Date: 2012 03 01
File: T1-CR-2011-000143

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CARL JOSEPH CARTER

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Norman Wells, Northwest Territories December 5 – 6, 2011
Date of Decision:	March 1, 2012
Counsel for the Crown:	Mathew Johnson
Counsel for the Accused:	Rod Gregory

[s. 253(1)(a) and s. 253(1)(b) of the *Criminal Code*]

Date: 2012 03 01
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- and -

CARL JOSEPH CARTER

A. BACKGROUND AND ISSUES

A.1 Introduction

[1] Carl Carter is charged that he operated a motor vehicle while his ability to drive was impaired by alcohol and while the alcohol level in his blood was over 80 mg. of alcohol per 100 ml. of blood.

[2] The trial commenced with a *voir dire* with respect to the "over 80 charge". One witness was heard in the *voir dire*, Cst. Andrew Hicks. Following the *viva voce* evidence of Cst. Hicks, Crown and defence gave their submissions. If the defence is successful in its *Charter* application, the evidence of the breathalyzer readings will be excluded.

[3] It was agreed that I would give my decision on the *voir dire* before any further steps in the trial are taken.

A.2 Issues

[4] In a summary form, the issues with respect to the "over 80 charge" are:

(a) Was there an investigative detention of the accused in the police vehicle?

(b) If there was an investigative detention, was there a breach of the accused's section 10(b) *Charter* right to counsel?

(c) The constable admits that throughout the interaction with Mr. Carter, he did not arrest the accused for impaired driving but detained him. The accused was detained but not arrested when the breathalyzer demand was read to him. Was this a breach of section 10(a) of the *Charter*?

(d) When Cst. Hicks dialed the telephone for the accused, was this a breach of the accused's section 10(b) right to counsel?

(e) After the accused had spoken to legal counsel and responded to Cst. Hicks' two questions as follows: "Are you satisfied with the advice you received from the lawyer?" "No." "Do you want to call another lawyer?" "No", did Cst. Hicks breach the accused's section 10(b) rights when he did not read the accused a "*Prosper"* warning before administering the breathalyzer test?

(f) If any or all of these breaches are established, should the evidence of the breathalyzer test be excluded?

[5] Before analyzing each of these issues in turn to determine if there is a *Charter* breach and then providing the section 24(2) analysis, I will briefly recite the facts and provide an overview of the section 10(b) right to counsel as it relates to this situation.

B. OVERVIEW OF THE FACTS

[6] At 10:13 p.m. on November 19, 2010, Cst. Hicks of the Norman Wells RCMP received a call advising of an accident and a possible impaired driver. Cst. Hicks drove to the site and found a dark colour pickup truck straddling a guardrail which ran parallel to the road. The roadway was snow and ice-covered.

[7] The accused was holding the end of a chain that was attached, at the other end, to the bumper area of the rear of the vehicle. Cst. Hicks introduced himself to the accused who identified himself as "Carl" and said that he was driving the vehicle.

[8] Nothing about Mr. Carter's behaviour indicated impairment to Cst. Hicks except that his voice was "raspy" and there was some slurring in his words, i.e., his words were elongated.

[9] Cst. Hicks took the accused back to the police vehicle. He told the accused that "he wasn't arrested or anything" and asked if he could search him for officer safety reasons. Mr. Carter agreed to the search and sat in the back seat of the

police vehicle. Cst. Hicks advised the accused that they were investigating "an impaired" and read him the police caution. Through questioning, Cst. Hicks determined that Mr. Carter had been operating a motor vehicle and within the past three hours had consumed alcohol. He read Mr. Carter the Approved Screening Device (ASD) demand. Mr. Carter blew a "fail".

[10] Cst. Hicks then gave the accused a breath demand. He advised the accused that he was detained for impaired operation of a motor vehicle and read him his right to counsel and police caution. Mr. Carter said he would contact a lawyer.

[11] Cst. Hicks consciously decided not to arrest the accused, but detained him. In all places where the police *Charter* and other informational cards which were read to the accused required the officer to choose between "detained" or "arrested", Cst. Hicks said "detained".

[12] At the detachment, Cst. Hicks smelled an odour of alcohol for the first time as he was taking the accused from the police vehicle. Cst. Hicks has a sinus condition so that he is only able to detect strong odours. Cst. Hicks took the accused to a phone room, dialed the Legal Aid telephone number for the accused and handed the phone to the accused. The accused spoke in private to a lawyer for three minutes. Cst. Hicks asked, "Are you satisfied with the advice you received from the lawyer?" The answer was, "No." Cst. Hicks asked, "Do you want to call another lawyer?" The answer was, "No."

[13] The accused was taken to the breathalyzer room where he gave two samples of his breath. The readings were both 180 mg. of alcohol/100 ml. of blood.

C. ANALYSIS OF ALLEGED CHARTER BREACHES

C.1 Overview of the Section 10(b) Right to Counsel

[14] Section 10 of the *Charter* states:

> 10. Everyone has the right on arrest or detention
> (a) to be informed promptly of the reasons therefor;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[15] When an individual is detained or arrested by the state, he or she will be concerned about regaining liberty and knowing what rights and obligations he or she has with respect to dealing with the police. In particular, the right to counsel is intertwined with the right to silence as stated by the Supreme Court of Canada in *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 176:

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.

[16] A useful summary of the obligations of the police with respect to an individual's right to counsel was provided by the Alberta Court of Appeal in *R. v. Luong* (2000), 149 C.C.C. (3d) 571 at para. 12:

> For the assistance of trial judges charged with the onerous task of adjudicating such issues, we offer the following guidance:
>
> 1. The onus is upon the person asserting a violation of his or her Charter right to establish that the right as guaranteed by the Charter has been infringed or denied.
>
> 2. Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.
>
> 3. The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.
>
> 4. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.
>
> 5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)". *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.) at 301.
>
> 6. The second implementational duty is 'to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)". *R. v. Bartle*, *supra*, at 301.
>
> 7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
>
> 8. If the trial judge concludes that the first implementational duty was breached, an infringement is made out.
>
> 9. If the trial judge is persuaded that the first implementational duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the exercise of his rights. *R. v. Smith* (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.
>
> 10. If the detainee, who has invoked the right to counsel, is found not to have been reasonably diligent in exercising it, the implementational duties either do not arise in

the first place or will be suspended. *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565 (S.C.C.) at 568; *R. v. Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C.) at 135; *R. v. Black* (1989), 50 C.C.C. (3d) 1 (S.C.C.) at 13; *R. v. Smith*, *supra*, at 314; *R. v. Bartle*, *supra*, at 301 and *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.) at 375-381 and 400-401. In such circumstances, no infringement is made out.

11. Once a detainee asserts his or her right to counsel and is duly diligent in exercising it, (having been afforded a reasonable opportunity to exercise it), if the detainee indicates that he or she has changed his or her mind and no longer wants legal advice, the Crown is required to prove a valid waiver of the right to counsel. In such a case, state authorities have an additional informational obligation to "tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity" (sometimes referred to as a "*Prosper* warning"). *R. v. Prosper*, *supra*, at 378-79. Absent such a warning, an infringement is made out.

C.2 Burden of Proof

[17] As indicated in *R. v. Luong*¸ *supra* and in *R v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508, once the Crown has shown that the accused had a reasonable opportunity to consult counsel, the burden of proving a Charter breach is on the accused, on a balance of probabilities.

C.3 Investigative Detention and Section 10(b)

[18] The accused submits that when he accompanied Cst. Hicks back to the police vehicle, he was placed under investigative detention. He was not provided with his right to counsel and therefore there was a breach of section 10(b) of the *Charter*.

[19] When Cst. Hicks invited the accused back to the police vehicle "to find out what had happened" (to use the words of Cst. Hicks), Cst. Hicks felt that he was not detaining the accused. This impression was despite the following indicators of detention:

(a) Cst. Hicks said, "Okay. We're going to go back to the police vehicle."

(b) Cst. Hicks asked the accused if he could search the accused for officer safety reasons.

(c) Cst. Hicks placed Mr. Carter into the back seat of the police vehicle; Cst. Hicks closed the door and got in the front seat. As is standard with police vehicles, the back doors could not be opened from the inside.

(d) Cst. Hicks told the accused that they were investigating an impaired and then read him the police caution, "You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence."

[20] At the trial, during cross-examination, Cst. Hicks admitted that between the date of this incident, November 19, 2010 and the date of the trial, December 5, 2011, he had come to realize that, in law, and contrary to what he believed at the time, he had detained the accused.

[21] The Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353 at para. 44 summarized the meaning of psychological detention:

> ... In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> > (a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.
> >
> > (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
> >
> > (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[22] In my view, the answer to the question of "whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand" as stated in *Grant* at paragraph 31, is clear. The accused was detained as he was seated in the back seat of the police vehicle. There were elements of physical detention (being locked in the back of the police vehicle) and psychological detention (the language used, the search and the police caution).

[23] The information obtained by Cst. Hicks after this detention was significant to the investigation. Up to the point in time before Cst. Hicks asked questions of the accused in the back seat of the police vehicle, Cst. Hicks had noticed that the accused had a raspy voice and there was slight slurring of his words. Cst. Hicks admitted that he did not have sufficient grounds to make an ASD demand, i.e., he

did not have reasonable grounds to suspect that Mr. Carter had alcohol or a drug in his body.

[24] Once in the vehicle, the following conversation took place (answers in quotes indicate verbatim answers):

(a) Were you driving the truck across the road? "Yup."
(b) Where were you coming from? "The Legion."
(c) When did you leave the Legion? "Left 9:30 p.m."
(d) What were you doing at the Legion? "Setting up for the bazaar and had a few beers."
(e) When did you start drinking? 7:00 tonight.
(f) When did you have your last beer? "Around 9:00 tonight."
(g) How many beer did you have in total? "Three – three to four beer total."
(h) Can you tell me what happened? I slipped here on the corner and she started sliding and lost control, bad tires. I need to buy new tires because they're bad in the snow.
(i) Do you have diabetes or any other medical conditions? "No."
(j) Have you taken any legal or illegal drugs tonight? "Nope."

[25] As a result of these answers from the accused, Cst. Hicks concluded that the accused had been operating a motor vehicle and within the past three hours had consumed alcohol. He therefore felt that he had sufficient grounds to make an ASD demand pursuant to s. 254(2) of the *Criminal Code*.

[26] Counsel for the accused argues that the accused should have been provided his section 10(b) right to counsel on detention and therefore prior to answering the questions asked by Cst. Hicks. If the answers to the questions are excluded under section 24(2) of the *Charter*, then Cst. Hicks would not have had sufficient grounds for an ASD demand; there would have been no "fail"; and there would have been no grounds for a breathalyzer demand.

[27] Crown admits a violation of Mr. Carter's section 10(b) right to counsel but argues that the evidence should not be excluded.

[28] This is not the same situation as in *R. v. Thomsen*, [1988] 1 S.C.R. 640 and *R. v. Orbanski*, [2005] 2 S.C.R. 3. In these cases, the Supreme Court of Canada found that where the police stop a motor vehicle and proceed with roadside screening device procedures, roadside questioning and sobriety tests, these actions may occur before the detainee is advised of his right to counsel. This is a reasonable limit under section 1 of the *Charter*. It is based on the authority of police officers to stop motor vehicles under the applicable provincial or territorial legislation which regulates travel on highways and their duty to enforce section 254 of the *Criminal Code*.

[29] When Cst. Hicks arrived at the scene of the accident, this was not a "roadside stop." Mr. Carter was out of the vehicle; he had already attached a chain to the rear bumper. There may have been an obligation on Mr. Carter to participate in an accident report under territorial legislation; however, this was not raised by either the Crown or defence. In any case, statutorily compelled statements are not admissible for criminal prosecution purposes: *Regina and White* (1999), 135 CCC (3rd) 257 (S.C.C.)

[30] Cst. Hicks testified that he placed Mr. Carter in the back seat of the police vehicle because he wanted "to find out what happened"; because it was -7 degrees Celsius outside and because it would be more comfortable to speak to Mr. Carter in the warmth of the police vehicle. In November of 2010, Cst. Hicks was still relatively inexperienced with respect to the investigation of impaired driving and the use of the ASD. I believe Cst. Hicks when he testified that his reason for moving to the police vehicle was out of consideration to the accused and that he did not realize that the legal effect would be to detain Mr. Carter.

[31] Still, he had received a complaint reporting an impaired driver and he knew that Mr. Carter was the driver. Cst. Hicks started the conversation in the police vehicle with a statement that they were "investigating an impaired." Despite how Cst. Hicks characterized this interaction in his own mind, it is clear that, objectively, this was an investigative detention focused on Mr. Carter.

[32] At the point Mr. Carter got into the police vehicle, he was under no obligation to speak to Cst. Hicks. Had Mr. Carter spoken to legal counsel and as a result, invoked his right to silence, Cst. Hicks would not have obtained the necessary grounds for an ASD demand. Mr. Carter's detention was the type of situation referred to in *R. v. Therens,* [1985] S.C.J. 30 at paras. 48 to 49 "directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee."

[33] It is significant that Cst. Hicks read the standard police caution to the accused. As part of the caution, Mr. Carter was informed that he did not have to speak to Cst. Hicks ("You need not say anything.") Still, this reading of the police caution does not remove the requirement for giving a right to counsel. In the absence of legal advice, the average person with limited experience in dealing with the police might not realize that the questions that followed the caution and which dealt with what the accused had done earlier that night were caught in the net of things that the accused did not have to talk about. If the accused was uncertain, speaking to legal counsel would have clarified any confusion.

[34] The underlying purpose of the section 10(b) right to counsel is to ensure that "a suspect is able to make a choice to speak to the police investigators that is both free and informed": *R. v. Sinclair*, [2010] 2 S.C.R. 310 (S.C.C.).

[35] The fact situation in the case involving Mr. Carter is similar to the facts in *R. v. Oliver*, [2011] O.J. No. 4554 (Ont. C.J.). In *Oliver*, the Court determined that the police officer had abandoned any investigation under the *Highway Traffic Act* and during a prolonged detention was investigating an offence under the *Criminal Code*. During that detention, the officer formed the necessary grounds for an ASD demand. No section 10(b) right to counsel was provided to the detainee. The Court found a breach of the section 10(b) right to counsel and subsequently excluded the certificate of analysis.

C.4 Detention But No Arrest

[36] As stated earlier, Cst. Hicks did not feel that he had detained the accused when he placed him in the back seat of the police vehicle to ask him questions. After the accused blew a "fail" in the Approved Screening Device, the constable read him the breath demand; advised him that he was detained for impaired operation of a motor vehicle; read him his rights to counsel; and then read him the police caution again.

[37] Cst. Hicks made a conscious decision not to arrest the accused, but chose instead to detain him:

> Q. All right. So why didn't you place him under arrest?
>
> A. I, I can only guess. Like I said, I am a nervous person and, like, I just – I did what I did. I detained him and I did not arrest him.
>
> Q. All right. But you made a conscious effort not to place him under arrest; do you agree with that?
>
> A. I picked detention and that's what I picked and that's what I followed all the way through. I never said "arrest".

[38] Counsel for the accused submits that this decision to "detain" instead of "arrest" was a violation of the accused's section 10(a) right.

[39] Section 10(a) of the *Charter* provides that "Everyone has the right on arrest or detention to be informed promptly of the reasons therefor."

[40] The accused argues that the failure to arrest the accused would have made it difficult for the accused to properly advise counsel. Had the accused spoken to a lawyer and advised the lawyer that he was "detained" and being asked to blow in a

breathalyzer, the lawyer would not understand or at least would be confused with the extent of his or her client's jeopardy.

[41] The purpose of section s. 10(a) of the *Charter* is to provide the accused with sufficient information to allow the accused to make a decision with respect to whether or not to submit to a detention or an arrest or to exercise his right to counsel. In *Evans v. The Queen* (1991), 63 C.C.C. (3d) 289, McLachlin J. speaking for the majority said at p. 302:

> l. Section 10(a) of the Charter
>
> > 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 reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 at p. 424, 44 C.R. (3d) 17, 12 C.R.R. 354 (Ont. C.A.). 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* (1989), 50 C.C.C. (3d) 1 at p. 12, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97, "[a]n 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.

[42] At p. 303, McLachlin J. continued:

> > When considering whether there has been a breach of s. 10(a) of the Charter, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to determine his right to counsel under s. 10(b).

[43] Cst. Hicks said that, in all respects, he treated the accused as if he had been arrested, except that he used the word "detained" instead of "arrested". The accused was told that the police were "investigating an impaired." The accused had been read the breath demand in the police vehicle and indicated that he understood:

> > I am satisfied that your ability to operate a motor vehicle is impaired. You are, therefore, required to accompany me for the purpose of providing samples of your breath suitable for alcohol analysis to determine the concentration, if any, of alcohol in your blood in accordance with the provisions of the *Criminal Code*. Should you refuse this demand, you may be charged with the offence of refusal.

[44] In my view, the accused would have understood the basis for his apprehension by the police and hence the extent of his jeopardy.

[45] Counsel did not provide me any case law in support that this was a breach. Although not directly on point, the British Columbia Court of Appeal case, *R. v. Madsen*¸ [1994] B.C.J. No. 709 deals with a situation where the accused was detained throughout but not arrested. The issue was whether the continuing detention after the breathalyzer tests was arbitrary. There was no issue indicated by the Court with respect to the "detention" versus "arrest" distinction.

[46] Despite the Crown's concession that there has been a section 10(a) breach, I am satisfied that the accused was aware of the extent of his jeopardy and had sufficient information to properly instruct counsel and to make the decision as to whether or not to submit to his detention. I do not find that there has been a section 10(a) breach.

C.5 Cst. Hicks Placed the Phone Call

[47] At trial, Cst. Hicks described the circumstances of the phone call to legal counsel by the accused. Cst. Hicks and Mr. Carter went to the interview room which is also used for someone to call a lawyer in private. I will refer to it as the "phone room" later. Cst. Hicks asked Mr. Carter if he wanted to call Legal Aid or any other lawyer of his choice and in response to the answer, Cst. Hicks dialed the number for Legal Aid. On this evening, there was a telephone book, containing the numbers of lawyers, in the interview room. Although he has no independent recollection of what happened on this occasion, Cst. Hicks normally speaks to the lawyer; informs the lawyer of who is going to be on the phone and what the investigation is for or the possible charges.

[48] As a practice, Cst. Hicks does not let the accused person dial the phone himself and if an accused person tried to, Cst. Hicks would walk in and ask what was going on.

[49] The defence submits that Cst. Hicks' personal policy to dial phone numbers and to control and ask who the detained person is calling, in effect, restricts access to counsel and is interference that goes beyond the neutral police involvement as outlined in *R. v. Wolbeck*, 2010 ABCA 65.

[50] In *Wolbeck*, the Alberta Court of Appeal stated the law with respect to the permitted actions of the police in assisting a detained person in contacting legal counsel:

> **23** Even though the police only have the informational and implementational duties mentioned, it does not follow that they must desist from providing any assistance to the accused in his or her attempts to contact counsel. In the oral unreserved decision in *R. v. Rath*, [2003] A.J. No. 1659 it was stated:

> 132 I concur completely in the statement made by that trial judge, that the police should [n]ot participate in the attempts by a detainee to exercise a right to counsel by dialing numbers of lawyers, suggesting lawyers' names, approaching lawyers on behalf of the detainee, or the like. They must give the reasonable opportunity to the detainee to contact counsel of his or her choosing. Absent any specific request for assistance by the detainee, or the reasonably apprehended belief that the detainee is unable to contact counsel personally, no further step should be undertaken by the police to ensure the exercise by the detainee of the right to counsel within that reasonable opportunity.
>
> **This statement does not correctly reflect the law.** 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. [emphasis added]

[51] Counsel for the accused argues that the fact situation in *Wolbeck* is different from the fact situation before the Court. In *Wolbeck*, the accused requested that the police officer call Legal Aid for him. In the situation involving the accused, Mr. Carter, Cst. Hicks was not requested by the accused to place the telephone call; rather, Cst. Hicks did it on his own, in this case and as a general practice. Because *Wolbeck* can be distinguished on the facts, the accused relies on the decisions of *R. v. Rath*, [2003] A.J. No. 1659 (AB QB) and *R. v. McLinden*, [2004] A.J. No. 200 (AB PC) which both involve situations where the police officer made the phone calls without being requested.

[52] I do not read the Alberta Court of Appeal in *Wolbeck* as making the distinction that counsel for the accused urges me to make. The operative principle in *Wolbeck* has nothing to do with whether the police officer is requested to make a telephone call or not. The operative principle is:

> 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.

[53] The question I must answer is as the Court of Appeal states: Is there evidence of interference in the right to contact counsel?

[54] Cst. Hicks and Mr. Carter were in the phone room. In the phone room, there is a phone book and there is a sheet on the wall that says "Legal Aid" and the telephone number. Mr. Carter was asked if he wanted to call Legal Aid or any other lawyer of his choice. Cst. Hicks, in his testimony, did not explicitly give Mr. Carter's response but as a result of the response, Cst. Hicks phoned Legal Aid. Cst. Hicks left the room. He monitored Mr. Carter through a window in the door which allowed Cst. Hicks to see Mr. Carter but not to hear him. After Mr. Carter

finished speaking with Legal Aid, Mr. Carter made no attempt to dial another number.

[55] When Mr. Carter expressed his wish to phone Legal Aid, there was only one telephone number to phone. This differs from the situations in *Rath* and *McLinden,* where a call to a legal aid lawyer meant choosing someone on the list of legal aid lawyers who had indicated that he or she was willing to take section 10(b) calls. Once Mr. Carter made the choice to phone Legal Aid, no further choice had to be made. That Cst. Hicks dialed the Legal Aid telephone number or that the accused dialed the Legal Aid telephone number, in my view, makes no difference with respect to the implementation of his right to counsel.

[56] For these reasons, I do not find that the placing of the phone call by Cst. Hicks was a breach of the accused's section 10(b) right to counsel.

C.6 Was a *Prosper* Warning Required?

[57] When Cst. Hicks and the accused were in the police vehicle, Cst. Hicks gave Mr. Carter his right to counsel. He then asked Mr. Carter if he wanted to call a lawyer. Mr. Carter said, "Yea, I will."

[58] When they got back to the detachment, Cst. Hicks took the accused to the phone room and dialed the telephone number for Legal Aid as indicated above. Mr. Carter spoke to the lawyer for three minutes as Cst. Hicks monitored through a window in the door.

[59] After the call was over, Cst. Hicks went in and the following conversation took place:

(a) "Are you satisfied with the advice you received from the lawyer?" "No."

(b) "Do you want to call another lawyer?" "No."

[60] Cst. Hicks then took Mr. Carter into the room where the breathalyzer instrument was located.

[61] The accused submits that a *Prosper* warning should have been given after the accused expressed dissatisfaction with the advice he received from the lawyer. The failure to provide this warning, it is argued, results in a breach of the accused's section 10(b) right to counsel.

[62] The *Prosper* warning is normally given in the following situation. The accused indicates his intent to speak to a specific lawyer. Attempts are made to

contact that lawyer but are unsuccessful. The accused then decides that he does not wish to speak to a lawyer and waives his right to counsel. The *Prosper* warning is given to make it clear to the accused that (a) he has not exhausted his right to counsel and he has the right to speak to another lawyer and (b) the police will not take further action until he has spoken to counsel.

[63] The Supreme Court of Canada in *R. v. Willier*, [2010] 2 S.C.R. 429 dealt with the situation where an accused initially wished to speak to counsel of his choice but it became apparent that that specific lawyer might not be available until after the weekend. Mr. Willier was told of the availability of duty counsel. He spoke to duty counsel and did not express any dissatisfaction with the advice received; nor did he renew his request to speak to the specific lawyer.

[64] The Supreme Court of Canada said that if the accused does not express dissatisfaction with the advice received, the police can proceed with the investigative interview.

[65] This leaves open the question of what the obligations of the police are, if the accused *does express dissatisfaction* with the advice received. It seems self-evident that if an accused is unhappy with the advice received from a specific lawyer and wishes to seek advice from another lawyer, then the opportunity to contact another lawyer should be given.

[66] An accused in this situation needs to be aware that his right to counsel is not exhausted upon a lawyer picking up a telephone at the other end of the line and speaking to the accused. There may be a number of reasons for the accused's dissatisfaction: the call may have been interrupted; the lawyer's advice was legally incorrect; the accused may simply not accept what is legally sound advice; or the accused may be stalling for time.

[67] As stated in *Willier*, the police are not in a position to inquire as to the source of the dissatisfaction since that inquiry would be treading on an area covered by solicitor-client privilege.

[68] The accused has to be made aware that he has not exhausted his right to counsel simply because he has been connected to a lawyer. The difference between this situation and the *Prosper* situation is that in the *Prosper* situation, the accused initially wished to exercise his right to counsel and then appeared to change his mind without having exercised the right. In the case involving Mr. Carter, he initially wished to exercise his right to counsel; he appeared to exercise his right to counsel; was dissatisfied with result and then decided not to continue exercising his right.

[69] I accept that the police have a duty in Mr. Carter's situation to communicate to the accused that his right to counsel is not exhausted.

[70] In this case, Cst. Hicks said, "Do you want to call another lawyer?" This question clearly indicates that Mr. Carter had the opportunity to call someone other than the lawyer that he had just spoken to.

[71] Cst. Hicks had available on one of his cards, a *Prosper* warning. It stated:

> 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 this right.

[72] At the time of this incident on November 19, 2010, Cst. Hicks was not aware of the situation when he would provide the *Prosper* warning. He testified at trial that, in retrospect and based on the knowledge that he now possesses, he would have read the *Proper* warning to the accused at the time.

[73] In my view, what was said to Mr. Carter has to be examined in the context of the situation and the information that the accused possessed. Would the information contained in the *Prosper* warning have added anything to the information he already had?

[74] Mr. Carter was aware that he could contact another lawyer. That choice was clearly put to him. He was in the phone room; there was a telephone book; there was no indication that he was being pressured to leave the phone room to go to the breathalyzer room.

[75] In the absence of testimony from Mr. Carter that he felt that he could not phone other counsel or that he felt pressured to go to the breathalyzer room, the *Prosper* warning did not appear necessary. As I stated earlier, the expression of dissatisfaction by the accused with advice received from legal counsel should trigger a response by the police, but that response does not have to be a *Prosper* warning. The response should be sufficient to communicate clearly to the accused that his right to counsel is still ongoing and has not been exhausted.

[76] As the Court said in *Brimacombe*, "I am satisfied that closely read *Willier* actually supports the proposition that where the police have clear information from the subject that there is something unsatisfactory about the advice that it ought to trigger the "*Prosper* warning", or alternatively, simply returning the accused to the phone room for further consultation."

[77] Counsel for the accused has drawn the Court's attention to the case of *R. v. George*, 2010 SKPC 41 from the Saskatchewan Provincial Court. Mr. George had

exercised his right to counsel but was not satisfied with the response. After he had spoken to legal aid duty counsel for a second time, he was asked if he was satisfied with the advice received and responded, "No, not really." The officer then asked, "Do you want to call another lawyer?" This conversation was tape recorded. Mr. George's response was inaudible on the recording and the officer had no independent recollection as to what the answer was. Judge Lebach stated that Mr. George's waiver of his right to counsel was not unequivocal and stated:

> The evidence on this *voir dire* is insufficient to establish that Mr. George unequivocally waived his right to counsel. In addition, there is no evidence that Constable Angestadt or any other officer gave Mr. George a *Prosper* warning at this stage of the proceedings. Therefore, I conclude that Mr. George's s. 10(b) *Charter* right to counsel was breached.

[78] The facts in *George* are different that the case before the Court. Mr. Carter's response to "Do you want to call another lawyer?" was unequivocal. It was "no". Based on this question, Mr. Carter should have been aware that he still had the opportunity to contact another lawyer and therefore he had not exhausted his right to counsel.

[79] In *R. v. Krivoblocki*, 2010 SKQB 76, Mr. Krivoblocki wished to speak to Mr. Smith, a lawyer. The police officer placed the call to Mr. Smith and allowed Mr. Krivoblocki to speak to him in private, observing him through a window but not hearing the conversation. After Mr. Krivoblocki finished his call, the officer asked Mr. Krivoblocki if he was satisfied. The accused said he was not satisfied, but added, "I will be speaking to him again later." When asked if he wished to speak to another lawyer, he responded that he did not but that he would speak to Mr. Smith again after the first blow into the breathalyzer. At paragraph 21, Justice Koch made the following observation which is applicable to the case at bar:

> After the phone call to Mr. Smith, the accused told Constable Milne that he was not satisfied. It is not clear whether he was not satisfied with his opportunity to obtain advice, whether he was not satisfied with the advice he received or whether he was simply untruthful. The implications might be significant. However, the burden of proof as to whether Charter rights have been infringed or denied falls to the accused, *R. v. Luong* 2000 BCA 301, 271 A.R. 368 (Alta. C.A.). It is his choice whether to leave this issue unresolved at trial. Understandably, the Crown is not in position to delve further into it. Neither is it for the Court to speculatively select an inference most favourable to the accused. Only the accused knows what the proper inference is, and he has chosen not to assist the Court in this regard.

[80] I do not find that there was a breach of the accused's section 10(b) right to counsel as a result of the failure of Cst. Hicks to provide a *Prosper* warning.

D. SHOULD EVIDENCE BE EXCLUDED UNDER S. 24(2)

D.1 Section 24(2) analysis

[81] For the reasons given above, I have found that there was a breach of Mr. Carter's section 10(b) right to counsel when he was detained in the back of the police vehicle. Once a breach has been established, the onus is on the accused to show that the evidence obtained should be excluded under section 24(2).

[82] In this case, the accused seeks to exclude the statements that the accused made to Cst. Hicks which gave Cst. Hicks the grounds to suspect that the accused had alcohol in his body. If this evidence is excluded, it is conceded by the Crown that there would not have been grounds for an ASD demand and the subsequent, "fail" reading. In the absence of this "fail" reading, the officer would not have had grounds to make the breathalyzer demand and therefore the results of the breathalyzer should be excluded as a breach of section 8 of the *Charter*: *R. v. Shepherd*, [2009] S.C.J. No. 35.

[83] Section 24(2) of the *Charter* states:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[84] The approach to be taken by the Court when dealing with an application to exclude evidence under s. 24(2) was set out by the Supreme Court of Canada in paragraph 71 of *R. v. Grant* (2009), 245 C.C.C. (3d) 1 (S.C.C.):

> … When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute …

The seriousness of the *Charter*-infringing state conduct

[85] The Supreme Court of Canada in *Grant, supra*, defined three types of detention: physical restraint, psychological restraint with legal compulsion and psychological restraint without legal compulsion. The Court in *Grant, supra,* at

para. 75 also stated that negligence or wilful blindness of *Charter* standards on the part of the police cannot be equated with good faith.

[86] Although Cst. Hicks may have been thinking of the comfort of the accused and himself when he chose "to find out what happened" by conducting a conversation in the police vehicle, the legal effect of this decision was a detention. Cst. Hicks should have been aware of this. Cst. Hicks was investigating the situation to find out if the accused was impaired. After all, the complaint was about an impaired driver; Cst. Hicks told the accused that they were investigating "an impaired"; and Cst. Hicks knew that the accused had been driving.

[87] That Cst. Hicks could have had the conversation with the accused while they were standing in the cold *without* detaining him as the Crown suggests is questionable. Even if that conversation would not have been considered to take place during a detention, the conversation in the police vehicle did take place during a detention and the failure to provide the accused with his right to counsel was serious.

[88] As stated in *Grant*, *supra*, at para. 72, "The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts do dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law."

[89] Justice Doherty in *R. v. Kitaitchik,* [2002] O.J. No. 2476 (Ont. C.A.) described a spectrum of police conduct at paragraph 41:

> 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. [citations omitted from paragraph]

[90] Although the police conduct was serious, it was not deliberate. Cst. Hicks subjectively believed that he was not detaining the accused and that there was no issue with respect to the grounds for the ASD demand. This conduct was mid-range on the spectrum since the constable should have been aware of what investigative detention was and the consequential *Charter* rights which flowed from detaining the accused.

The impact of the breach on the *Charter*-protected interests of the accused

[91] The right to silence and the right to choose whether or not to speak to authorities are important *Charter*-protected interests. In this situation, there are

two factors, which in my view lessen the impact of the breach of the right to counsel.

[92] Firstly, the evidence which is sought to be excluded consists of statements made by the accused regarding his activities that night, and in particular his 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.

[93] 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.

Society's interest in the adjudication of the case on its merits

[94] The Supreme Court of Canada in *Grant*¸ *supra* at paragraph 79 stated that "Society generally expects that a criminal allegation will be adjudicated on its merits. According, the third line of inquiry . . . asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion."

[95] Driving with a blood alcohol concentration "over 80" is a serious offence and it is accepted that roadside screening and breathalyzers are the main tools in the investigation and proof of these types of offences. Although the accused was also charged with impaired driving under section 253(1)(a) of the *Criminal Code* and that charge could proceed even if the Crown is unable to proceed with the "over 80" offence, evidence of the "fail" reading on the ASD and the readings from the breathalyzer are highly reliable. If the evidence of Cst. Hicks were the sole evidence on the impaired charge, there would most probably be an acquittal. Therefore, in the absence of other witnesses, the evidence sought to be excluded is very important to the prosecution's case against the accused.

[96] The reliability of the evidence is a factor to be considered in the third line of inquiry in *Grant*. The reliability of statements of an accused can be questioned where the statements are compelled as a result of a breach. In this case, however, the accused's statements were used as the grounds to administer the ASD demand;

and there is no issue with respect to the reliability of the ASD or breathalyzer results.

[97] In determining whether the statements of the accused should be excluded as evidence and therefore also, the results of the breathalyzer, the Court must consider the combination of the three factors referred to above with a view to determining whether admission would bring the administration of justice into disrepute.

[98] The manner in which I am to weigh these factors was suggested by the Supreme Court of Canada in *R. v. Harrison*, [2009] S.C.J. No. 34 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.

[99] The admission of breath sample evidence was discussed under this third heading in *Grant*, *supra* at paragraph 111: "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-invasive."

[100] 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 of the 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.

[101] Let me make one final observation with respect to section 24(2) which is only applicable if I am wrong with respect to the number of *Charter* breaches. Counsel for the accused urged the Court to find four breaches of *Charter* rights. The Crown conceded that there were two. I have found one, that being the failure to provide the accused with the right to counsel upon investigative detention.

[102] 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.

E. CONCLUSION

[103] To summarize, I find that the accused's section 10(b) right to counsel was breached when he was detained in the back of the police vehicle. I have found no other *Charter* breaches. Pursuant to section 24(b) of the *Charter*, I do not find that the admission of the statements of the accused while detained, the breath samples and the certificate of analysis would bring the administration of justice into disrepute. This evidence is ruled admissible in the *voir dire*.

Garth Malakoe
J.T.C.

Dated at Yellowknife, Northwest Territories, this 1st day of March, 2012.

Date: 2012 03 01
File: T1-CR-2011-000143

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CARL JOSEPH CARTER

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE
