PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Brine*, 2022 NSPC 26

Date: 20220726
Docket: 8460916, 8460917
Registry: Truro

Between:

Her Majesty The Queen

v.

Katherine Anne Brine

Judge:	The Honourable Judge Alain Bégin,
Heard:	March 15, 2022, in Truro, Nova Scotia April 19, 2022, in Truro, Nova Scotia
Decision	July 26, 2022
Charge:	CC320.14(1)(b) CC320.14(1)(a)
Counsel:	Laura Barrett, for the Crown Attorney Kerry Ann Robson, for the Defendant

By the Court:

[1] There is no dispute that Ms. Brine provided breath samples of .150 and .160 within two hours of ceasing to operate a vehicle. The issue is whether the breath tests were administered "as soon as practicable" due to the police on duty being handcuffed in being able to properly perform their duties due to RCMP administrative staffing decisions.

[2] The evidence was clear that the minimum staffing for Colchester RCMP is 4 officers for all of Colchester County. However, on May 15, 2020, the shift was only staffed with 3 officers, and this directly impacted the ability of the 3 constables on duty to perform their duties as required by law. Should citizens have to endure unnecessary detention and delays due to RCMP administrative staffing decisions? Can RCMP staffing issues trump *Criminal Code* requirements for testing to be done as soon as is practicable?

The Case Law on "As Soon as is Practicable"

[3] As noted in ***R. v. Vanderbruggen*, 2006 CanLII 9039, 208 OAC (OntCA)** and ***R. v. Burwell*, 2015 SKCA 37**, "as soon as practicable" "means nothing more than that the tests were taken within a reasonably prompt time under the circumstances… there is no requirement that the tests be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably."

[4] In ***R. v. Wright*, 2008 ABPC 126** the court held at paras 37-46 that relatively short delays can be found to be not as soon as is practicable. A delay of 10 minutes - from arrest to reading rights to counsel and the demand – because the officer decided to make notes and call dispatch to get a case number, resulted in the demand being judged not as soon as practicable.

[5] In ***R. v. Dzaja*, 2003 CanLII 21127, 173 OAC 14 (OntCA)** the court held that a 33-minute wait between being paraded before the officer in charge of the station and the police calling duty counsel because the officer was doing paperwork meant that the samples were not taken as soon as practicable.

[6] In ***R. v. Ruck*, 2013 ONCJ 527** at para 53 the court noted that the as soon as practicable requirement is in the legislation as a "concern for the deprivation of

liberty that detention to accommodate the test entails. It is exceptional to require citizens to forfeit their liberty to accommodate police investigations. While it is necessary to do so, the period of deprivation should not be unnecessarily long, given its purpose."

Consideration of ASD demand case law principles

[7] There is also case law regarding the 'immediacy factor' for ASD demands that is not directly applicable to breath tests, but the over-riding principles of what should be considered as legitimate delays should be applicable. The relevant cases are as follows:

[8] In ***R. v. Latour*** **1997 CanLII 1615 (Ont CA)** held that in assessing whether a demand was made and carried out immediately was not a case of "counting the minutes."

[9] In ***R. v. Anderson*** **2014 SKCA 32** the Court held that when looking at a case and assessing whether there was a prompt demand and immediate response, that short delays that are required by the circumstances or to ensure accurate results are acceptable. There just cannot be any unreasonable or unjustified delay in the circumstances.

[10] And in ***R. v. Quansah*** **2012 ONCA 123** the Court held that the immediacy requirement must consider all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD in not immediately available, or where a short delay is needed to ensure the accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delays that are no more than are reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.

[11] The guiding principles in the ASD cases regarding delays being looked at through the lens of being "necessary" or for "legitimate police safety concerns" would be equally applicable when looking at delays in administering breath tests that should be done "as soon as practicable." As would the principle of the delays having to be "reasonable" and "justified." Equally applicable would also be the principle that delays are not simply a matter of counting minutes, but we must look at the reasons for the delays.

[12] Are administrative RCMP under-staffing decisions that cause otherwise completely preventable delays for the on-duty police from properly performing their duties "necessary" "legitimate safety concerns" "justified" or "reasonable"?

My Analysis of the Evidence

[13] I have reviewed all of the evidence that was presented at the trial, along with all of the Exhibits. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts. Further, any quotes that I attribute to a witness may not be an exact quote, but paraphrases and captures the essence of their testimony.

Mr. Hopper

[14] Mr. Hopper tried to present himself as an innocent civilian witness who had no vested interest in the ongoing dispute between Ms. Brine and her neighbours over ongoing access to a right-of-way.

[15] The video evidence contradicted much of what Mr. Hopper stated:

- There were statements made by Mr. Hopper towards Ms. Brine.
- Statements alleged to have been made by Mr. Hopper to Ms. Brine did not occur.
- There was less room for Ms. Brine to get past the parked vehicle than stated by Mr. Hopper.
- The video taken by Ms. Brine while driving did not show any indications of impairment while driving.

[16] I treat Mr. Hopper's evidence with extreme caution and skepticism.

Constable Lafferty

[17] Constable Lafferty was on duty with only 2 other RCMP officers. There should have been 3 other officers also on duty as there is the expected minimum of 4 officers per shift.

[18] Cst. Lafferty attends at the scene in Brookfield as there had been two prior complaints at 5 p.m. and 7 p.m. He arrives alone in a marked police vehicle.

There are 5 or 6 people, including Mr. Hopper, attending a bonfire at the start of the right-of-way (also Ms. Brine's driveway). Cst. Lafferty asks the group to turn the music down and they comply with this demand.

[19] While Cst. Lafferty is speaking with the group, Ms. Brine arrives on foot from her residence, yelling at the group to get off her property.

[20] Cst. Lafferty notes from a distance of 40-50 feet that Ms. Brine is unsteady on her feet. Cst. Lafferty approaches Ms. Brine and he notes red eyes, slurred speech and the odour of liquor. Based on these observations he forms the opinion that Ms. Brine is impaired and he arrests Ms. Brine for impaired operation of a vehicle. Cst. Lafferty noted that if he had seen Ms. Brine in public that she would have been arrestable for being drunk in a public place.

[21] Cst. Lafferty was so certain of Ms. Brine's impairment that he arrested her without first administering a roadside test (ASD).

[22] The time of arrest was 22:47. Ms. Brine is informed of the reason for her arrest and she is given the right to counsel at 22:48.

[23] The breath demand is given at 22:53. Ms. Brine states at 22:54 that she would not comply with the breath demand. She is not charged with refusal.

[24] Instead of then departing the scene with Ms. Brine to take her to the police station to administer the breath test, Cst. Lafferty places Ms. Brine in the back of his cruiser and then takes 12 minutes to obtain a further statement from Mr. Hopper before finally departing the scene at 23:06. Cst. Lafferty acknowledged on cross-examination that there was nothing preventing him from obtaining a second statement from Mr. Hopper at a later time. In fact, Cst. Lafferty does obtain three further statements later that month.

[25] It was clear that the main reason that Cst. Lafferty remained at the scene instead of directly proceeding to the station to administer the breath test was that due to being under-staffed for that shift there was no other RCMP officer available to remain at the scene and take statements while he proceeded to the station with Ms. Brine without unnecessary delays.

[26] There was a 12-minute delay in departing the scene due to administrative RCMP staffing decisions. This was not the fault of the officers

on-duty who did the best that they could with less than minimum shift staffing.

[27] Even though Cst. Lafferty already had a statement from Mr. Hopper he "wanted to make sure" that he had the proper information from him. This is after Cst. Lafferty had already formed the opinion that Ms. Brine was impaired and that he had arrested her. Further, nothing after he had arrested Ms. Brine made Cst. Lafferty think that he had made a wrongful arrest of Ms. Brine which questions the need for the second statement from Mr. Hopper.

[28] Cst. Lafferty arrives at the RCMP station at 23:24. Ms. Brine could not get in touch with her lawyer of choice so she was put in contact with duty counsel at 23:40. Her call with duty counsel commences at 23:43 and ends at 00:15.

[29] The first observation period commences at 00:18 after Ms. Brine has a washroom break.

[30] The initial observation period is interrupted due to an insufficient number of officers on duty. Cst. Dorrington has a combative person that he was bringing into the station and all 3 officers were needed to deal with the individual. Cst. Lafferty could not continue with Ms. Brine's observation period, and the breath test, due to short-staffing.

[31] It is necessary to interrupt the observation period and place Ms. Brine in the phone room for her safety while the only 3 officers on duty dealt with the unruly individual.

[32] 35 minutes later, after the new observation period, Ms. Brine is able to provide her first breath sample at 00:53 after failed attempts at 00:50 and 00:52.

[33] There was a 17-minute delay in administering the first breath test due to administrative RCMP staffing decisions (35 minutes less 3 minutes for failed tests, and less 15 min observation period). This was not the fault of the officers on-duty who did the best that they could with less than minimum shift staffing.

[34] The second breath test occurs at 01:16 after failed attempts at 01:14 and 01:15

[35] **The total delay for Ms. Brine to do the breath tests directly attributed to the administrative RCMP decision to staff the shift with 3 instead of the**

minimum 4 officers was 29 minutes. This was not the fault of the officers on-duty who did the best that they could with less than minimum shift staffing

Ms. Brine

[36] Ms. Brine testified. She under-stated the amount of alcohol that she had consumed as confirmed by her breathalyser readings. She did testify that she had consumed alcohol after she had driven, and this would be supported by her breath tests increasing between 00:53 and 01:16. There was no BOLUS expert evidence.

[37] Ms. Brine confirmed that by the time that she spoke with Cst. Lafferty that she "had had too many" drinks.

[38] A video taken by Ms. Brine on her phone while driving did not show any signs of impairment such as swerving, weaving, etc.

Decision

[39] There was no credible evidence of impaired driving by Ms. Brine, as evidenced by the video taken by Ms. Brine while driving. Ms. Brine is not guilty of that charge.

[40] I will turn my attention to the issue of whether Ms. Brine was given the test "as soon as practicable" or whether RCMP administrative decisions prevented the on-duty police from providing the breath tests to Ms. Brine "as soon as practicable."

[41] In applying the legal principles from:

- ***R. v. Vanderbruggen*, 2006 CanLII 9039, 208 OAC (OntCA) and *R. v. Burwell*, 2015 SKCA 37**, "as soon as practicable" "means nothing more than that the tests were taken within a reasonably prompt time under the circumstances… there is no requirement that the tests be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably."
- ***R. v. Wright*, 2008 ABPC 126** the court held at paras 37-46 that relatively short delays can be found to be not as soon as is practicable. A delay of 10 minutes - from arrest to reading rights to counsel and the demand – because ethe officer decided to make notes and call dispatch to get a case number, resulted in the demand being judged not as soon as practicable.

- ***R. v. Dzaja*, 2003 CanLII 21127, 173 OAC 14 (OntCA)** the court held that a 33-minute wait between being paraded before the officer in charge of the station and the police calling duty counsel because the officer was doing paperwork meant that the samples were not taken as soon as practicable.
- ***R. v. Ruck*, 2013 ONCJ 527** there is a "concern for the deprivation of liberty that detention to accommodate the test entails. It is exceptional to require citizens to forfeit their liberty to accommodate police investigations. While it is necessary to do so, the period of deprivation should not be unnecessarily long, given its purpose."

[42] And in consideration of the testimony from Cst. Lafferty, I find as fact that Ms. Brine was not administered the breath tests "as soon as practicable." There was a violation of Ms. Brine's s.9 Charter right to not be arbitrarily detained or imprisoned as she was held for 29 minutes more than she should have been, through no fault of Cst. Lafferty, but as a direct result of a completely avoidable administrative RCMP staffing decisions to only have 3 officers on duty for a shift that was supposed to have a minimum of 4 officers.

[43] What is the remedy for Ms. Brine's *Charter* breach by the RCMP?

***Grant* Analysis**

[44] Under the Supreme Court's decision in ***R. v. Grant*, 2009 SCC 32** (CanLII), **[2009] 2 SCR 353**, this court should look at three factors (emphasis added):

(a) Seriousness of the Charter-Infringing State Conduct

[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to 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.

[73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the

police or to deter Charter breaches, although deterrence of Charter breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

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

[45] The 29-minute delay in administering the breath test to Ms. Brine was solely as a result of an RCMP administrative staffing decision for what should have been a routine and straightforward breath test. Ms. Brine was detained in the back of a police vehicle after arrest without access to counsel for 12 minutes longer than necessary, and she was detained at the police station for an additional 17 minutes, directly as a result of the RCMP administrative decision to purposely under-staff their shift. This administrative RCMP decision was unreasonable considering the resulting prolonged, and unnecessary, detention of Ms. Brine.

[46] To permit individuals to be detained for prolonged periods unnecessarily solely because of administrative RCMP staffing decisions would bring the administration of justice into disrepute.

(b) Impact on the *Charter*-Protected Interests of the Accused

[76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the

citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (***Hebert***) — all stemming from the principle against self-incrimination: ***R. v. White*, 1999 CanLII 689 (SCC), [1999] 2 S.C.R. 417**, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

The unnecessary detention of Ms. Brine in the back of a police vehicle after arrest without access to counsel for 12 minutes longer than necessary, and the detention at the police station for an additional 17 minutes, for what should have been routine breath tests at the police station, directly as a result of the RCMP administrative decision to purposely under-staff their shift, is a serious violation of Ms. Brine's rights.

(c) Society's Interest in an Adjudication on the Merits

[79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": ***R. v. Askov***, **1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199**, at pp. 1219-20. Thus, the Court suggested in ***Collins*** that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.

[80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is

inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

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

[47] *Charter* breaches must be balanced with the prosecution of serious charges arising from minor breaches under the *Charter*. Serious, egregious breaches require closer scrutiny. From para 80 of ***Grant***:

> "The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence."

[48] Drinking and driving offenses are serious. An average of four persons are killed each day in Canada due to impaired drivers. Society expects the Courts to take these charges very seriously. However, society also expects the Courts to protect the rights of persons brought before them.

[49] I find that the breach of Ms. Brine's s.9 *Charter* right was a serious breach, and not a minor breach as, referring to ***R. v. Ruck,*** 2013 ONCJ 527, there is a "concern for the deprivation of liberty that detention to accommodate the test entails. It is exceptional to require citizens to forfeit their liberty to accommodate police investigations. While it is necessary to do so, the period of deprivation should not be unnecessarily long, given its purpose." The additional 29 minutes of detention of Ms. Brine was unnecessarily long given its purpose of administering what should have been a routine breath test.

[50] And in referring to ***R. v. Vanderbruggen,* 2006 CanLII 9039, 208 OAC (OntCA)** and ***R. v. Burwell,* 2015 SKCA 37**, the "touchstone for determining

whether the tests were taken as soon as practicable is whether the police acted reasonably." The police were not "acting reasonably" by making the RCMP administrative decision to purposely under-staff their shift such that the on-duty police could not perform their duties without breaching Ms. Brine's right to unnecessary detention.

[51] All the ***Grant*** factors militate in favour of staying the s. 320.14(1)(b) charge against Ms. Brine as the unnecessary and prolonged detention of Ms. Brine was easily preventable, but for an administrative RCMP decision that directly prevented the on-duty police to properly perform their duties pursuant to the *Charter*.

[52] The delays in administering the tests "as soon as practicable" were not "necessary" "justified" "reasonable" nor for "legitimate safety concerns."

[53] No other remedy is sufficient in these particular circumstances considering how the administration of justice would be brought into disrepute by permitting RCMP administrative staffing decisions to unnecessarily prolong the detention of individuals.

[54] The s. 320.14(1)(b) charge against Ms. Brine is stayed.

Judge Alain Bégin, JPC