SUPREME COURT OF NOVA SCOTIA
Citation: *R* v *MacGregor*, 2011 NSSC 100

Date: 20110310
Docket: Ken No 333121
Registry: Kentville

Between:

Regina

Appellant

v.

Robert Owen MacGregor

Defendant

Revised decision:	The text of the original decision has been corrected according to the erratum dated March 14, 2011. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Gregory M. Warner
Heard:	January 4, 2011 at Kentville, Nova Scotia
Written Decision:	March 10, 2011
Counsel:	**James A. Fyfe**, Crown Attorney, for the appellant **Curtis C. Palmer**, counsel for the defendant

By the Court:

A. **The issues**

[1] The Crown appeals the trial judge's acquittal of an accused on a charge of failing a breathalyser (s. 253(1)(b) of the *Criminal Code*). The acquittal followed the trial judge's ruling that the breath test results be excluded pursuant to s. 24(2) of the *Charter* by reason of his finding that the accused's right to counsel under s. 10(b) of the *Charter* had been infringed or denied.

[2] The two grounds of appeal are:

1. The trial judge erred in law in finding that the accused's right to counsel under s. 10(b) of the *Charter* had been infringed; and,

2. The trial judge erred in law in excluding evidence of the certificate of the technician pursuant to s. 24(2) of the *Charter*.

B. **Powers of a Summary Conviction Appeal Court**

[3] This appeal is brought pursuant to s. 813(b)(i) of the *Criminal Code*. It is a Crown appeal from the dismissal of an Information.

[4] Section 822 applies. It provides that a summary conviction appeal is an appeal on the record; the summary conviction appeal court may not retry the matter.

[5] By reason of s. 822(i), ss. 683 to 689 (with two exceptions and certain modifications) apply. These sections set out the powers and limitations on a court of appeal. The Crown may appeal as of right on any ground.

[6] Section 686(4) states that where an appeal is from an acquittal, the Court may:

1. dismiss the appeal; or,

2. allow the appeal, set aside the acquittal and either order a new trial or enter a verdict of guilty where, but for an error of law, the accused should have been found guilty.

C. **Standard of Review**

[7] In *R* v *Nickerson*, 1999 NSCA 168, Justice Cromwell described the standard to be applied by a summary conviction appeal court at ¶ 6:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and **R. v. Gillis** (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the

> Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns**, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[8] In *R* v *Barrett*, 2004 NSCA 38, decided after *R* v *Biniaris*, 2000 SCC 15, Justice Cromwell restated the standard of review at ¶¶ 14 to 19:

> [14] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: **. . .**
>
> [15] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: . . .
>
> [16] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "... re-examine and to some extent reweigh and consider the effect of the evidence.": **Yebes** at 186. As Arbour, J. put it in **Biniaris** at para. 36, this requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence..." so as to examine the weight which the evidence could reasonably bear.

[9] In *R* v *CE*, 2009 NSCA 79, Justice Fichaud adopted, as the standard of review, *Nickerson* and cited a similar statement made by Justice Fish in *R* v *Clark*, 2005 SCC 2, at ¶ 9:

> [9] ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship "Kathy K"*; *Lensen v. Lensen*; *Geffen v. Goodman*; *Hodgkinson v. Simms*; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*; *Schwartz v. Canada*; *Housen v. Nikolaisen.*

[10] The standard for review for errors of law is correctness. As noted by Justice Roscoe in *R* v *Farrell*, 2009 NSCA 3, at ¶¶ 19-20 and Justice Beveridge in *R* v *Spinney*, 2010 NSCA 4 at ¶¶ 22 to 41, finding an error of law is not enough. The Court is required to consider whether the error may have affected the verdict. The onus on the Crown, on an appeal from acquittal, is a heavy one.

[11] Both grounds of appeal relate to *Charter* issues. This affects the scope and standard of review.

[12] The July 2009 "*Grant- Suberu-Harrison-Shepherd*" quartet revised the analysis for excluding evidence pursuant to s. 24(2). The October 2010 "*Willier-McCrimmon-Sinclair*" trilogy provided new guidance on the parameters of the 10(b) right to counsel. These decisions impact this Court's analysis.

[13] Five appellate decisions give guidance respecting the approach of an appeal court to the review of *Charter* decisions:

1. *R* v *Farrell*, 2009 NSCA 3, at ¶¶ 25 and 26,
2. *R v Styles*, 2009 ABCA 98, at ¶ 9;
3. *R* v *Wong*, 2010 BCCA 160, at ¶¶ 21 to 35;
4. *R* v *Kelly*, 2010 NBCA 89, at ¶¶ 55 and 56; and
5. *R v KPLF*, 2010 NSCA 45.

[14] The task of the summary conviction appeal court is to determine whether the trial judge erred in his analysis in light of the analytical framework articulated in *Grant*. A decision as to the admission of evidence under 24(2) involves a question of law, reviewable on correctness, but the foundational fact findings are reviewed for palpable and overriding error. Considerable deference is owed to a trial judge's 24(2) conclusions, absent an apparent error as to the applicable principles of law or an unreasonable finding of fact.

D. **The Facts**

[15] The trial judge's factual findings, set out in ¶¶ 2 to 8 of his decision (2010 NSPC 65) are supported by the trial transcript and the video recording of the exchange between the constable and defendant in the police vehicle at the time the demand and *Charter* rights were read, with one exception and a few omissions.

[16] The trial judge sets out the facts as follows:

> [2] The defendant was stopped at a police spot check which was set up at the corner of Middle Dyke Road and Belcher Street near the town of Kentville–just on the edge of town, so to speak. The police officer noticed the smell of alcohol and mouthwash. He formed an opinion the defendant had alcohol in his body and gave him a, so-called, "ASD" or "Approved Screening Device" demand. The defendant took the test and registered a "fail". The officer then arrested the defendant for an offence under s. 253(1) of the *Code*, gave him a breath demand and his s. 10(b) *Charter* rights. He read from the card–the standard wording which complies with the cases of *Brydges* and *Bartle*, were given. As an interesting aside the officer said in part, "you have the right to free and immediate legal advice by making <u>three</u> telephone calls", although no issue was made about that odd remark, but I found that a bit curious. In any event he then went on to give the 1-800 number and duty counsel numbers in the standard format.
>
> [3] At the conclusion of this portion of what was read to the defendant the officer then asked, "Do you understand that?" The defendant replied, "I do". **<u>The officer then asked, "Do you wish to call a lawyer?". The defendant replied, "Not right now, thank you".</u>**

> **[4]** **The officer then said the following, "I'll let you know that if you change your mind at any time tonight during this whole process that you want to talk to a lawyer just let myself or any other officer know and we'll make sure you get in contact with a lawyer, okay". The defendant said, "Yeah".** (This Court's emphasis)
>
> [5] The officer then read the, so-called, "*Moore* rights". The defendant indicated he understood that. He was then given the standard police caution. The defendant indicated he understood that. The above was read to the defendant beginning at 12:53 a.m., shortly before 1:00 a.m. That came from the notes from the lead officer when he indicated the demand was read, so I am concluding that the process began at that time and took some moments to complete it.
>
> [6] This whole exchange was captured on the police officer's video camera. Accordingly the exact wording was before the Court. I had an opportunity to listen to it and to re-listen to it, so to speak.
>
> [7] The defendant was then taken by the officer to the Kentville Police Service and handed over to the breath technician who was, I believe, one of the other officers at the scene and had gone to the police station–one of the local officers.
>
> [8] The first test was conducted at 1:28 a.m. - 28 minutes after the demand was made back in the police car. The defendant was never asked or reminded at the police station about his opportunity to speak to a lawyer. The other officer, that is the technician, did not testify at the *Charter voir dire* hearing. The defendant did testify. He said it was his intent to call a lawyer when he was taken to the police station. He said he did not have a cell phone with him in his car which would have explained his response. He anticipated that when at the police station he would have been given an opportunity to call a lawyer. He was not given that opportunity. Finally, the officer never noticed any signs of impairment other than what I have earlier indicated, the smell of alcohol—these types of signs which are often observed in these types of incidences.

[17] The following uncontradicted evidence is relevant additional context:

a) The ALERT demand was made at 00:49 a.m., a fail reading obtained at 00:52 a.m., the breathalyser demand and *Charter* rights read at 00:53 a.m. and the Legal Aid rights at 00:54 a.m.

b) The constable read the breathalyser demand and *Charter* right directly from a printed card, but his response to the defendant's response of "Not right now, thank you," when asked if he wished to speak to a lawyer, was not from a card. He did not ask the defendant if he understood his reply (the defendant had replied "Yeah"),

> because I believed that he did understand what I was telling him. It was not a written question that was on my card. It was something that I did just to ensure that he understood that this was not a one-time proposition for the lawyer, that if . . . you know, and I believed Mr. MacGregor at the time to be an intelligent man. He had already told me that he was a dentist. I realized he was well schooled. I just wanted to make sure that he knew, at that time, that it wasn't a one-time shot for the lawyer, that if he wanted to speak to one later on, if he changed his mind, that all he had to do was tell myself or any other police officer that he was dealing with, and that option would still be available to him. (Transcript, p. 50)

c) The constable drove the defendant directly to the police station. The spot check was set up in the Town of Kentville, a few minutes from the police station. The defendant was introduced and turned over to the breath technician as soon as they arrived at the station.

d) When they arrived at the station, the constable did not ask the defendant if he wanted to contact a lawyer or offer him the use of a phone because "I felt [he] was an intelligent man and I had explained to him in the vehicle . . . that if he wanted to speak to a lawyer, then he would let me know." Defence counsel asked if it was his practice to offer the use of a phone at the police station: he replied no, unless someone said he wanted to call "then, yes of course I would . . . If it's made perfectly clear to them and . . . And I believe that they have understood what I have told them . . . then, no, I don't." (Transcript, pp. 42-43)

e) Defence counsel asked if the constable was aware of a common police practice to routinely offer defendants the use of a phone to call a lawyer "no matter what the individual may have said on the side of the road," when they get back to the police station. The constable replied no. (Transcript, p. 43)

f) The constable stated that the defendant exhibited no signs of impairment other than the smell of alcohol on his breath.

g) The only error in the trial judge's facts was respecting the time of the first reading. The first reading was received at 1:21 a.m. (not 1:28 a.m.) which was 28 minutes after the defendant was given the breathalyser demand. The second reading was received at 1:39 a.m.

h) The constable was a qualified breath technician. He stated that technicians are trained to observe a defendant 20 minutes before the first test and "a clear 15 minutes" before inputting the information for the second test (Transcript, pp. 47-48). Defence counsel asked if it was his practice as a breathalyser technician, to ask if the defendant wanted to speak to a lawyer, before doing the first test. He replied no (Transcript, pp.54-55).

i) The defendant's trial evidence was very brief, and confined to his intention when asked in the police car if he wished to contact a lawyer. He testified that his intention, when he replied: "Not right now, thank you" was: "not to phone right then, but as soon as I got to the police station." He had no cell phone or privacy on the road. When he got to the station, he did not raise the issue again because "At that point, I was just doing what was asked of me by the officers." He acknowledged that he said nothing to the breath technician about calling a lawyer.

[18] The trial judge made additional findings of fact in the analysis portion of his decision at ¶¶ 9 to 11:

a) At paragraph 9: "It is clear that what transpired from the time of demand until the testing procedure was relatively quick."

b) At paragraph 10, ". . . the defendant was nervous. It appeared that he was overwhelmed by the experience. . . . the defendant was likely nervous and self-conscious. He was clearly being deferential to the authority of the police. He seemed unfamiliar with the circumstances."

c) At paragraph 11, "However, in my opinion, he wanted to speak to a lawyer at some point. I conclude this because **in effect that is what he said to the police officer in the car that evening** and furthermore he testified to that same effect at the *voir dire* hearing." (This Court's highlighting)

[19] The last three factual conclusions are grounded on the trial judge's viewing of the police car video. This Court had the same advantage as the trial judge in assessing the demeanour of the defendant during the exchange in the police car. This Court's review of the police car video does not support a finding that the defendant said in effect that he wanted to speak to a lawyer "at any point tonight during this whole process" (the constable's words, acknowledged by the defendant with a "Yeah"), nor that the defendant was overwhelmed.

E. **Analysis**

Issue #1 **Did the trial judge err in finding that the defendants' 10(b) rights were infringed or denied?**

[20] The trial judge concluded that:

a) The defendant's answer to the constable's question asking if he wanted to speak to a lawyer of "Not right now, thank you" was in effect that he wanted to speak to a lawyer at some point (Decision, ¶ 11).

b) "The defendant's responses raise a serious concern, subjectively speaking, from the officer's point of view, that the defendant did not fully understand his rights" in the sense that if he forewent his rights to contact a lawyer on the road side that he could still do so at the station as opposed to at some future, unknown date (Decision, ¶ 15).

c) The constable's response was not sufficient "because of the time lines and the lack of evidence of any interaction between the defendant and the breath tech or this officer at the police station" (¶15).

d) The first reason that the response was found insufficient (the time lines) was described in ¶ 17 as: "there was no opportunity for him to express any desire to call a lawyer [at the station]."

e) The second reason that the response was found insufficient (lack of evidence of any interaction at the station) implies that the defendant's "Not right now" response was not a "No" answer, and the constable's follow up advice, acknowledged by the defendant, was not a sufficient

reply and waiver. In effect, the "Not right now" statement required the officer or breathalyser technician to repeat to the defendant at the station the question/offer to contact a lawyer.

[21] The trial judge cited several decisions that describe circumstances where the defendant's response displayed equivalence or a lack of understanding of the 10(b) rights and the resultant duty on the police to do more (¶ 18).

[22] The trial judge correctly noted that: "The police are not mind readers and once the rights are given, the defendant is obliged to act diligently."(¶ 21) He further correctly concluded that when police receive an equivocal answer, they have an additional obligation to ensure that the defendant understands his rights.

[23] Assuming, as the trial judge found, that the defendant always intended to call a lawyer when he reached the station, the central issues, on the facts of this case, are whether the trial judge erred in concluding that:

a) the constable's answer to the "Not right now" statement was inadequate;

b) the constable or technician had a duty when the defendant arrived at the station to expressly offer him the opportunity to contact a lawyer and whether the time lines at the station were sufficient for the defendant to request to speak with a lawyer; and,

c) the defendant acted diligently.

Was the constable's answer to the "Not right now" statement inadequate in the circumstances?

[24] The trial judge appears to have taken two approaches to the defendant's response to the question of whether he wanted to call a lawyer:

1. that the defendant understood his right to contact a lawyer and always intended to speak to a lawyer and "in effect" told the constable that was his intention; and,

2. that the defendant did not understand his rights, and the officer "subjectively speaking from the officer's point of view" knew this.

In either case, he found that the constable's response to the defendant's "Not right now" statement was inadequate.

[25] The trial judge concluded that the officer's response was inadequate in part because "now" included not only the time that the defendant was in the police vehicle on the side of the road, but "in the sense of as soon as a call can be effectively arranged, usually at the police station." (¶ 14)

[26] It is important to repeat the constable's response at this junction: "I'll let you know that if you change your mind **at any time tonight during this whole process** that you want to talk to a

lawyer, just let myself or any other officer know and we'll make sure that you get in contact with a lawyer, okay?" to which the defendant replied: "Yeah." (This Court's emphasis)

[27] If, as the defendant testified at trial and the trial judge accepted, the defendant always intended to contact a lawyer at the station, the fact that the constable started the sentence with: "If you change your mind" is not misleading, unless one concludes that any reasonable officer in the constable's position should have known that to the defendant "Not right now" meant only "at some future unknown date."

[28] Doherty J.A. makes a perceptive observation about misleading words in *R. v. Devries*, 2009 ONCA 477, in rejecting the argument that the police question: "Do you wish to call a lawyer now?" was misleading. After recognizing that analysing deficiencies in a 10(b) caution is a contextual analysis, he wrote at ¶¶ 35-36:

> Virtually any word in the English language has some ambiguity and is capable of taking on different meanings to different people. Any word or combination of words has the potential to mislead somebody at some time. . . . It is fruitless to search for phrasing that does not have the potential to mislead anybody in any given situation. Rather than pursuing the hopeless task of finding absolutely unambiguous language, compliance with s. 10(b) must be measured by its ability to convey the essential character of the s. 10(b) rights to the detainee . . .

[29] In *Devries*, Doherty's concern with the summary conviction appeal court's analysis was that it might lead to the suggestion that "without delay" did not mean at the roadside, when the term clearly did not preclude the right to contact counsel at any time. In context, the constable's use of the term: "If you change your mind" in this case was not at all misleading.

[30] The constable's statement was clearly responsive to the defendant's response "Not right now." If the defendant wanted to talk to a lawyer "at any time tonight during this whole process . . . just let myself or any other officer know" and we'll ensure it happens. Without requiring that the constable be a mind reader (and even assuming that the constable was a mind reader and knew that the defendant wanted to talk to counsel when he got to the station), it is difficult to imagine a more clear and responsive response to the defendant's statement "Not right now, thank you."

[31] When, at ¶ 11, the trial judge concluded that the defendant wanted to speak to a lawyer at some point, the only relevant point would be before the breath tests were completed. There is no evidence from which the court could find as a fact that, "in effect," the defendant told the constable while he was in the police car that he wanted to speak to a lawyer at the station.

[32] Even so, the evidence, as whole, shows that the constable was cognizant of the fact that the defendant's answer "Not right now," was an equivocal "no" and left the possibility that the defendant wished to contact a lawyer at the station.

[33] In that context, the constable's immediate response, making reference to "at any time tonight during this whole process," was clear and responsive.

[34] The officer's statement at the end of his explanation "Okay?" and the defendant's acknowledgement: "Yeah," as shown on the police car video, demonstrates understanding.

Time lines and lack of further interaction at the station

[35] The trial judge concluded that the constable's response in the car was insufficient because of the time lines and lack of further interaction at the station.

[36] With respect to time lines, the concern appears to be that the process was "too quick." This is the opposite concern to that normally advanced in breathalyser cases.

[37] The fact that the first test was taken approximately 28 minutes after the breathalyser demand, or about 26 or 27 minutes after the defendant's "Not right now" statement and the constable's reply, would suggest that the constable's offer (that he or any other officer would "at any time tonight during the process" ensure the defendant had a chance to contact a lawyer) would be fresh in the defendant's mind when he arrived at the station a few minutes later.

[38] The practice or policy (according to the only evidence in this case) is that the technician observes the defendant for 20 minutes before he or she administers the first test. The evidence is that 26 to 27 minutes passed between the defendant being advised of his right to counsel without delay and the first test. This does not suggest that the defendant was "inappropriately rushed" or prevented from asking to speak to counsel. There was no evidence from the constable or the defendant that anything occurred at the station that would have interfered with the defendant's opportunity to ask.

[39] I fail to understand how the time lines were such that the accused may be seen to have forgotten the response made by the constable in the car, or would have prevented him from asking at the station for the opportunity to speak to a lawyer.

[40] The second reason stated for the insufficiency of the constable's response was the failure of the constable or technician to repeat to the defendant his 10(b) rights at the station.

[41] There was no case law proffered to the Court that, regardless of the defendant's response to the initial police question asking if the accused wished to speak to a lawyer, it must be repeated again when the defendant arrived at the station. The evidence at this trial was that this is not a common nor routine practice.

[42] The case law is clear that if there is any ambivalence or ambiguity in the defendant's answer to the request by the officer as to whether the defendant wishes to speak to counsel, or if there is some other conduct of the defendant that does lead or ought to reasonably lead the officer to surmise that the defendant either does not understand his/her rights or has not waived them, the constable must do more so as to satisfy himself that the defendant understands his rights and waives them.

[43] Most of the case law referred to by the trial judge at ¶ 18 of his decision, and cited by the defendant to this court, involved fact scenarios where the police did nothing in response to answers by the defendant that either were equivocal or demonstrated a lack of understanding of the 10(b) rights. In many of those cases, the judges stated that more was required of the police, and some of them stated that this would include asking the defendant again if he or she wished to speak to a lawyer upon arrival at the station. Those scenarios do not stand for the proposition that a waiver of the right to counsel at the roadside must be followed up with a reiteration at the station. That is not to say that there may be circumstances where such would be appropriate or even necessary. The explanation or reiteration can, as it did in this case, and probably should take place immediately after any ambivalence or lack of understanding becomes evident.

[44] It is an error to decide that the only place that an officer can clarify to a defendant that his right to contact counsel need not be exercised "now," in the sense of at the roadside, is at the station.

[45] As previously stated, the constable's response to the defendant's "Not right now" statement was clear and responsive. The defendant's acknowledgement ("Yeah") does not impose any further obligation upon the constable or the technician when the accused arrived at the station.

[46] The defendant's appearance, conduct and demeanor is relevant (a) to whether a police officer is obliged to offer a further explanation and opportunity to a defendant to contact a lawyer in circumstances such as these, and (b) to the sufficiency of that explanation and opportunity. The constable's evidence regarding the defendant's appearance, conduct and demeanor is set out in ¶ 17 of this decision.

[47] The trial judge stated at ¶ 17 and the first part of ¶ 18 as follows:

> [17] The defendant testified and I accept this - there was no opportunity for him to express any desire to call a lawyer. The officer who testified said that because the defendant was a professional man and an intelligent man he expected the defendant would speak up and ask.
>
> [18] With respect, I would not subscribe to this assumption. This is not a matter of the degree of one's education. It is about being informed of one's constitutional rights and being given the opportunity to exercise those rights and if the defendant did not want to exercise those rights to be clear and unequivocal in waiving his rights.

[48] The trial judge appears to have unduly discounted the constable's evidence as to the defendant's ability and capacity to understand, and why the constable concluded that the defendant did understand his follow-up explanation. Contrary to the trial judge's determination, it is relevant that the defendant showed no signs of impairment during this process and appeared to be an intelligent professional. What the defendant said and did, is relevant to the constable's ability to conclude that the defendant understood and waived his 10(b) rights. It was an error to assume that all persons facing a breathalyser have the same ability or capacity, at the time their rights are read to them, to understand those rights and respond voluntarily and appropriately.

[49] I conclude that the officer's stated observations as to the capacity and ability of the defendant to understand his further explanation of the defendant's right to contact a lawyer are relevant to the issue of whether the officer had a further obligation to repeat the offer when they arrived at the station. The failure of the trial judge to recognize this was an error.

Defendant's obligation to act diligently

[50] The trial judge acknowledged that case law exists to support the proposition that the defendant has an obligation to act diligently in pursuing his *Charter* rights.

[51] In this case, the trial judge concluded that the defendant always intended to contact a lawyer when he got to the station. The defendant did not raise the issue again or request the opportunity to call a lawyer.

[52] The defendant did not testify that he did not understand his rights or the explanation by the constable to his response "Not right now, thank you."

[53] There is nothing in the evidence before the Court upon which one could conclude that the defendant did not understand his right to counsel after the additional explanation given by the constable.

[54] The defendant did not testify as to any condition, such as a physical or mental impairment, alcohol induced or otherwise, that interfered with his ability to ask for the opportunity to contact a lawyer after he arrived at the station - if that was his intention. The closest he came to an explanation of his failure to pursue his rights is at p. 61 of the Transcript:

> **A.** I was just in an unfamiliar setting and I was doing what was requested of me.
> **Q.** Okay. Well . . . so are you saying that had you thought of it [asking to speak to a lawyer], you probably might have asked at that point?
> **A.** Yes, I would have. I sort of expected I would be offered at that time, yes.

[55] In summary, the defendant provides no reasonable basis for not pursuing his right to contact a lawyer.

[56] Since the trial judge's decision, the Supreme Court released three important decisions describing 10(b) rights - *R v Sinclair*, 2010 SCC 35, ¶¶ 19 - 65 (particularly relevant to this case ¶ 52), *R v McCrimmon*, 2010 SCC 36, ¶¶ 17 - 21, and *R v Willier*, 2010 SCC 37, ¶¶ 25 - 42.

[57] In *Sinclair*, at ¶ 52, the Supreme Court repeated the fundamental principle that where the circumstances indicate that a detainee may not have understood his or her rights, the police should reiterate the right, and that undermining the right nullifies it. The manner in which the police should respond to an indicated misunderstanding is fact-specific or contextual. In breathalyser cases, it does not require reiteration at the station.

[58] In *Willier*, the facts required the court to address what constituted a reasonable opportunity to contact counsel and the contents of the defendant's duty to be reasonably diligent in exercising it. Application of the Supreme Court's statements to the specific facts of this case negates a finding that, absent any evidence as to why the defendant could not have asked the police for the opportunity to contact counsel when he arrived at the station, if that always was his intention, and in light of the time between the giving of the 10(b) rights and the first test, the defendant either acted diligently or did not have a reasonable opportunity to ask to contact counsel.

The Case law

[59] The trial judge cited several decisions as supportive of his conclusion that the constable's explanation at the roadside was insufficient and that a reiteration of the 10(b) rights at the station were necessary. The common element in these decisions was the respondent's equivocal response to the reading of the 10(b) rights, usually with words like "not at this time" or "not right now."

[60] It is irrelevant that some of the decisions predated *Grant*. The relevant aspect of s. 10(b) was not redefined in the *Grant* quartet. All the decisions related to situations where courts discussed circumstances where a further explanation, beyond the standardized iteration of the 10(b) rights, was required. In my view, none of these decisions support a conclusion that, in the circumstances of this case, the officer's explanation at the roadside was insufficient, and/or a reiteration at the station was required.

[61] In *R* v *Galbraith*, 2005 CarswellOnt 1107 (ONSJ), the Court found the police question: "Do you want to speak to a lawyer now?" to be nonsensical where the young defendant, without prior experience with the law, was sitting in a police vehicle in a remote area. Later, when lodged in a cell, the defendant was asked again and answered that he did not have a lawyer. Clearly he did not comprehend that he could get free legal advice from a Legal Aid lawyer. The police did not tell him this. The Court held that if the police had, the informational component of the defendant's 10(b) rights would have been fulfilled.

[62] In *R* v *Dean*, 2008 ONCJ 702, when a young accused, handcuffed in a police car, was read his 10(b) rights, he told the officer that he did not wish to speak to a lawyer at that time because he was unable to make a call from that location. The accused was never asked again. The Court concluded, at ¶ 4, that the defendant should have been advised either <u>at the scene or at the station</u> that he could make a phone call from the station.

[63] In *R* v *Webster*, 2004 BCPC 19, the accused was from away and made comments that suggested that he felt limited in his options for contacting a lawyer. The trial judge recited *R* v *Evans*, [1991] 1 SCR 869, for the proposition that if, during the informational component, it became apparent to the officer that some sort of unusual circumstance prevails which prevents the detainee from clearly understanding his rights (which circumstances vary widely), the officer must "clarify any ambiguity or uncertainty so far as it is reasonably possible to do so" (¶ 18).

[64] In *R* v *Bruno*, 2009 ABPC 232, one issue was the admissibility of admissions made by Bruno after his roadside response to the 10(b) caution: "not right now." Questions were asked and incriminating answers were given on the way to the station. The Court excluded the statements, stating at ¶¶ 58 and 62, that Bruno's response to the 10(b) caution was equivocal. It required the police: to follow up to ensure he understood, to clarify whether he wished to exercise his 10(b) right, and to refrain from asking questions until this was done. Nothing in this decision suggests that the constable's response at this case would have been insufficient.

[65] In *R* v *Karalash*, 2003 CarswellMan 579 (MPC), an accused driver, badly injured in an automobile accident, was home sleeping in his bed. Police and an ambulance arrived. Police arrested him for impaired driving and gave him his 10(b) rights. He replied "not at this time." A breathalyser demand was not practicable. The defendant was taken to the hospital, where the officer gave the demand for a blood sample. His 10(b) charter rights were not repeated or alluded to at the hospital. The Court held, at ¶ 58, that:

> The intervening change in circumstances in the time lapse of over one hour [from when the defendant was given his 10(b) rights at his residence to when he was given the blood sample demand at the hospital], the changing of locale [from his home to the hospital] . . ., and the possible higher impairment level from post-driving and alcohol consumption are such that the accused cannot be rationally and reasonably held to have waived his right to counsel at 12:28 a.m. at the hospital surrounding the demand for a blood sample. [Words in square brackets are this court's.]

[66] The circumstances and police conduct in *Karalash* are not applicable to this case.

[67] In *R* v *Liddell*, 2008 BCPC 143, a short decision, the accused's response to the question of whether he wanted to speak to a lawyer was "not at this time." No follow-up or secondary reminder was given. That judge's experience was that when such equivocal responses were given, officers normally repeat the 10(b) caution at the detachment in an informal way. His conclusion was that the police were required to satisfy themselves that they had received an unequivocal waiver.

[68] *Liddell* does not help the defendant in this case for two reasons:

(a) the constable in this case did give a clear and responsive "secondary" reminder; and

(b) the only evidence in this case was that there was no police practice of repeating the 10(b) caution at the station.

[69] In *R* v *Turcotte*, 2008 ABPC 16, the Court excluded a breathalyser certificate because of an unexplained seven-minute delay in the reading of the roadside screening device. The Court also noted that the accused responded to the 10(b) caution with "no, not right now." When approaching the check-stop bus where the breathalyser was located, the accused asked about a lawyer. The officer replied that he could call a lawyer at any time, to which the defendant replied "No, I don't think there's any point in calling." The trial judge held that this exchange demonstrated that the defendant was clearly confused about the purpose of immediate legal advice and that the officer must "go further to ensure [the accused] understood his right to counsel."

[70] This case does not stand for the proposition that a further recitation of the 10(b) caution at the station was required or that the constable's explanation in this case was not sufficient.

[71] In *R* v *King*, 2009 BCPC 26, the defendant's response to his 10(b) caution was "I don't, right now." He asked about how long he would be detained and was told about three hours. There was no further explanation or reiteration or reference to his 10(b) rights.

[72] *R* v *Jackman*, 2008 ABPC 201, is not a breathalyser case. The defendant's house was entered in a violent manner pursuant to a search warrant for drugs. The defendant's answer to her 10(b) caution was "No, not now." She was asked if she wanted to say anything and replied no. She was then asked who lived there and replied "Just me." The Court properly excluded this admission. It found that before finding that the accused had given up her 10(b) rights, the Court must be satisfied that the defendant's decision was informed and unequivocal. At paragraphs 26 to 32, the judge found several factual circumstances suggesting that the 10(b) rights were not voluntarily waived.

[73] *R* v *MacDonald*, 2009 NSSC 420, was not a breathalyser case. After being arrested for an aggravated assault and given his 10(b) rights, the defendant declined to contact a lawyer at that time with the reply: "Nah, probably be one down around there anyway, John Black or . . ." The trial judge found that in all the circumstances, the defendant was confused about his 10(b) rights and this created enough uncertainty as to require the officer to give a further explanation.

[74] Finally, *R* v *Devries*, 2009 ONCA 477, is an important recent decision of the Ontario Court of Appeal. In connection with a breathalyser demand and 10(b) caution, the officer asked "Do you wish to call a lawyer <u>now</u>?"; the accused replied "No." No further iteration of or reference to her right to counsel was made by the officer. The trial judge found no breach of the defendant's 10(b) rights. The summary conviction appeal court found the officer's question to be meaningless, if not misleading, because of the officer's use of the word "now."

[75] For the Court of Appeal, Doherty J.A. provided a helpful and thorough analysis of the 10(b) rights (¶¶ 21 to 28), an analysis of the use of the word "now" in that context (¶¶ 29 to 32) and an analysis of the practical problems associated with the 10(b) caution (¶¶ 33 to 37). He overturned the summary conviction court's finding that the officer's question was misleading or that a further explanation was required. At paragraphs 38 to 42, he does suggest that the police are obliged to give a further explanation to comply with the informational component where comments and circumstances indicate a misunderstanding. He also suggested that it was a "better practice" to reiterate the 10(b) caution at the station, and that in the right circumstances, absent a reiteration, the defendant's motion for a remedy could succeed.

[76] *Devries* does not stand for the proposition that an ambivalent reply to the 10(b) caution requires a reiteration of the 10(b) caution at the station, as opposed to an immediate response in the police car. None was required in that case.

[77] In his factum, the respondent cites four further decisions supportive of the trial judge's finding: *R* v *Perry*, 2009 ONCJ 548; *R* v *Guyett*, 2010 ONSC 4575; *R* v *Howes*, 2010 ABPC 186, and *R* v *Farahanchi*, 2010 NSPC 57. *Perry* is not relevant because in that case the problem was that the officer put an unreasonable time limit on the defendant's request to call a second lawyer. In *Guyett*, the officer did not respond to or follow up when the defendant's responses required a further response. In *Howes*, the court did not believe the officer's testimony. In *Farahanchi*, the court found that because of language difficulties, the officer should clearly have understood that the accused did not understand and appreciate his legal rights. In that case, the police made no inquiries to determine the defendant's understanding.

[78] In its factum, the Crown refers the Court to two Nova Scotia decisions that it submits are reflective of the circumstances in this case: *R* v *Boudreau*, 2009 NSPC 26 and *R* v *Harrison*, 2005 NSPC 20.

[79] In the end this Court found the analysis of Doherty J.A. in *Devries* and of MacLaughlin J, as she then was, in *Evans*, to constitute a correction statement and application of the relevant law, and a helpful guide in circumstances where a defendant gives an equivocal or ambiguous response to the 10(b) caution.

Conclusion

[80] The section *10(b)* right imposes at least three duties on the police:

a) to inform the accused of the right;

b) to give the accused who so wishes a reasonable opportunity to retain and instruct counsel without delay; and,

c) to refrain from obtaining evidence from the defendant until he has had a reasonable opportunity to retain and instruct counsel. (See: *R* v *Manninen* [1987] 1 SCR 1233 and *R* v *Ross* [1989] 1 SCR 3)

[81] The duty on the police to inform the defendant of his rights requires an explanation in a manner that the defendant can understand. Where there is a positive indication that the defendant does not understand his right to counsel, the police cannot rely on a mechanical recitation of the right of the accused but must take steps to facilitate his understanding. (See: *R* v *Evans* [1991] 1 SCR 869)

[82] The defendant must be reasonably diligent in attempting to obtain counsel if he wishes to do so. (See: *R* v *Tremblay* [1987] 2 SCR 435, *R v Black* [1989] 2 SCR 138, *R* v *Smith* [1989] 2 SCR 368 and *R v Willier*, supra, ¶¶ 32-35)

[83] I conclude that there was no evidence that the defendant did not understand his s. 10(b) rights after the constable's reply to his "Not right now" statement, which reply the defendant acknowledged.

[84] To the extent that the defendant intended to speak to a lawyer after he arrived at the station, there was no evidence that the circumstances were such that he could not do so if he had exercised reasonable diligence. The trial judge's conclusion that he did not have an opportunity to ask at the station, and that the police had a duty to again ask the defendant at the station if he wanted to contact counsel, is not supported by any evidence before the Court.

[85] The defendant's Section 10(b) rights were not infringed or denied.

Issue #2 **Did the learned trial judge err in law in excluding evidence of the certificate of the technician pursuant to s. 24(2) of the *Charter***

[86] If I am wrong on the first issue, should the certificate have been excluded in any event.

[87] Counsel agree that the framework for this analysis is that set out in the *Grant* quartet (*Grant, Suberu, Harrison* and *Shepherd*).

[88] The trial judge properly characterized the three inquiries under the 24(2) analysis as:

1. the seriousness of the police conduct;

2. the impact on the protected rights; and,

3. the interest of society in having the matter judged on its merits.

[89] For the first inquiry, the trial judge acknowledged that the police conduct was not deliberate or in bad faith nor an attempt to subvert the defendant's rights. He described the misconduct as "a lack of attention to the defendant's rights to counsel after an equivocal response," which meant that the defendant was not fully informed and his rights not fully implemented. The conduct was "more about being efficient, from the officer's point of view . . . he was polite and courteous . . . the state conduct, in my opinion, is not serious, but I would not describe it as inadvertent."

[90] For the second inquiry, he described the protected right as the right to counsel. He qualified the *Grant* exclusion analysis because "in my opinion the comments in *Grant* about the minimally intrusive nature of taking breath samples is more applicable to a section 8 violation, where privacy is the issue. Here the right to counsel was completely denied . . . the right to counsel is a gateway to other rights . . . From a principled point of view it is important not to confine this part of the analysis to the usual so-called breathalyser stop. . . . Arresting or detaining an individual in a free country like Canada is a serious matter, even if that detention or arrest is lawful. . . . Being able to speak to a lawyer upon arrest helps to uphold the integrity of the criminal justice system in my

opinion. Here the defendant was completely denied this right. . . . This, in my opinion, would favour exclusion."

[91] For the third inquiry, the trial judge acknowledged that the interest of society in having the case heard on its merits, which includes all available relevant evidence, including the critical breath sample test results, would not favour exclusion.

[92] In balancing the three inquiries, "it is the long term effect on the administration of the justice which is important." The remedy belongs to society. In his view, the long term interests of the justice system are better served by excluding evidence in order to uphold the right to counsel, a critically important value to the functioning of the criminal justice system.

First Inquiry: **Seriousness of *Charter* infringing conduct**

[93] The trial judge found the constable's conduct was due to a lack of attention to the defendant's 10(b) rights. He found it was not serious, but not "inadvertent." Dictionaries define "inadvertence" as: a mistake due to a lack of attention, not intentional, accidental.

[94] In *Grant*, the Supreme Court discussed the first inquiry generally (¶¶ 72 to 75), and in the context of the type of evidence obtained (a) statements of the accused (¶¶ 89 to 98, and especially ¶¶ 93 and 94); (b) bodily evidence (¶¶ 99 to 111, especially ¶ 108); (c) non-bodily physical evidence (¶¶ 112 to 115, especially ¶ 112); and, (d) derivative evidence (¶¶ 116 to 128, especially ¶ 124).

[95] The seriousness of the *Charter* violations vary. Admission of evidence obtained through inadvertent breaches of the *Charter* undermines public confidence in the justice system minimally (¶ 74). Good faith, or absence of bad faith, reduces the need for courts to disassociate themselves from the conduct of police (¶ 75).

[96] With respect to statements of the accused, the court stated that all three lines of inquiry support the presumptive, but not automatic, exclusion of statements obtained in breach of the *Charter* (¶ 92).

[97] The Court identified breath samples as a "bodily substance" in ¶ 99. It expressly rejected the *Stillman* analysis (the simple conscription test) for admissibility. At paragraph 105, the court stated that the taking of a bodily sample does not trench on the accused's autonomy on the same way as the unlawful taking of a statement may.

[98] Applying the first inquiry analysis to the admission of bodily substances, the court noted at ¶ 108:

> The first inquiry informing the s. 24(2) analysis - the seriousness of the *Charter*-infringing conduct - is fact-specific. Admission of evidence obtained by deliberate and egregious police conduct that disregards the rights of the accused may lead the public to conclude that the court implicitly condones such conduct, undermining respect for the administration of justice. On the other hand, where the breach was committed in good faith, admission of evidence may have little adverse effect on the repute of the court process.

[99] In his decision, the trial judge did not expressly state, in the balancing exercise mandated by *Grant*, whether the first inquiry would mitigate for or against exclusion of the certificate of the defendant's breath tests.

[100] Applying the *Grant* analysis, a breach which resulted from a "lack of attention" by the police would clearly fall at the low end of the spectrum of seriousness and would favour admission of the certificate.

Second Inquiry: **Impact on Accused**

[101] The trial judge distinguished the relevance of the conclusion in *Grant* that the minimally intrusive nature of breath samples does not support exclusion in this case, because "the comments in *Grant* about the minimally intrusive nature of taking breath samples was more applicable to a s. 8 violation, where privacy is the issue. Here the right to counsel was completely denied . . ."

[102] The *Charter* rights denied in *Grant* did not relate to s. 8, but rather to s. 9 and consequently s. 10 of the *Charter*. More important, the Court's analysis of the s. 24(2) remedy was expressly set out in a broader context that simply the *Charter* breach in *Grant*. While the impugned evidence in *Grant* was a statement and non-bodily physical evidence, it is obvious that the Court's analysis was intended as a general guide to courts with respect to when evidence should be excluded pursuant to s. 24(2). The Court gave directions respecting the 24(2) analysis in the context of four different categories of evidence.

[103] In *Grant*, the Supreme Court dealt with the second inquiry in general terms (¶¶ 76 to 78), in the context of statements of the accused (¶¶ 89 to 98, especially ¶¶ 95 and 96), respecting bodily substances, such as breath samples (¶¶ 99 to 111, especially ¶ 109), non-bodily physical evidence (¶¶ 112 to 115, especially ¶ 113), and derivative evidence (¶¶ 116 to 128, especially ¶ 125). Their analysis produces different results for the different types of evidence.

[104] The Supreme Court directed attention first to the interest engaged. The interests included privacy, bodily integrity, human dignity and the principle against self-incrimination.

[105] The Court noted at ¶ 95 that the second inquiry usually leads to the exclusion of statements obtained in breach of a *Charter* right.

[106] The Supreme Court's application of the second inquiry to bodily substances, such as breath samples, was quite different. At paragraph 105 and 109, the Court stated:

> 105 . . . Nor does the taking of a bodily sample trench on the accused's autonomy in the same way as may the unlawful taking of a statement.
>
> . . .
>
> 109 The second inquiry assesses the danger that admitting the evidence may suggest that *Charter* rights do not count, thereby negatively impacting on the repute of the system of justice. This requires

> the judge to look at the seriousness of the breach on the accused's protected interests. In the context of bodily evidence obtained in violation to s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion one these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.

[107] The Supreme Court in *Grant* specifically described breath samples as minimally intrusive. There is no fact specific evidence in the case at bar that the manner in which the breath samples were obtained was in any way forceful or distasteful or egregious.

[108] It was correct for the trial judge to find that the defendant did not speak to counsel and that this is serious; however, the 10(b) rights have more than one component and it is a misstatement to state that these rights were "completely denied."

[109] It was open to the trial judge to conclude that the second inquiry, before balancing it with the first and third inquiry, would support exclusion of a breath certificate.

Third Inquiry: **Society's interest in an adjudication of the merits**

[110] The trial judge acknowledged that the breath certificate was critical evidence and "of course there's always an interest in having cases judged on all relevant evidence that is available." This finding is consistent with the more strongly stated pronouncements in *Grant*.

[111] In *Grant*, the Supreme Court discussed the third inquiry generally (¶¶ 79 to 84), and in the context of statements (¶¶ 89 to 98, especially 97), bodily substances (¶¶ 99 to 112, especially ¶ 110), non-bodily physical evidence (¶¶ 112 to 115, especially ¶ 115) and derivative evidence (¶¶ 116 to 128, especially ¶ 126).

[112] The following specifically enumerated considerations that infused the Supreme Court's analysis of the third inquiry:

a) the public's interest in truth finding, including the negative impact that failure to admit evidence on the truth-finding functions may have;

b) the reliability and relevance of the evidence; and,

c) the importance of the evidence to the prosecution's case.

[113] Respecting its impact on statements obtained from the accused, the court stated at ¶ 97:

> The third inquiry focusses on the public interest in having the case tried fairly on its merits. This may lead to consideration of the reliability of the evidence. Just as involuntary confessions are suspect on

> grounds of the reliability, so may, on occasion, be statements taken in contravention of the *Charter*. Detained by the police and without a lawyer, a suspect may make statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger, where present, undercuts the argument that the illegally obtained statement is necessary for a trial of the merits.

[114] In contrast, respecting its impact on the admission of bodily substances, the Supreme Court wrote at ¶ 110:

> The third line of inquiry - the effect of admitting the evidence on the public interest in having a case adjudicated on its merits - will usually favour admissibility in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission.

Analysis: **Balancing the First, Second and Third Inquiries**

[115] The trial judge's analysis of the balancing exercise (¶¶ 29 and 30 of his decision) repeats his concern for upholding the value of the critically important right to retain and instruct counsel as foundational to the criminal justice system in a free and democratic society. He did not expressly attempt to balance the three inquiries mandated in *Grant* when he concluded that the critically important 10(b) right was breached and therefore the evidence of the breath certificate must be excluded.

[116] In *Grant* the Supreme Court discussed the balancing exercise generally (¶¶ 85 and 86), in the context of admission of a statement of an accused (¶ 98), in the context of bodily substances (¶ 111) and in the context of derivate evidence (¶¶ 127 and 128). The Supreme Court description of the mandate on judges in carrying out the balancing exercise cannot be more succinctly stated.

[117] In the general context, at ¶¶ 85 and 86:

> 85 . . . Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.
>
> 86 In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incriminating test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination. (This Court's highlighting)

[118] Respecting their impact on admission of statements of the accused, at ¶ 98:

> In summary, the heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements

> taken in breach of the *Charter*, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability. This, together with common law's historic tendency to treat statements of the accused differently from other evidence, explains why such statements tend to be excluded under s. 24(2).

[119] In contrast to their impact upon the admissions of statements of an accused, in the context of their impact on admission of evidence of bodily substances, such as breath samples, at ¶ 111:

> While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive. (This court's emphasis)

[120] Finally, in respect of derivative evidence, at ¶¶ 127 and 128:

> 127 The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.
>
> 128 The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible. The judge should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would bring the administration of justice into further disrepute and the evidence should be excluded.

[121] In the case at bar, the trial judge focussed on the inadvertent infringement on the defendant's critically important 10(b) rights and did not, either expressly or inferentially, balance or attempt to balance all three inquiries. Before the radical revision of the 24(2) analysis, the *Stillman* test treated the principle against self-incrimination as so fundamentally important that it required evidence to be excluded, regardless of other considerations such as the degree of police fault, the reliability of the evidence and the seriousness of the offence (Jonathan Dawe & Heather McArthur, "Charter Detention and the Exclusion of evidence after *Grant*, *Harrison* and *Suberu*" (2010), 51 SCLR (2d) 381 at 410). That analysis appears to have influenced the trial judge's balancing exercise.

[122] In *Grant*, the analysis of the effects of the infringement of one's *Charter* rights on the s. 24(2) remedy was comprehensive and specifically encompassed breath sample evidence. In *Harrison*, at ¶¶ 36-39, the court determined that the trial judge erred by placing "undue emphasis" on the third line of inquiry, while neglecting the importance of the other two. That approach transformed the analysis into a simple contest as opposed to the required balancing exercise.

[123] A helpful analysis of the impact of the new *Grant* approach to the admission of breath sample certificates following charter breaches is found in the article noted above by Jonathan Dawe & Heather McArthur, (2010) 51 SCLR (2d) 381 at pp. 423 to 435.

[124] Applying the Supreme Court's analytical approach to the facts in this case should not have lead to the exclusion of the breath samples.

F. **Conclusion**

[125] The appeal is allowed for the reasons given. The charge was dismissed on the basis of the exclusion of the certificate. The matter is remitted to the trial judge to complete the trial on the basis that the certificate is admissible against the defendant.

J.

SUPREME COURT OF NOVA SCOTIA
Citation: *R* v *MacGregor*, 2011 NSSC 100

Date: 20110310
Docket: Ken No 333121
Registry: Kentville

Between:

Regina

Appellant

v.

Robert Owen MacGregor

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	January 4, 2011 at Kentville, Nova Scotia
Written Decision:	March 10, 2011
Counsel:	**James A. Fyfe**, Crown Attorney, for the appellant **Curtis C. Palmer**, counsel for the defendant

Erratum:

[1] In line 3 of ¶ 43, the word “was” should be “were”.

[2] In line 4 of ¶ 73, the word “Court” should be “defendant”.

[3] In line 3 of ¶ 93, the phrase “lack of intention” should be “lack of attention”.

J.