PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Fletcher*, 2021 NSPC 55

Date: 20211229
Docket: 8447818, 8447819
Registry: Kentville

Between:

Her Majesty the Queen

v.

Gerald Lewis Fletcher

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	October 4, November 19, 24, December 8, and 29, 2021, in Kentville, Nova Scotia
Decision	December 29, 2021
Counsel:	Nathan McLean, for the Crown Mr. Fletcher, self-represented

By the Court:

Overview

[1] Mr. Fletcher is charged with refusing to provide a sample of his breath and impaired operation of a motor vehicle contrary to sections 320.15(1) and 320.14(1)(a) of the *Criminal Code*. He represented himself at trial and during the testimony of the final witness, breath technician Cst. Charlton, there arose concern that Mr. Fletcher's right to counsel may have been breached.

[2] Cst. Charlton testified that Mr. Fletcher was under arrest for impaired operation, had been read the breathalyzer demand and refused. Those words were of course provisional until such time as he was provided an opportunity to consult counsel. At the detachment, he spoke to duty counsel, the call was short, and the lawyer quickly called back to advise the officer he had not provided advice to Mr. Fletcher. Following a *Prosper* warning, Mr. Fletcher reasserted his right to counsel but was unable to provide the name or phone number of a lawyer. The officer used a cell phone to locate three local law firms, however it was a Sunday, they were closed, and calls were unanswered. The officer says Mr. Fletcher then agreed the police had exhausted all efforts to find counsel and refused to provide a breath sample.

Issues:

[3] The evidence on the *voir dire* presented four issues:

1. Did Mr. Fletcher's initial contact with duty counsel satisfy the s. 10(b) *Charter* right to counsel?

2. Following the *Prosper* warning, did the officer's effort to assist Mr. Fletcher comply with the implementational duty?

3. Was there a valid waiver of the right to counsel?

4. If there was a breach, is the remedy exclusion of the words of refusal?

Decision:

[4] After considering the evidence on the *voir dire*, I find Mr. Fletcher's initial consultation with duty counsel did not result in the provision of legal advice, and the officer was correct to read the *Prosper* warning after duty counsel raised concerns. Unfortunately, the officer's efforts to satisfy the implementational obligation after that point were inadequate. Mr. Fletcher should have been presented with a telephone book or a list of criminal lawyers available for consultation on the weekend. Without the proper tools, Mr. Fletcher acquiesced to the inevitable and his acquiescence did not constitute a valid waiver of his *Charter* right. Having established, on a balance of probabilities, a breach of the right to counsel and after applying the test in *Grant*, I exclude Mr. Fletcher's words of refusal at trial.

The Evidence on the Trial Proper:

[5] While a number of witnesses provided testimony over the course of the trial, it is only necessary to review that of Cst. Charlton, the qualified breath technician, who assisted Mr. Fletcher's contact with legal counsel. On the trial proper, he testified that duty counsel immediately called back after speaking to Mr. Fletcher telling the officer Mr. Fletcher's, "10(b) was not fulfilled, and he could not provide advice". Initially, I thought the officer said the lawyer *would* not provide advice, but a review of the audio recording confirmed he used the word "could". In any event, it was clear a *voir dire* was necessary in the circumstances.

Evidence on the *Voir Dire:*

[6] Since Mr. Fletcher was representing himself and the Court was not sure he fully understood the option to incorporate evidence from the trial into the *voir dire*, Cst. Charlton testified once again. He says he introduced himself to Mr. Fletcher at 15:03 hrs and asked him if there was a lawyer he would like to speak to or did he wish to speak with the free duty counsel. Mr. Fletcher indicated he would like to speak with free duty counsel, and at 15:05 hrs the officer placed the call.

[7] Cst. Charlton spoke to duty counsel, Mr. Noel Fellows, providing background information before placing Mr. Fletcher in the "lawyer room" at 15:07 hrs. On cross-examination he agreed Mr. Fellows knew Mr. Fletcher was in custody arrested for impaired operation and releasable on an undertaking. Asked if he advised Mr. Fellows that Mr. Fletcher had been provided the breath demand, he could not recall.

[8] Cst. Charlton testified that he went to the guard desk to transfer the call to Mr. Fletcher and remotely monitor when it ended. He says the call lasted a few minutes and he went to collect Mr. Fletcher to take him to the breath room, but was halted when the phone rang at 15:12 hrs. Cst. Charlton answered it and Mr. Fellows said, "he could not provide Mr. Fletcher with his s. 10(b), so that was unfulfilled, he could not provide advice, so his s. 10(b) was not fulfilled". On cross-examination, Cst. Charlton testified that in 14 years such a situation had never occurred, and he was surprised by the lawyer's comments. He elaborated saying he does not know what goes on in the conversation between a lawyer and a client so did not know what to say to the lawyer. He did, however, conclude Mr. Fellows had not provided legal advice to Mr. Fletcher.

[9] At 15:14 hrs the officer asked Mr. Fletcher if he wanted to speak to another lawyer and Mr. Fletcher indicated he did not. At 15:16 hrs the constable provided the *Prosper* warning. Mr. Fletcher said he understood and was not waiving his right to contact a lawyer. Asked if he knew any lawyers or numbers to call, Mr. Fletcher said "No".

[10] On cross-examination Mr. Fletcher asked Cst. Charlton why he would need to know a lawyer's number. Cst. Charlton said some people know lawyer's numbers and some people do not. Also, on cross-examination, Cst. Charlton was asked if he had a list of phone numbers for lawyers to be reached on the weekend, the constable said they only have the number for duty counsel explaining that they do not have contact numbers for private lawyers.

[11] Cst. Charlton testified that he used Google to search for lawyers and made three calls to local law firms, leaving messages with the first two but not the third which is a property law firm. The calls were placed between 15:18 and 15:24 hrs.

[12] After leaving messages, Cst. Charlton asked Mr. Fletcher once again if he had any contact numbers or the names of lawyers. Mr. Fletcher did not. At 15:24 hrs, Mr. Fletcher was offered the opportunity to speak to duty counsel once again. He said no.

[13] The officer says he and Mr. Fletcher agreed that the police had exhausted all efforts to contact a lawyer given it was the weekend and such. The officer testified that on a weekend one typically needs a cell number.

[14] At 15:36 hrs. Cst. Charlton called Mr. Fellows to see if he had "any other numbers for people to speak to Mr. Fletcher" because it was the weekend and he could not reach anyone, but he did not. In his testimony, Mr. Fellows had neither memory nor note of that call.

[15] At 15:37 hrs. Cst. Charlton asked Mr. Fletcher if he would provide a sample of his breath, explained the consequences of a refusal "being higher than blowing over", and Mr. Fletcher said "no" he did not trust the machine. He was charged with refusal.

The testimony of Mr. Fletcher:

[16] Mr. Fletcher testified that he initially wanted to speak to duty counsel. He recollected doing so and Mr. Fellows' advice was, "go along with whatever the police say". He testified that it seemed to him Mr. Fellows knew he had already said he would not take the breathalyzer. Mr. Fletcher hung up.

[17] Mr. Fletcher believes the phone call with duty counsel lasted two minutes, and he "took the words" spoken by Mr. Fellows to mean "give a sample". Mr. Fletcher added, "I hung up and said heard enough". Later, under cross-examination, he said Mr. Fellows' words, "Beared no meaning, 'go along with what?'", adding there was no specific direction "of what to go along with". He described the conversation with Mr. Fellows as "short and sweet".

[18] Mr. Fletcher reconfirmed that he did not have a lawyer's number. He also did not believe he was offered a second opportunity to speak to duty counsel.

[19] Mr. Fletcher also denied a conversation occurred between he and Cst. Charlton about exhausting efforts to locate a lawyer, adding "but it was a Sunday, and it's common sense". Mr. Fletcher says he most likely needed a lawyer and figured he did not do anything wrong so why would he do something-presumably blow into the breathalyzer. He recalled the officer saying, "Do I want a lawyer, I said looks like I need one but where was I going to get one". Finally, Mr. Fletcher says he does not know what would have happened if he "got to" another lawyer.

The testimony of Mr. Fellows:

[20] Mr. Fellows testified remotely on the *voir dire*. He was the duty counsel lawyer on March 22, 2020, when the call came in from Cst. Charlton at 3:06 p.m. The officer provided this information: Mr. Fletcher's name, address, DOB, time of arrest 1432 hrs, and that there were no admissions. Mr. Fellows understood Mr. Fletcher was in custody for impaired operation of a motor vehicle and had been provided a breath demand.

[21] Mr. Fellows says he spoke to Mr. Fletcher but provided neither release advice nor right to silence advice because "Mr. Fletcher hung up on me". As a result, there was no meaningful conversation and he "could not carry a conversation." He described Mr. Fletcher as somewhere between a little bit agitated and belligerent. He reached the conclusion Mr. Fletcher was not in a pleasant mood because he hung up without explanation. Mr. Fellows described him as both unpleasant and rude.

[22] Mr. Fellows confirmed that his recollection of the short interaction with Mr. Fletcher comes entirely from his notes. He says if he received any information, he would have written it down. As a result of the hang up, Mr. Fellows called back at 3:10 p.m. and told the officer he could not provide meaningful advice, understood the officer would secure/try other counsel if Mr. Fletcher wanted it, and the second call ended at 3:12 p.m. His entire interaction with Cst. Charlton and Mr. Fletcher lasted approximately six minutes.

[23] On cross-examination, Mr. Fellows was asked if the officer called him back. He says he has neither memory nor record of a call back.

[24] Also on cross-examination, Mr. Fellows denied telling Mr. Fletcher to "go along with whatever the officer says" adding, "I have never said that in my practice of law…[i]n these cases there are things I typically say but I got none of that out before he hung up".

[25] Finally, Mr. Fellows testified, "I try to find out what is going on and give advice". The Court asked about the typical questions he asks, he says he asks some questions of the officer and others of the accused, i.e., to Mr. Fletcher. He does not recall asking Mr. Fletcher any questions and concluded the goal of providing advice was not fulfilled.

Analysis:

[26] In *R. v. Sinclair*, 2010 SCC 35, the Court defined the purpose of the s. 10(b) *Charter* right at para. 26:

> [26] The purpose of the right to counsel is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233, at pp. 1242-43. The emphasis, therefore, is on assuring that the detainee's decision to cooperate with the investigation or decline to do so is free and informed. Section 10(b) does not guarantee that the detainee's decision is wise; nor does it guard against subjective factors that may influence the decision. *Its purpose is simply to give detainees the opportunity to access legal advice relevant to that choice*. [Emphasis added]

[27] Fulfillment of the purpose requires two components: the informational component and an implementational component. There is no contest that the informational component was provided, the only issue on this *voir dire* relates to implementation of the right.

[28] The Crown argues Mr. Fletcher was provided a reasonable opportunity to consult duty counsel, but duty counsel could not provide meaningful and substantive advice because Mr. Fletcher chose to end the call when he did not like what he heard. The Crown is not wrong, Mr. Fletcher was on the phone with duty counsel and chose to hang up the phone. While it was Mr. Fletcher's testimony that the lawyer told him to go along with police, I must assess that testimony and determine if I accept it occurred and if those words constituted advice.

[29] Mr. Fellows, I find, was a conscientious witness. His testimony was clear, he noted in his report what occurred during his brief contact with Cst. Charlton and Mr. Fletcher. He denies speaking the words attributed to him by Mr. Fletcher. While he testified that his notes did not reflect providing release or right to silence advice, he also testified denying provision of advice regarding the breathalyzer. His testimony made sense. He is a lawyer tasked with one objective- provide advice to persons in custody. He did not recall or record any back and forth with Mr. Fletcher, but did report that Mr. Fletcher was agitated and talkative. Under cross-examination he once again denied providing any advice based on what was recorded in his notations. I find Mr. Fellows was a reliable and accurate historian of the interaction.

[30] Analysing Mr. Fletcher's testimony, I find, at best Mr. Fellows may have had enough time to parrot back the information provided by Cst. Charlton in the few minutes before the call ended abruptly. That likely accords with Mr. Fletcher

reaching a conclusion that Mr. Fellows knew he had declined to blow into the breathalyzer. He had done so when the demand was first read.

[31] Mr. Fletcher's testimony suggests perfunctory legal advice may have been given, but the words attributable to Mr. Fellows, I find, could not in any event be considered meaningful legal advice about what was in issue— choosing to provide a sample of breath for the breathalyzer or whether to cooperate with the police investigation in other ways such as giving a statement. While Mr. Fletcher assumed the words meant he should blow into the device, I do not believe his recollection is accurate. He was upset and agitated; Mr. Fellows was not. Mr. Fellows' evidence is accepted over that of Mr. Fletcher's which I do not believe. It also finds support in the evidence of Cst. Charlton who I also found a credible and reliable witness.

[32] The Ontario Court of Appeal in *R. v. Badgerow,* 2008 ONCA 605, at para. 50 addressed perfunctory advice:

> [50] In my view, the possibility that Mr. Mackesy may have told the appellant not to say anything is irrelevant to the issue of whether the appellant's s. 10(b) rights were breached. The right to seek advice from counsel of choice on arrest or detention is not limited to receiving perfunctory advice to keep quiet. Rather, it entitles an accused to obtain sufficiently meaningful advice to enable him or her to make an informed choice concerning whether to exercise his or her right to silence: see *R. v. Hebert* (1990), 1990 CanLII 118 (SCC), 57 C.C.C. (3d) 1 (S.C.C.).

[33] It was also suggested the short length of the call did not rule out the provision of legal advice. That is of course correct, and finds support from the SCC in *R. v. Willier,* 2010 SCC 37, [2010] 2 S.C.R. 429, wherein the Court declined to conclude an inference should be drawn from the brevity of a consultation. While it is very likely a lawyer consultation focused on whether to provide a breath sample may not require the depth of considerations required on a consultation about whether to provide a statement, here Mr. Fletcher was under arrest for impaired operation, not observed by police, as well as considering whether to provide a sample. Likewise, taking a statement might have made some sense in the circumstances (See *Sinclair* at para. 50). Advice is expected to be, "tailored to the situation as the detainee and his lawyer then understand it" (*Sinclair* at para. 51). That is, no doubt, why Mr. Fellows sought to elicit information from Mr. Fletcher, however that necessary tailoring did not occur.

[34] In any event, the words attributable to Mr. Fellows— go along with the police— is not legal advice. Mr. Fletcher ended the call before Mr. Fellows could provide meaningful advice. I am not satisfied the implementational component was sufficiently satisfied on that call.

[35] Mr. Fellows was sufficiently concerned about the lack of advice given, that he was compelled to immediately call the officer, convey that information, and note it in his legal aid report. He could not recall ever doing so on another occasion while providing duty counsel advice. This evidence I also find stood up to scrutiny. Just as the court in *Badgerow* concluded police cannot be arbiters of the quality of legal advice and must react when an accused raises a concern, they also should not ignore duty counsel's statement of same — that the advice did not come to its logical conclusion. The return call from duty counsel must, I find, be such a characterization. The officer's testimony supports my conclusion.

[36] *R. v. Sinclair* clarified that developments may require an additional opportunity to consult such as when there is reason to believe the detainee's first consultation with counsel was deficient. At paragraph 2:

> [2] We conclude that s. 10(b) does not mandate the presence of defence counsel throughout a custodial interrogation. We further conclude that in most cases, an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, satisfies s. 10(b). **However, the police must give the detainee an additional opportunity to receive advice from counsel where developments in the course of the investigation make this necessary to serve the purpose underlying s. 10(b) of providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation or not.** To date, this principle has led to the recognition of the right to a second consultation with a lawyer where changed circumstances result from: new procedures involving the detainee; a change in the jeopardy facing the detainee; or **reason to believe that the first information provided was deficient**. The categories are
>
> not closed. [Emphasis added]

[37] Following the call back, Cst. Charlton was in receipt of "objectively observable" information that "renewed legal consultation was required" to permit Mr. Fletcher "to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so". (*Sinclair* at paragraph 55)

[38] Police obligations under s. 10(b) are highly case dependent and filled with judgment calls. They are required to monitor vigilantly the situation and adapt their

approach to a wide variety of factors that are often beyond their control. This must occur in the context of advancing the investigation. As the Crown reminds, the officer was cognizant of the need to obtain a timely breath sample, however, while it makes sense to have a bright line when the implementational duty is complete, on these facts, the callback once again triggered the implementational duty. Cst. Charlton read the *Prosper* warning. As such, even if Mr. Fletcher could be said to have given up the right to receive advice by hanging up the phone, once he engaged the right following the warning, implementation once again became an outstanding issue.

[39] The Crown says Cst. Charlton satisfied the implementational obligation when he called three law firms for Mr. Fletcher and once again offered duty counsel. The Crown characterizes the steps as reasonable given it was 3 pm on Sunday and Mr. Fletcher did not want duty counsel. Options were limited and the call back to Mr. Fellows also did not produce a list of alternative lawyers. In addition, time was an issue because the investigation needed to continue. That said, the Crown conceded the Court could take judicial notice that it is reasonable to present people of Mr. Fletcher's age with access to a telephone book and list of criminal lawyers.

[40] In an effort to support Mr. Fletcher on the *voir dire*, I asked the officer what options he had considered to assist Mr. Fletcher contacting a lawyer. He did not mention either a telephone book or a list of criminal lawyers. Surely criminal lawyers still answer the phone for potential clients at all hours of the day and night and I am bewildered as to why such an offer was not considered. Mr. Fletcher repeatedly confirmed that he did not know any lawyers or have phone numbers for lawyers, yet that did not trigger presentation of a phone book.

[41] I expect the Court can take judicial notice that criminal lawyers list their phone numbers, both office and after-hours numbers, in the provincial phone books. The phone book may seem an antiquated concept in this age of the internet, but many people still use it and I confirm it still exists. I am also aware that the practice in police departments was, at least in the 1990's, to provide the yellow pages, a separate or included component of the phone book, where lawyers advertise their services. I am also familiar with an actual list of criminal lawyers being posted on the wall in police telephone rooms — this information from my days as a criminal defence lawyer. Even so, offers of phonebooks to detainees in Nova Scotia have been chronicled as recently as 2002 in *R. v. Mood*, 2002 NSSC 17, at paras. 4 and 14, where the Court mentioned that both a phone book and a list

of lawyers was provided to the detainee. (See also *R. v. Soomal,* 2014 ONCJ 220, at para. 52).

[42] I observe Mr. Fletcher is not a young man. I expect he would have been able to look in a phone book to find an after-hours lawyer number should he have been presented that reasonable option. There was no evidence he had a cellular phone in his possession, which also supports my conclusion that a phone book was a reasonable option for this particular man. There was no evidence he supported/assisted Cst. Charlton in his Google search; Mr. Fletcher denies that search was conducted in his presence but instead outside the room.

[43] While the constable's initiative to use Google to search local lawyers was helpful, doing so took the option out of Mr. Fletcher's hands to try to find a lawyer in a manner that made best sense. As a result, Mr. Fletcher was constricted by the officer's decision.

[44] In *R. v. Willier*, at para. 33, after reiterating the implementational duty of police, the Court said:

> …these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel .... What constitutes reasonable diligence in the exercise of the right to contact counsel will depend on the context of the particular circumstances as a whole. ...

[45] It was clear from his testimony that Mr. Fletcher told the officer he did not know any lawyers and did not have any lawyer phone numbers. It was reasonably diligent in the circumstances for him to follow the lead of the officer. He did not appear to know what else to do. I find in these circumstances that use of the officer's access to the internet, while progressive, in the case of an unsophisticated older man was not reasonable. Instead, a phone book or list of criminal lawyers was warranted. Mr. Fletcher's words were indicative of his lack of experience in the criminal justice system and with lawyers. This was not the inexperienced person who says, "I will simply call my business lawyer", nor the experienced criminal who says, "I will call my legal aid lawyer or private criminal lawyer." Mr. Fletcher is the person before the Court who appeared unaware of how to navigate the situation after declining duty counsel but still desiring to consult a lawyer.

[46] I find the officer was not aware people in custody should have access to a phone book in order to exercise the right to contact counsel. It is, I suspect, not unusual that detainees are unaware of the name of a specific lawyer or a phone

number, but surely providing a phone book could easily put a detainee in a position to decide who to contact. Of course, some detainees may also choose to use their own cell phones with internet access. Mr. Fletcher, I find, did not present as one familiar with the criminal justice system; there was no mention of having a lawyer for other matters, and no evidence that he has been in custody on other occasions.

[47] While the right to counsel issue on this *voir dire* could easily be resolved on that point alone, I must also consider the Crown's argument that Mr. Fletcher ultimately waived his right to counsel.

Waiver:

[48] The law is clear, before acting on a waiver of the right to counsel, police must first determine whether the detained person has demonstrated a "clear, free, and voluntary change of mind made by someone who knew what they were giving up". (*R. v. Fountain* 2017 ONCA 596 at para. 27)

[49] Indeed, in *R. v. Prosper*, [1994] 3 SCR 236, at para. 45, then Chief Justice Lamer said:

> Given the importance of the right to counsel, I would also say with respect to waiver that once the detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing unequivocal waiver will be on the Crown. Further, the waiver must be free and voluntary and it must not be the product of either direct or indirect compulsion. This court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high.

[50] Assessing the evidence of Cst. Charlton, I am concerned that the conversation about reaching a mutual understanding that efforts to locate a lawyer were exhausted, simply cannot constitute a waiver. That conversation, one Mr. Fletcher denies, was said to have occurred in the aforementioned context of the officer choosing the three firms to search and telephone, and following a conversation about difficulties reaching law firms on the weekend. I do accept the officer's evidence that there was some conversation about those topics, however, I find the conversation was short and laced with a lack of hope.

[51] Mr. Fletcher says he did not agree that all options were exhausted, but it was a Sunday and what else could he do. Mr. Fletcher presented as an unsophisticated older black man who was not confident in the situation. He equivocated between wanting a lawyer and not wanting a lawyer. During his testimony he presented as

one who was giving up. Cst. Charlton, I suspect was kind and supportive, but for Mr. Fletcher the situation was unfamiliar, and he was unsure of other options. My sense was he acquiesced to the inevitable due to the day of the week and lack of a phone book. The constable's evidence, I find, did not satisfy the Court that there was a clear, free, voluntary, or informed waiver.

[52] Without a proper tool in his hands, Mr. Fletcher simply acquiesced because he could not come up with other options. Without options such as a phonebook presented to Mr. Fletcher who repeatedly said he did not have names or phone numbers of lawyers, there appears to me direct, or at the least indirect, compulsion for him to accept the conclusion there was no point holding out hope for finding a lawyer. The Crown has not established a valid waiver.

Section 24(2)

[53] Having found a breach, the Crown argues the remedy should not be exclusion of the words of refusal. He says there was no impact on Mr. Fletcher who, it appeared inevitably was not going to provide a breath sample. Cst. Charlton did not demonstrate bad faith and simply did what he could on a Sunday afternoon. While the Court can conclude there may have been a generational issue at play in not considering the phone book, the evidence should nonetheless be admitted.

[54] Section 24(2) of the *Charter* allows for exclusion of evidence "…obtained in a manner that infringed or denied any rights…". First, there must be a causal or temporal nexus between the breach and the evidence sought to be excluded. I easily find a connection between Mr. Fletcher's decision not to provide a breath sample and the denial of his right to counsel to take advice on the issue. Next, I must apply the three-step test in *R. v. Grant*, [2009] 2 SCR 353.

[55] On the first step in the *Grant* test, I find the breach was serious. While Cst. Charlton did not exercise bad faith and appeared to me to be a fair-minded and diligent officer, his RCMP detachment was clearly ill-equipped to provide appropriate after-hours access to lawyers other than duty counsel. While duty counsel is of course one of the necessary options, so too are private lawyers. Providing access to private lawyers by means of the telephone book has been routine for decades, and despite being a relatively young officer, robust RCMP training should have ensured such a tool remained available to detainees. This step favours exclusion.

[56] The second step also favours exclusion. The right to consult a lawyer to take advice about whether to provide a sample of breath is vital. The *Charter* provides Mr. Fletcher the right to take advice on that and the right to silence. He was deprived of advice that could guide his decisions on all these issues. His testimony that he did not trust the machine demonstrated his lack of understanding, and need for advice from a lawyer to assist him making an informed choice. It cannot be understated that citizens in the custody of police are vulnerable, perhaps more so in the case of an older black man. Access to counsel is a hallmark of Canadian society and distinguishes us from most nations in the world— we have *Charter* rights that must be respected. The impact on his *Charter* protected interests was very serious and favours exclusion.

[57] The third step recognizes society's interest in a trial on the merits and clearly favours inclusion. Drinking and driving is a scourge across the nation and must be aggressively addressed by the police.

[58] The final balancing of the three factors results in my finding that, in all the circumstances, admission of the words of refusal would bring the administration of justice into disrepute. I should also say that I am satisfied the law supports exclusion as a remedy despite those words constituting the actus reus of the offence, and for this proposition I rely on *R. v. Soomal*. On the facts, there is obviously a causal or temporal nexus between the breach and the evidence sought to be excluded. I simply do not accept that Mr. Fletcher would have inevitably refused to provide a sample and, in any event, that refusal is less than reliable.

[59] All detainees should expect appropriate support in the exercise of their *Charter* right to counsel at police detachments, and the Court must disassociate itself from the conduct in this case. If I do not uphold the requirement for older people to have after hours access to phone books and lists of lawyers, I am needlessly penalizing those who do not adopt the latest trends in technology. The *Charter* must protect equally the luddite and the technologically savvy detainee.

[60] The words of refusal are ordered excluded at trial.

[61] Judgment accordingly

van der Hoek, J.