IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Farahanchi, 2010 NSPC 57

Date: 2010-09-24
Docket: 1991300, 1991301
Registry: Halifax

Between:

The Queen

v.

Hamed Farahanchi

Judge:	The Honourable Judge Castor H. Williams
Heard:	September 24, 2010, in Halifax, Nova Scotia
Charge:	Section 253(b) and 253(a) CC
Counsel:	Richard Miller, for the Crown Joshua Arnold, for the defence

By the Court:

Introduction

[1] Hamed Farahanchi**,** is an Iranian citizen and a landed immigrant in Canada. Additionally, he has attended a local Canadian university and has completed, in English, a computer science degree. Similarly, at the time of his arrest, he had worked in Canada at a call centre and in a bank where he was obligated to communicate in English to clients.

[2] In any event, the police have charged him with impaired driving and driving with a blood alcohol that exceeded the legal limit. As a result, he has submitted that, although he understood and could communicate in English, his English language skills were insufficiently developed to allow him to understand and to appreciate legal technical issues that would arise in a stressful situation.

[3] Furthermore, and as a consequence of his stated language deficit, he neither understood nor appreciated his legal rights when he was arrested. In effect, he now asserts that, as a foreign national resident of Canada, the police failed to meet the informational and implementation components of his right to counsel. As a sub-text to his right to counsel, he also asserts that he was denied his

constitutional rights, upon arrest and/or detention, to the services of an interpreter. This is despite the fact that he neither requested such services nor did the police reasonably believe, in the circumstances, that the services of an interpreter were required.

Overview

[4] At 0300 hours on December 13, 2008, Cst. Nick Joseph of the Halifax Regional Police was alone in a marked police cruiser on routine patrol in the Spryfield area of the Halifax Regional Municipality. When proceeding inbound on the Old Sambro Road, he saw ahead of him a station wagon that was travelling at a speed of 40 kph in a 50 kph speed zone. The vehicle appeared to be riding its brakes as it did not reduce speed. Also, it was weaving or drifting from left to right within the assigned traffic lane. In addition, it crossed the double solid line road markings and struck the side of the road.

[5] These observed movements of the vehicle over a distance of approximately two kilometers and for approximately ten minutes were sufficiently noticeable for Cst. Joseph to conclude that something was amiss. He, therefore, initiated a traffic stop with the intention of checking the sobriety of its operator.

[6] Approaching the driver's side of the vehicle, with a flashlight in hand, Cst. Joseph identified himself. Inside the vehicle were other persons who were friends of Mr. Farahanchi and who were also Iranians. Cst. Joseph never spoke to them, but he thought that they were under the influence of alcohol. Nonetheless, the driver, later identified as Mr. Farahanchi**,** had his driving documents ready, without any demand, for Cst. Joseph to inspect. However, Cst. Joseph noted that he, the driver, had bloodshot glassy eyes and that a smell of liquor emanated from his breath when he spoke. Also, when Cst. Joseph asked him to get out of his vehicle, Mr. Farahanchi complied but failed to unbuckle his seatbelt. After adjusting himself, he eventually got out of his vehicle and Cst. Joseph placed him in the rear of the patrol car.

[7] From Mr. Farahanchi's manner of driving, the smell of liquor from his breath and his bloodshot and watery eyes, Cst. Joseph formed the opinion that Mr. Farahanchi's ability to operate a motor vehicle was impaired by alcohol. Thereupon, he arrested Mr. Farahanchi for impaired driving and chartered and cautioned him.

[8] Cst. Joseph read him his Charter rights from his notebook. When he told Mr. Farahanchi the reason for his arrest, Mr. Farahanchi indicated that he understood. However, when Cst. Joseph told him that he had the right to call his lawyer, Mr. Farahanchi responded that he did not need a lawyer as he neither had done anything wrong nor broken the law. But Cst. Joseph, for no particular reason, never read to him the toll-free numbers for him to contact duty counsel or legal aid. Cst. Joseph testified that he did not do that on arrest.

[9] Further, when Cst. Joseph read to him the breath demand, he responded that he would take the test. To Mr. Farahanchi, Cst. Joseph spoke rapidly and read from a card. It was a stressful situation and he did not really understand the import of the spoken words. From his cultural ingraining, he felt that he had to cooperate with the police or suffer adverse consequences. He understood that the police wanted him to take some kind of test and that he should cooperate or things would be bad for him. Mr. Farahanchi advised Cst. Joseph that he had consumed alcohol and that he was driving slowly as his vehicle was running out of gas and that he and his passengers were looking for a gas station. Also, he testified that he informed Cst. Joseph that he was from Iran, a recent landed immigrant and a foreign student. Additionally, he queried what would happen

to him. To Cst. Joseph, this was all small talk and excuses. But, at the traffic stop and when Mr. Farahanchi was in the police cruiser, one of his friends spoke to him in Farsi although Cst. Joseph asserted that he neither recalled nor heard this communication.

[10] In addition, Mr. Farahanchi affirmed that, although he attended university courses conducted in English, he asserted that they were, however, in specialized and technical English. Additionally, his work at the call centre was scripted English in that he had written formulated questions and answers check sheets that were supported by specialized computer software to communicate and resolve clients' problems. Furthermore, in stressful work and study situations, he would seek assistance to understand more fully any language problems that would arise with his comprehension of English. Also, he normally socialized either with Farsi speaking friends or others whose first language was not English.

[11] Of import here is that Jacqueline Hynes, the policy and research coordinator of the Halifax Regional Police Force, testified that there is an internal policy and procedure for dealing with foreign nationals, including diplomats and consular

personnel. Essentially, the policy requires an arresting officer to enquire of an identified or identifiable foreign national his/her country of origin, his/her status within Canada, whether they wished to contact their respective consulate and whether, for a police investigation, they required the services of a qualified interpreter. This policy and all updated amendments would have been e-mailed to all members. Additionally, it was on the police network system with access to all members through intranet. However, at the time of Mr. Farahanchi's arrest, Cst. Joseph was not conversant with this policy.

Synopses of the Position of the Parties

(a) On behalf of the Crown

[12] In the Crown's view, Mr. Farahanchi has an appropriate working knowledge of English that would have enabled him to understand the tenor and importance of what Cst. Joseph had communicated to him. This was the case as he responded appropriately. Furthermore, he complied with the officer's commands and he did not say that he neither understood nor required the services of an interpreter. Additionally, in all his conversations with Cst. Joseph, he neither said nor did anything that reasonably would have alerted Cst. Joseph that he was having any problems with his English comprehension.

[13] However, even if it could be said that the officers with whom Mr. Farahanchi had contact should have been more alert in recognizing the fact that he was a foreign national who needed assistance and what that could involve, in all the circumstances, it is submitted that they acted in good faith. Thus, given the gravity of the offence and the current flexible test to determine the exclusion of evidence, this was a case where the evidence obtained following the alleged violation ought not be excluded. If, however, the Charter challenge was successful, the officer's road-side observations would not be subject to Charter scrutiny and can still be considered as evidence against the accused.

(b) On behalf of Mr. Farahanchi

[14] On the other hand, through a Farsi interpreter and his counsel, Mr. Farahanchi submitted that his comprehension of English was overstated. Firstly, although his university degree courses were conducted in English, they were course specific and technical, and he still had difficulties in understanding the language, especially in stressful situations. Secondly, his work experience was limited to scripted written responses that were supported by computer software to resolve issues. It was not a case where he conversed unedited.

[15] What is more, all his socializing was with persons who spoke either Farsi or whose first language was not English. The arrest was a stressful situation and Cst. Joseph spoke rapidly and, as a result, he neither perceived nor comprehended the nature and significance of the spoken words. However, despite the lack of his understanding, given his cultural ingraining, he felt that it was wise to cooperate with the police or suffer adverse consequences. He surmised that he was obliged to take a test as that was what Cst. Joseph wanted him to do. Yet, he did not understand, due to the stressful situation and the officer's rapid speech, that he had the constitutional right to speak to a lawyer free of costs.

[16] Additionally, at the road stop, one of his companions, in the presence of Cst. Joseph, spoke to him in Farsi. Likewise, he told Cst. Joseph that he was a foreign student who was attending university and who had recently become a landed immigrant in Canada. Moreover, his responses to the officer's reading his Charter rights and police caution were sufficiently inappropriate to alert a reasonably attuned person that something was amiss. Therefore, given all these

telling factors, Cst. Joseph should have made more inquiries to ensure that Mr. Farahanchi actually and properly understood all his rights.

[17] Furthermore and significantly, Cst. Joseph was not conversant with his departmental policies and protocol concerning foreign nationals. This was a vital factor in his not appreciating and being sensitive to the situation with which he was dealing and which required a particular set of responses. Thus, in all the circumstances, this was a cumulative and egregious violation of Mr. Farahanchi's protected rights that warranted the exclusion of the obtained evidence.

Findings of fact and Analysis

[18] Mr. Farahanchi took the stand in a blended trial that included a Charter application and the trial proper. He testified through the assistance of a Farsi-speaking interpreter. On the total evidence, I accept and find that Mr. Farahanchi, at the time of his arrest, was a foreign national whose first language was Farsi and with a recent landed immigrant status in Canada. Additionally, I accept and find that, although he might have a working knowledge of the English language sufficient for him to function adequately in an English-

speaking work and school environment, it is possible that in a stressful situation he might have some difficulty fully appreciating what was being communicated to him. That, however, is not to say that he does not understand the words communicated but, unlike a person whose first language is English, he might not grasp their full import and which, as here, resulted in his making incongruous responses.

[19] Additionally, I accept and find that Cst. Joseph, observing the movements of the vehicle on the highway and smelling the odour of alcohol emanating from Mr. Farahanchi's breath when he stopped the vehicle, had reasons to suspect that Mr. Farahanchi had alcohol in his system. However, I am mindful of the proposition enunciated in ***R.* v. *Stellato***, [1993] O.J. No.18(C.A.), [1994] 2 S.C.R. 478 concerning proof of impairment.

[20] On the evidence, I accept and find that the issue of Mr. Farahanchi's bloodshot eyes was questionable as he had been smoking and earlier was in a smoke-filled environment. Also, I find that the issues of his slurred speech and unsteadiness on his feet were questionable. That is because there were conflicts in the officer's testimony and his recorded observations of Mr. Farahanchi. Also,

there was the evidence of Cst. Williams who stated that he observed that the accused had no difficulties moving around. Concerning the slow driving, that was explained by their being in a strange neighbourhood, being lost and looking for a gas station as they were low on gas. Also, Cst. Joseph did no roadside field testing of Mr. Farahanchi to check and to determine his balance and coordination, and Cst. Williams testified that he observed no difficulties with his motor skills.

[21] Therefore, all that is left is the smell of alcohol on his breath, which is consistent with drinking alcohol which he has admitted. However, the smell of alcohol on one's breath, standing alone, is insufficient to find, beyond a reasonable doubt, that one's ability to operate a motor vehicle is impaired by alcohol. It should be borne in mind that it is not an offence to drive a motor vehicle after one has consumed alcohol. Rather, the criminal offence is one's ability to operate a motor vehicle when one's ability to do so is impaired by the consumption of alcohol. ***(Stellato***, *supra*.) Thus, impairment is a question of fact that is determined on the evidence presented in support. Here, in my opinion, the evidence of impairment is frail and leaves me with reasonable

doubt as to the impairment of Mr. Farahanchi and his ability to operate a motor vehicle due to his impairment by the consumption of alcohol.

[22] However, in my opinion, the officer's roadside observations were sufficient to provide reasonable and probable grounds for Mr. Farahanchi's arrest and for him to make the breath demand. But, in my view, they also fall short on the evidence of proof beyond a reasonable doubt for the impaired operation charge that I will dismiss.

[23] Essentially, Mr. Farahanchi has proposed that the police did not fully advise him of the informational component of the right to counsel. Thus, he must demonstrate, on the balance of probabilities, an infringement of his section 10(b) *Charter* rights in that the police did not advise him of those rights in "a meaningful and comprehensible manner." ***R.* v. *Vanstaceghem,*** [1987] O.J. No. 509. See also: ***R.* v. *Mannien*** (1987), 1 S.C.R. 1233; R**. v. *Suberu*** (2009), 245 C.C.C.(3d) 112 (S.C.C.).

[24] The circumstances here, however, are somewhat unusual. I accept and find that Mr. Farahanchi informed Cst. Joseph that he was from Iran and that he was a

foreign student attending university and that he was a recent landed immigrant in Canada. Likewise, I accept and find that, at the traffic stop scene, a passenger from Mr. Farahanchi's vehicle, in the presence of Cst. Joseph, and when Mr. Farahanchi was in custody, spoke to Mr. Farahanchi in the Farsi language advising him not to worry and that it was alright to go with the police.

[25] Here, the officer's belief that Mr. Farahanchi understood what was said was based only on the fact that Mr. Farahanchi spoke English and said that he understood. Yet, Mr. Farahanchi told him that he was a foreign student from Iran. Also, he and his friends were driving slowly, looking for a gas station as their vehicle was almost out of gas. Additionally, his responses to the questions reflected that he did not fully appreciate his jeopardy, and one of them did speak in a foreign language to Mr. Farahanchi. These factors, in my view, should have alerted Cst. Joseph that Mr. Farahanchi's first language might not be English. Even so, it should also be said that, because one's first language is not English does not mean that one does not speak and understand English.

[26] All the same, Cst. Joseph made no inquiries to determine the veracity of Mr. Farahanchi's stated circumstances. He believed that they were merely excuses.

Moreover, by placing Mr. Farahanchi, within moments of the traffic stop, under arrest and proceeding directly to a breath demand, it could be said that Cst. Joseph was only concerned with satisfying the procedural requirements of reading Mr. Farahanchi his rights and receiving a response that could be considered in order rather than ensuring that Mr. Farahanchi, in fact, did understand the import of what was put to him.

[27] I say so because, when Cst. Joseph told Mr. Farahanchi that he had the right to call his lawyer, Mr. Farahanchi responded with why should he call a lawyer as he had not committed a crime. Mr. Farahanchi had given him his licence and insurance particulars and he was satisfied with these documents. To Mr. Farahanchi, in the set of circumstances, there were no issues concerning his possession of the vehicle. He denied understanding the import of his rights under section 10(b) of the Charter and maintained that, essentially, he surrendered to the process due to his cultural perceptions of dealing with the police.

[28] Furthermore, in my opinion, there were other factors that should have alerted Cst. Joseph of Mr. Farahanchi's understanding. For instance, when he told Mr.

Farahanchi that he, Mr. Farahanchi, had to go to the police station to take the breath test, Mr. Farahanchi agreed to go but not that he understood the implications. This was because from his conversation with Cst. Joseph, such as it was, concerned his, Mr. Farahanchi's, perception of his predicament that he attempted to convey to the police.

[29] First, he told Cst. Joseph that he was a foreign student from Iran, a recent landed immigrant with no prior dealings with the police, and enquired what was to happen to him and what was to be his punishment. Secondly, when they arrived at the police station and Cst. Joseph told him that he could call his own lawyer, Mr. Farahanchi responded that he had no lawyer and enquired who could he call at this time in the morning, 0400 hours. He, however, again was told to call his own lawyer. Thirdly, even Cst. Joseph himself admitted, in direct examination, that he had not provided the toll-free numbers but only the non-800 numbers for Mr. Farahanchi to contact legal aid or duty counsel. He merely placed him in a room with a telephone but never assisted in contacting duty counsel when Mr. Farahanchi asked whom he could contact.

[30] It is clear from the cases from the Supreme Court of Canada that there are three elements of the informational duty. A person who is detained must be told that he or she has:

(a) the right to retain and instruct counsel without delay;

(b) access to counsel free of charge from the provincial legal aid plan: and

(c) access to duty counsel and the telephone numbers to communicate with duty counsel. See: ***R.* v. *Bartle*** (1994), 3 S.C.R. 173, at 194-195; ***R.* v. *Latimer*** (1997), S.C.R. 217, para.33. ***R.* v. *Prosper***, [1994] S.C.J. No.72.

[31] Apart from the fact that Cst. Joseph did not provide the toll-free numbers, there was also the issue of cultural perceptions that gave rise to language comprehension. To Cst. Joseph, Mr. Farahanchi spoke English and appeared to understand him. At least Mr. Farahanchi gave no inclination that he did not understand and neither did he ask for an interpreter. To Mr. Farahanchi, from a cultural perspective, one cooperates with the police or suffers serious consequences. Further, from a language perspective, the police spoke rapidly in a stressful situation, and Mr. Farahanchi testified that he did not fully comprehend the meaning of what was spoken. He was stressed, frightened and

confused. To compound all this, from Mr. Farahanchi's perspective, Cst. Joseph was not conversant with departmental policies and procedures concerning the arrest or detention of foreign nationals.

[32] Counsel for Mr. Farahanchi has submitted, along with numerous authorities, several documents including the ***Vienna Convention on Consular Relations (1963), Foreign Missions and International Organizations Act,*** S.C. 1991, c.41 and the ***Halifax Regional Police Standard Operational Policy and Procedure Manual***; Policy: 12 FOREIGN NATIONALS, to support his contention that, as a foreign national, Mr. Farahanchi was denied his consular services and his rights to an interpreter. As a result, it is contended that he suffered serious prejudice. These factors, however, were reviewed in ***R.* v. *Partak,*** 2001 CanLII 28411 (On. S.C.). See also: ***R.* v. *Van Bergen***, [2000] A.J. No.882 (C.A.). Succinctly put, if the rights are read only in English, "special circumstances" arise if the detainee's knowledge of English "does not allow sufficient comprehension of the matter."

[33] Through its *Standard Operational Policy and Procedure Manual*, the Halifax Regional Police Department has mandated to its members that, in our diverse

and multi-cultural society, there is not a one-size-fit-all approach to ensure that a person who is detained or in custody actually understands his or her entrenched constitutional rights. In this context, as was put by Klein J. In ***R.* v. *Nayyar***, [2009] O.J. No. 5824 (Ont. C.J.), at para 34:

> Having a familiarity with the words that are spoken, those words that constitute your Charter rights, in a language that is not your native language is not the same as having those same Charter rights expressed and explained to you in your first language, thus ensuring an understanding of those rights, making them meaningful and comprehensible . . .

[34] Thus, as had been said on several occasions, the investigating officer merely reciting, by rote, or perfunctorily reading from a card or note book, those rights to an accused is quite unsatisfactory. It, therefore, seems to me in this context that, when dealing with the detained person, as here, it is obligatory that the investigating officer take into account and assess all the information that is available to him and, only if he has good reasons, he should disregard information that he believes to be unreliable. This means, in my view, that objectively, there must be some positive words or action on the part of the detainee to trigger the required and further police responses. On the contrary, subjective inaction on the part of the detainee does not rise to the level of the

required triggering factor as the police would have no indication of his or her "special circumstances."

[35] On the evidence, at first blush, it could be said there were circumstances that suggested that Mr. Farahanchi might not have understood in a meaningful way the information being communicated. Also, that "special circumstances" as was proposed in ***R.* v. *Anderson*** (1984), 10 C.C.C. (3d) 417 (Ont.C.A.), might have existed. Critically and importantly, however, Mr. Farahanchi testified that when he had difficulties with his English comprehension he would let the speaker know of this fact. But here, inexplicably, he did not do so. If, as he contends at trial, the reading of his rights in English, confused him, in that he did not comprehend the import of the words spoken, then it seems to me, on his own testimony of asking for help in such situations, that he should have been reasonably diligent to inform Cst. Joseph of his language predicament, if at all. He did not do so. He was responsive, in English, to Cst. Joseph throughout. He never said that he did not understand while talking to the officers and never gave the officers any reasons to suggest that he did not understand.

[36] Furthermore, he initiated conversation in English and, from the police perspective, he responded appropriately to English questions. Thus, from this perspective, the police had no reasons to offer the services of an interpreter and no "special circumstances" came to light that required any further correlative police responses. See for example: ***R.* v. *Vidovic***, [2006] O.J. No.4093 (Ont. C. J.), ***R.* v. *Zbarcea***, [1998] O.J. No.1101. Thus, I find that, in the circumstances and on this point, the police acted reasonably.

[37] Therefore, difficult as it may seem, in my view, given the totality of the evidence, even though ignorant of departmental policies, there were no objective evidentiary indicia that would have impelled the police to take the further step to enquire of the need for an interpreter or consular services. I find that the total evidence points to the conclusion that Mr. Farahanchi, at the time of his detention and custody, on the balance of probabilities, did, in fact, understand to a high degree, as evidenced by his responses, the information given to him by the police. Put another way, on the total evidence, I am not satisfied Mr. Farahanchi has demonstrated, on the balance of probabilities, that the police breached his Charter rights to counsel when they did not provide him with the services of an interpreter or consular services.

[38] Even so, that does not resolve or end the *Charter* challenge. I accept and find that Cst. Joseph read Mr. Farahanchi his right to counsel at 0320 hours, to which Mr. Farahanchi responded that he understood. Further, I accept and find that Mr. Farahanchi responded to the question: "Do you wish to call a lawyer?" with the comment: "Why should I call a lawyer? I didn't break the law." However, I should say that Cst. Joseph, omitting to read the 1-800 numbers, although not prejudicial in this case, should neither be encouraged nor condoned. These numbers are an integral part of the informational component of how to contact legal aid and duty counsel and cannot, for any personal preferences, arbitrarily be omitted.

[39] Furthermore, I accept and find that the traffic stop was at 0315 hours and that Cst. Joseph read to Mr. Farahanchi the first breathalyser demand at 0321 hours. Mr. Farahanchi agreed to take the test. Additionally, I accept and find that, after about a ten-minute drive, they arrived at the police station at 0334 hours. On arriving at the police station, I accept and find that Cst. Joseph placed Mr. Farahanchi in a holding room with a telephone and, upon doing so, told him that he can now call his lawyer. I also accept and find that Mr. Farahanchi, at that point in time, told Cst. Joseph that he had no personal lawyer and asked

whom could he contact at 0400 hours. Likewise, I accept and find that Cst. Joseph repeated to Mr. Farahanchi that he could call his own lawyer and then left Mr. Farahanchi alone.

[40] I accept and find that at 0336 hours Cst. Joseph turned Mr. Farahanchi over to Cst. Marshall Williams, the breathalyser technician, who escorted him to the breathalyser room. However, neither Cst. Williams nor Cst. Joseph ever asked Mr. Farahanchi whether he had contacted his own or any lawyer. In any event, Cst. Williams instructed him on how to give his breath samples and, on demand, Mr. Farahanchi gave his first breath sample at 0400 hours. He gave the second sample at 0424 hours.

[41] Here, Cst. Williams made the final breath demand within twenty minutes of Mr. Farahanchi's arrest. During that time he was taken to the police station and placed in a holding room for approximately only two minutes where he was told to call his own lawyer. He, however, told Cst. Joseph that he had no personal lawyer and asked whom he could call at that time of the morning. I accept and find that Cst. Joseph walked away, perhaps interpreting the situation to be one of either that Mr. Farahanchi had been told his right which he said he

understood, and he was in a room with a telephone to make that call, or that Mr. Farahanchi was stalling, not exercising due diligence to contact his lawyer, or was not asking for a lawyer.

[42] However, in all the circumstances, I conclude and find that, by his comments, Mr. Farahanchi was essentially requesting assistance to obtain and to contact counsel. From his testimony, on this point, I accept that Mr. Farahanchi was left with the impression that, as he had no personal lawyer, he had no other choice. Therefore, in my view, and in all the circumstances, it would have been apparent to the objective observer that Mr. Farahanchi misunderstood the full content of his right to counsel and that Cst. Joseph had a duty to take affirmative steps to facilitate that understanding. ***R*. v. *Brydges*,** [1990] S.C.J. No. 8, at para.16.

[43] Further, I find that, in all the circumstances, it should have been obvious to Cst. Joseph that Mr. Farahanchi needed assistance to exercise his right to counsel. There was no urgency as there was sufficient time between the time of the first demand at the roadside and before the breath samples had to be taken. Moreover, Cst. Joseph testified that, at times in the past, he had assisted an

accused person by dialing the number for duty counsel and legal aid. But, here, inexplicably, he did not. In any event, here, I accept and find that he gave no assistance but walked away and left Mr. Farahanchi alone in the room with a telephone.

[44] Even if it could be said that Cst. Joseph told him to call a lawyer, as distinct to his own lawyer, I find that, in any event, he was not told, upon his comment and enquiry concerning counsel, that he could call legal aid or duty counsel and, at that point in time, was given the information to do so. Moreover, there was no evidence that either the telephone numbers for legal aid or duty counsel, with any explanations of what they were about, were in the holding room. Additionally, when the time-line of Mr. Farahanchi's contact with Cst. Joseph is considered, I find that it lends some support to the accused's testimony that he appeared to be in a hurry to complete the process and was perfunctory in his conduct. Thus, I conclude and find that, in the circumstances, Cst. Joseph must have felt that he had done what was required of him to do as he did not pause to take the time to explain to Mr. Farahanchi in any meaningful or comprehensive manner, or at all, Mr. Farahanchi's full right to counsel. See: ***R*. v. *Burlingham*** (1995), 97 C.C.C. (3d) 385 (S.C.C.), ***Bartle***, *supra*.

[45] The question of whether Mr. Farahanchi was diligent, in my opinion, must be resolved in his favour. First, he was arrested in the early morning outside of regular office hours. Secondly, he was placed in a room for the most of two minutes and told to call his lawyer that he expressed he did not have. In all the circumstances, I accept his testimony and find that it is possible that he was not familiar with the terms "legal aid" and "duty counsel," as these terms were never explained to him. (See: ***Nayyar***, *supra*.) Also, he testified that he understood that his right to call a lawyer meant that if he had a personal lawyer he could do so or, if not, he had no choice. Thus, in the set of circumstances, I find that he could not be diligent in exercising a right that he neither comprehended nor understood that he had. Therefore, in the circumstances, I find that he was reasonably diligent in advising Cst. Joseph that he needed to contact someone but that Cst. Joseph disregarded him. (See: ***R*. v. *Chisholm*,** [2001] N.S.J. No. 58 (C.A.))

[46] Likewise, in all the circumstances, I conclude and find that any requirement for the police to assist Mr. Farahanchi was not met by Cst. Joseph. I find that merely putting Mr. Farahanchi in a room with a telephone for the most of two

minutes and, without enquiring whether he had contacted counsel, and then requiring him to take the breathalyser test in the absence of any urgency or dangerous circumstances and with the information conveyed by Mr. Farahanchi's comments concerning counsel, was unreasonable. (See: ***R.* v. *Brown***, [2009] N.B.J. No.143) Therefore, in my opinion, Mr. Farahanchi's actions, such as they were, did not meet the high standard required to be characterized as his waiving his rights to counsel. (See: ***R.* v. *Clarkson***, [1986] S.C.J. No.20; ***R.* v. *Ross***, [1989] 1 S.C.R. 3; ***R.* v. *Dunnett***, [1990] N.B.J. No. 1135 (C.A.))

[47] For the above reasons, I find that the police violated Mr. Farahanchi's constitutional right to counsel as I find that Mr. Farahanchi did ask how he could contact counsel but was ignored. In all the circumstances, I find that Mr. Farahanchi's full right to contact counsel was not explained to him in any meaningful and comprehensive manner. Besides, in my opinion, even if it could be said that he understood his rights, which I find that he did not, he was not given any reasonable opportunity to exercise his right to counsel. Thus, in the circumstances, it cannot be said that Mr. Farahanchi made an informed choice to waive his constitutional rights.

[48] Likewise, I find that the police did not refrain from taking the breath samples from Mr. Farahanchi until he had that reasonable opportunity to consult with counsel. In the result, I conclude and find that Mr. Farahanchi has demonstrated, on the balance of probabilities, that the police infringed his section 10(b) *Charter* rights. (See: ***Latimer***, *supra*.; ***Grouse* v. *R.*** (2004), N.S.R. No. 346 (C.A..)***; Chisholm,*** *supra*.)

Section 24(2) *Charter* analysis

[49] I have concluded that the police breached Mr. Farahanchi's right to counsel. The next step is to consider his remedies under s. 24(2) of the *Charter*. The Supreme Court of Canada, in the cases of ***R*. v. *Grant,*** 2009 SCC 32, [2009] 2 S.C.R. 353 and ***R*. v. *Harrison,*** 2009 SCC 34, [2009] 2 S.C.R. 494, has made the test more flexible in that now less importance is placed on whether the evidence sought to be excluded is conscriptive or non-conscriptive.

[50] The line of inquiry that I must take is stated in ***Grant***, *supra*., in para. 71, as follows:

> 71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public [page394] interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. 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. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

(1) The seriousness of the Charter-infringing state conduct

[51] The more serious the state conduct, the more likely it is that the challenged evidence would be excluded. It is well-settled law that the police had a duty to tell Mr. Farahanchi in clear and simple language that he could understand his proper *Charter* rights and to assist him in implementing those rights. I have found that Cst. Joseph did not recite the full informational component of how

to contact legal aid or duty counsel. Furthermore, when Mr. Farahanchi sought assistance on whom he should call, the officer failed to provide that information or assist him to contact a lawyer. *Charter* rights must mean something and cannot be sacrificed to expediency or personal idiosyncracies. Wilful blindness cannot be equated with good faith.

[52] In balancing the actions of Cst. Joseph in omitting to read the 1-800 numbers, although certainly not egregious, I do not consider it to be merely trivial or technical in nature. The more serious and egregious conduct, in my view, is his failure to ensure that Mr. Farahanchi fully understood his right to counsel and his failure to assist Mr. Farahanchi to contact duty counsel when it was apparent that Mr. Farahanchi asked for and needed assistance to exercise his right to counsel and required a reasonable opportunity to do so.

[53] Under this branch of the test, my concern is not to punish the police, or to deter Charter breaches, but rather to preserve public confidence in the rule of law and its processes in that the message is clear that the justice system does not condone serious state misconduct. Thus, in the result, under this first aspect of

the s. 24(2) test, I will exclude the challenged evidence obtained after the breach.

(2) The impact of the breach on the Charter-protected interests of the accused

[54] Generally speaking, the suppression of relevant evidence could have an adverse effect on the repute of the justice system. Here, however, I would apply the standard of the reasonable man, as adopted per Lamer J., in ***R.*** **v**. ***Collins***, [1987] 1 S.C.R. 265, at para 49:

> 49 With the exception of his conclusion, there is little, if anything, inconsistent in the judgment of Seaton J.A. with what my colleague, Lamer J., has said up to the point where he discusses his approach to the question of how a court should determine, in accordance with s. 24(2) of the Charter, whether the admission of evidence would bring the administration of justice into disrepute. It is with respect to that aspect of my colleague's judgment that a divergence in our views appears. With the very greatest deference to my colleague, I would not approve of a test so formulated. I [page290] would prefer the less formulated approach of Seaton J.A., who said at p. 151:
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> > Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through

> > the eyes of a policeman or a law teacher, or a judge for that matter. I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question. It follows, and I do not think this is a disadvantage of the suggestion, that there will be a gradual shifting. I expect that there will be a trend away from admission of improperly obtained evidence.
> >
> > I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.
>
> In this, I take it that Seaton J.A. in deciding the question has adopted an approach similar to that of the reasonable man, so well known in the law of torts. This is by no means a perfect test, but one which has served well and which has, by its application over the generations, led to the development of a serviceable body of jurisprudence from which has emerged a set of rules generally consistent with what might be termed social attitudes. I would suggest that such an approach, developing rules and principles on a case-by-case basis, will produce an acceptable standard for the application of s. 24(2) of the Charter.

[55] Here, I think that a reasonable person fully apprised of all the facts would express concern that Mr. Farahanchi's constitutional rights should count for

something. The police rushed the process when there was no urgency. Furthermore, apart from the fact that the police failed to respond to his request for assistance to obtain counsel and took no reasonable steps to ensure that he fully understood that right, he was also not given a reasonable opportunity to contact counsel even if he wanted to do so. The impact of denying him his rights, in the set of circumstances and given the voluminous jurisprudence on this point, in my view, is severe and any admission of the evidence would taint the trial fairness. Thus, in balancing the interests of truth with the integrity and the long-term effect on the administration of justice, it should be clear, based on the well-established law, that constitutionally entrenched rights do mean something and cannot be trivialized. The ends do not justify the means. Consequently, I conclude and find that a consideration of this second aspect of the s.24(2) test militates in favour of excluding the evidence.

(3) ***Society's interest in the adjudication of the case on its merits***

[56] Drinking and operating a vehicle when one's ability is impaired by the consumption of alcohol is a serious social evil. The evidence obtained is reliable and essential to substantiate the charge. The Certificate of a Qualified Technician is highly reliable evidence and, in my view, would not "operate

unfairly having regard to the truth-seeking function of the trial." ***Harrison***, *supra*. , at para, 34. Or, as stated in ***Grant***, *supra.* , at para. 111:

> 111 While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

[57] Without this evidence, it is unlikely that the Crown can prove, beyond a reasonable doubt, its case against Mr. Farahanchi. However, critical as it may be, that evidence, in its context, must also be considered appropriately and not disproportionately. I am reminded that ***Grant***, *supra.*, impresses that the public has a heightened interest in a justice system that is beyond reproach and in seeing a determination of the merits of the case particularly when the charge is a serious one. Therefore, with that caveat in mind, I find that a consideration of this third factor of the s.24(2) test militates in favour of admitting the evidence as it "would promote the public interest in having the case adjudicated on its merits." ***Harrison***, *supra*. , at para. 34.

Balancing the interests

[58] The final aspect of the s.24(2) test is to balance all three factors. In ***Harrison***, *supra*., the Court stated at para. 36:

> 36 The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[59] Thus, the s.24(2) inquiry must look beyond this particular case and to consider the impact, over time, of admitting evidence obtained by the infringement of the constitutionally protected rights of Mr. Farahanchi. The breach was very serious and justice, in my view, would receive an indelible blot on its untarnished escutcheon if it were to turn a blind eye to unacceptable police practices. Moreover, in my view, the public must have confidence that whenever a person is detained or is in police custody, regardless of the crime

charged, that person's guaranteed and protected constitutional rights will be assiduously implemented by the police. Here, I find that the police took a nonchalant approach to Mr. Farahanchi's guaranteed rights.

[60] Consequently, having considered all the circumstances of this case, I find that on a balancing of the three factors, to admit the evidence in this and similar cases in the future would undermine the long-term confidence in the justice system. This does not mean that, in this case, seeking the truth did not matter. Rather, it means that the need to safeguard the integrity of the justice system in relation to the constitutionally guaranteed right to counsel outweighs the truth-seeking interests of the trial. In my opinion, in the long run, the integrity of the justice system and the repute of the administration of justice is enhanced and preserved by excluding the evidence.

[61] In the result, I grant Mr. Farahanchi his application and will exclude any and all evidence obtained as a result of the police breaching his Charter-protected right to counsel. Application granted.

Merit of the case

[62] As I have suppressed the evidence essential to the Crown's case, there is no need for me to determine the case on its merits. Needless to say, in the interest of completeness, there would have been little difficulty for me to find, on the expunged evidence, Mr. Farahanchi guilty of having more than the legal limit of alcohol in his blood.

Disposition

[63] As I have ordered the exclusion of the Certificate of a Qualified Technician and any and all evidence obtained following the breach, as I have found, the Crown's case necessarily must fail. In the result, I will find Mr. Farahanchi not guilty as charged.

The Honourable Judge Castor H. Williams