PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Burns*, 2017 NSPC 82

Date: 20171018
Docket: 8051873
Registry: Dartmouth

Between:

Her Majesty The Queen

v.

Ben Mark Scott Burns

Judge: The Honourable Judge Frank P. Hoskins

Decision October 18, 2017

Charge: **THAT** on or about the 5th day of November, 2016, at or near Lower Sackville, Nova Scotia did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 millilitres in 100 millilitres of blood, contrary to section 253(1)(b) of the *Criminal Code*.

Counsel: Aaron Martens for the Crown
Quy Linh for the Defence

By the Court: (Orally)

Introduction:

[1] This is the decision on the *voir dire*, in the matter of *The Queen v. Ben Burns.*

[2] Mr. Burns is charged with impaired operation of a motor vehicle and furthermore having consumed alcohol in such a quantity that the concentration in his blood exceeded eighty milligrams of alcohol in one hundred milliliters of blood, contrary to s. 253 (a) and (b) of the *Criminal Code.*

[3] These offenses arise from a police checkpoint that was conducted on November 5, 2016, on Sackville Drive, in Lower Sackville. At approximately, 2:30 a.m., Mr. Burns entered the checkpoint. Cst. Desroche and Cst. Orman were conducting the checkpoint when Mr. Burns entered it.

[4] Mr. Burns stopped his vehicle as it approached Cst. Desroche. After speaking with Mr. Burns, Cst. Desroche demanded a breath sample from Mr. Burns. In making the breath demand, Cst. Desroche read from a pre-printed card, which is intended to inform a suspect of exactly what is being demanded of him, and why. He also read from a pre-printed card the police caution, and *Charter of*

Rights. It was during this process, the reading of the pre-printed cards, by Cst. Desroche, that the issue arises in this blended *voir dire.*

[5] The issue focuses on whether Mr. Burns understood or comprehended what was being read to him by Cst. Desroche. Mr. Burns says he could not understand or comprehend what Cst. Desroche read to him because of Mr. Desroche's strong French accent. He further contends that he requested an English-speaking officer to read the pre-printed cards to him. His incessant requests were ignored, so he gave up as he did not want to continue to argue about it with the officer.

[6] Mr. Burns declined to speak to a lawyer, not having been made aware that he could speak to duty counsel. He called his grandparents and spoke to them before he provided a sample of his breath to the breath technician for the purposes of analysis. Following that, he was released from police custody.

[7] The central issue is whether the police failed to fully inform Mr. Burns of his 10(b) *Charter Rights*.

[8] I reserved my decision until today, so that I would have time to carefully consider and thoroughly reflect upon the evidence.

[9] Accordingly, I have had the opportunity to listen intently to the submissions that have been made by the Counsel and have considered all the evidence that was proffered in this *voir dire.*

[10] I will briefly summarize the surrounding circumstances which have emerged from the evidence presented, touch upon the law, and then provide my analysis, which has led me to the result in respect to the issue of whether the police failed to fully inform Mr. Burns.

Summary of the Evidence

[11] Three witnesses were called in the *voir dire*: Cst. Orman; Cst. Desroche; and the applicant, Mr. Burns.

The Evidence of Cst. Orman

[12] Cst. Orman testified that he has been a member of the RCMP for 15 years, and was so employed and working on November 5, 2016.

[13] On that date, he was conducting a checkpoint at the 200 block at or near the Canadian Tire Gas Bar located on Sackville Drive.

[14] The driver informed the officer that he had consumed a drink of alcohol earlier in the evening. With this information, Cst. Desroche formed the requisite

reasonable suspicion that the driver had alcohol in his body, and accordingly, he made a breath sample demand for the purposes of conducting an analysis with the Road Side Screening Device.

[15] Cst. Orman was Cst. Desroche's training officer at the time. He oversaw Cst. Desroche administer the Approved Screening Device to the accused, Mr. Burns.

[16] Cst. Orman observed Cst. Desroche read the roadside screening demand to Mr. Burns, in which he appeared to understand and complied accordingly. Mr. Burns registered a failure on the device. As a result of that, Cst. Desroche formed the belief that Mr. Burns' ability to operate a motor vehicle was impaired by alcohol. Cst. Desroche then demanded a breath sample from Mr. Burns for the purposes of conducting a breathalyzer test. He made the breath sample demand by reading from a pre-printed card. Mr. Burns appeared to understand what was read to him. Following that, Mr. Burns was transported to the RCMP detachment to complete the breathalyzer test.

[17] On cross-examination, Cst. Orman stated that he did not observe Mr. Burns drive a vehicle. He agreed that Cst. Desroche is a Francophone, and has a French accent.

[18] Cst. Orman also testified that Cst. Desroche had recently graduated from the RCMP Depot; he was a newly qualified officer, who began training in August 2016.

[19] Cst. Orman recalled that Cst. Desroche read the Approved Screening Device demand twice to Mr. Burns, which he appeared to understand.

[20] Cst. Orman also recalled that Cst. Desroche then read the breathalyzer demand to Mr. Burns, but could not recall how many times the demand was made. He added that there was a discussion back and forth regarding whether Mr. Burns understood what was being requested of him. Cst. Orman stated that the discussion focused on clarifying whether Mr. Burns understood what was being asked of him. He did not, however, make any notes of the discussion. And he could not recall whether he or Cst. Desroche was driving the police cruiser. He added that nothing unusual happen during the trip to the RCMP detachment where the breathalyzer test was administered.

The Evidence of Cst. Desroche

[21] Cst. Desroche testified that on the date and time in question, he was conducting a checkpoint on Sackville Drive, at or near the Canadian Tire Store gas pumps.

[22] As he was conducting the checkpoint, he observed a black SUV enter the checkpoint. The vehicle had a New Brunswick license plate. He stopped the vehicle and interacted with the driver. The driver produced his driver's license. Cst. Desroche detected a smell of marijuana. The driver, Mr. Burns, stated that his friends had smoked marijuana earlier in the evening, and he had consumed a beer. Having learned that, Cst. Descroche made the Approved Screening Device Demand. He read the demand from a pre-printed card. He read it twice to Mr. Burns because Mr. Burns did not understand what was being said to him because of Cst. Desroche's French accent. He spoke slower the second time he read from the card.

[23] He stated that there is not much of a difference in his accent, in what we heard in Court as compared to the date and time of the incident.

[24] Cst. Desroche administered the test. Mr. Burns registered a failure on the approved screening device. Cst. Desroche then read Mr. Burns the breathalyzer demand, the police caution and his *Charter of Rights*, to which he appeared to understand, because he stated, "yeah".

[25] Mr. Burns was then transported to the RCMP detachment where he provided two samples of his breath for the purposes of analysis. Following that, Mr. Burns was released on a Promise to Appear.

[26] Cst. Desroche read into the record from the pre-printed cards the breath demands, police caution and *Charter of Rights.* He stated that after he read each printed card to Mr. Burns, Mr. Burns indicated that he understood. He added that he only read the police caution and *Charter of Rights* once to Mr. Burns.

[27] On cross-examination, Cst. Desroche agreed that there was nothing unusual about Mr. Burns' driving, and he confirmed that he is from Quebec; that is his home. He has lived, however, in Alberta for 6 or 7 months, and was, at the time in question, a new officer, having recently graduated from Depot.

[28] It was put to him by Mr. Manning, defence counsel, that Mr. Burns asked for an English speaking officer to read the breath sample demand to him. Cst. Desroche replied that he could not remember that.

[29] Cst. Desroche agreed that he read the approved screening device breath sample demand to Mr. Burns twice inside the police vehicle. He did not provide Mr. Burns with his rights, caution and breath demand at the police detachment. He

added that it was clear that Mr. Burns did not want to speak to a lawyer. Cst. Desroche could not recall how many times he read the breathalyzer demand, after Mr. Burns registered a fail on the approved screening device. He recalled that he was satisfied that Mr. Burns understood what he had stated and/or read to him from the pre-printed card. Following that, he transported Mr. Burns to the detachment where the breathalyzer test was conducted.

[30] After failing the breathalyzer tests, Mr. Burns was released from custody on a Promise to Appear. He stated that he explained what was contained in the documents, the paperwork, to Mr. Burns before releasing him.

[31] Cst. Desroche stated that he could not remember Mr. Burns asking to have an English-speaking officer read him the breath demand, nor did he recall reading the breathalyzer demand twice to Mr. Burns.

[32] Cst. Descroche re-read into the record what he had read to Mr. Burns on the date and time in question. There is no doubt that Cst. Dearoche has a strong French accent. After intently listening to him in court, his apparent French accent was noted.

[33] Cst. Descroche confirmed that the detachment only has video recording; there is no audio. He also could not recall whether he had to explain the documents, or the paperwork, to Mr. Burns on two occasions. He could not recall whether he read them to Mr. Burns twice.

[34] Cst. Descroche agreed that he had a voice recorder on him at the time, but did not use it. He only uses it when he is going to take a statement.

[35] On re-direct examination, Cst. Descroche stated that Mr. Burns never indicated that he did not understand him. He could not recall whether or not Mr. Burns asked for assistance in understanding what was being said to him.

[36] Cst. Descroche could not recall whether he asked Mr. Burns to re-phrase what he had read to him.

The Evidence of Mr. Burns

[37] Mr. Burns testified. He stated that on November 5, 2016, at approximately 2:30 a.m., he approached a police checkpoint at or near the Canadian Tire Store Gas Pumps on Sackville Drive.

[38] He recalled informing the officer that he had consumed one beer earlier in the evening, but did not recall having any discussion about marijuana. He stressed

that he was the only person in the vehicle. He drove into Halifax by himself and was returning by himself when he was stopped. He recalled that there were two police officers present. Cst. Descrohe spoke to him, while the second officer, Cst. Orman, stood back behind Cst. Descrohe.

[39] Mr. Burns testified that Cst. Descrohe read to him a demand from a card. He read it two and a half times. At one point, as Cst. Descroche was reading, Mr. Burns stopped him, and told Cst. Descrohe that he could not understand him. He stressed to Cst. Descroche that he did not understand him and asked for an English speaking officer to read it to him. After arguing with Cst. Descroche, he took the test realizing that he was not going to speak to an English-speaking officer. Therefore, he declined to speak to a lawyer, but at the detachment asked to speak to a lawyer.

[40] While at the police detachment, Mr. Burns recalled being placed in an interview room where he telephoned his grandparents.

[41] He was emphatic that he did not understand Cst. Descroche, and was incessant on speaking with an English-speaking officer.

[42] Mr. Burns stated that he did not fully understand everything that was read to him because of Cst. Descroche's French accent; that is why he asked to have an English-speaking officer talk to him.

[43] On cross-examination, Mr. Burns agreed that he declined to speak to a lawyer, as he understood the word lawyer. He agreed that he can read, but denied that he read the release documents that were presented to him.

[44] Mr. Burns stated that at the roadside he understood that he was being detained for a road side sobriety test. He added, that he simply did not understand what Cst. Descroche had read or stated to him. He stressed that he had the officer read it again because he could not understand what Cst. Descroche given the speed at which he read from the card, coupled with Cst. Descroche's French accent. He added that the long paragraphs also made it hard to understand what he was saying to him.

[45] Mr. Burns stressed that he clearly understood what the breathalyzer technician who administered the tests to him said.

[46] Mr. Burns stated that he did not fully understand and appreciate his *Charter of Rights*, because he could not fully understand what Cst. Descroche had stated to

him because of Cst. Descroche's French accent. He stressed that Cst. Descroche did not advise him of his right to consult with duty counsel, which was immediately available and free. He added that there was no duty counsel telephone number provided to him.

[47] Again, he repeated that he wanted to speak to an English-speaking officer.

[48] That is a brief summary of the evidence.

The Burden of Proof: *Charter*

[49] The applicant, Mr. Burns, must establish on the balance of probabilities that his *Charter of Rights* were infringed. Mr. Burns contends that his *Charter of Rights* were infringed because he was not clearly informed that he had the right to free and immediate legal advice. In other words, he did not understand what was read and/or stated to him by the officer, who spoke with a strong French accent.

[50] The onus is on the accused, Mr. Burns, to establish that on a balance of probabilities that he did not understand his rights to counsel.

Informational Component

[51] Section 10(b) of the *Charter* imposes an informational duty on the police to inform a 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. (*R.* v. *Bartle* , [1994] 3 S.C.R. 173, at para. 17)

[52] The informational component of the s. 10(b) right is pivotal; a person who does not understand his or her right cannot be expected to assert it. (*Bartle* at para. 20)

[53] In *Bartle* the Supreme Court of Canada stressed that it is critical that the information component of the right to counsel be comprehensible in scope and that it be presented by police authorities in a timely and comprehensive manner. Unless they are clearly and fully informed of their right at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact and, in turn, whether to exercise other rights, such as their right to silence. It is important that the standard caution given to detainees be as instructive and clear as possible. (*Bartle,* at para. 19).

The Right to be Advised of Free & Immediate Legal Advice

[54] The Supreme Court of Canada in *R. v. Brydges*, [1990] 1 S.C.R.190 held that the police must inform an arrested or detained suspect of the existence and availability of relevant systems of duty counsel and legal aid that are in operation in the jurisdiction concerned. The police are required to provide the suspect with

basic information about how to access the free legal services that are provided in the jurisdiction concerned. In particular, they must inform the suspect of the opportunity to call a toll-free number or to consult a list of the telephone numbers of duty counsel. (See: *Bartle; R. v. Pozniak*, [1994] 3 S.C.R. 310)

[55] What is important to emphasize is that the police must specifically inform an accused or detained suspect of the opportunity to access immediate, free legal advice, as for example, a 1-800 number. It is not sufficient to inform the suspect, that should he or she wish to contact duty counsel, the police will supply a telephone number.

[56] The failure to provide specific information about the availability of *Brydges* services does not constitute a violation of s. 10(b) if the accused person exercises the right to counsel and actually speaks to counsel.

[57] If a suspect has been fully informed of his or her rights under s. 10(b) and knowingly waves the opportunity to contact counsel, it is not necessary for the police to provide him or her with the specific toll –free number.

The Importance of the Suspect to Understand the contents of his or her *Charter of Rights*

[58] Language barriers may prevent suspects from fully understanding a police caution concerning their rights to counsel and/or legal advice provided by *Brydges* duty counsel. Often this issue arises, in Canada, where the first language of the suspect is not English.

[59] Section 10(b) of the *Charter* requires that an accused be informed of the right to counsel. This means that the accused must understand what is being said by the police officer and must understand what the options are so he or she can make an informed choice as to the exercise or waiver of their constitutional rights. Put differently, the police are required to ensure that the accused is advised of the right to counsel in a meaningful and comprehensive manner. The accused must not only be read their rights to counsel, they must also understand them. In *R.* v. *Vanstaceghem,* [1987] O. J. No. 509, the police officer knew that the accused was French speaking and was not at ease in the English language. The accused had not understood the breath demand when given in English and the officer was forced to read the demand in French. In those circumstances, the fact that the accused was not read his rights in French violated s. 10(b). In that case, the Ontario Court of Appeal held that a subjective belief by the officer that the accused really does

understand English is not sufficient where *special circumstances exist* that require the police to ensure the accused understands his or her rights.

[60] In most cases, it is possible to infer from the circumstances that the accused understands what he or she has been told. In such cases, the police are required to go no further. However, where there is a positive indication that the accused does not understand their rights to counsel, the police cannot rely on a mechanical recitation of the rights. They must take steps to facilitate that understanding. (*R.* v. *Evans*, [1991] 1 S.C.R. 869 at 891). In other words, where special circumstances exist, the police are required to take extra steps to reasonably ascertain that the accused understands their rights to counsel.

[61] In essence, the right to be informed of the right to counsel imposes a duty on the police to communicate clearly to the detainee the fact that he or she has a right to retain and instruct counsel without delay.

[62] As pointed out in *Evans*, in most cases it can be inferred from the circumstances that the detainee understands what she or he has been told. In such cases, the duty will be discharged when the detainee responds affirmatively to the question whether the advice given is understood.

[63] But, as was also pointed out in *Evans*, if there is something in the circumstances which suggests that the detainee does not understand the right, a duty to make further explanation or to facilitate the understanding will arise.

[64] As noted in *Bartle,* absent special circumstances, police are not required to assure themselves that the person under arrest or detention understands the rights granted by s. 10(b). More particularly, where s. 10(b) rights are read to an accused person who responds by saying that he or she understands but does not wish to exercise the right to counsel then, in the absence of circumstances suggesting a lack of understanding, police will have complied with their obligations under s. 10(b) and no correlative duties are triggered.

[65] In view of the foregoing, it would appear that a lack of proficiency in the English language can in some cases amount to "special circumstances" which require that police take further steps to ensure that the accused person understands his or her *Charter Rights*.

[66] In *Vanstaceghem* the Ontario Court of Appeal described the principle in the following way at para. 20:

> Each case turns on its own facts, but I am prepared to adopt, as applicable to this case, what was said in the District Court of Ontario by the Honourable Judge

> Stortini in *R. v. Michaud*, [1986] O.J. No. 1631 (December 9, 1986) at p. 6, in his interpretation of this Court's decisions in R. *v. Anderson*, *supra* and R. *v. Baig*, supra*:*
>
> > The police may not be required to go to extreme means in order to respect an accused's rights under s. 10 of the *Charter*. It is necessary, however, in order to comply with the section that an accused be meaningfully informed of the rights. The accused must understand what is being said to him or her and understand what the options are in order that he or she may make a choice in the exercise of the rights guaranteed by the *Charter*.
> >
> > It is not sufficient for a police officer upon the arrest or detention of a person to merely recite the rights guaranteed by s. 10 of the *Charter*. As s. 10(b) stipulates, the accused or detainee must be informed. This means that the accused or detainee must understand what is being said to him or her by the police officer. Otherwise, he or she is not able to make an informed choice with respect to the exercise or waiver of the guaranteed rights.
> >
> > If the rights are read in English only, and the accused's or detainee's knowledge of the English language does not allow sufficient comprehension of the matter, those are "special circumstances" which alert the officer and oblige him to act reasonably in the circumstances.

Application of Principles

[67] Whether “special circumstances” exist will depend on all of the facts of the case. In the present case, circumstances are unusual because it is the language of the police officer, not the accused, that has allegedly caused the accused person difficulty in understanding and comprehending his *Charter of Rights*.

[68] As explained by the Supreme Court of Canada in *Evans*, in circumstances when it is clear that an accused has difficulty understanding the language, especially when he states he has difficulty understanding, the police should make

further inquiries to ensure that the accused does indeed fully understand their rights.

[69] In *R. v. Prodan*, 2007 ONCJ 551, at para. 11, Justice Armstrong made the following observations which are apposite:

> In most cases, it is possible to infer from the circumstances that the accused understands what he or she has been told. In such cases, the police are required to go no further. However, where there is a positive indication that the accused does not understand their rights to counsel, the police cannot rely on a mechanical recitation of the rights. They must take steps to facilitate that understanding: *R. v. Evans,* [1991] 1 S.C.R. 869 at 891. In other words, where special circumstances exist, the police are required to take extra steps to reasonably ascertain that the accused understands their rights to counsel: *R. v. Vanstaceghem.*
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> > While each case turns on its own facts, "special circumstances" have been found to exist (1) where the accused was severely intoxicated, did not appear to respond to the reading of his rights and had very little recollection of his arrest: *R. v. Mohl*; (2) where the police were aware that the accused was of subnormal mental capacity and said he did not understand the rights to counsel that had been read to him: *R. v. Evans*; and (3) where a French-speaking defendant had difficulties in English, even though he said he understood his rights to counsel: *R. v. Vanstaceghem.*
> >
> > In addition, "special circumstances" requiring the police to take extra steps to ensure that the accused has understood his or her section 10(b) rights have been held to exist even when the police officer was not aware of them. Emotional distress, for example, may qualify as such special circumstances whether or not the distress is overt and whether the accused explains his or her mental state: *R v. Averill,* [1988] B.C.J. No. 2414 (Co. Ct.) and *R v. S.L.H.*, [2004] B.C.J. No. 610 (B.C.S.C.).
> >
> > Courts apply a modified objective test to the issue of whether an accused understands his or her section 10(b) rights where special circumstances exist: *R. v. S.L.H.* The test contains an objective element that can be applied by a court viewing the circumstances after the fact. It is therefore not dependant on the *bona fides* of the opinion formed by the officer on the spot, or the credibility of the accused assessed against the officer's

> opinion: *R. v. Lukavecki,* [1992] O.J. No. 2123 (Ont. Ct. (Gen. Div.)) K. Feldman, J.)
>
> In most cases, whether an accused understands his or her rights to counsel will be determined objectively. However, there will be rare cases when, despite the best efforts of the police officer to communicate the rights, special circumstances will exist such that the accused will not understand them. As has been noted "to not recognize the possibility that an accused may subjectively not understand his or her rights, even though he or she may objectively seem to understand them would risk making the act of communicating *Charter Rights* a box-checking exercise". Accordingly, if the accused truly does not understand his or her rights to counsel, for whatever reason, their section 10(b) rights have been infringed**.** This will be so even when the accused has communicated to the police officer that he or she understood: *R. v. S.L.H.*, paras 26 and 27.

[70] An exemplification of this principle is found in *R. v. Montoya*, 2007 MBQB 205. In that case the Court held that an officer who was alerted to a language issue but did nothing to ensure that the accused understood did not comply with their duties under s. 10(b) of the *Charter*.

[71] As previously mentioned, the central issue in this *voir dire* is whether Mr. Burns, the accused, has established on the balance of probabilities that the police breached his s. 10(b) *Charter Rights* by failing to ensure that he was fully informed of his rights.

Position of the Parties

[72] The defence contends that because of Cst. Descroche's strong French accent, Mr. Burns did not understand or comprehend what Cst. Descroche had read or

stated to him when he read the breath demands and the *Charter of Rights* from the pre-printed forms. Mr. Burns submits that he repeatedly asked for an English speaking officer to read and/or explain the breath demands and *Charter Rights* to him, as he could not understand or comprehend what Cst. Descroche had said to him.

[73] The Crown submits that the applicant, Mr. Burns has failed to establish on the balance of probabilities that the police failed to fully inform Mr. Burns of his *Charter Rights*, and indeed, contends that Mr. Burns never indicated to the officers that he did not understand or comprehend what Cst. Descroche stated or read to him about the breath demands and *Charter Rights*. Therefore, the application should be dismissed.

Analysis

[74] Having considered the whole of the evidence adduced in this *voir dire*, I am satisfied on the balance of probabilities that Mr. Burns did not fully understand or comprehend the breath demands and his *Charter of Rights* when Cst. Descroche read them to him. I accept Mr. Burns' evidence that he could not understand or comprehend what Cst. Descroche had said to him, notwithstanding Cst. Descroche's attempts to re-read or repeat what he had stated to Mr. Burns from the

pre-printed cards. I have reached this decision after having carefully considered all of the evidence. Let me explain.

[75] This is an unusual case, because I am not dealing with a French speaking accused, who had difficulties in English, but rather an English speaking accused that could not fully understand or comprehend what was being said to him by the arresting officer, who had a strong French accent. In other words, I find that Mr. Burns made it known to the officers that he was having difficulty with understanding what Cst. Descroche read to him when he interacted with the officers. This finding is supported by the evidence of the officers that there was some difficulty with Mr. Burns' understanding of what Cst. Descroche had read to him. To put it another way, having regard to the strong French accent of Cst. Descroche, and that Mr. Burns expressed his difficulty with understanding Cst. Descroche because of his French accent, *special circumstances* existed which required the officers to reasonably ascertain that Mr. Burns' constitutional rights were understood by him. I will address this more fully later in these reasons.

[76] It is indisputable that Cst. Descroche has a strong French accent when he speaks. This was patently obvious to me as I listened to him when he testified in this *voir dire*. Indeed, I had to intently listen to him when he read from the pre-

printed cards. His French accent was strong as he read from the cards, which required me to pay much more attention to exactly what he was saying than I normally do.; mindful that I am very familiar with the wording of the pre-printed cards, having listened to police officers on numerous occasions read from those pre-printed cards in court.

[77] I accept Mr. Burns' evidence that on the date and time in question he could not understand or comprehend what Cst. Descroche read to him from the pre-printed cards. His evidence is supported, in part, by Cst. Descroche's evidence wherein he testified that he had to read the breath sample demand twice to Mr. Burns.

[78] Also, Cst. Orman's evidence confirmed that Cst. Descroche read the Approved Screening Device demand twice to Mr. Burns. Cst. Orman could not recall how many times the breath demand was made, but added that there was a discussion regarding whether Mr. Burns understood what was being requested of him. Cst. Orman explained that the discussion focused on clarifying whether Mr. Burns understood what was being asked of him. This evidence clearly suggests that there was an issue with Mr. Burns' ability to understand or comprehend what was being read and/or stated to him.

[79] Moreover, Cst. Descroche testified that he read the breath demand from a pre-printed card twice to Mr. Burns because Mr. Burns did not understand what was being said to him because of his (Cst. Descroche's) French accent. Cst. Descroche added that he spoke slower the second time that he read from the card. Cst. Descroche could not, however, recall how many times he read the breathalyzer demand to Mr. Burns.

[80] Cst. Descroche also could not he recall whether Mr. Burns requested to have an English-speaking officer speak to him. Lastly, Cst. Descroche could not recall whether he had to read the release documents to Mr. Burns on more than one occasion.

[81] It should be noted that Cst. Descroche stressed that Mr. Burns never indicated to him that he did not understand him, and he could not recall whether or not Mr. Burns asked for assistance of an English-speaking officer. Nor could Cst. Descroche recall whether Mr. Burns asked him to re-phrase or repeat what he had said to him.

[82] Mr. Burns testified that Cst. Descroche read him the breath demand from a card. He stated that the officer read it two and a-half times. It was during the last occasion, that he stopped Cst. Descroche and told him that he could not understand

him. He then immediately asked for an English-speaking officer to talk to him. Cst. Orman was present on scene. He was Cst. Descroche's training officer. Cst. Descroche had recently graduated from the RCMP depot and began training in August 2016. He had only approximately three months experience.

[83] Mr. Burns was emphatic that he made several requests to have an English speaking officer read the card to him. He stated that he took the test because he gave up, and did not want to argue with the officer, as he realized that he was not going to speak to an English-speaking officer. He also declined to speak to a lawyer. He acknowledged that he was aware of his right to a lawyer, but added, that he was not advised that he could speak to duty counsel and legal aid for free and immediate legal advice.

[84] Mr. Burns explained that he requested an English-speaking officer because he could not understand what Cst. Descroche read and/or stated to him. He added Cst. Descroche read it to him from the card on more than one occasion because he could not understand what Cst. Descroche said to him because of his French accent, and because of the speed at which Cst. Descroche read from the card; he read very fast. He added that the long paragraphs also made it hard to understand what Cst. Descroche was saying to him.

[85] He also stated that he clearly understood the breath technician when he spoke to him during the breath tests.

[86] As mentioned, Mr. Burns emphatically stated that he was not advised of his right to consult with duty counsel and legal aid. He added that there was no duty counsel telephone number provided to him.

[87] Now, let me be clear. While I accept Mr. Burns' evidence that he did not understand or comprehend what Cst. Descroche had read and/or stated to him, which included the breath demands and his *Charter Rights*, that does not mean that I did not accept the police officers' evidence. I will address the officers' evidence in a moment.

[88] I accept Mr. Burns' evidence because he struck me as being sincere, honest and forthright in providing his evidence and because his evidence is confirmed, in part, by both police officers' evidence. Furthermore, he withstood a fair and thoughtful cross-examination. He was neither evasive nor argumentative in providing his evidence, and seemingly answered all of the questions to the best of his ability. He did not strike me as trying to gild the lily, to borrow an old Shakespearian phrase. In fact, he conceded that he gave up and went along with the officers because he did not want to argue with them, and he readily acknowledged

that he had a basic understanding that he could contact a lawyer because he heard the word lawyer mentioned. He then added, emphatically, that he was not advised to his right to contact duty counsel and legal aid, which included accessing a toll-free number.

[89] Having considered the entirety of the evidence, I find that it is reasonable to conclude that there was an issue with respect to Mr. Burns' comprehensive understanding of what was being stated and/or read to him by Cst. Descroche. Put differently, while I accept that both police officers honestly believed that Mr. Burns' understood and comprehended his *Charter Rights*, because as they stressed, he appeared to understand, I do not believe, however, on an objective analysis that he did. On the totality of the evidence, including Mr. Burns' evidence, he has satisfied me on the balance of probabilities (which means more likely than not) that he did not fully understand and comprehend his *Charter Rights*.

[90] The circumstances of this case are unusual; in the sense, that Cst. Descroche's strong French accent caused difficulty for Mr. Burns' to fully grasp what was being read and/or stated to him.

[91] I am also mindful that the brief interaction between the officers and Mr. Burns occurred at the roadside, at a police checkpoint, during the early morning hours.

[92] In my view, a reasonable person would conclude that on the basis of the totality of the evidence, that the special circumstances in this case warranted further action, or additional steps to be taken by the officers to ensure that Mr. Burns' clearly understood and comprehended his rights.

[93] In my view, I find that notwithstanding the best efforts of Cst. Descroche to communicate with Mr. Burns, Mr. Burns did not fully grasp, understand or comprehend what was said and/or read to him.

[94] Therefore, it was incumbent upon the officers to reasonably ascertain that Mr. Burns' constitutional rights were understood by him. This could have been accomplished by having Cst. Orman read and/or state to Mr. Burns the breath demands and *Charter Rights*, and/or by having Mr. Burns rephrase or repeat what was read and/or stated to him back to the officers so that they could be ensured that he understood what was stated to him.

[95] Now, let me also be clear, in reaching this decision I did not have any difficulty with the credibility of Cst. Orman and Cst. Descroche, as I found them both to be credible witnesses. They both testified to the best of their abilities and provided their evidence in a forthright manner. In my view both officers presented as conscientious police officers who honestly believed that Mr. Burns understood what was read and/or stated to him with respect to the breath demands and the *Charter Rights.*

[96] I am also mindful that Cst. Descroche only had approximately three months experience as a police officer during the date and time in question. Moreover, I do accept the evidence of both officers, Csts. Descroche and Orman, that it appeared to them that Mr. Burns' understood what was read and/or stated to him. In other words, he understood his rights. However, as demonstrated in other cases, such as *R.* v. *Averill* ,[1998] B.C. J. No. 2414 (Co.Ct.) and in *R.* v. *S.L.H.*, 2004 BCSC 410, "special circumstances" can require the police to take extra or additional steps to ensure that the accused had understood his or her s. 10(b) rights even when the police officer was not aware of them. Emotional distress, for example, may qualify as such special circumstances whether or not the distress is overt and whether the accused explains his or her mental state.

[97] As noted by Justice Armstrong in *R.* v. *Prodan*,2007 ONCJ 551 courts apply a modified objective test to the issue of whether an accused understands his or her s. 10 (b) rights where special circumstances exist. The test contains an objective element that can be applied by a court viewing the circumstances after the fact. It is therefore not dependent on the *bona fides* of the opinion formed by the police officer on the spot, or the credibility of the accused assessed against the officer's opinion. In most cases, whether an accused understands his or her rights to counsel will be determined objectively. However, there will be rare cases when, despite the best efforts of the police officer to communicate the rights, special circumstances will exist such that the accused will not understand them. As Justice Armstrong observed, it has been noted "to not recognize the possibility that an accused may subjectively not understand his or her rights, even though he or she may objectively seem to understand them would risk making the act of communicating *Charter Rights* a box-checking exercise."(*Prodan*, at para.15) Accordingly, if the accused truly does not understand his or her rights to counsel, for whatever reason, their s. 10(b) rights have been infringed. This will be so seen when the accused has communicated to the police that he or she understood. See*: S.L.H.* , [2004] B.C.J.No. 610.

[98] Similarly in the *Vanstaceghem* case, the accused, a Francophone, had been driving erratically. A police officer pulled him over and, upon noticing bloodshot eyes and a smell of alcohol on the breath, read him the breathalyser demand in English. The accused said he did not understand so the officer gave him the card in French to read. Before this time the two had been conversing in English; the officer testified that he understood the accused and it appeared that the accused understood him. After the accused read the French card, the officer asked him whether or not he understood and he replied that he did. The officer then reiterated the right to counsel in English and asked if the accused understood. He said that he did.

[99] The accused testified that he only understood a small part of his conversation with the officer. He specifically did not hear the word “lawyer”. He claimed he may have answered yes to a question asking if he understood his right to contact a lawyer but he did not know what he was answering to. The provincial court judge found that the accused understood English well enough to have been properly advised of his *Charter Rights*; this decision was overturned on appeal. The Ontario Court of Appeal, upholding the appeal decision, stressed the fact that the circumstances here were unusual. It opined at 147-48 that “special circumstances existed which required the officer to reasonably ascertain that the

respondent's constitutional rights were understood by him." This was necessary to ensure that his rights were communicated in a "meaningful and comprehensible manner" (*Vanstaceghem* at 147).

[100] As mentioned, it is not sufficient for a police officer upon arrest or detention of a person to merely recite the rights guaranteed by s. 10 of the *Charter*. As s. 10(b) stipulates, the accused or detainee must be informed. This means that the accused or detainee must understand what is being said to him or her by the police officer. Otherwise, he or she is not able to make an informed choice with respect to the exercise or waiver of the guaranteed rights.

[101] In my view, I find that the special circumstances of this case required the officers to take additional measure or steps to ensure that Mr. Burns had a clear understanding and comprehension of his *Charter Rights*. I reached this conclusion having regard to Cst. Descroche's strong French accent, couple with the fact that he read several passages from a pre-printed card, on more than one occasion, at the roadside of a police checkpoint, to a person who verbally expressed his difficulty with understanding what was being said to him.

[102] For all of the foregoing reasons, I am satisfied on the balance of probabilities that Mr. Burns did not fully understand and comprehend his *Charter of Rights*, in

particular his right to consult with duty counsel and legal aid, as I accept his evidence that he was not aware that he could contact duty counsel and legal aid. Moreover, I accept his evidence that he did not understand what was read and/ or stated to him by Cst. Descroche. With respect to whether or not he asked to speak to an English speaking officer, it is reasonable to infer that he made that request given his difficulty understanding Cst. Descroche. I say that mindful that Mr. Burns was not explicitly contradicted on this aspect of his evidence, as Cst. Descroche testified that he could not remember whether Mr. Burns requested to speak to an English speaking officer.

[103] In any event, in the special circumstances of this case, it is my view that the officers should have taken extra steps to ensure that Mr. Burns was fully informed of his rights. Therefore, Cst. Descroche did not discharge his duty to ensure that Mr. Burns was informed of his right to counsel in a meaningful and comprehensive manner. Cst. Descroche gave a mechanical recitation of the right in circumstances that required him to do more. The circumstances, including Mr. Burns express concerns that he could not understand what Cst. Descroche said to him, constituted special circumstances that imposed a duty on him to take extra steps to facilitate Mr. Burns understanding. I am satisfied on a balance of probabilities Mr. Burns truly did not fully understand his rights to counsel.

[104] Accordingly, I find that Mr. Burns has established a breach of s. 10 (b) of the *Charter.*

Section 24(2) Analysis

[105] Having concluded that Mr. Burns' 10(b) *Charter Rights* have been breached, the next issue is whether the evidence should be excluded under s. 24(2) of the *Charter*.

[106] To determine whether the evidence should be excluded in accordance with s.24(2) of the Charter, I will undertake the analysis outlined by the majority in *R. v. Grant*, [2009] 2 S.C.R. 353.

[107] In *Grant,* the Supreme Court developed a revised framework for determining whether evidence obtained in breach of the *Charter Rights* must be excluded under s. 24(2), as the Court's prior approach in *R. v. Collins,*[1987] 1 S.C.R. 265, and in *R. v. Stillman,*[1999] 1 S.C.R. 607 was difficult to apply and could lead to unsatisfactory results. As stated, at para. 3:

> The submissions before us reveal that existing jurisprudence on the issue of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results. Without undermining the principles that animate the jurisprudence to date, we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed for the resolution of these two issues.

[108] The new revised framework for analysis under s. 24(2), is intended to be more flexible than the prior approach utilized in *Collins*, and *Stillman*.

[109] This new revised framework is described at para. 67 -71 in *Grant*.

[110] There are a number general propositions contained in paragraphs 67-71that are very important, in the consideration of the issues in the present case, and thus, it might be appropriate at this juncture to summarize them. They include:

1. The purpose of s. 24(2) is to maintain the good repute of the administration of justice which embraces the notion of maintaining the rule of law and upholding *Charter Rights* in the system as a whole;

2. The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining public confidence in and for the effectiveness of the justice system. The inquiry is objective;

3. The focus of s. 24(2) is both long-term and prospective. Section 24(2) seeks to ensure that the impugned evidence does not do further damage to the repute of the justice system;

4. The focus of s. 24(2) is societal. It is not aimed at punishing the police or providing compensation to the accused, but rather at systematic concerns. Its focus is on the broad impact of admission of the evidence on the long term repute of the justice system;

5. The three avenues of inquiry are each rooted in the public interests engaged by s.24(2), viewed in a long-term forward looking, and societal perspective;

6. The court must assess and balance the effect of admitting the impugned evidence on society's confidence in the justice system having regard to (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits;

7. The court must balance the assessments under each of these three lines of inquiry to determine whether, on the totality of the circumstances, the admission would bring the administration of justice into disrepute; and

8. While the categories of consideration set out in *Collins*, are no longer applied, the factors relevant to the s.24(2) determination enunciated in

Collins, and subsequent cases are capture in the new framework of analysis.

[111] After describing the new framework of analysis, the majority in *Grant*, then set out to clarify the criteria for consideration of *all the circumstances* in determining whether the admission of illegally obtained evidence would bring the administration of justice into disrepute.

[112] As stated, the majority in *Grant* identified three criteria (avenues of inquiry) to guide courts in the delicate balancing exercise mandated s. 24(2) which are:

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

b) the impact of the breach on the *Charter* protected interests of the accused; and

c) society's interest in the adjudication of the case on its merits.

[113] The Court also provided specific guidance with respect to different types or forms of conscriptive evidence at paras. 107-111.

[114] It should also be noted that the Supreme Court in *R. v. Harrison*, [2009] 2 S.C.R. 494 observed, at para. 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.

Analysis

a) Seriousness of the *Charter*-infringing State Conduct

[115] In consideration of the seriousness of the *Charter*-infringing conduct, the Court must consider whether admitting the evidence would send the message that the Court condones the state misconduct by allowing it to benefit from the fruit of the misconduct.

[116] At this stage, the Court must consider the nature of the police conduct that led to the *Charter* violation and the subsequent discovery of evidence. The Court must ask itself whether the police engaged in misconduct from which the Court should disassociate itself. This will be a case where the departure from *Charter* standards was major in degree or where the police knew (or should have known) their conduct was not *Charter* compliant. (See *Harrison*, at para. 22).

[117] In assessing the seriousness of the *Charter*-infringing conduct, it is recognized that state conduct resulting in *Charter* violations varies in seriousness. As expressed by the majority in *Grant*, at para. 74:

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

[118] The majority in *Grant*, also expressed the view that while extenuating circumstances or good faith could attenuate the seriousness of the misconduct or reduce the need for the Court to dissociate itself, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.

[119] In *Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), Doherty J.A., suggested an approach to characterize police conduct for purposes of considering this factor under 24(2), which was approved and endorsed by the Supreme Court of Canada in *Harrison*. Justice Doherty stated:

> Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter Rights*... . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.

[120] Furthermore, as explained in *Grant*, at para. 22:

> The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

[121] In the present case, the *Charter* violations were serious, notwithstanding that I found the police officers had acted in good faith. As stressed earlier in these reasons, the special circumstances of this case warranted Cst. Orman and Cst. Descroche to take further or additional steps to ensure that Mr. Burns clearly understood and comprehended his rights. It was incumbent upon the officers to reasonably ascertain that Mr. Burns' constitutional rights were understood by him. Indeed, it is critical that the informational component of the right to counsel be comprehensible in scope and that it be presented by the police in comprehensive manner. Unless detainees are clearly and fully informed of their right at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel. This could have been accomplished by having Cst. Orman read and/or state to Mr. Burns the breath demands and *Charter Rights*, and/or by having Mr. Burns rephrase or repeat what was read and/or stated to him back to the officers so that they could be ensured that he understood what was

stated to him. Cst Orman and Cst. Descroche should have known that by not ensuring that Mr. Burns did not fully understand or comprehend his *Charter of Rights*, their conduct was not *Charter*-compliant, and therefore was negligent. The officers' failure to facilitate Mr. Burns' s. 10(b) rights constituted a significant departure from the standard of conduct expected of police officers and cannot be condoned.

[122] Let me add, I am also mindful that it would be inappropriate for the court to observe that in circumstances such as the present case, the accused would have provided a sample in any case, as pointed out in *R. v. Richfield*, [2003] O.J.No. 3230, at para. 14, wherein Weiler, J.A., in delivering the judgment for the Ontario Court of Appeal:

> Because of our decision that there was ultimately no breach of the appellant's s. 10(b) Charter right, it is unnecessary to decide whether the evidence should have been excluded pursuant to s. 24(2) of the *Charter*. We note, however, that in giving his reasons why the evidence should not be excluded pursuant to s. 24(2), the summary conviction appeal judge observed that the appellant did not really have much choice about providing a breath sample because even if he had contacted a lawyer, he would have been given the advice to submit to a breathalyzer. This was not a proper consideration and ought not to have formed part of his s. 24(2) analysis: *R. v. Bartle*, *supra*, at 319-320

[123] Although, this is not a situation where the officers deliberately and flagrantly demonstrated a *blatant disregard* for Mr. Burns' *Charter Rights*, it nonetheless, was very serious.

[124] While the *Charter* violations may have not been deliberate in the sense that Cst. Orman and Cst. Descroche knowingly breached Mr. Burns's rights, they were *reckless* and demonstrated disregard for *Charter Rights*.

[125] Thus, the *Charter* infringing conduct in this case cannot be considered as being merely technical, inadvertent, or minor violations of the *Charter*, which would place it at the least serious end of the spectrum. Cst. Orman and Cst. Descroche's actions were reckless and showed an insufficient regard for *Charter Rights*. Therefore, having determined the seriousness of the breaches in this case, as being a reckless disregard of *Charter Rights*, rather than a minor or technical breach in nature, the Court must disassociate itself from the conduct to maintain public confidence in the rule of law and risk bringing the administration of justice into disrepute.

[126] With respect to Cst Orman and Cst. Descroche's conduct, let me be clear, that although I find both officers to be honest and sincere witnesses, they ought to have been more diligent and should have taken additional steps to ensure that Mr. Burns understood his *Charter of Rights*.

[127] I want to be clear that in this case, I am not dealing with dishonest police officers who mislead the court in their testimony, but rather, officers who ought to have ensured that Mr. Burns' constitutional rights were fully provided.

[128] As a result, this factor favours exclusion of the evidence. (See *Grant*, at para. 71).

b) Impact on the Charter - Protected Interest of the Applicant

[129] This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interest of the Applicant, and is also a fact-specific determination. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact is examined from the perspective of the Applicant.

[130] In *Grant,* at para. 76, the majority commented on the impact of a *Charter* breach:

> The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive, the greater the risks that admission of the evidence may signal to the public that *Charter Rights*, however high-sounding, are little actual avail to the citizen, breeding public cynicism and bring the administration of justice into disrepute.

[131] In *Harrison,* at paras. 28-32, McLaughlin C.J. found:

> This factor looks at the seriousness of the infringement from the perspective of the accused. Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact? These are among the questions that fall for consideration in this inquiry.

[132] In this case, the failure to provide Mr. Burns his s. 10(b) rights is a serious infringement as Mr. Burns was denied his right to be fully informed. The breach of s. 10(b) was not trivial. The impact of the breach on Mr. Burns' *Charter* -protected interests was serious. As previously stressed, the special circumstances of this case, warranted further action, or additional (extra) steps to be taken by the officers to ensure that Mr. Burns clearly understood and comprehended his rights.

[133] As explained in *Grant*, this inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The more serious the impact on the accused's protected interests, the greater the risks that admission of the evidence may signal to the public that *Charter Rights*, however high sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute. (*Grant*, at para. 76).

c) Society's Interest in the Adjudication of the Merits

[134] As recognized in *Grant*, at para. 79, "Society generally expects that a criminal allegation will be adjudicated on its merits".

[135] The public interest in truth-finding remains a relevant consideration under. 24(2) analysis. Thus, the reliability of the evidence is an important factor in this line of inquiry. The Court stated at para. 81:

> This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[136] In effectively doing away with the distinction between conscriptive and non-conscriptive evidence, the court in *Grant*, instructs courts to consider the new third factor, the effect of admitting evidence on the public interest in having a case adjudicated on its merits, when assessing admission of all evidence, including, real evidence.

[137] In *Grant, supra*, the court recognized the importance of the evidence to the Crown's case is another important factor that should be considered in this line of inquiry. At para. 83 the court commented:

> The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. ... we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of

> justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

[138] Another important consideration under this line of inquiry is the seriousness of the offence at issue. The Court in *Grant*, expressed the view, at para. 84, that:

> [w]hile the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[139] At this stage, the Court must consider factors such as the reliability of the impugned evidence and its importance to the Crown's case. (See *Harrison*, at para. 33).

[140] In the case at bar, the evidence of the certificate of analysis obtained from as a result of the *Charter* violations is highly reliable. It is, indeed, a critical part of the Crown's case as it is virtually conclusive of guilt.

[141] Prior to *Grant*, this evidence, the breath sample evidence, would almost invariably be automatically excluded, as being conscripted evidence. The *Grant* decision expressly overruled and replaced the *Collins* approach, with an analysis based on the three inquires, which often favour the admission of the breath test evidence. (R. v. MacMillan, [2013] O.J. No. 727(C.A.) at para. 89. At para. 111, the Court observed:

> 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

[142] Again, it should be stressed that the C*harter* violation in this is very serious.

[143] In *R. v. Bjelland,* [2009] S.C.J. No. 38, the Supreme Court of Canada considered the impact on society and the justice system if the Courts were to rely on evidence that was improperly obtained by the state. The Court observed at para. 65:

> Finally, we have long accepted that an acquittal that results from the exclusion of evidence is warranted by overriding considerations of justice. …The policy of the law in this regard was well put by Samuel Freedman, then Chief Justice of Manitoba, in this well-known passage:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony... . [T]he law makes its choice between competing values and declares it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at unlimited cost. "Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."

[144] In the case at bar, the evidence of the certificate of analysis as a consequence of the *Charter* breaches is highly reliable. It is critical evidence, virtually conclusive of guilt on the offences charged. The evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial. While the charged offences are serious, this factor must not take on disproportionate significance. As noted in *Grant,* while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. In this case, Mr. Burns is charged with serious offences.

[145] As previously mentioned, the certificate of analysis is highly reliable evidence. The exclusion of the that evidence seized would leave the Crown essentially with no case against Mr. Burns. Exclusion would therefore seriously

undermine the truth-seeking function of the trial. This factor then weighs against exclusion of the evidence (see *Grant* at paras. 79-83).

Balancing the Factors

[146] The three lines of inquiry reflect what the court must consider in the totality of the circumstances of a case. At para. 85-86, in *Grant*, the comments are instructive:

> To review, the three lines of inquiry identified above - the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits - reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.
>
> In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible.

[147] In *Harrison,* McLachlin C.J., wrote at paras. 35 to 42:

> I begin by summarizing my findings on the three factors in *Grant*. The police conduct in stopping and searching the appellant's vehicle without any semblance of reasonable grounds was reprehensible, and was aggravated by the officer's misleading testimony in court. The *Charter* infringements had a significant, although not egregious, impact on the *Charter*-protected interests of the appellant. These factors favour exclusion, the former more strongly than the latter. On the other hand, the drugs seized constitute highly reliable evidence tendered on a very serious charge, albeit not one of the most serious known to our criminal law. This factor weighs in favour of admission.

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.

In my view, when examined through the lens of the s. 24(2) analysis set out in *Grant*, the trial judge's reasoning in this case placed undue emphasis on the third line of inquiry while neglecting the importance of the other inquiries, particularly the need to dissociate the justice system from flagrant breaches of *Charter Rights*. Effectively, he transformed the s. 24(2) analysis into a simple contest between the degree of the police misconduct and the seriousness of the offence.

The trial judge placed great reliance on the Ontario Court of Appeal's decision in *Puskas*. However, the impact of the breach on the accused's interests and the seriousness of the police conduct were not at issue in *Puskas*; Moldaver J.A. opined that *if* there was a breach of s. 8, it was "considerably less serious than the trial judge perceived it to be", the police having fallen "minimally" short of the constitutional mark (para. 16). In those circumstances, the public interest in truth-seeking rightly became determinative.

This case is very different. The police misconduct was serious; indeed, the trial judge found that it represented a "brazen and flagrant" disregard of the *Charter*. To appear to condone wilful and flagrant *Charter* breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.

As Cronk J.A. put it, allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'"(para. 150). *Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. In relying on *Puskas* in these circumstances, the trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. As *Grant* makes clear, this is not the law.

Additionally, the trial judge's observation that the *Charter* breaches "pale in comparison to the criminality involved" in drug trafficking risked the appearance

> of turning the s. 24(2) inquiry into a contest between the misdeeds of the police and those of the accused. The fact that a *Charter* breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). We expect police to adhere to higher standards than alleged criminals.
>
> In summary, the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards. That being the case, the admission of the cocaine into evidence would bring the administration of justice into disrepute. It should have been excluded.

[148] As previously emphasized in these reasons, the seriousness of the *Charter* breaches and their impact on Mr. Burns' *Charter* protected interests favour exclusion of the evidence whereas reliability of the evidence and its significance to the Crown's case favours admission.

[149] I must weigh in the balance the evidence on each line of inquiry to determine whether having regard to all of the circumstances, admission of the evidence would bring the administration of justice into disrepute. In *Harrison*, the court held that, "in all cases, it is the long-term repute of the administration of justice that must be assessed.

[150] The purpose of requiring the police to fully inform an accused person of his or her Constitutional rights was explained in *Bartle* at para. 16, in these terms:

> The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: R. v. Manninen, [1987] 1 S.C.R.

> 1233, at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: Brydges, at p. 206; R. v. Hebert, [1990] 2 S.C.R. 151, at pp. 176-77; and Prosper. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in Clarkson v. The Queen, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

[151] Given the importance of this fundamental right, which is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process, the public must have confidence that police conduct will comply with the duties imposed on them by law.

[152] The failure to do so, as in this case, resulted in the unconstitutional search and seizure of Mr. Burns. Put differently, the officers' failure to facilitate Mr. Burns' s.10(b) rights constituted a significant departure from the standard of conduct expected of police officers and cannot be condoned. The police misconduct in this case was serious. To appear to condone the constitutional breaches in this case that constituted a significant incursion on Mr. Burns' rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offences, and the reliability of the evidence, while important, do not outweigh the factors pointing to

exclusion. As Cronk J.A. stated, allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charge with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that the administration of the criminal law the ends justify the means. *Charter* protections must be construed so as to apply to everyone, even those alleged to have been committed the most serious criminal offences": *R. v Harrison*, [2008] 89 O.R. (3d) 161, at para. 150).

[153] In my view, to admit the unconstitutionally obtained evidence in this case and similar cases in the future would undermine the public's confidence in the criminal justice system over the long term. Put differently, as Cronk J.A.., writing in dissent, in *R. v. Harrison*, [2008] 89 O.R.(3d) 161, observed, the price to be paid for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards.

[154] In conclusion, having balanced the significance of the *Charter* violations with the impact on Mr. Burns, as well as on society's interest in an adjudication on the merits, I have concluded that if the Court were to allow into evidence the results of breath test, the certificate of analysis, the Court would be condoning the *Charter* breaches which in this case were serious. Maintaining the integrity of the

justice system and the rule of law requires the Court to exclude the evidence. As Justice Fish stated, in *R. v. Morelli*,[2010] 1 S.C.R. 253, at para. 110: “justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices”.

Frank P. Hoskins, JPC