel…
>
> …
>
> 46 The obligation to facilitate a reasonable opportunity for the detainee to contact counsel includes facilitating a reasonable opportunity to contact counsel of choice and imposes a positive obligation on the police to facilitate that contact…

[49] The law is also clear that, where it is asserted that a detainee has waived his or her right to legal counsel the evidence of waiver must be clear and unequivocal. This is the case both where a detainee indicates that he or she does not wish to contact counsel after being provided the requisite informational component of s. 10(b), or where there has been an initial request to speak to legal counsel but a subsequent change of mind indicated. In the latter circumstances, a ***Prosper*** warning is required (***R.*** v. ***Prosper***, [1994] 3 S.C.R. 236).

[50] The law is also clear that a police officer is able to assist a detainee in his or her efforts to contact legal counsel so long as this assistance does not constitute an interference or infringement of the right to counsel, a matter left to be determined by the trier of fact (***R.*** v. ***Wolbeck***, 2010 ABCA 65, at para. 22).

[51] The right of a detainee to contact counsel of choice is not absolute. A detainee who asserts the right to contact counsel, including counsel of choice, must be reasonably diligent in exercising that right (***R.*** v. ***Willier***, 2010 SCC 37, at para. 33).

Findings regarding s. 10(b) of the *Charter*

[52] It is clear that at no time did Ms. Edzerza-MacNeill specifically state that she wanted to speak to a particular counsel of her choice. It is clear that the information that she was able to do so was provided to her when Cst. Smee read her the *Charter* right to counsel in the police cruiser.

[53] This said, I find that Ms. Edzerza-MacNeill, while in the police cruiser and also on the cell phone with her grandmother, was somewhat uncertain about what she wished to do with respect to speaking to counsel. In my opinion, she did not at any time say that she did not wish to speak to a lawyer and decline the opportunity to speak to legal counsel. In the police cruiser, I also find that she did not say that she wished to assert her right to speak to counsel. I find that she was equivocal with respect to whether she wanted the opportunity to speak to counsel or not before providing breath samples at the Detachment. I am satisfied that she did not know whether she wanted to speak to a lawyer or not. To the extent that Cst. Smee testified that he believed that Ms. Edzerza-MacNeill had said that she did not want to speak to legal counsel, I find that the evidence does not support his subjective belief.

[54] I find that, once in the Detachment, Cst. Smee, notwithstanding his belief that Ms. Edzerza-MacNeill had declined to speak to legal counsel, wished to confirm that his belief was correct. He then asked her whether she wished to speak to legal aid duty counsel and, when she stated that she would speak to a lawyer, he contacted legal aid duty counsel and gave Ms. Edzerza-MacNeill the opportunity to speak to counsel.

[55] There is no reliable evidence, however, that at the Detachment Cst. Smee further informed Ms. Edzerza-MacNeill of her right to speak with counsel of choice, or provided her the opportunity to do so. Contrary to what Ms. Edzerza-MacNeill was informed of when her *Charter* right to counsel was read to her in the police cruiser, she was not provided a list of numbers she could use to contact counsel of her choice. Cst. Smee effectively chose who Ms. Edzerza-MacNeill would speak to by dialing legal aid duty counsel, and placing her into the interview room to answer the call when legal aid duty counsel called back.

[56] In my opinion, Ms. Edzerza-MacNeill did not waive her right to speak to counsel of choice. She simply was not afforded the opportunity to do so when Cst. Smee contacted legal aid duty counsel on her behalf.

[57] I agree that Ms. Edzerza-MacNeill did not at any time identify to Cst. Smee a particular counsel that she wished to speak to, or ask for a list of lawyers that she could choose from. I also agree that there was nothing that precluded her from doing so. I am satisfied that, had she requested to speak to a particular lawyer or asked to see a list of lawyers, Cst. Smee would have facilitated such a request.

[58] I wish to make it clear that I find Cst. Smee to have handled this investigation in a courteous, thoughtful and respectful manner throughout. He at no time showed any intent to disregard Ms. Edzerza-MacNeill's legal rights. He was sensitive to the circumstances and the emotional condition of Ms. Edzerza-MacNeill.

[59] The burden rests with the Crown to show that Ms. Edzerza-MacNeill had a reasonable opportunity to contact counsel, including counsel of choice and then the

burden of proving a breach of the s. 10(b) *Charter* right shifts to Ms. Edzerza-MacNeill (***R.*** v. ***Araya***, 2018 ABQB 987, para. 61; ***R.*** v. ***Luong***, 2000 ABCA 301 at para. 12).

[60] In my opinion, once Ms. Edzerza-MacNeill said that she wished to speak to legal counsel, Cst. Smee was required to ensure that she was provided the opportunity to speak with either counsel of choice or legal aid duty counsel. The fact that Ms. Edzerza-MacNeill did not have a particular counsel in mind does not alter my opinion. It may be that if she had been provided a list of lawyers to choose from she may have done so. It may be that she would have asked her grandmother if she could help her contact a private lawyer, a step that has been approved in the jurisprudence.

[61] To assume Ms. Edzerza-MacNeill would have sought to contact private counsel, particularly in the absence of evidence from her that she would have, would be improper speculation. However, the law is clear that an accused is not required to adduce evidence that he or she would have acted differently had there not been a s. 10(b) *Charter* breach in order to establish that such a breach occurred. This said, this factor may be a relevant consideration on a s. 24(2) analysis when considering the seriousness of the breach and the impact on the accused's *Charter*-protected rights

[62] As stated in ***Ector*** at paras. 76-81:

> 76 It is undisputed that the accused has the overall burden of presenting evidence to show that his *Charter* rights were infringed (*R v Collins*, [1987] 1 SCR 265). However, the jurisprudence also indicates that an accused is not required to demonstrate that anything different would have occurred had his s. 10(b) rights not been breached.
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> 77 In *Bartle*, Lamer C.J.C. found a s. 10(b) breach had arisen where the accused had not been advised of the existence and availability of duty counsel and a toll-free number. Having established a breach of the

informational duty, Lamer C.J.C. went on to discuss whether an accused bore the onus of demonstrating "anything different" would have occurred had the breach not occurred. Squarely addressing this point, he said:

> ... It follows, therefore, that where the informational obligations under s. 10(*b*) have not been properly complied with by police, questions about whether a particular detainee exercised his or her right to counsel with reasonable diligence and/or whether he or she waived his or her facilitation rights do not properly arise for consideration. *Such questions are simply not relevant under s. 10(b) (although they may be when it comes to considering whether the evidence obtained in the course of the Charter violation should be excluded under s. 24(2) of the Charter). The breach of s. 10(b) is complete, except in cases of waiver or urgency, upon a failure by state authorities to properly inform a detainee of his or her right to counsel and until such time as that failure is corrected.* (198, emphasis added)

78 Chief Justice Lamer reiterated these comments in *R v Pozniak*, [1994] 3 SCR 310. Similarly, in *R v Carosella*, [1997] 1 SCR 80, the Supreme Court yet again confirmed the principle that a breach of s. 10(b) rights is complete when the police fail to discharge their informational obligations and that the accused's subsequent conduct is irrelevant to the question of whether a breach occurred:

> [27] This Court has consistently taken the position that the question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive *Charter* right has been breached. The extent to which the *Charter* violation caused prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis. The decision of this Court in *R. v. Tran*, [1994] 2 S.C.R. 951, dealt with the accused's right to an interpreter, as guaranteed by ss. 7 and 14 of the *Charter*. ...
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> ...
>
> [28] Similarly, in *R. v. Bartle*, [1994] 3 S.C.R. 173, the Court commented on the issue of prejudice in relation to a violation of s. 10(*b*), and held that the question of prejudice was relevant only in determining whether the evidence obtained in violation of that right ought to be excluded. *Although the scope of legal advice available to the accused in that case was limited* (he was charged with having care and control of a motor vehicle while his blood alcohol level was in excess of .08), *the Court held that it would be improper to speculate*

> *in relation to what the accused would have done had he been properly informed of his right to counsel. Thus, even though there may not have been actual prejudice to the accused as a result of the s. 10(b) breach, since the information would likely have been obtained in any event, this fact is not relevant to the question of whether a Charter violation has been established*.
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> ...
>
> [38] ... an accused can satisfy the court that he or she was denied his or her s. 10(*b*) right to counsel as a result of the failure of the police to inform him or her as to the availability of legal aid. There is no further onus imposed on the accused to show that, in addition to the fact that his corollary right to be informed of the availability of legal aid was breached, this resulted in prejudice of such a magnitude that his right to counsel as a whole was also breached..

79 While *Bartle*, *Pozniak* and *Carosella* were all cases involving a breach of the informational component of the police duty, this principle appears to have been applied to cases involving a breach of the *implementational* duty (see for example: *R v Kreiser*, 2013 SKPC 107, 428 Sask R 191; *R v Bagherli (A.)*, 2014 MBCA 105, 322 CCC (3d) 213; *Ferris*; *R v Singer* (1999), 176 Sask R 266 (QB)). More narrowly, several lower court decisions from Saskatchewan have applied *Bartle* in situations where incorrect information was communicated by the police to the accused. As stated in *Grenier-Spence*, speculation about what the accused would have done differently is irrelevant as the accused's *Charter* right was breached the moment he was given erroneous information (see also: *O'Connor*; *Fulford*).

80 I see no reason to depart from the principles established in *Bartle*, *Pozniak and Carosella*. Evidence as to what Mr. Ector would have done differently is not relevant to whether an officer's conduct constituted a breach in first instance. This means that, to establish the breach, Mr. Ector was *not* required to demonstrate how he would have acted differently had he received the specific names of counsel. By placing the onus on Mr. Ector to do this in the context of determining *if* there was a breach, the summary appeal judge erred.

81 That said, evidence about what Mr. Ector might have done differently is directly relevant to the s. 24(2) analysis, particularly in relation to questions about the seriousness of the breach and the impact on the accused's *Charter* protected rights. In order for the trial judge to have properly assessed these factors, a factual foundation for this analysis was required.

[63] By choosing to contact legal aid duty counsel without ensuring that Ms. Edzerza-MacNeill also had the opportunity to decide whether she wished to speak to counsel of her choice, Cst. Smee, unintentionally and with no intent to override Ms. Edzerza-MacNeill's s. 10(b) rights, inadvertently did so. In that regard, he effectively interfered with Ms. Edzerza-MacNeill's s. 10(b) right to contact counsel of her choice.

[64] As stated in ***R.*** v. ***Sakharevych***, 2017 ONCJ 669, at paras. 81 and 82:

> 81 I wholeheartedly concur with the words of Justice Horkins in *R. v. Panigas,* [[2014] O.J. No. 2058 (C.J.)], wherein he stated, at para. 10:
>
> > Because the police have taken it on themselves to be the exclusive conduit to legal advice, it is essential in my mind that they explain very carefully that the accused has options at this point in the process. It must be carefully explained that speaking to the provided duty counsel is not their only choice… The accused also has a right to contact any number of private lawyers.
>
> 82 I am also fortified in my conclusion on this issue when I examine police practices in other parts of the country. In Alberta for instance, it would appear that it is a matter of routine for the police to place the accused in a room, with a telephone, a telephone book, and information about Legal Aid, so as to allow the accused to properly exercise his/her right to counsel.
>
> (see also paras. 69 – 80 for a more thorough discussion)

[65] I agree that the informational component of s. 10(b) was initially met in the police cruiser when Ms. Edzerza-MacNeill's *Charter* right to counsel was read to her from the card Cst. Smee had. However, by not reminding Ms. Edzerza-MacNeill of the right she had to contact counsel of choice, once she said in the Detachment that she wished to speak to counsel, and not making accessible a list of counsel to choose from, and then effectively choosing legal aid duty counsel for Ms. Edzerza-MacNeill, I find that Ms.

Edzerza-MacNeill's s. 10(b) *Charter* rights to counsel were breached. The means chosen to implement a detainee's right to counsel must give some meaning and substance to the informational component that has been provided, not, for practical purposes, set it to the side.

[66] There may be occasions where simply reading a detainee the *Charter* right to legal counsel at the outset is all that is required, assuming that the implementational component is then complied with once there has been an assertion of the right to counsel. There may also be occasions, however, where additional steps need to be taken to ensure that what has been read to the detainee is clearly understood. The informational component of the *Charter* right to counsel is not simply a pro-forma process that needs to be done quickly to get it out of the way, so that the police investigation may proceed. It must be meaningful and whether it has been meaningful or not may vary depending on the circumstances of each case.

[67] I find that the fact Ms. Edzerza-MacNeill could have, on her own initiative, conducted an internet search on her phone to search for private counsel, to be no substitute for the obligation on police to ensure that detainees have access to a list of counsel to choose from. This was Cst. Smee's obligation.

[68] The requirement to ensure *Charter* compliance with the right to counsel by police officers rests with the State, and is not to be placed on the detainee, excluding those circumstances, of course, where waiver or due diligence on the part of the detainee applies. In my opinion, this is not such a circumstance.

[69] As such, I find that Ms. Edzerda-MacNeill's s. 10(b) *Charter* rights to have been breached.

Section 24(2) of the *Charter*

[70] 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.

[71] In ***R.*** v. ***Roberts***, 2019 YKTC 2, I reviewed the s. 24(2) *Charter* principles insofar as they apply to a breach of the s. 10(b) right to counsel.

[72] As I stated in ***Roberts*** in paras. 57 – 60:

> 57 Once a breach of a *Charter*-protected right has been established, the sole question in deciding if the evidence obtained as a result of the breach should be excluded from trial is whether, in the circumstances, the admission of the evidence would bring the administration of justice into disrepute.
>
> 58 In para. 86 of ***Sakaraveych***, (referring to ***R.*** v. ***Pino***, 2016 ONCA 389 at para. 72), the Court stated that:
>
> > In determining whether or not the evidence was "obtained in a manner that infringed or denied any rights or freedoms" of the applicant, the court should be guided by the following considerations:
> >
> > (1) the approach should be generous, consistent with the purpose of s. 24(2);

(2) the court should consider the entire "chain of events" between the accused and the police;

(3) the requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct;

(4) the connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections;

(5) but the connection cannot be either too tenuous or too remote.

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

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

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

(a) the seriousness of the *Charter*-infringing state conduct;

(b) the impact of the breach on the *Charte*r-protected interests of the accused; and

(c) society's interest in the adjudication on the merits.

Seriousness of the Charter-infringing State conduct

[73] As I stated in paras. 61 - 63 of ***Roberts***:

> 61 Underpinning the seriousness of the breach is the nature of the Charter-protected right to counsel. The significance of the right to speak with legal counsel once a person is detained by the State is of fundamental importance. It provides procedural safeguards that maintain a balance between the individual and the State. It ensures, at the very outset of the State's intrusion into the liberty of the detainee, that the detainee is provided assistance to help them to navigate the process. It guards against unfairness and abuse. There is no more important Charter-protected right than the right to speak to counsel without delay upon detention or arrest. On its face, any breach of the s. 10(b) Charter right of a detainee should be taken seriously.
>
> 62 While egregious or "bad faith" conduct on the part of a police officer in his or her actions will generally aggravate the seriousness of a *Charter* breach, it is not necessarily the case that "good faith" on the part of a police officer will result in a breach being considered not to be serious.
>
> 63 As stated in para. 63 of ***Fountain***:
>
> > While Det. Dellipizzi presented as being careful to ensure that he did not violate Mr. Fountain's right to counsel, and attempted to facilitate that right on more than one occasion, good faith requires more than good intentions. Prosper has been the law since 1994. It is not an obscure decision addressing a rare event. It is a long-standing precedent governing not only a ubiquitous investigative technique – the police interview – but every case where the police use a detained suspect as a source of evidence.
>
> (see also para. 90 of ***Pino***)

[74] The right to counsel without delay does not mean the right only to speak to a legal aid duty counsel, but also counsel of choice. This has been the law for a long time. The need to ensure that proper information about this right is provided to a detainee, and a reasonable opportunity to implement that right is a well-known and fundamental principle of law. Impaired driving, and impaired driving investigations are

common and oft-occurring. They are not at all unusual. It is important that the s. 10(b) right to retain and instruct counsel without delay is clearly understood and is complied with.

[75] I concur with the comments of Parry J. in para. 95 of ***Sakarevych*** as also being applicable to the actions of Cst. Smee in this case:

> I would pause here to say that the officer's error is one that is easily fixed, and hard to repeat once identified. This, as they say, is a teachable moment. I have every faith that this officer can avoid this error in the future.

[76] It was not clear to me from the evidence in the *voir dire* specifically what is available to detainees at the RCMP Detachment once they are brought into custody, with respect to contacting counsel, whether there is generally available a list of counsel posted on the wall or other easily accessible location in proximity to a telephone and what the ability of the detainee to use the phone is. In this case, the uncontradicted evidence of Ms. Edzerza-MacNeill is that there was no list of phone numbers in the interview room. I cannot say that there is a systemic deficiency in this regard. This said, I would expect that all detainees seeking to exercise their s. 10(b) right to counsel would have this right clearly explained to them and reasonably facilitated.

[77] I find that this aspect of the ***Grant*** analysis favours exclusion of the evidence.

The impact of the Breach on the accused's Charter-protected interests

[78] This is not a case where the evidence the Crown is seeking to introduce at trial, the breath test certificates, would not have been available without the breach having occurred. It is fairly trite to say that, given the, at the time, very similar criminal consequences for refusing to provide a breath sample and providing a sample that results in a reading of over 80 mg%, it is hard to imagine a competent lawyer advising an accused individual not to provide a breath sample. Regardless of the advice the lawyer provides, Ms. Edzerza-MacNeill would have provided a breath sample, as she did, or refused to provide a breath sample and been charged under s. 254(5), which bore similar consequences.

[79] It is also not a case where Ms. Edzerza-MacNeill was saying that she wished to speak to a private counsel and Cst. Smee overrode her expressed wishes. Ms. Edzerza-MacNeill essentially "went with the flow" and when Cst. Smee set her up to contact legal aid duty counsel she simply accepted what he had done and went along with it.

[80] I note that in paras. 24 and 25 of ***R.*** v. ***Berger***, 2012 ABCA 189 the Court, in its 24(2) analysis of the impact of the breach, stated that:

> 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.

[81] The Court overturned the trial judge's admission of the evidence. The actions of the police officer in that case were considered deliberate and opportunistic, and certainly not inadvertent as appears to be the case here.

[82] I recognize that there is no evidence Ms. Edzerza-MacNeill would have acted differently if Cst. Smee had made her aware at the Detachment of her right to speak to counsel of choice and afforded her the opportunity to do so, rather than contacting legal aid and effectively making the choice for her. I am not sure that she would have contacted other counsel. That is the point; I am not sure. She may have or she may not have.

[83] Whether she would or would not have, however, is not the point. It is the importance of the Ms. Edzerza-MacNeill's fundamental right guaranteed under s. 10(b) that is at stake here, not whether the result would have been any different.

[84] In paras. 104 and 105 of ***Sakarevych*** the Court stated as follows:

> 104 With regard to the breach of the right to counsel, I consider the impact on the accused's *Charter* protected right to be significant. In my view, admission of the evidence would send the message that the accused's right to counsel counts for little.
>
> 105 Justice G.A. Martin once described the right to counsel as one of "superordinate" importance. It is the means by which individuals can gain an understanding of all their rights, obligations, and vulnerabilities; it is the means by which individuals may then begin to assert their other rights.

[85] The statutorily-mandated intrusion upon Ms. Edzerza-MacNeill's right against self-incrimination occurred after she was denied her s. 10(b) right to counsel.

[86] In my opinion, considering the fundamental nature of the s. 10(b) right, I find that the impact on Ms. Edzerza-MacNeill's s. 10(b) right is serious.

[87] I find that this aspect of the ***Grant*** analysis favours exclusion of the evidence.

Societies interest in adjudication on the merits

[88] As I stated in paras. 76 - 81 of ***Roberts***:

> 76 Generally speaking, this branch of the ***Grant*** analysis favours the admission of the evidence obtained following a *Charter* breach to be allowed into trial.
>
> 77 However, as stated in ***R.*** v. ***McGuffie***, 2016 ONCA 365, (cited in para. 69 of ***Fountain***), where the first two steps of the Grant analysis make a strong case for exclusion, the third step will rarely if ever tip the balance in favour of inclusion. (see also ***Sivalingham***, at para. 33)
>
> 78 It must also be remembered that the benefits of admission of the evidence in a particular case must be balanced against the impact upon the reputation of the administration of justice in the long term. (***Sakarevych***, para. 110)
>
> 79 The negative impacts of impaired driving and the devastating impacts on individuals, families, and communities cannot be understated. Impaired driving is a serious offence with all-too-often tragic consequences. It is important to ensure that individuals who are committing the offence of impaired driving are brought before the courts and dealt with according to law.
>
> 80 It is also important, however, that individuals who are accused of committing serious criminal offences are able to be arrested, prosecuted and held accountable for their actions. It is important that they do not escape being held accountable because their rights under the Charter have been infringed, and evidence necessary to the prosecution, such as in this case, is not excluded from trial.

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

[89] This is an impaired driving simpliciter of an individual with no prior criminal history in distressing circumstances. In my opinion, keeping in mind the seriousness of the breach and the impact on Ms. Edzerza-MacNeill's s. 10(b) *Charter* right to counsel, the admission of the evidence would bring the administration of justice into disrepute and therefore it is excluded from trial.

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COZENS T.C.J.