Date: 2013 06 25
Docket: S-1-CR-2012 000081

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CARL JOSEPH CARTER

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Appeal from Conviction.

Heard at Yellowknife, NT, on January 28, 2013.

Reasons filed: June 25, 2013

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Appellant: Deborah R. Hatch

Counsel for the Respondent: Marc Lecorre

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REASONS FOR JUDGMENT

I INTRODUCTION

[1] The Appellant was found guilty, following a trial held in the Territorial Court of the Northwest Territories, of having driven a motor vehicle while the concentration of alcohol in his blood was in excess of the legal limit.

[2] At trial, he challenged the admissibility of the breathalyser results, alleging that the evidence was obtained in contravention of his rights as guaranteed by the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[3] The Trial Judge found that the Appellant's rights had been breached but that the admission of the evidence would not bring the administration of justice into disrepute. The breathalyser results were admitted into evidence and the Appellant was convicted.

[4] In this appeal the Appellant challenges the Trial Judge's conclusions as to the extent and nature of the breaches as well as his decision not to exclude the evidence.

II) TRIAL PROCEEDINGS

A) The evidence

[5] The only witness called on the *voir dire* into the admissibility of the breathalyser results was Cst. Andrew Hicks. For the most part, the factual findings made by the Trial Judge on the basis of that evidence are not controversial.

[6] Cst. Hicks testified about how he came to be in contact with the Appellant on the evening in question. He explained that he received a report from a member of the community that there had been a motor vehicle accident. The caller believed that the driver of the vehicle was impaired and was asking that police attend right away.

[7] Cst. Hicks and another officer responded to this complaint and went to the location described by the caller. Once there, Cst. Hicks observed a truck that appeared to have gone off the road. The road was snow and ice covered. The truck was perpendicular to the road with its front bumper partially resting on a guardrail. The Appellant was one of four or five people standing nearby; he was holding a chain that had been tied to the rear bumper of the vehicle.

[8] Cst. Hicks approached the Appellant, who said he was the driver. He explained to Cst. Hicks what happened. Cst. Hicks noted that the Appellant's voice was raspy and that his speech was slurred.

[9] The other officer advised the Appellant that police were investigating the accident and that the vehicle would not be going anywhere.

[10] One of the officers - Cst. Hicks could not recall which one - told the Appellant they were going to go to the back of the police vehicle. Cst. Hicks said that this was because it was around -7 degrees Celcius outside. He felt it made more sense to talk inside a warm police vehicle rather than do so outside in the cold.

[11] Cst. Hicks acknowledged that had the Appellant refused to follow him to the police truck, there was nothing he could have done because he did not, at that point, have grounds to detain him. He also conceded he did not, at that point, have grounds to ask the Appellant to provide a sample of his breath in an Approved Screening Device (ASD).

[12] Cst. Hicks testified that he told the Appellant that he "was not under arrest or anything". Before going in the police vehicle, he asked if he could search the Appellant, for police officer's safety. The Appellant agreed. Cst. Hicks did a brief pat down search. It did not reveal anything of concern. The Appellant then sat in the back of the police vehicle.

[13] This was a standard police vehicle; the back doors cannot be opened from the inside. Once the Appellant was seated in the back of the vehicle, he could not get out unless Cst. Hicks opened the door for him.

[14] Once the Appellant was seated in the back of the police truck, Cst. Hicks asked him a number of questions. Cst. Hicks testified that at that point, he was "investigating an impaired" and was "trying to find out if that was the case or not".

[15] Cst. Hicks obtained personal information from the Appellant. He then informed him that they were "investigating an impaired" and read him the standard police caution from a card. This caution is to the effect that the person need not say anything, has nothing to hope from any promises made and nothing to fear from any threats made, and that everything they say may be used as evidence.

[16] Cst. Hicks then asked the Appellant a series of questions; these included questions about who was driving the vehicle; where the Appellant had been that evening prior to the accident; whether he had been drinking alcohol; and how the accident happened. During this exchange Cst. Hicks noted again that the Appellant's voice was raspy and that his speech was slurred.

[17] In answer to those questions the Appellant made a number of incriminating statements, including that he was the driver of the vehicle and that he had consumed alcohol that evening. Based on those answers, Cst. Hicks formed the grounds to make a demand that the Appellant provide a sample of his breath for analysis in an ASD. He made that demand and the Appellant complied. The ASD registered a "Fail". Based on this result, Cst. Hicks formed the grounds to make a breathalyser demand.

[18] Cst. Hicks did not place the Appellant under arrest. Instead he read the breathalyser demand to him and advised him that he was being detained for having operated a motor vehicle while impaired. Cst. Hicks could not explain why he chose to detain the Appellant rather than place him under arrest at that point.

[19] Cst. Hicks advised the Appellant of his right to retain and instruct counsel without delay, and of the availability of Legal Aid. He also read the police caution to the Appellant again. In advising the Appellant of his rights to counsel, Cst. Hicks, throughout, told him was "detained", not "under arrest".

[20] Cst. Hicks then drove the Appellant to the R.C.M.P. detachment. Once there, he let the Appellant out of the back of the police truck. At that point, for the first time, he noted a smell of alcohol on his breath. Cst. Hicks handcuffed the Appellant with his hands in the front. He explained that he used the handcuffs because he and the Appellant were going to be alone inside the detachment. Cst. Hicks then escorted the Appellant to a room to allow the Appellant to speak to a lawyer.

[21] Cst. Hicks placed a call to the Legal Aid number, gave the phone to the Appellant and left the room. The Appellant takes issue with the Trial Judge's findings of fact as to what occurred immediately before that call was placed, and about why the call was placed to Legal Aid. I deal with that issue at Paragraphs 50 to 52 of these Reasons.

[22] The Appellant was on the phone for 3 minutes. Cst. Hicks was monitoring the call from outside the room, by observing the Appellant through a window on the door. Cst. Hicks could observe what was happening in the room but could not hear what was being said. After the call was completed, the Appellant did not make another one.

[23] Cst. Hicks went back into the room and asked the Appellant if he was satisfied with the advice he received. The Appellant replied "no". Cst. Hicks asked the Appellant if he wanted to speak to another lawyer. The Appellant replied "no".

[24] Cst. Hicks explained that he asks detainees if they are satisfied with the advice that they have received so that if they are not satisfied, he can give them an opportunity to make another call. He testified that had the Appellant said that he wanted to speak to another lawyer, he would have allowed him to call a lawyer of his choice (either by making another call to the Legal Aid phone number, or by calling a lawyer listed in the phone book). Cst. Hicks did not inquire as to why

the Appellant was not satisfied with the advice he received. Asked why he did not, he answered that it was "not his business". He did not provide the Appellant with another opportunity to contact counsel.

[25] Cst. Hicks escorted the Appellant to the breathalyser room and samples of his breath were obtained. The results of those tests formed the basis of the Crown's case on the charge as far as establishing that the level of alcohol in the Appellant's blood was higher than the legal limit.

B) The position of the parties

[26] The Defence's position at trial was that the Appellant's rights were breached in a number of ways during this investigation.

[27] First, Defence argued that the Appellant was detained at the scene, when he was asked to sit in the back of the police vehicle, and that because of this, Cst. Hicks ought to have advised him of his right to counsel before attempting to elicit incriminating information from him. The Crown conceded that the Appellant was detained and that this triggered an obligation on the part of the officer to advise him of his rights to counsel. Crown conceded that the Appellant's rights under Paragraph 10(b) of the *Charter* were breached at that point.

[28] The Defence also argued that the Appellant should have been arrested, and not merely told he was detained, after he failed the ASD test. Defence argued that not doing so constituted a breach of the Appellant's rights under Paragraph 10(a) of the *Charter*. The Crown conceded that the Appellant's rights under Paragraph 10(a) were breached.

[29] Finally, Defence argued that the Appellant's rights to counsel were breached again at the police detachment. Defence argued that Cst. Hicks interfered with the Appellant's exercise of his rights by placing the call himself even though the Appellant had not asked for assistance.

[30] Defence also argued that once the Appellant expressed dissatisfaction with the advice he received, Cst. Hicks should have given him a further warning before proceeding to obtain breath samples from him. The warning that Defence argued was required is commonly referred to as a "*Prosper* warning"; it appears on the standard cards used by police officers to advise detainees of their rights. Cst. Hicks testified he had never used this warning before and that at the time of this investigation, he did not know what it was for.

[31] The Crown’s position was that the Appellant's rights were not breached at the detachment.

[32] Defence argued that the breaches were serious, that their cumulative impact on the Appellant’s rights were significant, and that notwithstanding the importance of the evidence to the Crown's case, the evidence obtained as a result of the breaches should be excluded pursuant to Paragraph 24(2) of the *Charter*.

[33] The Crown argued that the breaches were unintentional; that they had limited impact on the Appellant’s rights because the Crown was not relying on the utterances he made in the police vehicle to prove that he was the driver or to prove that he was impaired by alcohol; that there was no suggestion of bad faith on the part of the police officer; and that the evidence obtained following the breaches was essential to the Crown's case. The Crown argued that the exclusion of the evidence was not warranted.

C) The Trial Judge's decision

[34] The Trial Judge accepted that the Appellant was detained when Cst. Hicks asked him to sit in the back of the vehicle. He also accepted that this triggered a requirement to inform him of his rights to counsel.

[35] Despite the Crown's concession, the Trial Judge was not persuaded that Cst. Hicks' decision to detain the Appellant but not place him under arrest in the police vehicle amounted to a breach of Paragraph 10(a) of the *Charter*. The Trial Judge found that Cst. Hicks, for all intents and purposes, had treated the Appellant the same way as if he had been under arrest, had given him the same information, the same cautions, and had advised him of the same rights. The Trial Judge found that as a result, the Appellant was fully aware of the reasons why he was being taken into custody and of the jeopardy that he faced.

[36] The Trial Judge concluded that the Appellant's rights were not breached at the police detachment. He found it was inconsequential that Cst. Hicks dialled the phone to contact Legal Aid. The Trial Judge also concluded that there was no need, under the circumstances, for Cst. Hicks to give the Appellant a "*Prosper*" warning.

[37] In his analysis under Paragraph 24(2) of the Charter, the Trial Judge characterized the breach of the Appellant's rights at the scene as serious, but not

deliberate. In considering the impact of the breach, the Trial Judge found that it was mitigated by the fact that the Appellant was given the standard police caution that he need not say anything, and by the fact that his utterances to Cst. Hicks were not being used as evidence against him in the trial, but only formed the basis for the ASD demand. The Trial Judge noted that in the context of roadside stops, police are permitted to ask people questions of the same nature without providing them an opportunity to contact counsel.

[38] Finally, the Trial Judge considered society's interests in having cases adjudicated on their merits. He took into account the reliability of ASD and breathalyser test results, the importance of the evidence sought to be excluded to the prosecution's case, and the seriousness of drinking and driving offenses. He concluded that the evidence should not be excluded.

III) ANALYSIS

A) Standard of Review

[39] Questions of law are reviewed, on appeal, on a standard of correctness. Questions of facts are reviewed on a standard of overriding and palpable error. An issue involving mixed fact and law, for appeal purposes, is considered to be an error of law only if it raises an extricable error in principle. This can consist, for example, of the application of an incorrect standard, or the failure to consider one or more required elements of a legal test. *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235, at paras 10-37.

[40] Findings of facts that underlie a legal analysis are reviewable on a standard of overriding and palpable error. But the application of the legal standard to those facts is a question of law, reviewable on a correctness standard. As such, the Trial Judge’s findings of fact for the purposes of determining whether there were breaches, and those made in the context of the analysis pursuant to Paragraph 24(2) of the *Charter*, are entitled to considerable deference. However, the application of legal standards to those facts is reviewable on a standard of correctness. *R.* v. *Sheperd*, 2009 SCC 35, at para.20.

B) The Breaches

a. Breach of Section 10(b) of the *Charter* at the scene

[41] The Trial Judge was correct in concluding that the Appellant was detained when he was asked to sit in the back of the police vehicle. The Trial Judge was also correct in concluding that this triggered a requirement on Cst. Hicks' part to advise the Appellant of his rights to counsel and to refrain from attempting to elicit information from him until he had had an opportunity to exercise that right. *R.* v. *Grant* 2009 SCC 32.

b. Breach of Paragraph 10(a) of the *Charter* at the scene

[42] Paragraph 10(a) reads as follows:

> Everyone has the right on arrest or detention
>
> > (a) to be informed promptly of the reasons therefor;
> > (…)

Canadian Charter of Rights and Freedoms, para. 10(a)

[43] This provision has two goals: one is to enshrine everyone's right to not submit to arrest or detention without being told the reasons for it. The second is to ensure the ability to exercise the rights to counsel in a meaningful way:

> The right to be promptly advised of the reason for one's detention embodied in s.10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reason for it.
>
> A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s.10(b) of the Charter. As Wilson J. stated for the court in R. v. Black "an individual can only exercise his s.10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s.10(a) in a purposive manner, regard must be had to the double rationale underlying the right. (References omitted).

Evans v. *The Queen* [1991] 1 S.C.R. 869, at para. 31

[44] The Trial Judge concluded that because the Appellant was advised of the same rights, given the same caution, and for all intents and purposes, treated exactly the same way as if he had been under arrest, he was fully aware of the jeopardy he was in.

[45] I agree that given what Cst. Hicks told the Appellant, the Appellant would have been aware of the reason why his freedom was being taken away at that particular point in time. This addresses the first objective that underlies Paragraph 10(a).

[46] However, I do not think the same can be said about the second objective that underlies Paragraph 10(a). There is a difference in jeopardy between being detained and being under arrest. Under the *Criminal Code*, an arrest triggers a number of consequences about how a person is to be dealt with and the processes whereby that person can regain his or her freedom. By contrast, detention may be brief and the person may be released without any conditions. A person must know what their status is, among other reasons, to be in a position to convey it to counsel and obtain meaningful legal advice.

[47] At the hearing of the appeal, Crown counsel, who was not counsel at trial, took the position that the Trial Judge was correct in concluding that there was no breach of Paragraph 10(a) and that the Crown's concession at trial was "hasty". Leaving aside issues that arise from the Crown resiling from the position it took at trial, the transcript of the trial does not support the suggestion that there was anything "hasty" about the Crown's concession. Lengthy and well-articulated submissions were made by both Crown counsel and Defence counsel at trial. The concessions that the Crown was making as far as what breaches were committed were carefully outlined by Crown counsel. The record does not suggest that these concessions were hasty.

[48] The Crown's position, of course, was not binding on the Trial Judge. But in my view, for the reasons set out above at Paragraph 46, the Crown's concession at trial was justified in these circumstances and the Trial Judge erred in concluding otherwise.

c. Breach of Section 10(b) at the R.C.M.P. detachment

[49] I entirely agree with the Trial Judge's conclusions that there was no breach of the Appellant's rights to counsel at the detachment.

1. Interference with exercise of rights to counsel

[50] The Appellant argues that Cst. Hicks interfered with the exercise of his rights because he dialled the Legal Aid number for him. The Appellant says that the Trial Judge's finding that this was done at the Appellant's request was

speculative and not founded on the evidence. The Trial Judge's findings of fact, as previously mentioned, are reviewable on a standard of overriding and palpable error.

[51] Cst. Hicks did not specifically recall the Appellant asking him to contact Legal Aid. But he testified that his standard practice is to dial the number that the person asks him to. This was circumstantial evidence from which the Trial Judge could draw the inference that this was what happened, especially in the absence of evidence suggesting the contrary.

[52] Cst. Hicks' stated practice to ask who the detainee wants to call and then dial the number does not offend the *Charter*. There is no *Charter*-based prohibition on police officers to assist detainees in contacting counsel, whether they are specifically asked or not:

> (…) There is no Charter prohibition on the police assisting an accused in contacting counsel, only a prohibition on the police interfering with the right to contact counsel. That the police provided some assistance (whether requested or not) is a neutral factor unless there is evidence of interference in the right to contact counsel. There is no such evidence on this record. Specifically, there is no evidence that the police contrived in some way to make the respondent consult Legal Aid rather than some other counsel. Indeed there is no evidence that the respondent ever had any intention to consult anyone other than Legal Aid.

R. v. *Wolbeck*, 2010 ABCA 65, at para.23

[53] Similarly, I do not find it significant that the Appellant was in handcuffs when the phone call was made. There was no evidence that being handcuffed interfered in any way in his ability to obtain legal advice.

[54] That a police officer would control the situation to the extent of placing the call to the number requested, and monitor what is going on in the interview room, is not problematic, as long as the detainee is given privacy during the call and there is no interference with the exercise of the right. The evidence in this case was that Cst. Hicks observed the call through a window on the door and could not hear what was being said. There was no evidence that his conduct interfered in any way in the Appellant's exercise of his rights.

2. Failure to give the Appellant a "*Prosper*" warning

[55] I turn to the Appellant's submission that Cst. Hicks should have given him a "*Prosper* warning" after he expressed dissatisfaction with the legal advice he had

received. Cst. Hicks testified that this secondary warning appears on the standard cards used by police officers to advise individuals of their rights. Cst. Hicks testified that the wording of this warning is as follows:

> You have the right to a reasonable opportunity to contact counsel. I will not take a statement from you or ask you to participate in any process which might provide evidence against you until you are certain about whether you want to exercise that right.

[56] The rights to counsel enshrined in Paragraph 10(b) of the *Charter* must be interpreted in a purposive manner. This means that police officers must ensure that detainees understand their rights and have a meaningful opportunity to exercise them. It also means that any time a detainee purports to waive his or her right to consult with counsel, that waiver must be clear, unequivocal and fully informed.

[57] Concerns about the waiver of the right are even more pressing when they come from a person who has previously indicated that they do wish to avail themselves of the right and speak to counsel. That was the situation that arose in *R.* v. *Prosper* [1994] 3 S.C.R. 236.

[58] *Prosper* was not concerned about what police officers' obligations are where a detainee expresses dissatisfaction with the legal advice they have received. It was concerned with their obligations when a detainee, having expressed a wish to contact counsel, and having been diligent but unsuccessful in trying to reach counsel, indicates an intention to waive the right. Those circumstances do give rise to a requirement for a further warning to ensure that the waiver is voluntary and fully informed:

> (…)
> a *Prosper* warning is warranted in circumstances where a detainee is diligent but unsuccessful in contacting a lawyer and subsequently declines any opportunity to consult with counsel.
> (…)
> The *Prosper* warning ensures that detainees are aware that their right to counsel is not exhausted by their unsuccessful attempts to contact a lawyer. This additional informational safeguard is warranted when a detainee indicates an intent to forego s.10(b)’s protections in their entirety, ensuring that any choice to do so is fully informed.
> (…)

R. v. *Willier* 2010 SCC 37, at para. 38

[59] This is very different from the situation where the detainee has actually spoken to counsel and expresses dissatisfaction with the advice received. That scenario engages other considerations.

[60] The requirement for a purposive approach to *Charter* rights means that when this occurs, police officers cannot ignore the fact that a detainee has expressed dissatisfaction with the advice received and simply carry on with their investigation without doing more. The question is: what exactly are they required to do?

[61] As noted in *Willier*, while police officers are required to ensure that the detainee has a meaningful opportunity to exercise his or her rights, they must also avoid doing anything that could compromise the confidentiality of the solicitor-client relationship:

> While s.10(b) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made. The solicitor-client relationship is one of confidence, premised upon privileged communication. Respect for the integrity of this relationship makes it untenable for the police to be responsible, as arbiters, for monitoring the quality of legal advice received by a detainee. To impose such a duty on the police would be incompatible with the privileged nature of the relationship. The police cannot be required to mandate a particular qualitative standard of advice, nor are they entitled to inquire into the content of the advice provided. (…)
>
> *R.* v. *Willier*, *supra*, at para. 41

[62] What this means is that where a detainee expresses dissatisfaction with the advice received, police officers should not inquire about the nature of the advice or the reasons for the detainee's dissatisfaction. To do so, even with the best of intentions, runs a very real risk of compromising solicitor-client privilege. Arguably, that risk is even greater when dealing with individuals whose capacities are believed to be impaired by alcohol.

[63] The obligation of police officers, in those circumstances, is to ensure that the detainee understands that he or she can contact another counsel if they wish. If so, they must be provided with that opportunity before any further investigative steps are taken. Cst. Hicks gave the Appellant the option to contact another lawyer. The Appellant said he did not wish to avail himself of that option. In my view, Cst. Hicks was not required to do anything more at that point.

[64] To the extent that *R.* v. *Brimacombe*, 2011 ABPC 252 stands for the proposition that the requirement to give a detainee a *Prosper* warning is triggered whenever that detainee expresses dissatisfaction with the legal advice that he or she has received, I respectfully disagree with that decision and decline to follow it.

C) The Paragraph 24(2) Analysis

[65] In deciding whether evidence should be excluded pursuant to Paragraph 24(2) of the *Charter*, courts must consider three factors: the seriousness of the *Charter*-infringing conduct; the impact of the breach on the *Charter*-protected interests of the accused; and society's interest in the adjudication of the case on its merits. *R.* v. *Grant*, *supra*; *R.* v. *Suberu*, 2009 SCC 33; *R.* v. *Harrisson*, 2009 SCC 34

[66] As the Trial Judge correctly noted, the balancing exercise mandated by Paragraph 24(2) is a qualitative one. The evidence on each line of inquiry must be weighed in the balance. While one of the concerns underlying the power to exclude evidence is to enable the justice system to dissociate itself from police misconduct, that does not always trump the truth-seeking interests of that justice system. In all cases, the long-term repute of the administration of justice must be assessed. *R.* v. *Harrisson*, *supra*, at para. 36.

[67] My conclusions as to the extent of the breaches in this case are slightly different from those reached by the Trial Judge. But that is not a significant factor for the purposes of my review of his analysis pursuant to Paragraph 24(2), as he made it clear in his Reasons for Judgment that he would not have excluded the evidence even if he had concluded that all the breaches alleged by the Defence had in fact taken place:

> If I had found more than one breach, counsel for the accused argued that there was a cumulative effect to the breaches which should have caused an exclusion under section 24(2) of the Charter. Having found that there was only one breach, I do not have to make that determination; however, I am satisfied that even if I had found breaches with respect to the section 10(a) detention instead of arrest; the police officer placing the call and the lack of Prosper warning, their cumulative effect would not have changed the section 24(2) analysis significantly. The conduct of the police was not of such a nature that it was necessary for the courts to dissociate themselves from that conduct.
>
> *R.* v. *Carter*, *supra*, at para. 102.

[68] The Trial Judge correctly identified the criteria that must be considered in deciding whether evidence should be excluded pursuant to Paragraph 24(2). The record also discloses no overriding or palpable error in any of his factual findings relevant to the analysis.

[69] In examining the seriousness of the *Charter*-infringing conduct, the Trial Judge characterized Cst. Hicks' conduct as serious, but noted it was not deliberate. He considered that conduct to be "mid range of the spectrum" of seriousness because Cst. Hicks should have been aware of what investigative detention is and of the obligations that it triggers for police officers. I find no error in his analysis in this regard.

[70] In examining society's interest in the adjudication of the case on its merits, the Trial Judge noted the seriousness of drinking and driving offenses, and the usefulness of roadside screening and breathalyser testing as the main tools for the investigation and proof of such offenses. He also noted that results from those types of tests are highly reliable. Finally he noted the importance of the impugned evidence to the Crown's case. Again, there is no discernable error in his analysis of this factor.

[71] In examining the impact of the breach on the Appellant's *Charter* protected interests, the Trial Judge recognized the importance of the right to silence but found that there were two things that lessened the impact of the breach on the Appellant's *Charter*-protected interests:

> Firstly, the evidence which is sought to be excluded consists of statements made by the accused regarding his activities of that night, and in particular the admission that he had been drinking alcohol. To the extent that the accused was unsure whether he should answer the questions or not, he was advised by Cst. Hicks that he "need not say anything" along with the remaining contents of the standard police caution. On the face of it, this would have communicated the right to silence to the accused.
>
> Secondly, the Supreme Court of Canada in *Orbanski* found that in the context of roadside stops, questioning during a brief detention without a right to counsel was a reasonable limit. The minority decision in *Orbanski* felt that it was a violation of section 10(b) but the evidence should not be excluded under section 24(2) of the Charter. Although Mr. Carter was not detained in the context of a roadside traffic stop, the detention was brief and the statements made by the accused were used to form the grounds for the roadside screening device demand.
>
> *R.* v. *Carter*, *supra*, at paras 92-93.

[72] With the greatest of respect, I am of the view that the Trial Judge erred in concluding that these two things mitigated the seriousness of the impact of the *Charter*-infringing conduct on the Appellant's *Charter*-protected interests in the circumstances of this case.

[73] In my view, a person being told by a police officer that he or she has the right to remain silent is very different from that person having an opportunity to speak to counsel and receive advice about the right to silence, the implications of giving up that right, and other advice that person might receive from counsel.

[74] Where an issue arises as to whether a detainee's rights to counsel have been complied with, the accused will usually have been given the standard police caution, because that caution is, as a matter of course, given at the same time as the rights to counsel are. The importance and significance of the rights to counsel would be seriously undermined if the police caution were found to mitigate the impact of a breach of those rights in the manner suggested by the Trial Judge, because that mitigating effect would be present in a large number of cases.

[75] I also have some difficulty with the second factor identified by the Trial Judge as mitigating the seriousness of the impact of the breaches on the Appellant's rights. I fail to see how the length of the period of detention can be said to have had any bearing on the impact of the failure to advise the Appellant of his rights to counsel, considering that the net result was that he incriminated himself. Cst. Hicks acknowledged that but for those incriminating answers, he would have had no grounds to make the ASD demand. Hence, the impact of the Appellant having answered the officer's questions was very significant.

[76] In concluding that the Appellant's rights were breached at the scene, the Trial Judge had correctly rejected the notion that the situation the Appellant faced was akin to a roadside stop. As he noted, by the time the Appellant was detained in the back of the police vehicle, Cst. Hicks was investigating an impaired driving situation, that investigation was focused on the Appellant, and the purpose of the questions he asked him was to gather additional evidence. That situation, in my view, is entirely different from the considerations that are engaged in the context of roadside stops and were discussed in *R.* v. *Orbanski*, 2005 SCC 37.

[77] I do not consider that either of these factors should have been given the significance that the Trial Judge gave them for the purposes of the analysis pursuant to Paragraph 24(2). The Trial Judge made it clear that those factors were the only reason that he was not excluding the breathalyser results:

> Had the mitigating factors referred to with respect to the first two Grant lines of inquiry not been present, I would have excluded the breath samples. However, given the analysis with respect to all three factors, the accused has not established that the admission of the statements and consequently, the breath samples, would bring the administration of justice into disrepute.
>
> *R.* v. *Carter*, *supra*, at para. 100.

[78] I have explained why I have concluded that the Trial Judge erred in his conclusion that there were factors mitigating the impact of the breaches on the Appellant's *Charter* protected interests. I agree with his assessment that without such mitigating factors, the exclusion of the breathalyser results was warranted.

[79] As conceded by Defence at trial, the breach of the Appellant's 10(a) rights was not a particularly serious one. But it was completely unexplained. When asked why he did not place the Appellant under arrest, Cst. Hicks said he "could only guess".

[80] The breach of the Appellant's rights to counsel at the scene was serious. At the time of these events, the law regarding what constitutes "detention" was not in flux. Beyond the relative inexperience of the officer, there was no explanation for his lack of knowledge about concepts that are crucial for those tasked with the enforcement of the law. The absence of explanation for a breach in itself makes the breach serious. *R.* v. *Berger*, 2012 ABCA 189, at para. 22.

[81] As outlined above, even though the period of detention was relatively short, what is significant is that during that short period of time, Cst. Hicks acquired, through questioning the Appellant, the totality of his grounds for making the ASD demand; the result of the ASD testing, in turn, formed the totality of his grounds for making the breathalyser demand. Under those circumstances, it matters little that the Crown was not seeking to use the utterances themselves as evidence against the Appellant. The point is that the case against him only came into existence because of the self-incriminating answers that he gave, while detained, and without having been advised of his rights to counsel. The breach of his rights to counsel had a significant impact on his *Charter*-protected rights because but for his admissions, there would have been no basis for the officer to do anything but let him go on his way. Cst. Hicks acknowledged this in his testimony.

[82] There is no doubt that drinking and driving continues to be of serious concern in our communities. Society has a clear interest in those cases being decided on their merits. However, it is equally true the long term repute of the administration of justice suffers where law enforcement officials act in ways that disclose ignorance of well established tenets of our legal system, and of their obligations under our law.

D) CONCLUSION

[83] For those reasons, I conclude that the Appellant's application to exclude the evidence of the breathalyser results at his trial should have been granted. Having regard to the balance of the evidence adduced by the Crown at this trial, the Appellant is entitled to an acquittal.

[84] The appeal is allowed, the conviction is quashed, and an acquittal is entered.

L.A. Charbonneau,
J.S.C.

Dated in Yellowknife, NT this
25 day of June, 2013

Counsel for the Appellant: Deborah R. Hatch
Counsel for the Respondent: Marc Lecorre

S-1-CR-2012 000081

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CARL JOSEPH CARTER

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU
