In the Provincial Court of Alberta

Citation: R. v. McDonald, 2010 ABPC 251

Date: 20101130
Docket: 071377279P10101-0103
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Kevin McDonald

Ruling on *Voir Dire* by the Honourable Judge Bruce R. Fraser

Introduction

[1] The accused is charged with impaired driving and refusing to provide samples of his breath pursuant to a lawful demand by a police officer. The accused made a *Charter* Application that his 10(b) *Charter* right was infringed. Therefore the Crown entered a *voir dire* to determine the issue and called all its evidence being the evidence of Cst. Urquart in the *voir dire* on the agreement the evidence found to be admissible would be applied to the trial proper by consent. The defence called evidence on the *voir dire* being the evidence of the accused. This is my ruling on the *voir dire* to determine if the 10(b) *Charter* rights were infringed.

Facts

[2] The facts as testified to by Cst. Urquart are as follows. In the early morning hours of October 18, 2007 the Calgary police had a Checkstop set up on McLeod Trail at approximately 25th Avenue, monitoring traffic travelling southbound. At approximately 2:40 a.m., Cst. Urquart and other officers were standing in the grass median of McLeod Trail separating the north and southbound lanes. Traffic going south was light and they were not dealing with any vehicles. Cst. Urquart noted a vehicle travelling northbound at a high rate of speed. He estimated the speed to be 100-110 kilometres per hour. Another constable, using his flashlight attempted to flag down the vehicle and to stop it. The vehicle slowed to approximately 60 kilometres per

hour but did not stop. Cst. Urquart retrieved his unmarked police vehicle and pulled in behind the vehicle. Another constable in a marked vehicle also turned northbound using his emergency equipment. The vehicle stopped at the red light at 17th Avenue with Cst. Urquart right behind him. At this point, the other constable in the police vehicle with his emergency lights activated, was just leaving the Checkstop location and was visible in the rearview mirror.

[3] The vehicle that was stopped, signalled and then made a left turn from the left lane against the red light. It then stopped at 1st Street S.E., a one way street south, and then turned right to go north which was the wrong way. It then immediately turned right again into a laneway beside a restaurant which is a dead end parking area for one or two vehicles. Cst. Urquart followed, turning his emergency lights on when the vehicle turned north on a one way street south. He pulled in behind the vehicle. The accused was driving the vehicle and was the sole occupant. The other police vehicle pulled in behind as well. Cst. Urquart approached from the passenger side. He noted a strong smell of alcohol and asked the accused to get out. He asked the accused if he had been consuming alcohol. He replied he had consumed four beer. The officer formed a suspicion he had alcohol in his body and made a demand for a breath sample into a roadside device. The accused complied and failed. The officer then formed the opinion the accused's ability to operate a motor vehicle was impaired by alcohol and arrested him for impaired driving. He read him his *Charter* rights under 10(a) and 10(b) as well as a caution. The accused said he understood his 10(b) rights and he wished to exercise his rights. He was then read a breath demand for analysis and replied he understood.

[4] The officer then transported the accused to the Checkstop bus. All of this occurred in less than 14 minutes. Before he got on the bus, the accused ran to a tree and urinated. They then entered the bus and he was escorted to the phone booth. The officer said he showed him the white and yellow page phone books that were in a pocket attached to the wall under the wall phone and the Brydges list and 1-800 number posted on the wall. He explained his options and left the room to afford privacy. He was able to monitor him by way of a camera in the room.

[5] The officer observed him standing with the phone staring at the phone book and then looking through the book. The accused then picked up the phone. After being in the booth for 14 minutes, he knocked on the door and asked the officer for an assessment of his situation. He was again told he had been arrested for impaired driving and being over the legal limit of alcohol in his blood and given a breath demand, and this was his opportunity to contact a lawyer before he asked him to comply with the breath demand. If he refused, he would be charged with refusal. The officer asked him if he had called a lawyer and he said he needed an update first. He was again left in the booth.

[6] A few minutes later the accused reached up and pulled the video camera off the ceiling in the booth. He was immediately removed from the booth and the constable re-attached the camera to the ceiling. Apparently it was held there by tape. He was again asked if he had called a lawyer to which he replied he was trying to. He was again placed in the booth and told not to touch anything.

[7] A few minutes later he knocked again and asked for a pen. The officer refused on the basis that he had already caused some damage in the booth and he did not want to give him anything that could be used to cause more damage.

[8] Shortly after that he observed the accused ripping pages from the white pages phone book. He then took the accused out of the booth and advised him his opportunity to contact a lawyer was over. It is possible he was on the phone at the time but the officer could not recall. At this point he had been in the booth for 32 minutes. The officer produced the torn white pages as an exhibit. He was not certain whether he took them from the accused or seized them off the table.

[9] He also observed the back page of the yellow pages book ripped off and in the pocket by the phone. He did not see the accused do that as he had with the white pages.

[10] The accused was then taken to the breath room and presented to the breath technician and asked to provide a sample of his breath. The accused refused on the basis he had not spoken to counsel. He refused twice. During this time the accused repeatedly touched the breath machine, tied his shoe and said he was standing up for himself.

[11] The accused gave evidence and testified to a different version on some issues. He had been at the Back Alley nightclub for approximately two hours before travelling north on McLeod Trail, and consumed portions of four beers. He did not see the officer flag him down or the Checkstop. He was travelling between 70 and 80 kilometres per hour and slowed to 60. He made the left turn onto 17th Avenue on a green light. He saw the emergency lights of the police car some distance behind and made the two right turns to get out of the way, thinking the police wanted to pass him. He deliberately turned the wrong way on a one-way street saying it was the safest thing to do.

[12] He said he did not urinate on McLeod Trail and there were no trees.

[13] When he went into the phone booth he began calling lawyers. There were no white pages, no Brydges list and no 800 number. The yellow pages book was delapidated with torn and missing pages.

[14] He tried to block the camera and it fell down. He did this because he heard people laughing outside the booth and he thought they were laughing at him. He was forcibly removed from the booth and called names.

[15] He requested a proper phone book and a pen and was denied. He was told the book he had was good enough. He continued to call numbers.

[16] The officer entered the booth and told him he had been given enough time and they wanted to go home. He was removed from the booth and taken to the breath room and was asked for a breath sample. He refused because he had not spoken to a lawyer. He was waiting

for a lawyer to answer when he was removed from the room. He testified he never touched the machine and never tied his shoe.

[17] He said he was co-operative and polite but felt threatened. When he was taken out of the booth, reasonable force was used. As to ripping pages from the phone book, he denied doing so and said he could not have ripped out white pages because there were no white pages in the room. He admitted some pages might have ripped while he was using them but that would have been unintentional. I am assuming he was referring to the yellow pages as he was adamant there were no white pages, no Brydges list and no 800 number.

Credibility

[18] There are some discrepancies between the evidence of the accused and that of Cst. Urquart. They are not of great significance in relation to the *Charter* issue, but enough that a credibility finding is necessary.

[19] I find the credibility of the accused to be doubtful for the following reasons.

[20] The first reason is the driving evidence. The accused clearly was speeding while he made his way from the Back Alley nightclub, northwards on McLeod Trail to downtown, and passing the Checkstop on the other side of the road, monitoring southbound traffic. The speed limit was 60 kilometres per hour. The accused says he was speeding at 70 to 80 kilometres per hour. The officer estimated his speed at more like 100 to 110 kilometres per hour. His speed certainly brought him to the attention of the police to flag him down. I doubt if 70 would, 80 might. Certainly 100 - 110 would cause an officer to jump in his car and follow him, especially if he ignored the flagging with the flashlight.

[21] Making a turn on a red light, if he did, and then turning the wrong way on a one way street and again into a dead end alley or parking space smacks of an attempt to allude the police car and hide, than it does trying to get out of the way. The ordinary method of getting out of the way is to pull to the right hand curb to let the police car pass. There is certainly no reason to go north on a one way street south, and then pull off that road. In my view the accused's explanation for his actions is not credible. I find he was clearly trying to avoid the police from the time they tried to flag him down as he passed the Checkstop. When Cst. Urquart pulled in behind him at the light at 17th Avenue, the accused was unaware he was the police. He was concentrating on the police car with the emergency lights activated, a substantial distance behind Cst. Urquart. That is why he thought he had time to jump the red lights, turn the wrong way and duck into the first alley. By making these quick turns he might have avoided the police car some distance back. Unfortunately for him and unbeknown to him, Cst. Urquart was right behind him.

[22] Secondly, I do not believe the accused when he says he did not have the white pages phone book and he did not rip out pages as observed by Cst. Urquart. If the white pages were not in the phone room, how could Cst. Urquart have seized them and produced them in court as an exhibit? The phone book had to have been there unless Cst. Urquart manufactured this

evidence, which I refuse to accept and find no evidence to support. If the phone book was there, the accused is either outright lying or completely mistaken. Either way, his version is not credible.

[23] Thirdly, I do not believe the accused when he says he was not provided with the Brydges list or 800 number when the officer says they are posted on the wall by the phone.

[24] Fourth, by admission the accused had spent the previous two hours drinking and this would certainly have some effect on his memory and give him reason to want to avoid both the police and providing a sample of his breath.

[25] As for Cst. Urquart, I found him to be an excellent witness as to his powers of observation and based on his demeanour. There was nothing in his direct examination or in an exhaustive cross-examination that gave me any cause for concern as to his credibility.

[26] Evaluating the accused's credibility on its own, I find I do not believe his version of the events as a whole, nor does his evidence raise a reasonable doubt as to Cst. Urquart's evidence. Where his version differs from the version of Cst. Urquart, I accept and believe that of Cst. Urquart.

Analysis of *Charter* 10(b) Infringement Application

[27] There is no question the police complied with their informational duty. There is no question the accused asserted his right to counsel. Therefore the implementational duty arises. Clearly he was given an opportunity to contact counsel. He was given access to a phone in private with the appropriate means of contacting private counsel, a legal aid lawyer or the free 1-800 number. He was in the room for more than 30 minutes. However, he was removed from the room before he received legal advice and this was known to the officer. He was removed because in the officer's view the accused was not making an effort to contact counsel and was causing or attempting to cause damage to property in the phone room.

[28] The Crown's submission is that the accused was not exercising due diligence in exercising his right so that in accordance with ***R. v. Luong*** (2000), 149 C.C.C. (3d) 571 (Alta. C.A.), the implementational duty is suspended and no infringement is made out.

[29] The defence submission is that he was being diligent, the implementational duty was still in effect when he was taken from the room, the officer knowing he had not contacted counsel and wanted to, and anything he had done in the room was not cause to prevent him from exercising his right to counsel.

The Authorities

[30] I do not see the issue as being strictly a case of whether due diligence was exercised. He was on the phone and was utilizing the tools given him to make contact. There was nothing to make the officer believe he was not making an effort to contact counsel, except for his extra-curricular activities in the room.

[31] The real question is how much bad behaviour including causing or attempting to cause damage is acceptable before it becomes unacceptable and he foregoes his right even if he is attempting to contact counsel.

[32] I have attempted to find authorities on this issue and can find none on point. Most deal with due diligence, obstruction and delaying tactics. However, a few are instructive and I will attempt to set out some legal principles derived therefrom.

[33] In ***R. v. Smith***, [1989] 2 S.C.R. 368 (S.C.C.), the accused was arrested for robbery. He expressed an intention to communicate with counsel and given resources to do so. When he could only find his lawyer's office number, he declined to contact him until morning. The police suggested he try anyway but he declined. An hour later the police commenced questioning which resulted in an inculpatory statement. The Supreme Court found the statement to be admissible.

[34] The majority stated at paras. 32 and 33:

> The police officers, in these circumstances, were justified to continue their questioning and to act as they did. This Court, in R. v. Tremblay, [1987] 2 S.C.R. 435, clearly indicated, at p. 439, that the duties imposed on the police as stated in Manninen, supra, were suspended when the arrested or detained person is not reasonably diligent in the exercise of his rights.
>
> This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks.

[35] At para. 37, they stated:

> Apart from these exceptional circumstances, the arrested or detained person who was not diligent in the exercise of his rights can always exercise his rights but cannot, in the process, require the police to suspend their investigation. It is

necessary to draw a distinction between the right to retain and instruct counsel and the duty imposed on the police to cease questioning the detained or arrested person until he has had a reasonable opportunity to exercise this right. One who is not diligent in the exercise of his right to retain counsel does not lose this right; one can always exercise it. However, one cannot require that the police respect the duty imposed on them to cease questioning until he has had a reasonable opportunity to exercise his right. The duty imposed on the police to refrain from attempting to elicit evidence from a person until this person has had a reasonable opportunity to communicate with counsel is suspended and is not again "in force" when the arrested or the detained person finally decides to exercise his right. A different conclusion would render meaningless the duty imposed on a detained or arrested person to be diligent in the exercise of his rights. This would enable one to do exactly what this obligation seeks to prevent, that is delaying needlessly and with impunity the investigation and, in certain cases, to allow for an important piece of evidence to be lost, destroyed or, for whatever reasons, made impossible to obtain.

[36] In ***R. v. Squires*** (2004), 7 M.V.R. (5th) 101 (Nfld. and Labrador Supreme Court - Trial Division), the accused was arrested for care or control impaired driving. He was placed in an interview room to access counsel. He used the phone twice but refused to say who he talked to. The police suggested several times he call legal aid. The accused was uncooperative and uncommunicative. He was taken before a breathalyzer and refused to provide samples. He was convicted of refusal. The court found the accused was given reasonable opportunity to contact counsel but did not use reasonable diligence to do so, and therefore there was no Section 10 breach. After reviewing ***R. v. Smith***, *supra*, the court stated at para. 48:

In my view, the police gave Mr. Squires a reasonable opportunity to contact counsel, but he did not use reasonable diligence in doing so. While he had the right to remain silent, his actions in this case were actually obstructive and appeared to the police to be delaying tactics.

[37] In ***R. v. Tremblay***, [1987] 2 S.C.R. 435 (S.C.C.), the accused was charged with driving while over .08. He wanted to exercise his Section 10(b) rights and was given an opportunity to do so. He called his wife and asked her to contact a lawyer. Throughout his encounter with police he was actively obstructing the investigation and the police believed he was stalling when given access to the phone. He was immediately removed and taken to the breathalyzer and gave samples. The Supreme Court determined his Section 10(b) rights were infringed but the test results should not be excluded under Section 24(2). They found the police's hastiness to proceed was provoked by the accused's behaviour. The court stated at para. 8 and 9:

From the moment the accused was intercepted on the road to the moment he was asked to give the first sample of his breath his behaviour was violent, vulgar, and obnoxious. A reading of the record and the findings of fact below satisfy me that, while the police, following the request for counsel, did not, as they must, afford the accused a reasonable opportunity to contact a lawyer

through his wife before calling upon him to give a breath sample, their haste in the matter was provoked by the accused's behaviour. Indeed, throughout this encounter with the police, the [page 439] accused, as was found by the trial judge as a matter of fact, "was deliberately attempting to make the investigation difficult" and "was actively obstructing it". As testified to by a police officer, it appeared to the police that the accused was stalling when he was given the phone to contact a lawyer.

Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this Court's decision in R. v. Manninen, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath. While this is not the case here, the accused's conduct was, to some degree, misleading in that regard. While the police's hastiness does not change the fact that the detainee's right to counsel was violated, the reasons therefor make it understandable and are relevant when one addresses the s. 24(2) issue. In my view the admission of the evidence obtained would not, having regard to all of the circumstances, bring the administration of justice into disrepute.

Analysis

[38] In this case, I find the accused's actions were somewhere in between exercising due diligence and being obstructive. I suspect he was trying to delay taking the test and trying to manufacture a reason to refuse to do so. The police officer was of the view he was attempting to damage property in the phone booth as a result of his actions with the camera and the phone book. As a result he denied him the use of a pen and removed him from the phone booth before he had an opportunity to contact counsel and while he may have been on the phone with counsel. Clearly the accused was exhibiting bad behaviour and there comes a point where it is no longer acceptable and if the accused continues such behaviour he forgoes his Section 10(b) rights and the police have every right to shut his opportunity off for the moment and continue their investigation. I suppose at such point it could be said he is no longer exercising due diligence.

[39] The issue to be decided is whether the actions of the accused relating to the camera and the tearing of phone book pages had reached that stage. Obviously the police officer thought so. He was upset that the accused took the camera down. However, he did not find any damage and replaced it and it continued to function. No real harm was caused. The request for a pen was a reasonable request. It should have been provided. The officer's reason for not providing it, in my view was an insufficient reason. The reason given was he was not going to provide him with anything with which he could cause more damage. At that point he had not really caused any damage. Providing the pen with instructions not to damage anything with it and reminding him that he was being observed would have been the better course. I suspect the tearing of pages would not have occurred had the pen been provided. Even the tearing of pages could have been handled by a reprimand and a warning he would be removed if he caused any further damage. In

my view his behaviour had not reached the stage that he should be denied his right to continue to contact counsel to receive legal advice. I am not satisfied he had as yet clearly demonstrated he was stalling and obstructing the investigation to the point he was not exercising due diligence, although it would not take much more of his bad behaviour to convince me. I am satisfied the police officer acted too quickly in shutting off his right to contact counsel before continuing the investigation and as a result breached his Section 10(b) rights.

Resolution

[40] Both counsel took the position that if the court concluded there was a violation of the accused's Section 10(b) rights, this was a valid excuse to refuse to provide samples and no Section 24(2) analysis was necessary. This position surprised me since it is not a statutory excuse or defence and it is my view any *Charter* violation must undergo a Section 24(1) or (2) analysis to determine any effect on a trial. No authorities were provided by either counsel to support their position. I therefore researched this proposition and in doing so determined the authorities do not support counsels position and in fact clearly state they are incorrect and the evidence of refusal can only be excluded based on a Section 24(2) analysis. A refusal based on the right to counsel being infringed is not a statutory excuse.

Authorities and Analysis

[41] In ***R. v. Snider*** (2002), 27 M.V.R. (4th) 219 (Alta. Ct. Of Q.B.), Moreau, J., sitting on a Summary Conviction Appeal, an appeal of a conviction for refusal to provide breath samples, found a breach of the accused's Section 10(b) rights, and the trial judge was in error in not finding so. He then stated at para. 45 under V. Conclusion:

> ...the evidence, viewed in its totality, disclosed a breach of the Appellant's right to counsel and the evidence of his refusal to provide a breath sample should have been excluded pursuant to s. 24(2) of the Charter.

[42] Although there was no discussion of whether the breach was a statutory excuse, the court clearly excluded the refusal under Section 24(2) albeit without any analysis. I am, of course, bound by the decision of a summary conviction appeal court.

[43] The issue was actually analysed by the Ontario Court of Appeal in ***R. v. Williams*** (1992), 78 C.C.C. (3d) 72, leave to appeal to the Supreme Court of Canada dismissed, May 27, 1993. The court set out the issue in the case as follows at para. 2:

> This appeal raises the issue whether a breach of the appellant's constitutional right to retain and instruct counsel without delay (or as found by the trial judge a reasonable doubt on that issue), may, in law, provide the appellant with a "reasonable excuse", as referred to in s. 254(5) of the Criminal Code, for refusing to provide a sample of his breath suitable for analysis.

[44] At para. 39 the majority stated:

> Notwithstanding the proliferation of references to Brownridge, there has been very little direct consideration of whether a violation of an accused's right to counsel may constitute a "reasonable excuse" within the statutory framework of s. 254(5), for an accused's refusal to comply with a lawful demand to provide a breath sample or whether the Charter violation, if established, should be remedied under s. 24(2) of the Charter. Looked at quantitatively, if would appear that the majority of the cases take the reasonable excuse route. In many of the cases which refer to Brownridge, there is little or no consideration of the impact of the Charter, probably because the issue was not raised in argument.

[45] ***Brownridge v. The Queen*** (1972), 7 C.C.C. (2d) 417, (S.C.C.) was, of course, a *Pre-Charter* case and was dealing with rights under the Bill of Rights which had no equivalent Section 24(2).

[46] After reviewing the cases including Brownridge and ***R. v. Holmes*** (1988), 41 C.C.C. (3d) 497 (S.C.C.), the majority stated at paras. 50 and 51:

> ...In my opinion, the presence of s. 24 in the Charter is of particular significance in interpreting the provisions of the Charter in a way which may differ from the way in which similar provisions in the Bill of Rights were interpreted: see R. v. Therens, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481. In my view, it was Parliament's clear intention that breaches of Charter rights, if established, be remedied through the remedial provisions of the Charter, in this case s. 24(2).
>
> Accordingly, I would not give effect to Mr. Duncan's submission that, quite apart from the impact of the Charter, Brownridge compels the conclusion that s. 254(5) be interpreted in the light of s. 2(c) of the Bill of Rights with the result that a reasonable doubt on the denial of the Bill of Rights right to counsel issue, would necessarily result in an acquittal.

[47] The Appellant's conviction appeal was dismissed.

[48] The issue more recently came before the Ontario Court of Appeal in ***R. v. Van Deelen***, 2009 ONCA 53. The short judgment is found in two paragraphs as follows:

> 1. THE COURT (orally):- - In our view, the appeal judge reached the correct result. He accepted that it was open to the trial judge to find that the appellant mistakenly believed he was being requested to provide breath samples into an approved instrument and that he believed he did not have to comply with the demand because he had not been informed of his right to counsel. However, the trial judge erred in finding that this was a relevant mistake. Violation of s. 10(b) is not a reasonable excuse to refuse an approved instrument demand. See *R. v. Williams* (1992), 78 C.C.C. (3d) 72 (Ont. C.A.). Violation of s. 10(b) may or may

> not result in exclusion of the evidence of the refusal under s. 24(2). It follows that the appellant had the requisite *mens rea* for the offence and did not have a reasonable excuse for refusing the approved screening device demand.
>
> 2. Accordingly, while leave to appeal is granted, the appeal is dismissed.

[49] Clearly, in my view, the law is that a Section 10(b) *Charter* breach is not a reasonable excuse pursuant to s. 254(5). A Section 24(2) analysis is necessary to determine if the evidence of the refusal should be excluded or not.

[50] As counsel were of the view a Section 24(2) analysis was not necessary, I gave counsel an opportunity to make further submissions and submit authorities for my review. Both counsel have now done so and I have reviewed their submissions and authorities. I am now prepared to complete a 24(2) analysis which follows.

Charter Section 24(2) Analysis

[51] This analysis is now governed by ***R. v. Grant*** (2009), 245 C.C.C. (3d) 1 (S.C.C.). At para. 71, the Supreme Court instructed trial courts as follows:

> ...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...

1) **Seriousness of the Charter-Infringing State Conduct**

[52] Here, the state conduct was caused by the accused reaching up and pulling or dislodging the camera in the phone booth that allowed the police to monitor the accused. In doing so, he could have caused damage to an expensive piece of equipment and as well it interfered with the officer's ability to monitor the movements of the accused in the phone room and determine if he was being diligent in exercising his right to counsel. The officer had to remove the accused while he re-installed the camera and then placed him back in the room. The officer then observed the accused rip pages out of the telephone book. At this point the officer forcibly removed the accused from the room and terminated implementing his right to counsel to prevent him causing further damage to property.

[53] There is no question that at some point the police have the right to terminate based on improper conduct. I found his conduct had not quite reached that point. The officer subjectively felt it had, and that he had a right and a duty to protect police property. It is a question of degree as to how long the authorities have to tolerate an accused's bad behaviour in order to allow him to exercise his right to counsel. That right is so important and fundamental that a great deal of tolerance must be exercised. The fact the officer thought the conduct had reached that degree before the court did, is not serious *Charter* infringing state conduct. It is not a wilful or reckless or flagrant disregard of his rights. The officer is trying to implement his right in spite of the accused's behaviour. His only error in my view that resulted in the breach is that he terminated the opportunity too soon. It is not conduct by the police that requires the court to disassociate itself from such conduct. Rather, I have a great deal of sympathy for the officer in trying to implement the accused's right in the face of such conduct by the accused. The officer, in my view, was exhibiting good faith by his conduct.

2) **Impact on the *Charter* Protected Interests of the Accused**

[54] Here, the accused did not receive legal advice and he refused to provide a breath sample. His reason for not providing it was because he had not received legal advice. The fact his opportunity to contact counsel was terminated clearly had a serious impact on his interest and his committing the offence of refusal. However, he is in large part the author of losing his right. The police afforded him the opportunity to contact counsel. It was his bad behaviour that caused the early termination. The court anticipates when the police comply with their implementation duty, the accused will take advantage of that opportunity and behave properly and respect the property they are given in order to exercise their right. In addition, it is my view, based on all the evidence and the circumstances, the accused may well have been attempting to create an excuse to refuse to give a sample, knowing the result would incriminate him. However, I cannot determine that to any certainty based on the evidence.

[55] The fact is, absent the breach, the accused would have in all likelihood received legal advice that it was a criminal offence to refuse to provide breath samples. Had he received that advice, it may well have resulted in him not refusing.

[56] In any event I find the breach was a serious impact on his *Charter* protected right which in turn caused him to refuse.

3) **Society's Interest in an Adjudication on the Merits**

[57] Clearly, the truth-seeking function of the criminal trial process is better served by admission of the evidence than by exclusion since he did refuse and to exclude that evidence must result in an acquittal in the face of evidence that he committed the offence. The court must consider not only the negative impact of admission but also the impact of failing to admit the evidence on the repute of the administration of justice.

[58] There is no question that he did refuse; the accused gave evidence that he refused and had no intention of taking the test for the reason articulated. Therefore the evidence is both relevant and reliable. The Supreme Court said that exclusion of such evidence may undermine the truth-seeking function and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

Overall Analysis Considering All the Circumstances

[59] Considering all three lines of inquiry in all the circumstances, only the seriousness of the impact on his *Charter*-protected right would cause the evidence to be excluded. However, in all the circumstances including that the accused's bad behaviour was the cause of his own misfortune and the court's concern that he may have been attempting to create an excuse not to submit to the test, the impact on his *Charter* protected right is substantial. As the Alberta Court of Appeal said in ***R. v. Phillips*** (1986), 26 C.C.C. (3rd) 60, at pages 63 - 64:

> In those circumstances, where the accused has not committed the offence until after his rights have been infringed, and the effect of consulting a lawyer may well have resulted in this particular offence not occurring, I am of the opinion that the admission of such evidence would bring the administration of justice into disrepute in the eyes of reasonably minded persons.

[60] Therefore, even though the seriousness of the state conduct and society's interest in an adjudication on the merits would weigh on the side of admission, the impact of the breach weighs heavily on exclusion. In all the circumstances, particularly in view of the offence of refusal perhaps not occurring had he spoken to counsel, and in view of what was said in ***Phillips*** above, I find the admission of the evidence may well bring the administration of justice into disrepute, which is the final test in ***Grant***.

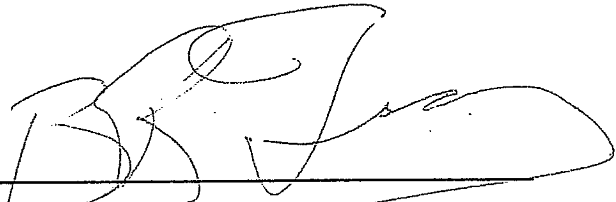
[61] I note in ***R. v. Tremblay***, *supra*, the Supreme Court did not exclude the evidence where the breach was also based in part on the bad behaviour of the accused, and the right infringed was also the right to counsel. However, that was a case of admission of the certificate where the accused gave samples as opposed to a refusal where absent the breach the offence may not have been committed.

[62] I also note in my previous judgment in ***R. v. Snow*** (2004), 372 A.R. 297, referred to by counsel for the accused in a case where there was no *Charter* Application, and I found the accused's right to counsel had been denied, following ***R. v. Brownridge*** (1972), 7 C.C.C. (2d) 417 (S.C.C.), I found such denial would constitute a reasonable excuse.

Ruling

[63] I therefore find the accused's *Charter* protected right to counsel under Section 10(b) was infringed and the evidence of his refusal should be excluded following a Section 24(2) ***Grant*** analysis.

Partially delivered orally in the City of Calgary, Alberta this 27th day of July, 2010.
Partially delivered in the City of Calgary, Alberta on the 30th day of November, 2010.
Dated and filed at the City of Calgary, Alberta this 30th day of November, 2010.



Bruce R. Fraser
A Judge of the Provincial Court of Alberta

Appearances:

Matt Dalidowicz
for the Crown

Robert James Sawyers
for the Defence