SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. McGrath*, 2026 NSSC 88

Date: 20260109
Docket: Pic No. 536771
Registry: Pictou

Between:

His Majesty the King

v.

Terry Robert McGrath

Decision

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	July 15, 16, 17, 2025, in Pictou, Nova Scotia
Oral Decision:	January 9, 2026
Written Decision:	March 20, 2026
Counsel:	T.W. (Bill) Gorman, for the Crown Stanley MacDonald, K.C., for Terry McGrath

By the Court (Orally):

Introduction

[1] The Accused, Terry Robert McGrath, is charged with two offences under s. 320.15(3) of the *Criminal Code*, which allege that he refused to provide a sample of his breath made to him by a peace officer, with knowledge that he was involved in an accident that resulted in death of a person.

[2] The charges arise from a tragic single motor vehicle accident that resulted in the death of Mr. McGrath's two passengers. He argues that the police breached his rights under the *Charter of Rights and Freedoms* (*Charter*) at the scene by failing to make an *immediate* demand for a sample of his breath for analysis by an approved screening device (ASD). Additionally, he contends that the police *arbitrarily* detained him in the back of a police vehicle while conducting the ASD test and failed to provide him with the *opportunity* to consult with a lawyer in a *timely manner.*

[3] The facts surrounding this tragic accident are not in dispute. The dispute is as to whether Mr. McGrath's *Charter* rights were violated by the arresting officer at the scene of the accident and, if so, whether the impugned evidence should be excluded under s. 24(2) of the *Charter.*

Issues

[4] The following issues arise from the alleged violations of Mr. McGrath's *Charter* rights:

i. Was his s. 8 *Charter* right to be free from unreasonable search and seizure breached by the arresting officer when he failed to make an *immediate* demand for a sample of breath pursuant to s. 320.27(1)(b) of the *Criminal Code*?

ii. Was his s. 9 *Charter* right to be free from arbitrary detention breached when the arresting officer detained Mr. McGrath in the back of the police vehicle while administering the ASD test?

iii. Was Mr. McGrath's s. 10(b) *Charter* right to counsel breached when the arresting officer did not afford him the opportunity to consult with counsel in a timely manner?

iv. Was Mr. McGrath's s. 10(b) *Charter* right to counsel undermined by police in such a way that it constituted a breach?

v. If Mr. McGrath's *Charter* rights were violated, should the impugned evidence obtained by the breach be excluded under s. 24(2) of the *Charter*?

[5] The parties filed extensive written submissions and ably argued their respective positions on each of the above issues.

[6] Before turning to my analysis, I will provide the background of the case, comment on my general assessment of the witnesses, set out the positions of the parties, review the evidence adduced in the blended *voir dire*, and explain my findings from the evidence.

Background

[7] On June 10, 2023, at approximately 4:09 am, the Pictou County District RCMP responded to a 911 call advising of a single vehicle collision on Brookville Road. They were advised that a young male arrived at the caller's residence and stated that he had just rolled his car nearby and his friends needed help.

[8] At approximately 4:25 am, Constable Blake Thornley of the Pictou County District RCMP arrived on scene, where he observed Emergency Health Service (EHS) and emergency response vehicles already on scene, and more arriving. He was the first police officer on scene. He activated his body worn camera, exited his vehicle and walked over to the accident scene, where he saw a brown motor vehicle on its side and paramedics talking to Terry McGrath, who was visibly distraught and very distressed. Mr. McGrath was pleading with first responders to help his two friends who were in the vehicle. Cst. Thornley saw a human appendage protruding out of the side of the vehicle and observed that Mr. McGrath was intently staring at the vehicle. He walked over to Mr. McGrath and asked for his name. Mr. McGrath identified himself and Cst. Thornley asked him what happened. He answered that he was driving, lost control, and the car crashed; there were two other occupants. Mr. McGrath was very distressed and was intently staring at the vehicle when he was speaking to Cst. Thornley. Cst. Thornley assumed the passengers might be deceased, so he decided to move Mr. McGrath away from the vehicle before he witnessed that. As they walked away, Cst. Thornley noticed a "whiff of liquor" emanating from Mr. McGrath and

asked him if he had been drinking, to which he said he had "a couple of beers earlier." Based on this information, Cst. Thornley formed reasonable grounds to suspect that Mr. McGrath had operated a motor vehicle with alcohol in his body. They continued to walk towards Cst. Thornley's police vehicle, while additional emergency services vehicles were arriving on scene. It took them about 20 seconds to walk from the overturned vehicle to the police vehicle. Upon arrival at the police vehicle, Cst. Thornley made the ASD demand pursuant to s. 320.27(1)(b) of the *Criminal Code*. The delay between the formation of Cst. Thornley's reasonable suspicion and making the ASD demand was two minutes and twenty seconds, as Cst. Thornley formed his suspicion at 4:27 am and the ASD demand was made at 4:29:20 a.m.

[9] The ASD demand was made while Mr. McGrath was standing beside the back door of the police vehicle. Immediately after reading the ASD demand from a pre-printed card, Cst. Thornley opened the back door and asked Mr. McGrath to sit down, which he did. The door remained open while Cst. Thornley retrieved the ASD from his vehicle. He then stood in front of Mr. McGrath, who remained seated, with his feet on the road, during the administration of the ASD test, which resulted in a "failure." At this point, a paramedic spoke with Mr. McGrath to determine whether he needed any medical attention. Mr. McGrath said he did not, and the paramedic was satisfied with his responses. Coincident with the test result of the ASD, Cst. Thornley learned that there had been a death in the accident.

[10] At 4:33 am Cst. Thornley arrested Mr. McGrath for impaired operation of a conveyance causing death and at 4:35 am read Mr. McGrath his *Charter* rights. When Cst. Thornley asked Mr. McGrath if he wished to speak to a lawyer, Mr. McGrath replied, "not right now." Cst. Thornley then read the police caution to him, which he said he understood. This was followed by a "Prosper warning", during which Cst. Thornley asked if he was waiving his right to consult with a lawyer. Mr. McGrath answered, "I would like to contact a lawyer at a reasonable time." Immediately following that, Cst. Thornley read a demand for Mr. McGrath to provide breath samples into an approved instrument. In the demand, he indicated that any samples were to be provided at the Pictou Detachment of the RCMP.

[11] Cst. Thornley handcuffed Mr. McGrath in the front seat. Mr. McGrath was very distraught, having learned during the arrest process that a passenger in his car was deceased. While searching Mr. McGrath, Cst. Thornley found an insulin

pump. Mr. McGrath said the pump had become disconnected from his body in the accident. Cst. Thornley requested that paramedics check on Mr. McGrath's condition. At 4:33 am two paramedics attended to Mr. McGrath and determined at 4:49 am that his blood sugar levels were double what they should be. Though Mr. McGrath was emotionally distraught, he was lucid and responsive. Mr. McGrath indicated that he had a diabetic needle in his bag in his vehicle, which was retrieved for him. It took Mr. McGrath several minutes to attach the insulin pump to his body**.** While Mr. McGrath was attaching the insulin pump, the paramedics advised Cst. Thornley that Mr. McGrath's medical condition was not life threatening, but if his blood sugar level got higher, he could get sick. Also, during this time, Cst. Thornley conferred with Cst. MacEwan at the roadside, during which time he turned off the audio portion of his body cam recorder. Cst. MacEwan reminded Cst. Thornley to caution Mr. McGrath for two counts of impaired operation of a conveyance causing death.

[12] At 4:59 am Cst. Thornley returned to Mr. McGrath and learned that he had successfully installed his insulin pump while under observation. The paramedics left the scene. Cst. Thornley then sat in the driver's seat of his vehicle and arrested Mr. McGrath for two counts of impaired operation of a conveyance causing death. He again read Mr. McGrath his *Charter* rights. When asked if he wanted to speak to a lawyer, Mr. McGrath answered, "I want a lawyer, I know my rights." Mr. McGrath said that repeatedly. This occurred at 5:02 am

[13] At 5:06 am Cst. Thornley left the scene with Mr. McGrath and travelled 25 kilometers directly to the Pictou Detachment of the RCMP, arriving at 5:27 am Mr. McGrath was escorted to the cell area, where the handcuffs were removed.

[14] At 5:30 am, Cst. Thornley asked Mr. McGrath if he wanted to speak to a particular lawyer or to Legal Aid. He said that he wanted to speak with Hector MacIsaac, a criminal lawyer known to the police. Cst. Thornley called Mr. MacIsaac's office, but there was no answer. He obtained a cell phone number for Mr. MacIsaac and called him at 5:38 am

[15] At 5:42 am Mr. McGrath spoke to Mr. MacIsaac. He was off the phone at 5:47 a.m. Cst. Thornley then started the 15-minute observation period, during which Mr. McGrath advised him that he was not going to provide breath samples. During the observation period, Cst. Spears, a breathalyzer technician, was preparing the Approved Instrument (in criminal parlance referred to as the

"Breathalyzer Machine"). When Mr. McGrath advised the officers that he was not going to take the test, Csts. Thornley and Spears advised him about the consequences of not providing breath samples. Mr. McGrath asked to speak to Mr. MacIsaac again. From 6:12 am to 6:15 am Mr. McGrath was on the phone with Mr. MacIsaac. At 6:15 am, Mr. McGrath advised, again, that he was not going to provide breath samples. Following that, Mr. McGrath was processed and held in custody until his release.

[16] Both Mr. McGrath and Cst. Thornley had working cell phones at the scene of the accident, and there was cell phone service.

[17] Cst. Thornley acknowledged that he could have afforded Mr. McGrath privacy at the scene in a police vehicle, while keeping him under observation. However, he had determined that he was going to travel to the RCMP Detachment with Mr. McGrath to permit him to consult with counsel there, and for the purpose of administering the breathalyser.

General Assessment of the Witnesses

[18] I will briefly comment on my general assessment of witnesses who testified in the blended *voir dire*. This general assessment will hopefully provide the necessary context for my factual findings and analysis while applying the appropriate standard of proof in the blended *voir dire.*

[19] As I assessed the demeanour of the witnesses, including Cst. Blake Thornley, mindful of the inherent dangers of this exercise, I found each witness sincere and honest in providing their respective evidence and each witness seemed to testify to the best of their abilities. In addition to their testimony, I have also considered the audio-video recordings which captured almost the entirety of the investigation. I found the audio-video evidence from Cst. Thornley's body cam, very helpful, for the reasons stated in *R. v. Nikolovski,* [1996] 3 S.C.R, 1197, by Cory J.:

> 21 The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.
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> …

> 25 … The powerful and probative record provided by the videotape should not be excluded when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by viva voce testimony.

[20] In the instant case, the parties agreed at the outset of the *voir dire* that the video accurately depicted the interaction between the investigating officers and Mr. McGrath. The audio-video recordings were of good quality and provided a clear picture of the officers' interaction with Mr. McGrath during the investigation.

Evidence of the Blended *Voir Dire*

[21] With the agreement of Counsel, the case commenced with a blended *voir dire.* The Crown called the following witnesses: Ms. Savonnah Smith and Cst. Blake Thornley. The Crown tendered the following exhibits:

- Exhibit VD 1: Section 655 of the *Criminal Code* Admissions
- Exhibit VD 2: Medical Examiner's Report (Nicholas Laffin)
- Exhibit VD 3: Medical Examiner's Report (Atlanta Bezanson)
- Exhibit VD 4: Security Video of Sherman Knight's Residence
- Exhibit VD 5: Accident Reconstruction Report
- Exhibit VD 6: Body Cam Recording worn by Cst. Thornley
- Exhibit VD 7: Video of Scene: Cst. Riley
- Exhibit VD 8: Body Cam Recording worn by Cst. Spears
- Exhibit VD 9: Test Report.

Summary of Witness Evidence

The Evidence of Savonnah Smith

[22] Ms. Savonnah Smith testified that she is 26 years old and is employed with Highland Community Residential Services, which provides supportive housing, programs and care for adults with intellectual disabilities or mental health challenges in Pictou County. She has been employed there for approximately five years.

[23] Ms. Smith met the accused, Terry McGrath, through her friends Nick Laffin and Atlanta Bezanson. Mr. McGrath was a friend of Mr. Laffin. Ms. Bezanson was her best friend.

[24] On June 9, 2023, Ms. Smith did not have much interaction with Mr. McGrath. She and Ms. Bezanson planned to go out to dinner with a group of friends. Mr. Laffin and Ms. Bezanson came to her residence in Stellarton, then Ms. Smith drove Mr. Laffin and Ms. Bezanson to the Thistle, a pub in New Glasgow. Other members of their dinner group met them there. Ms. Smith recalled having one drink of alcohol while at the Thistle during a period of one and a half to two hours. She drove back to her place with Mr. Laffin and Ms. Bezanson and others. Ms. Bezanson lived in an apartment with her boyfriend, who was working at the time in Alberta.

[25] After socializing at her place, Ms. Smith and her friends, including Mr. Laffin and Ms. Bezanson, went to the Rack, a bar in New Glasgow. Mr. Laffin's mother drove them. Mr. Laffin informed her that he called his friend (Terry McGrath) to come to the Rack. Ms. Smith was not sure of the exact time Mr. McGrath arrived, but said it was after last call. Ms. Smith did not recall how much alcohol she consumed at the Rack, but she estimated her state of sobriety on a scale of 10, being from sober to extremely drunk, at around a five or six. She said that she had her balance and speech and was aware of her surroundings. She had no difficulty recalling events. She said she had a "buzz on." She recalled Mr. McGrath talking to Mr. Laffin and saw him drinking a beer. He appeared to be sober. Mr. McGrath offered to drive people home, as his car was in the parking lot. She sat in the back seat beside Ms. Bezanson. Mr. Laffin sat in the front seat next to Mr. McGrath. She said that both Mr. Laffin and Ms. Bezanson were under the influence of alcohol. They were both much more talkative and outgoing.

[26] Ms. Smith described Mr. McGrath's vehicle as a SUV, tan in colour. She could not describe the make and model of the vehicle.

[27] Ms. Smith said that on the way home, Ms. Bezanson and Mr. Laffin indicated that they would go for a drive if they could stop and get some alcohol. Mr. McGrath replied that he would stop as long as he could have a couple of "swigs out of it". They stopped at a residence where Mr. Laffin entered and returned with two bottles of wine. Ms. Smith asked to be dropped off at her residence. She did not notice anything remarkable about Mr. McGrath's driving. Before she exited the vehicle, she and Ms. Bezanson expressed their love for each other. Ms. Smith recalled texting her boyfriend at 2:33 am when she arrived home.

[28] Ms. Smith testified that she first heard of the accident later that day. She was unsuccessful in contacting Ms. Bezanson, Mr. Laffin, and Mr. McGrath.

[29] On cross-examination, Ms. Smith confirmed that she only saw Mr. McGrath drinking a regular size beer. She did not see anyone drink the wine that was purchased. She also confirmed that she could not recall whether Mr. McGrath said that he wanted "a swig" or "a couple of swigs." She described Mr. McGrath as being sober, and his driving as normal, nothing dangerous or out of the ordinary.

The Evidence of Sherman Knight

[30] Mr. Knight testified that he is 61 years old and resides on Brookvale Road. At about 4:00 am in the morning on June 9, 2023, he was asleep on the couch when he heard a knock at his door. His German Shepherd dog became very distressed. There was a man at his door, who appeared to be under stress. He said his friends needed help. The man asked him to call 911 for an ambulance. The man remained outside while he called 911. He said the man did not appear to be physically injured, but was very distressed, and was hollering over the barking dog. He described the man as being in his early twenties. He could not provide a detailed description. He had never seen the man before. A security camera at Mr. Knight's house captured video and audio recordings of the man.

[31] Mr. Knight testified that the accident happened about two houses away from his house, across a bridge. He estimated that it would take five minutes to walk to the scene from his house. He saw emergency vehicles travelling to the scene. He started to walk over, but a firefighter told him to go home because there were things he did not want to see. Mr. Knight testified that an ambulance arrived within eight minutes closely followed by RCMP and Fire Department vehicles.

[32] Mr. Knight's surveillance recording was marked as Exhibit VD 4 and tendered without objection.

The Evidence of Constable Blake Thornley

[33] Cst. Thornley testified that he has been a member of the RCMP since 2018. He has been posted to Ottawa, at the National Child Exploitation Crime Centre, since June 2023. Prior to that he was posted to Pictou County.

[34] On June 9, 2023, Cst. Thornley was in uniform on general duty. At 4:09 am he was at the Stellarton Detachment when he received a dispatch call to respond to

an accident with injuries on Brookvale Road. He received updates on his way, including that other first responders were enroute, including fire trucks and ambulances. He arrived on scene at 4:25 am. He observed fire emergency vehicles, ambulances, and vehicles of volunteers on scene and arriving. He parked away from the scene on a dirt or gravel road to ensure access by emergency vehicles to the scene. There were other vehicles parked in front of his. As he exited his vehicle, he activated his body cam recorder and approached the overturned vehicle, which was on its side. He saw Mr. McGrath with a paramedic and observed a human appendage protruding from the vehicle. Cst. Thornley could not say how many paramedics were on scene but recalled that the paramedics were not doing CPR, which he took to mean there were fatalities. He noticed Mr. McGrath, who was near the overturned vehicle, visibly upset, asking if his friends were okay. Mr. McGrath was staring at the human appendage protruding from the vehicle. Cst. Thornley wanted to remove him from that situation. He approached Mr. McGrath and asked him his name. He stressed that Mr. McGrath appeared to be in shock as he stared at the overturned vehicle. To re-focus Mr. McGrath away from the vehicle, and to obtain information, Cst. Thornley asked him to come with him to the grass nearby. Mr. McGrath said he was driving the vehicle and lost control. Mr. McGrath provided his name and date of birth, and the names of his two friends who were passengers in the vehicle. Mr. McGrath was extremely distraught and asking if his friends were okay. He was fixated on the vehicle. Cst. Thornley asked him to move off to the side where an emergency vehicle was parked nearby, in order to obstruct Mr. McGrath's view of the accident scene. Cst. Thornley explained that he assumed that the passengers in the vehicle were dead, and he did not want Mr. McGrath fixated on the vehicle. He also wanted to speak to Mr. McGrath to get more information.

[35] Cst. Thornley detected a smell of liquor coming from Mr. McGrath, and asked him if he had been drinking, to which he answered that he had a couple of drinks, or words to that effect. Based on Mr. McGrath's admission that he was the driver, and the smell of liquor, Cst. Thornley formed the suspicion that Mr. McGrath was driving while impaired by alcohol. He then turned his mind to making an ASD demand. He asked for an ASD over the police radio, then realized he had one in his vehicle.

[36] At this point, Cst. Thornley testified, there were more emergency vehicles arriving on scene, so he decided to move McGrath to a safer location near his police vehicle. He asked Mr. McGrath to walk with him to his police vehicle, which he did.

[37] As soon as they arrived at the vehicle, at 4:29 am Cst. Thornley read the ASD demand from a card. Mr. McGrath confirmed that he understood what was read to him and agreed to provide a sample of his breath. Cst. Thornley opened the back door of the police car. He explained that people like to sit down, but he could not recall whether Mr. McGrath sat down in the vehicle.

[38] Mr. McGrath provided a suitable breath sample, which the device processed, registering a failure. At this point, Cst. Thornley heard over the police radio that there had been a fatality. At 4:33 am, he arrested Mr. McGrath for impaired operation causing death. He then read Mr. McGrath his Charter rights, reading from a card, and the police caution. After being informed of his right to speak to a lawyer, Mr. McGrath said that he "eventually" would. Cst. Thornley said he was unclear whether that response was a yes or no, so he decided to err of the side of caution and provided Mr. McGrath with a "Prosper warning." He explained that when he asked Mr. McGrath if he was waiving his right to speak to a lawyer, Mr. McGrath replied that he wanted to speak to a lawyer, which clarified the issue. At 4:39 am Cst. Thornley read the breath demand to Mr. McGrath from a card. Mr. McGrath said he understood.

[39] Cst. Thornley testified that Mr. McGrath was cooperative, but he placed handcuffs on him, on the front, for safety reasons. He then conducted a search incident to arrest for safety reasons before putting him in the police vehicle. During the search Cst. Thornley seized an insulin pump. Mr. McGrath explained that he was a diabetic and the pump was disconnected. Cst. Thornley immediately stopped what he was doing because he was concerned about Mr. McGrath's health. He contacted the paramedics to assess Mr. McGrath. The paramedics reported that Mr. McGrath's blood sugar level was very high, and that the insulin pump had to be re-connected. Mr. McGrath said that he could connect the insulin pump. After speaking with the paramedics, Cst. Thornley removed the handcuffs so that Mr. McGrath could connect his insulin pump. Mr. McGrath asked for an insulin bag that was in his vehicle, which Cst. Riley retrieved. The contents of the bag were used to assist Mr. McGrath in connecting the insulin pump.

[40] While connecting his insulin pump, Mr. McGrath became very distraught and began to make utterances about his friends' death. Cst. Thornley sought advice from Cst. MacEwan, who reminded him to caution Mr. McGrath for two counts of impaired operation of a conveyance causing death.

[41] At 4:59 am Cst. Thornley returned to Mr. McGrath and learned that he had successfully connected his insulin pump while under observation of the paramedics and Cst. Riley. The paramedics advised Cst. Thornley that Mr. McGrath was medically clear to go to the police station. Cst. Thornley then arrested Mr. McGrath for two counts of impaired operation of a conveyance causing death. He again read verbatim from the card, advising Mr. McGrath of his Charter rights, and providing the Police caution, as he had done earlier. Mr. McGrath indicated that he wanted to talk to a lawyer, so he did not repeat the Prosper warning.

[42] Cst. Thornley then put handcuffs on Mr. McGrath and put him in the back seat of the police vehicle. He drove Mr. McGrath to the Pictou RCMP Detachment because he believed that it was at the time the only Detachment able to conduct a breathalyzer test. They drove directly to the detachment, which Cst. Thornley estimated took about 20 minutes. They arrived at 5:27 am and he immediately escorted Mr. McGrath to a phone room, where he removed the handcuffs. He asked Mr. McGrath if he wanted to call a lawyer, to which Mr. McGrath said he wanted to speak to Hector MacIsaac, a local defence lawyer. Cst. Thornley left a voice message at Mr. MacIsaac's office. In the meantime, another officer obtained Mr. MacIsaac's cell phone number. At 5:38 am Cst. Thornley called Mr. MacIsaac's cell phone and explained the situation to him. Mr. MacIsaac agreed to speak to Mr. McGrath.

[43] At 5:43 am Mr. McGrath spoke to Mr. MacIsaac, and at 5:47 am, he was off the phone. Cst. Thornley said he provided Mr. MacIsaac an opportunity to speak to Mr. MacIsaac in private. He observed the call through a window. He could not hear the conversation. He estimated that the call lasted five minutes.

[44] After the call, Cst. Thornley started the 15-minute observation period in preparation for the breathalyzer test. The breath technician, Cst. Spears, prepared the breathalyzer machine. During this time Cst. Thornley ensured that Mr. McGrath did not consume anything or burp or regurgitate, to make sure that his airway was clear before providing a breath sample. Mr. McGrath advised him that he was going to "take the fifth" and refuse to provide a breath sample or to say anything. Cst. Thornley got the impression that Mr. McGrath was becoming more obstinate and became concerned that he did not understand the process. At the conclusion of the 15-minute observation period, Cst. Spears entered the room, and they took Mr. McGrath to the instrument room. At that point Mr. McGrath indicated that he would not provide a sample of his breath. Cst. Thornley explained to Mr. McGrath that refusal is a crime. Mr. McGrath indicated that he wanted to speak to Mr. MacIsaac again. At 6:10 am Cst. Thornley called Mr. MacIsaac and advised him that Mr.

McGrath wanted to speak to him in person. Mr. MacIsaac said that he was in Antigonish but would speak to Mr. McGrath. Cst. Thornley escorted Mr. McGrath to the phone room and permitted him speak privately with Mr. MacIsaac, at 6:12 am Cst. Thornley again observed the conversation through the window. He believed the conversation ended at 6:15 am. After Mr. McGrath hung up, Cst. Thornley entered the room and asked him if he was satisfied with the call. Mr. McGrath said he was. Cst. Thornley then started the 15-minute observation period during which Mr. McGrath said that he was "not saying nothing, not a word", or words to that effect at 6:19 am. Cst. Spears then spoke with Mr. McGrath in Cst. Thornley's presence, explaining the consequences of refusing the test. Cst. Thornley said he had earlier explained that to Mr. McGrath, that refusal was a charge. Cst. Spears explained what refusal is, and they confirmed with Mr. McGrath that he was not willing to do anything. At 6:20 am, after it was obvious that Mr. McGrath was not going to provide breath samples, Cst. Thornley arrested him for two counts of impaired operation of a conveyance causing death and refusal and again read his Charter rights.

[45] After that, Cst. Thornley photographed blood stains on Mr. McGrath's clothing, then turned off his camera, as he was finished dealing with Mr. McGrath. Cst. Thornley explained that he was involved in a pilot project with the body cam. He activated or turned it on when he arrived at the scene and only turned off the audio to have a private conversation with another officer, because it was not part of the investigation. Cst. Thornley explained that he was told this during his training for the pilot project, as it was set out in policy. He also advised that this policy has changed. The new policy is to keep the audio on during conversation with colleagues.

[46] The body cam was marked for identification purposes as Exhibit VD 6, and it was played in court. It is approximately two hours and one minute in length. Having reviewed Exhibit VD 6, Cst. Thornley said it was a fair and accurate representation of his arrival on scene, and of his interactions with Mr. McGrath. He also confirmed that Exhibit VD 6 had not been edited or changed.

[47] Cst. Thornley said he moved Mr. McGrath to the police vehicle in order to administer the ASD test, and to get him out of the roadway, as there were multiple emergency vehicles arriving on scene. At one point he can be heard warning Mr. McGrath to avoid something.

[48] Cst. Thornley was asked why, on arriving at his vehicle, he opened the back door and invited Mr. McGrath to sit down in the back seat with the door open. He answered, "so he would have a seat if he needed to." He added that he had to get the ASD ready and he had to read verbatim the ASD demand.

[49] Cst. Thornley confirmed that he had to retrieve the ASD from the front passenger seat while Mr. McGrath was seated in the rear seat, with his feet outside of the vehicle. He did not recall whether he summoned another officer to maintain continuity over Mr. McGrath while he retrieved the ASD.

[50] Cst. Thornley was asked "why he did not put Mr. McGrath on his personal cell phone in the back seat of his car to contact counsel." He answered, "my plan was to head to the detachment to put him in touch with a legal counsel there."

[51] On cross-examination, Cst. Thornley agreed that he was directing Mr. McGrath's movements very quickly after encountering him.

[52] After viewing the video (Exhibit VD 6), at 02:08 to 05:20 am, Cst. Thornley agreed that he detected what he described as "a whiff of alcohol" from Mr. McGrath. He then asked Mr. McGrath if he had anything to drink to which he said that he had couple of beer. This information formed his suspicion and provided him with the basis to make the ASD demand, which was formed at 05:05 on Exhibit VD 6.

[53] After viewing the video at 05:20 to 05:44 am, Cst. Thornley agreed he asked Cst. MacEwan if he had an ASD, and he had his card out to make the ASD demand at the time. He also agreed that at that time he could have read or made the ASD demand. He agreed that between 05:44 to 07:30 am he did not advise Mr. McGrath that he was a suspect in a drinking and driving offence, until he was going to make the demand.

[54] He also agreed that no vehicles passed them while they were walking to the police car from the side of the ambulance. When he arrived at the police vehicle with Mr. McGrath, he opened the back door and left it open while he made the ASD demand. After making the demand, and after Mr. McGrath said he would provide a sample, he told Mr. McGrath, "You just sit right there, hang tight." He agreed that he never asked Mr. McGrath if he wanted to sit down in the back of the police vehicle but directed him to do so. He also agreed that Mr. McGrath never asked him to sit in the back of the vehicle.

[55] Cst. Thornley agreed that at 07:35 am, Mr. McGrath was detained by the demand. He also agreed if Mr. McGrath were to get up out of the back seat of the vehicle and start to walk away, he would have stopped him because he was detained.

[56] At 07:35 to 08:45 am, Cst. Thornley agreed he went around the police vehicle to retrieve the ASD from the front passenger seat, and there were no police officers standing in front of Mr. McGrath at that time. He also agreed that had Mr. McGrath gotten out of the vehicle and began to walk away he would have gone after him because he was detained.

[57] At 08:45 to 10:17 am, when he administered the ASD test, Cst. Thornley stood in front of Mr. McGrath, who remained seated in the rear seat. He agreed that he could have administered the ASD test with Mr. McGrath standing outside, beside or behind the vehicle.

[58] Cst. Thornley agreed that up until he received the failure on the ASD, Mr. McGrath was a suspect in a potential criminal offence. He agreed that when Mr. McGrath learned that he failed the ASD, he did not provide him with the police caution at that point. Mr. McGrath started saying things like he "fucked up", when Cst. Thornley arrested him and read him his right to counsel, Mr. McGrath was uttering things such as, 'I understand I'm fucked", "are they okay I did a fucked-up thing," "I am sorry, I don't care what happens to me, if I need to spend the rest of my fucking life in jail". Cst. Thornley also agreed that as Mr. McGrath was saying those things, he did not stop him or caution him to stop talking until he read him the police caution. He added that earlier in their exchange, he told Mr. McGrath that he needed to read this out to him. Cst. Thornley explained that he had to read the whole card verbatim to Mr. McGrath, starting with the arrest, the right to counsel, and the police caution, which he eventually did.

[59] Cst. Thornley was referred to his preliminary inquiry evidence, where he indicated that he could have done a better job at providing the caution to Mr. McGrath, and could have cautioned him earlier in the process. He also agreed that up to the point where he cautioned Mr. McGrath, he had not told him that anything he said could be used against him.

[60] Cst. Thornley agreed that he did not advise Mr. McGrath that he was wearing a cam recorder, with audio and video, and that everything he said and did could be recorded. He also agreed that he was trained to tell the person that they are being recorded. He said he forgot to do so in this case.

[61] Cst. Thornley confirmed that when he advised Mr. McGrath of his right to counsel, he first answered “eventually”, and then the second time he said, “not right now”. He agreed that when Mr. McGrath was giving those answers he was not saying no to counsel. He was not sure when Mr. McGrath wanted to talk to counsel, so he gave him a Prosper warning. When he gave him the Prosper warning and asked him whether he wished to waive his right to counsel, he said no. Cst. Thornley agreed that he told Mr. McGrath that he had a right to a reasonable opportunity to contact a lawyer, and he said that he would like to contact a lawyer at a reasonable time. He also agreed that it was clear in his mind that Mr. McGrath wanted to talk to a lawyer.

[62] Cst. Thornley agreed that he knew that once Mr. McGrath asserted his right to counsel, he was obligated to implement it immediately. He also agreed that “immediately” can include at the roadside. It was suggested to Cst. Thornley that he did not turn his mind to having Mr. McGrath call a lawyer at the roadside. He said that he was focused on making sure that Mr. McGrath spoke to a lawyer at the detachment. He agreed that at the preliminary inquiry he stated that he was going to take Mr. McGrath to the police detachment before he would speak to a lawyer, and that this was a practice at the time. He acknowledged that is what he was going to do before the insulin issue arose. At the 15:30 minute mark of Exhibit VD 6, when Mr. McGrath said he wanted to speak to a lawyer in a reasonable time, he agreed that it was his intention to take Mr. McGrath to the police detachment to speak to a lawyer.

[63] At the roadside when Mr. McGrath asserted his right to speak to a lawyer, Cst. Thornley said that he had a cell phone in his possession that was functioning, and he confirmed that Mr. McGrath also had a cell phone in his possession, but he could not confirm that it was functioning. After reviewing Exhibit VD 6, at 15:30 to 18:21 he agreed that Mr. McGrath’s cell phone screen appeared to be on, as it displayed the time of 4:41am. He also agreed that there was cell phone service at the roadside (the scene).

[64] Cst. Thornley confirmed that when Mr. McGrath said that he wanted to call a lawyer at a reasonable time, he did not ask him at that point if he had a lawyer in mind. The first time he asked Mr. McGrath that question was at the police detachment. He also confirmed that at no point did he tell Mr. McGrath that he could call a lawyer from the roadside.

[65] Cst. Thornley agreed that he could have afforded Mr. McGrath privacy at the roadside to call a lawyer, and that he could have closed the car door and watched through the window while Mr. McGrath spoke to a lawyer.

[66] Cst. Thornley also agreed that part of his thought process at the time was to take Mr. McGrath to the police detachment because he had to get breath readings quickly. He agreed that time was a factor, as he had two hours to get the breath samples from Mr. McGrath. It was his understanding at the time that if the breath sample readings were not obtained within two hours, the results might not be admissible as evidence.

[67] Cst. Thornley was asked whether, in his experience, early legal advice would be important to a person arrested for impaired operation of a conveyance causing death. He replied that in general he believed that legal advice at the most opportune time is important. It was suggested to Cst. Thornley that it was his understanding at the time that getting a person an opportunity to talk to a lawyer should take place immediately if that is reasonable, to which he replied, "as soon as practicable, yes."

[68] Cst. Thornley agreed that up to the point when he discovered the insulin pump, he had been with Mr. McGrath for approximately 20 minutes, and that Mr. McGrath was coherent during that time, although he was upset; he understood what was going on and was cooperative. There were no indications of physical injury to Mr. McGrath. Only when he said his insulin pump was disconnected did Cst. Thornley seek medical assistance, because Mr. McGrath had Type 1 diabetes and he thought that would be a problem. He agreed that Mr. McGrath said he was fine when asked by the paramedics. He also agreed that at no time did he ask a paramedic if it would be safe for Mr. McGrath to call a lawyer at the roadside. The paramedics indicated that if Mr. McGrath's blood sugar level rose higher, he could get sick, but that it was not a life and death situation. His understanding was that once the insulin pump was re-connected, Mr. McGrath would be fine.

[69] After speaking to Cst. McGrath (off audio), Cst. Thornley entered the vehicle, re-arrested Mr. McGrath on two counts of impaired operation of a conveyance causing death and read him his right to counsel. He agreed that Mr. McGrath insisted on contacting a lawyer, as he did earlier during their interaction. He agreed that at this point, at the roadside, he could have allowed Mr. McGrath to call a lawyer, and that there was no longer any concern about a medical issue.

[70] Cst. Thornley drove Mr. McGrath to the Pictou Detachment, which was about a 20-minute drive. He explained that he did not take Mr. McGrath to either the New

Glasgow or Stellarton Detachments because they were busy, though both those Detachments were closer to the scene than Pictou.

[71] Cst. Thornley agreed it was approximately one hour after Mr. McGrath indicated that he wanted to speak to a lawyer that he asked Mr. McGrath whether he wanted a particular lawyer, and he indicated Hector MacIsaac. He agreed that after Mr. McGrath spoke to Mr. MacIsaac, he indicated that he would not say anything without a lawyer present. Cst. Thornley told him that refusing was the same thing as blowing over. Cst. Spears told Mr. McGrath that there were limited defences available to refusal. Cst. Thornley disagreed with the suggestion that he was giving legal advice. Cst. Thornley agreed that Mr. McGrath appeared confused and wanted to speak to Mr. MacIsaac again. Cst. Thornley spoke to Mr. MacIsaac and learned that he was in Antigonish. He did not recall Mr. MacIsaac saying that he could not come to Pictou. Cst. Thornley was asked why he did not ask Mr. McGrath if he wanted to contact another lawyer that could come to Pictou, to which he said that he did not ask him because Mr. MacGrath said he was satisfied with the call with Mr. MacIsaac.

[72] Cst. Thornley was asked on redirect what he was trying to communicate to Mr. MacGrath when he said to him that a refusal carries the same weight as blowing over, to which he said he was trying to communicate that refusing was a charge and that it is similar to blowing over.

[73] After a brief discussion about the confusion of a response from the witness, the court permitted counsel to clarify the answer with the witness. Cst. Thornley re-entered the witness box, and Defence counsel re-questioned him about what he understood Mr. McGrath meant when he said that he wanted to speak to a lawyer in a reasonable time. He answered that he understood that Mr. McGrath wanted to speak to a lawyer, and that a reasonable time to Cst. Thornley was when they get back at the police detachment. The Crown elected not to ask any further questions.

The Evidence of Constable Daphine Mirkovic-Riley

[74] Cst. Mirkovic-Riley testified that she has been employed as a RCMP officer for approximately six years. At approximately 4:09 am, on June 10, 2023, she responded to a complaint involving a single motor vehicle accident, a rollover, on Brookville Road. She arrived on scene and found a tan SUV on its driver's side, with emergency vehicles and Cst. Thornley present. She saw Cst. Thornley speaking to Mr. McGrath. Paramedics informed her that it was a fatality situation involving two

victims. She called her supervisor, and a collision analyst. She parked her vehicle in the roadway to block the road. EHS gave her a cell phone that they found on the ground. In addition to the phone, she seized a backpack with diabetic needles from the paramedics. Upon learning that it was required, she took it to where other paramedics were located with Mr. McGrath; looked up the identities of the two victims; told the homeowner of 1861 Brookville Road to return home; took a video of the scene; contacted the Medical Examiner; and took photographs. She took a video of the scene at dawn, when it became daylight. It showed the tire marks in the roadway, on the gravel. She took the video to assist the collision analyst, and to secure evidence. Though the road was closed to the public, she observed emergency vehicles on scene, they were travelling along the road, and along the roadway.

[75] On cross-examination Cst. Mirkovic-Riley confirmed that while she was at the scene, she used her cell phone to call an accident reconstructionist and the Medical Examiner Office, in the vicinity of Cst. Thornley's vehicle. She had cell phone service when she used her phone.

The Evidence of Constable Justin MacEwan

[76] Cst. MacEwan testified that he has been a member of the RCMP since November 2018. He was working night shift, in the New Glasgow area on June 9, 2023, when he received a call from dispatch of a motor vehicle accident. He proceeded to the accident scene and observed emergency vehicles on scene. On arrival, he observed the scene and learned from the paramedics of a fatality. He also recalled talking to Cst. Thornley about a second death. Cst. Thornley turned off his cam recording during their conversation. He did not recall the details of the conversation.

The Evidence of Constable Chad Spears

[77] Cst. Spears testified that he has been a member of the RCMP for ten years and was on duty and working on June 9, 2023. In the early morning hours of June 10, 2023, he was dispatched to assist in an investigation in his capacity as a qualified breath technician. He attended the Pictou Detachment. He put his uniform on at the Detachment. He was wearing a body cam as part of a pilot project. There was a policy in relation to when and where they should be turned on and off. He recalled that there were circumstances when the officer could exercise their discretion to mute the audio of the cam recording, for instance when speaking with another officer. He said that policy has since been amended.

[78] Cst. Spears described what they did at the detachment in preparation for administration of the approved instrument. When Cst. Thornley arrived with Mr. McGrath, he and Cst. Thornley escorted Mr. McGrath from the bay area into the detachment, at 5:30 am. Cst. Thornley informed him that Mr. McGrath vomited in the police car. Cst. Thornley asked Mr. McGrath if there was a specific lawyer that he wanted to speak to, to which he replied Hector MacIsaac. Mr. McGrath was then escorted into the phone room so that he could speak to Mr. MacIsaac. He recalled that Cst. Thornley called Mr. MacIsaac's office and left a message. At around that time, Cst. Morrison arrived and provided Mr. MacIsaac's cell phone number. Cst. Thornley then called Mr. MacIsaac and facilitated contact between Mr. MacIsaac and Mr. McGrath.

[79] Cst. Spears said that while Mr. McGrath was on the phone with the lawyer, he waited outside the room. After Mr. McGrath completed his telephone call with the lawyer, Cst. Thornley started the 15-minute observation period, while Cst. Spears prepared to administer the breath test. After the 15-minute observation period, Mr. McGrath advised him that he was not going to provide a sample, and that he was not going to do anything without his lawyer present. He and Cst. Thornley explained the charge consequences of refusing to provide a sample. Mr. McGrath "stuck" with his position. He took Mr. McGrath into the tech room and sat him beside the approved instrument. Mr. McGrath repeated that he was not going to do or say anything without his lawyer being present. At one point, Mr. McGrath indicated that he was not satisfied with his initial call with his lawyer and wanted to speak to him again. Cst. Spears facilitated this. After Mr. McGrath spoke to Mr. MacIsaac, Cst. Thornley started the observation period again, and he started to prepare the approved instrument.

[80] At 6:19 am Cst. Spears spoke to Mr. McGrath to see whether he was going to provide breath samples. Mr. McGrath said that he was not going to provide a sample or say anything and put his head down on the table. He asked Mr. McGrath again if he was going to provide a sample, and he did not get any response. Cst. Spears then reported what happened to Cst. Thornley, and Mr. McGrath was arrested for refusal.

[81] On cross-examination, Cst. Spears agreed that the sequence of events shown at 05:48 am to 06:42 am of Exhibit VD 8 occurred after Mr. McGrath had spoken to Mr. MacIsaac for approximately five to six minutes. Cst. Spears agreed that he did not do anything in response to Mr. McGrath's comment that he was not doing anything without his lawyer present. He agreed that Mr. McGrath appeared confused.

[82] Cst. Spears agreed that Cst. Thornley told Mr. McGrath that refusing is the exact same as blowing over and then was asked whether he agreed. He said they were equivalent charges. Cst. Spears agreed that he told Mr. McGrath that there were limited defences to the charge of refusal. He agreed that though it could appear that he was giving legal advice, that was not his intention.

[83] Cst. Spears confirmed that Mr. McGrath was provided a second opportunity to speak to Mr. MacIsaac, which he did. He also agreed that at around that time he and Cst. Thornley turned off their audio to talk but could not recall what they talked about.

Issue 1: Was the ASD demand made in accordance with s. 320.27(1)(b)

[84] This issue concerns the interpretation of the immediacy requirement in s. 320.27 (1)(b) of the Criminal Code in the context of the circumstances of this case. Section 320.27(1)(b) states, in part:

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that person has, within the preceding three hours, operated a conveyance the peace officer may, by demand, require the person …
>
> > (b) to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose.

[85] The immediacy requirement arising from this provision has both an implicit component and an explicit component. It is "implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample 'forthwith'" (R. v. Woods, 2005 SCC 42, at para. 14).

[86] Section 327.27(1)(b) requires detainees (drivers) upon whom ASD demands are made to comply "immediately - and not later, at a time of their choosing, when they have decided to stop refusing" (Woods at para. 45). This explicit statutory immediacy requirement also obliges the police to conduct themselves in a way that makes immediate compliance by the detainee possible. Among other things, the police must have an ASD immediately available when they make the demand, and they must give the detainee an immediate opportunity to blow into the device, subject to the inherent "operational time" requirements of the ASD test and any delays caused by "unusual circumstances" (R. v. Breault, 2023 SCC 9, at paras. 32, 61-68).

[87] Section 320.27 also has been interpreted as having a second implicit immediacy requirement, under which the police must make an ASD demand as soon as they form "the reasonable suspicion that the driver has alcohol in his or her body" (R. v. Pierman, [1994] O.J. No. 1821, Ont. C.A., at para. 5). The existence of this second implied immediacy requirement is linked to the implied limit on s. 10(b) Charter rights that has been read into the ASD demand power and found to be a reasonable limit under s. 1: see, e.g., Thomsen. As Arbour J.A. (as she then was) explained in Pierman, at para. 5:

> This is the only interpretation which is consistent with the judicial acceptance of an infringement on the right to counsel provided for in s. 10(*b*) of the *Charter*. If the police had discretion to wait before making the demand, the suspect would be detained and therefore entitled to consult a lawyer.

[88] Though the immediacy requirement is usually discussed in respect to the right to counsel guaranteed by s. 10(b) of the Charter, other constitutional rights may also be engaged by this requirement, including ss. 8 and 9 (Breault at para. 50).

[89] As Fish J. observed in Woods:

> 44 The "forthwith" requirement in s. 254(2) appears to me, however, to connote a prompt demand by the peace officer, and an immediate response by the … person to whom that demand is addressed. To accept as compliance "forthwith" the furnishing of a breath sample more than an hour after being arrested *for having failed to comply* is in my view a semantic stretch beyond literal bounds and constitutional limits.

[90] In *R. v. McCorriston*, 2024 SKCA 5, the Court recognized the immediacy requirement as foundational to the constitutional validity of the roadside screening regime:

> [16] Whenever a court is called upon to consider whether an ASD demand has been made immediately, it is important to remember that the requirement for immediacy is bound up by legal implications because it serves to preserve the constitutionality of a demand under s. 320.27(1)(b) by striking a balance between the public interest in eradicating driver impairment and the need to safeguard drivers' ss. 8, 9 and 10(b) *Charter* rights: *R v Breault* at paras 6 and 50. At root, the constitutional validity of an ASD demand made under s. 320.27(1)(b) requires that both the demand and the provision of a breath sample be made *immediately*, i.e., forthwith or without delay: *R v Breault* at para. 2; and *R v Woods* at paras 13-14 and 44. If the demand was not made immediately, then the driver will have been unlawfully detained at roadside. If the driver did not immediately provide a breath sample in response to a lawful demand, then the driver will have committed the

> offence under s. 320.15(1) of the *Criminal Code*. The decision in *R v Breault* affirms that, when determining whether an ASD demand was lawful, courts must have regard for the specific circumstances in which it was made.

[91] In *R. v. Wright,* 2025 SKCA 52, the Saskatchewan Court of Appeal observed:

> [133] While *Breault* rejected the line of jurisprudence which had held that the term "immediately" in s. 320.27(1) and 320.27(2) could be read as meaning "time reasonably necessary" to enable a police officer to discharge their duty under those provisions (at para 51), it did not go so far as to equate "immediately" with "instantaneously". As Caldwell J.A. observed in *McCorriston*, despite the immediacy requirement in roadside screening, allowances are still properly made to account for the operational requirement of the ASD, for delays directly tied to circumstances that may affect the reliability of the result, and for situations of urgency relating to officer or public safety:
>
> > [19] Based on the Supreme Court's jurisprudence, the starting point for that analysis is the "operational time component", which is implicit in the immediacy requirement (*R v Breault* at para 32; and *R v Bernshaw* at para 64). This requires courts to make allowance for the time during which a peace officer would ready the ASD and instruct the driver about what to do. That period does not count as delay.
> >
> > [20] Next, the Supreme Court acknowledged in *R v Breault* that the requirement that a "proper analysis" be made "opens the door to delays caused by *unusual circumstances related to the use of the [ASD] or the reliability of the result*" (at para 57, emphasis added; see also *R v Wood* and *R v Bernshaw*). The Court in *R v Breault* further recognised that there may be "unusual circumstances *other than those directly related to the use of the ASD or the reliability of the result* that will be generated" (emphasis added). In the latter regard, the Court specifically mentioned the consideration of "urgency in ensuring the safety of the public or of peace officers" (at para 58). While the Supreme Court left the legal effect of that and other considerations to trial courts to determine, it ruled out the possibility of "budgetary considerations", "considerations of practical efficiency" and the specific circumstance of the "absence of an ASD at the scene" as constituting unusual circumstances justifying a flexible interpretation of the word *immediately* in s. 320.27(1)(b) (at paras 59 and 60).
>
> (Emphasis in original)

[92] As noted in *Wright*, the Ontario Court of Appeal in *R. v. Quansah*, 2012 ONCA 123, at para. 47, interpreted the express and implied immediacy requirements of what was then s. 254(2) as permitting delays that were “reasonably necessary” in the circumstances “to enable the officer to discharge his or her duty”. However,

in *Breault*, at para. 51, the Supreme Court of Canada held that "the approach adopted by the Ontario Court of Appeal in *Quansah* needs to be qualified", concluding that the "reasonably necessary" standard in *Quansah* "broadened the immediacy requirement unduly". In *Breault*, Côté J, writing for the Court, stated:

> [51] … "Forthwith" is not synonymous with "time reasonably necessary"; this word must be given an interpretation consistent with its ordinary meaning, except in the unusual circumstances referred to by Fish J. at para. 43 of *Woods*.

[93] Justice Côté added that greater flexibility will be necessary in "unusual circumstances", stressing that it is neither necessary nor desirable to identify in the abstract in an exhaustive manner, the circumstances that may be characterized as unusual and may justify a flexible interpretation of the immediacy requirement. It is preferable for those circumstances to be identified on a case-by-case basis in light of each matter (at para. 54). Importantly, Justice Côté provided the following guidelines to assist courts in this inquiry. She wrote:

> [55] First, the burden of establishing the existence of unusual circumstances rests on the Crown.
>
> [56] Second, as in *Bernshaw*, the unusual circumstances must be identified in light of the text of the provision (*Piazza*, at para. 81 (CanLII)). This preserves the provision's constitutional integrity by ensuring that courts do not unduly extend the ordinary meaning strictly given to the word "forthwith".
>
> [57] Like the provision at issue in *Bernshaw*, s. 254(2)(b) *Cr. C.* specifies that the sample collected must enable a "proper analysis" to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result.
>
> [58] That being said, courts might recognize unusual circumstances other than those directly related to the use of the ASD or the reliability of the result that will be generated. For example, insofar as the primary purpose of the impaired driving detection procedure is to ensure everyone's safety, circumstances involving urgency in ensuring the safety of the public or of peace officers might be recognized.
>
> [59] Third, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency. A flexible interpretation of the immediacy requirement cannot be justified by the magnitude of the public funding required to supply police forces with ASDs or by the time needed to train officers to use them. There is nothing unusual about such utilitarian considerations. Allocating a limited budget is the daily reality of any government (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 153)

> [60] Fourth, the absence of an ASD at the scene at the time the demand is made is not *in itself* an unusual circumstance.
>
> (Emphasis in original)

[94] Justice Cote recognized that "operational time" is implicit in the word "forthwith" because the officer must ready the equipment and instruct the detainee on what to do (*Breault*, at para. 32).

[95] As Justice Dawe noted in *R. v. Khandakar*, 2024 ONCA 620:

> [42] I would also note that *Breault* was specifically concerned with the question of whether the explicit statutory immediacy requirement gives the police time to have an ASD brought to the scene after they make a breath demand (the court held that it does not). However, *Breault* does not squarely address whether the interpretation of "immediacy" the court adopted in relation to the explicit requirement also applies to the implicit requirement that the police must make ASD demands immediately after they form the required grounds.

[96] In this case, the Applicant (Mr. McGrath) argues that Cst. Thornley breached his ss. 8, 9 and 10(b) *Charter* rights by failing to make an "immediate" demand for breath samples at the roadside once he suspected that Mr. McGrath had alcohol in his body and had been operating a conveyance. Specifically, the Applicant submits that the delay between the formulation of suspicion and the making of the ASD demand, which was two minutes and 20 seconds, was not "immediate" and therefore not in compliance with s. 327. (1)(b).

[97] The Respondent Crown argues that in the context of the "unusual circumstances" of this case, Cst. Thornley's actions of taking Mr. McGrath to the police vehicle to make the ASD demand and administer the ASD was reasonable. The Respondent asserts "that this unusual situation is such that a gap of approximately 2 minutes and 20 seconds between the formulation of suspicion and the providing of the ASD demand is not unreasonable nor unusual in the circumstances and does, indeed, meet the immediacy requirement as set out in section 320.27."

Immediacy Requirement Under s. 320.27(1)

[98] As the decision in *Breault* affirms, when determining whether an ASD demand was lawful, courts must have regard for the specific circumstances in which it was made. In other words, context is important. In my view, the delay of two minutes and 20 seconds to make the ASD demand in the context of the specific

circumstances of this case was reasonably justified for safety reasons. I accept Cst. Thornley's evidence that he moved Mr. McGrath from the roadside, where he had formulated reasonable suspicion to his police vehicle, where he promptly made the ASD demand, because it was a safer location. I find that because of the dynamic conditions at the roadside, Cst. Thornley's decision to take Mr. McGrath to a safer place away from the moving emergency vehicles travelling on the road was reasonably justified in the circumstances.

[99] While it appears from viewing Exhibit VD 6 (the body cam video) that no vehicles passed them as they walked from the ambulance to the police vehicle, there was, however, a point in time, just prior to the start of their walk, when Cst. Thornley had cautioned Mr. McGrath to watch out for a vehicle as they were standing near the roadway, where emergency vehicles were operating.

[100] As Csts. Thornley and Mirkovic-Riley described in their testimony, there were several emergency vehicles at the scene, in the dark of the early morning hours. As shown on Cst. Thornley's body cam recorder (Exhibit VD 6), emergency vehicles, including fire trucks, ambulances and other vehicles were on scene when he first arrived. He parked away from the accident scene on a gravel road to provide other emergency vehicles access to the accident scene. The evidence clearly establishes that the scene of the accident was a dynamic situation with several emergency vehicles travelling to the location of the overturned vehicle, including fire trucks, Emergency Health Services vehicles and police vehicles. Cst. Thornley described it as a scene of carnage, as there were human appendages protruding from the windows of the overturned vehicle located on a road in the dark early morning hours. Mr. McGrath was near the overturned vehicle. He was emotionally distraught and fixated on the vehicle, repeatedly asking the first responders if his friends were okay. Cst. Thornley assumed that the passengers in the vehicle were dead and he did not want Mr. McGrath fixated on the vehicle, so he decided to move him away from the accident scene to a place where he could talk to him.

[101] As depicted on Cst. Thornley's body cam recorder (Exhibit VD 6), the walk from the roadside, where emergency vehicles were operating, to the police vehicle, took two minutes and 20 seconds. Once at the police vehicle, Cst. Thornley promptly made the ASD demand and then administered the ASD test.

[102] Given the specific circumstances of this case which involved a measure of urgency in ensuring the safety of both Mr. McGrath and Cst. Thornley, the brief delay of two minutes and 20 seconds between forming reasonable suspicion and

making the ASD demand was reasonably justified and necessary. Put differently, there were exigent circumstances at the scene. Cst. Thornley was dealing with an emotionally distraught driver who was fixated on the overturned vehicle, concerned about his friends inside the vehicle, in the context of a scene of carnage, with human appendages protruding from the windows of the overturned vehicle on a road in the dark early morning hours, with emergency vehicles and personnel moving around the scene. In these circumstances, moving Mr. McGrath and himself to a safer location to read the ASD demand arose from exigent circumstances of necessity or emergency in the context of ensuring the safety of Mr. McGrath and the officer. The delay was thus in compliance with s. 320. 27(1), which requires the ASD demand to be made "immediately" after the officer forms the requisite grounds to make the demand.

[103] As Caldwell J.A. observed in *McCorriston*, despite the immediacy requirement in roadside screening, allowances are still properly made to account for the operational requirement of the ASD, for delays directly tied to circumstances that may affect the reliability of the result and for situations of urgency relating to officer or public safety (at para. 20).

[104] I find that in the context of these specific circumstances Cst. Thornley "immediately" made the ASD demand as he is required to do upon forming the requisite grounds. In reaching this conclusion, I am mindful that while *Breault* rejected the line of authority which had held that the term "immediately" in s. 320.27(1) and 320.27(2) could be read as meaning "time reasonably necessary" to enable a police officer to discharge their duty under those provisions (*Breault*, at para 51), the Court did not go so far as to equate "immediately" with "instantaneously". As the Alberta Court of Appeal said in *R. v. Nelson*, 2010 ABCA 349, "immediately does not mean instantaneously; practical considerations still play a role" (at para. 17).

[105] Having reached that conclusion, the next issue to address is whether Mr. McGrath's s. 9 *Charter* right was breached when the arresting officer detained him in the back of the police vehicle.

Issue 2: Was Mr. McGrath's s. 9 *Charter* right to be free from arbitrary detention breached when the arresting officer detained him in the back of the police vehicle while administering the ASD test.

Governing Principles

[106] A detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint (*R. v. Grant*, 2009 SCC 32, at para. 44). As stated in *R. v. Suberu*, 2009 SCC 33:

> [21] In *Grant*, we adopted a purposive approach to the definition of "detention" and held that a "detention" for the purposes of the *Charter* refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state. The recognition that detention can manifest in both physical and psychological form is consistent with our acceptance that police actions short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the *Charter.*

[107] As stated in *Suberu,* while a detention is clearly indicated by the existence of physical restraint or a legal obligation to comply with a police demand, a detention can also be found when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether to cooperate with the police. As discussed more fully in *Grant*, this is an objective determination, made in light of the circumstances of the encounter as a whole (at para. 22). This latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the *Charter*, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. It does not mean that a detention necessarily arises the moment the police engage an individual for investigative purposes. In *R. v. Mann*, 2004 SCC 52, Iacobucci J., writing for the majority, explained:

> 19. Detention has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

[108] In *Grant*, at para. 44, McLachlin C.J. and Charron J., writing for the Court summarize the law as follows:

> 1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request

or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

   (a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

   (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

   (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[109] In this case, the Applicant Mr. McGrath argues that Cst. Thornley breached his s. 9 *Charter* rights when he directed him to sit in the back of the police vehicle while conducting the ASD test. Specifically, he submits that Cst. Thornley arbitrarily detained him because it was not *reasonably necessary* to secure him in the police vehicle in the circumstances. He further submits that at the point that this arbitrary detention occurred he was merely a suspect in a potential criminal offence. The Applicant says that Cst. Thornley saw nothing in Mr. McGrath's behaviour that suggested that he presented any kind of danger to the police, the paramedics, or other people on scene. Thus, he says, the breath test could have easily been conducted without putting him in the police vehicle.

[110] The Applicant cites several decisions, including *R. v. Aucoin*, 2012 SCC 66; *R. v. Cole,* 2017 ONCJ 83; *R. v. Wilczewski*, 2023 ONSC 3820; and *R. v. Sign,* 2015 ONCJ 643, for the general proposition that if there were less intrusive means for the police to continue with their investigation, other than asking the driver to leave their vehicle, that were reasonably available in the circumstances, then the police actions cannot be said to be reasonably necessary and a breach of s. 9 of the *Charter* may have occurred.

[111] However, in the unique circumstances of the case at bar, I find it was reasonable for Cst. Thornley to have Mr. McGrath, who was emotionally distraught, sit in the back seat of the police vehicle, uncuffed with the door open and his feet on the road while he retrieved, prepared, and administered the ASD test. This did not fundamentally alter the nature of Mr. McGrath's ongoing detention, which crystalized when Cst. Thornley formulated the requisite grounds to make the ASD demand under s. 320.27(1)(b). This is not a situation where the officer's decision led to increased restrictions on Mr. McGrath's liberty interest, and therefore, in my view, did not alter the nature and extent of Mr. McGrath's detention in a dramatic way, which is often the case when the police place a motorist in the rear of their police vehicle having lawfully stopped them for a regulatory infractions, as in the *Aucoin* case. As Moldaver J. observed in *Aucoin*, "a different factual matrix may well have supported a finding of reasonable necessity." The case at bar, in my view, is one of those rare and exceptional cases, as I find that Cst. Thornley's reasons for placing Mr. McGrath in the back seat of the police car were reasonably responsive and tailored to the specific circumstances, being intended to provide a measure of comfort to an emotionally distraught suspect in a very serious investigation involving fatalities. I find that based on the totality of the circumstances, Cst. Thornley's actions were reasonably necessary in the circumstances of this case because of the unusual circumstances that justifies a flexible interpretation of the word "immediately" in s. 320.27(2). Let me explain.

[112] In the cases cited above, the police were *not* dealing with an emotionally distraught driver who had been involved in a serious motor vehicle accident, resulting in a human appendage protruding from the window of his overturned vehicle. The condition of Mr. McGrath's passengers (his friends) was unknown to him, and understandably he was visibly distraught. Indeed, Cst. Thornley said that Mr. McGrath appeared to be in "shock". Cst. Thornley's police vehicle was parked a short distance away from the accident scene and could presumably provide some light in the darkness of the early morning hours. It is within this context that the nature and extent of the detention must be examined in determining whether Mr. McGrath was *arbitrarily* detained when he sat in the back of the police vehicle with the door open with his feet on the ground. Moreover, it is worthy of note that Mr. McGrath was not subjected to a search before he was asked to sit in the vehicle, nor was he handcuffed, and he was left alone when the officer went to the front of the vehicle to retrieve and prepare the ASD. Additionally, this case does not arise from a roadside or random stop, or from a motor vehicle infraction, where the driver was removed from their vehicle and placed in the back seat of the police vehicle. Rather, it arises from tragic circumstances wherein a compassionate police officer guided a

very emotionally distraught individual to sit in the police vehicle with the door open for the purposes of providing some comfort.

[113] While there is no specific evidence from Cst. Thornley that it was "reasonably necessary" to justify placing Mr. McGrath in the back seat of the police vehicle with the door open, with his feet on the ground, such as for safety reasons, it can be reasonably inferred from the evidence that Mr. McGrath was simply placed in the vehicle to wait for the officer to retrieve, prepare, and conduct the ASD test. This was nothing more than a kind gesture offered to comfort a very distraught, emotionally charged young man, who was involved in a very serious motor vehicle accident, and was worried about the well-being of his friends who were inside his overturned vehicle. Nothing more, nothing less. Mr. McGrath simply sat in the seat with the door open with his feet on the ground, while Cst. Thornley retrieved and conducted the ASD test. For these reasons, I find that the nature and extent of the detention, coupled with Cst. Thornley's intention to provide some comfort to an emotionally distraught suspect of an investigation involving a fatality, was reasonable response to the circumstances. The circumstances of this case are much different than in the cases where the issue of "reasonably necessary" has arisen, such as in *Aucoin* and in *Cole.*

[114] In *Aucoin*, the driver was stopped for a motor vehicle infraction, and while speaking with him the officer detected a smell of alcohol on his breath. Because it was dark outside and the lighting was poor, the officer chose to sit in the front seat of the police vehicle to write out the ticket. There were a lot of people milling around and the officer was concerned that the driver might walk away and disappear if he were allowed to remain outside the police vehicle. Accordingly, the officer decided to secure the driver in the rear of the police vehicle while completing his paperwork. As a prelude to placing the driver in the rear of the police cruiser, the officer sought and received permission from the driver to do a pat down search for safety reasons. During the search the officers seized illicit substances.

[115] Moldaver J., writing for the majority, noted that the driver's detention was for the driving infractions. The basis for the detention was not investigatory, as that term is used in *Mann.* It was grounded in the officer's belief that the driver had violated two provisions of the *Motor Vehicle Act*. Justice Moldaver wrote:

> [34] The problem in this case arises from the shift in the nature and extent of the appellant's detention - and the asserted need to do a pat-down search as a prelude to it - that flowed from Constable Burke's decision to secure the appellant in the rear of his cruiser while he wrote up the ticket for the motor vehicle infractions.

That decision carried with it increased restrictions on the appellant's liberty interests, and the added feature of an intrusion into his privacy interests. Those factors, in my view, altered the nature and extent of the appellant's detention in a fairly dramatic way - especially when one considers that the infractions for which he was being detained consisted of two relatively minor motor vehicle infractions.

[35] To be clear, I do not see this case as turning on whether Constable Burke had the *authority* to detain the appellant in the rear of his police cruiser, having lawfully stopped him for a regulatory infraction. Rather, the question is whether he was justified in *exercising* it as he did in the circumstances of this case.

[36] he existence of a general common law power to detain where it is reasonably necessary in the totality of the circumstances was settled in *R. v. Clayton*, 2007 SCC32, [2007] 2 S.C.R. 725. That case moved our jurisprudence from debating the existence of such a power to considering whether its exercise was reasonably necessary in the circumstances of a particular case. As Abella J., for the majority, observed:

> The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

[37] That brings me to what I consider to be the flaw in the trial judge's analysis in this case. Given the adverse impact that the decision to secure the appellant in the rear of the cruiser would have on his liberty and privacy interests, I am of the view that a more stringent test than the one applied by the trial judge was required to support her determination that Constable Burke's actions were lawful in the circumstances.

[38] Constable Burke knew that as a prelude to securing the appellant in the rear of his cruiser, he was going to do a pat-down search on him for reasons of officer safety and the appellant's safety. His reason for wanting to secure the appellant was to prevent the appellant from walking away and disappearing into the crowd. The trial judge accepted the officer's evidence in that regard. It was late at night, the street was crowded with people, and the appellant's vehicle was off-limits to him.

[39] Accepting, as the trial judge did, that Constable Burke was concerned about the appellant walking away, I am nonetheless of the view that in the context of this case, in order to justify securing the appellant in the back seat - knowing that this would also entail a pat-down search - detaining the appellant in that manner had to be reasonably necessary. In other words, the question to be asked is whether there

> were other reasonable means by which Constable Burke could have addressed his concern about the appellant disappearing into the crowd, short of doing what he did. If there were other reasonable means to ensure the appellant would not flee the scene, then detaining him in the police cruiser could not be said to be reasonably necessary and would thus have constituted an unlawful detention within the meaning of s. 9 of the *Charter*: *Clayton*, at para. 20.

[116] Justice Moldaver also recognized that it will be the rare case in which it will be reasonably necessary to secure a motorist in the rear of a police vehicle. But where reasonable necessity exists, no further balancing is required (at para. 44).

[117] Similarly, in *Cole,* after stopping a motorist for a driving infraction, the officer detected a smell of alcohol on the driver's breath which gave him the basis to make an ASD demand. Although the driver had done nothing threatening, the officer subjected him to a pat down search and secured him in the back of the police vehicle before administering the ASD. Although the Court in *Cole* acknowledged that the search was a non-intrusive and brief pat down search over the clothing where nothing was found or seized, it recognized that "any unjustified search will have a negative impact on an individual's privacy and dignity" (at para. 42).

[118] I conclude that the detention is this case was not arbitrary. As such, there was no violation of s. 9.

[119] The next claim by the applicant is that the police breached his s. 10(b) *Charter* rights by failing to facilitate an opportunity to contact counsel while he was at the roadside.

Issue 3: Was Mr. McGrath's s. 10(b) *Charter right* breached when the arresting officer did not afford him the opportunity to consult with counsel in a timely manner.

Section 10(B): implementation – Reasonable Opportunity

[120] Section 10(b) of the *Charter* provides:

> Everyone has the right on arrest or detention
>
> …
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

Governing Principles

[121] In *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43:

> 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. ... For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.

[122] As a result, s. 10(b) of the *Charter* imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First the police must give the detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and second, the police must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity. The second duty includes a bar on the police from compelling the detainee to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until the person has had a reasonable opportunity to exercise the right to counsel (*R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12).

[123] In *R. v. Dussault*, 2022 SCC 16, the Court reaffirmed that "the purpose of s. 10(b) of the *Charter* is to provide the detainee with an opportunity to obtain legal advice relevant to their legal situation" (para. 45). In doing so, the Court adopted Doherty J.A.'s description of the right to counsel, in *R. v. Rover,* 2018 ONCA 745, wherein he wrote:

> [45] The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

[124] In *R. v. Lafrance*, 2022 SCC 32, the Court explained that this purpose must be tied to a broader objective of mitigating the power imbalance between a detainee and the state (para. 37).

[125] In *R. v. Bartle*, [1989] 3 S.C.R. 173, Lamer C.J. summarized the three duties that s. 10(b) of the *Charter* imposes on the police:

> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[126] The purpose of these three duties is to protect any person whose detention puts them in a situation of vulnerability relative to the state (*Brunelle,* at para. 81). As explained in *Brunelle*, while under the control of the police, the detainee suffers a deprivation of liberty and is at risk of involuntary self-discrimination (para. 81). This duty is triggered upon detention, and the second and third duties arise only if the detainee indicates a desire to exercise their right to counsel (para. 82). Whereas in this case, the police are under an obligation to facilitate access to counsel at the first reasonably available opportunity and to refrain from eliciting evidence from the detainee until that time (para. 82).

[127] The central issue in this case is whether Cst. Thornley provided Mr. McGrath a reasonable opportunity to exercise his right to speak to a lawyer without delay.

Implementational obligation: Right to Speak to Counsel Without Delay

[128] The police must inform the detainee of the right to speak to counsel "without delay" – interpreted as "immediately" – and provide the detainee with a reasonable opportunity to exercise that right without delay (*Suberu*, at paras. 38-42). In some circumstances, however, there will be a justified delay in providing a detainee with access to counsel. Those circumstances will often arise from concerns over police safety, public safety, or the preservation of evidence (*R. v. Keshavarz*, 2022 ONCA 312, at para. 60). In *Rover,* Doherty J.A. wrote:

> [26] The s. 10(*b*) jurisprudence has, however, always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those circumstances often relate to police safety, public safety or the preservation of evidence. For example, in *R. v. Strachan*, [1988] 2 S.C.R. 980, [1988] S.C.J. No. 94, the court accepted that the police could delay providing access to counsel in order to properly gain control of the scene of the arrest and search for restricted weapons known to be at the scene. Subsequent cases have accepted that specific circumstances relating to the execution of search warrants can also justify delaying access to counsel until the warrant is executed: see, *e.g.*, *R. v. Learning*, [2010] O.J. No. 3092, 2010 ONSC 3816, 258 C.C.C (3d) 68 (S.C.J.), at paras. 71-75.

[129] In *R. v. Taylor*, 2014 SCC 50, the Supreme Court of Canada held that when an accused advises the police that he wishes to exercise his right to counsel, the police have both a duty to provide telephone access as soon as practicable and to refrain from eliciting evidence from the individual before access to counsel has been facilitated (at para 28). When there is a delay, the Crown must provide evidence to justify why the delay was reasonable in the circumstances. The inquiry is factual and highly contextual, which requires a finding of fact on whether a reasonable opportunity occurred at the scene of the arrest. The Court confirmed that the obligation to facilitate counsel arises immediately when the detainee expressed their desire to speak to counsel. In other words, if the police are able to implement the right immediately, then that is what they must do. Importantly, the police must turn to their minds to whether facilitating access to counsel is feasible when the detainee requests to speak to counsel. As stated in *Taylor*:

> [35] The result of the officers' failure to even turn their minds that night to the obligation to provide this access, meant that there was virtually no evidence about whether a private phone call would have been possible, and therefore no basis for assessing the reasonableness of the failure to facilitate access. In fact, this is a case not so much about delay in facilitating access, but about its complete denial. It is difficult to see how this ongoing failure can be characterized as reasonable. Mr. Taylor's s. 10(*b*) rights were clearly violated. With respect, the trial judge erred in concluding otherwise.

[130] In *Taylor*, the Supreme Court of Canada was clear that the requirement to facilitate access to counsel arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under an obligation to facilitate the requested access to a lawyer at the first reasonable opportunity. The burden is on the Crown to show that the circumstances were such that the delay in the implementation of the right to counsel was reasonable. Barriers to access or exceptional circumstances that justify suspending the exercise of the right to counsel cannot be assumed; they must be proved (*R. v. Brunelle* at para. 83). As a general rule, the police may not assume in advance that it will be impracticable for them to facilitate access to counsel. On the contrary, they must be mindful of the particular circumstances of the detention and take proactive steps to turn the right to counsel into access to counsel (*Taylor* at para. 33). This is the case because the detainee's ability to exercise their right depends entirely on the police (*Brunelle* at para. 95). However, the fact that a police officer assumes in advance that it will be reasonable to delay the implementation of the right to counsel, without regard to the circumstances of the detention, will not in itself entail an infringement of this right. After all, the central question remains whether the delay was reasonable having

regard to all the circumstances, whether those circumstances were considered by the police or not (*Brunelle* at para. 96). As stated in *Brunelle*, "the fact that the police assume the delay will be reasonable will make it much more difficult for the Crown to show that it was in fact reasonable" (at para. 96). The Court referred to the circumstances in *Taylor* to illustrate this principle:

> [97] ... In that case, this Court had to determine whether the failure of two police officers to facilitate Mr. Taylor's access to counsel during the 20 to 30 minutes between his admission to hospital and the time a first set of blood samples was taken was an infringement of his right to retain and instruct counsel without delay. Both officers had completely forgotten about their duty to ensure that Mr. Taylor could exercise his right at the first reasonably available opportunity. Far from concluding that the oversight was in itself an infringement of s. 10(b) of the *Charter*, this Court focused instead on how the oversight affected the determination of the reasonableness of the failure:
>
> > The result of the officers' failure to even turn their minds that night to the obligation to provide this access, meant that there was virtually no evidence about whether a private phone call would have been possible, and therefore no basis for assessing the reasonableness of the failure to facilitate access. [para. 35]
>
> [98] Yet one officer had testified that because of the hospital setting Mr. Taylor was in, there was "absolutely no way" that he could have contacted counsel in a confidential manner (para. 30). However, the Court gave little weight to her testimony, for the following reason:
>
> > ... this retrospective imputation of impracticability is of limited relevance given her acknowledgement that she was only there to track the blood samples and whether such access was possible was not part of her duties there. As a result, she too made no inquiries of the hospital staff. [para. 30]
>
> [99] Since there was no evidence justifying the failure, this Court came to the conclusion that Mr. Taylor's right to counsel under s. 10(b) of the *Charter* had been infringed before the first set of blood samples was taken (para. 37).

[131] In *Brunelle* the Court explained that the fact that the police postponed the exercise of a detainee's right to retain and instruct counsel without delay until the detainee has been taken to the police station, without first considering the particular circumstances of the arrest, does not in itself entail an infringement of the right guaranteed by s. 10(b) of the *Charter*. The central question remains whether the delay in facilitating access to counsel (in *Taylor*, it was a failure to facilitate such access (para. 35)) was reasonable in the circumstances. This is a question of fact that must be decided on the basis of the evidence in the record (paras. 24 and 32-33)

[132] As Justice Di Luca observed in *R. v. Wu*, 2017 ONSC 1003, there is no closed list of scenarios where a delay or suspension of the right to counsel is justified. Di Luca J provided a helpful summary of guiding principles that provide a framework for the assessment:

> 78. …
>
> a. The suspension of the right to counsel is an exceptional step that should only be undertaken in cases where urgent and dangerous circumstances arise or where there are concerns for officer or public safety. Effectively, the right to counsel should not be suspended unless exigent circumstances exist…
>
> b. There is no closed list of scenarios where a delay or suspension of the right to counsel is justified. However, the following general categories emerge from the case law:
>
> i. Cases where there are safety concerns for the police…
>
> ii. Cases where there are safety concerns for the public …
>
> iii. Cases where there safety concerns for the accused …
>
> iv. Cases where there are medical concerns…
>
> v. Cases where there is a risk of destruction of evidence and/or an impact on an ongoing investigation …
>
> vi. Cases where practical considerations such as lack of privacy, the need for an interpreter or an arrest at a location that has no telephone access justify some period of delay …
>
> c. The right to counsel cannot be suspended simply on the basis that a search warrant is pending …
>
> d. A general or bald assertion of "officer safety" or "destruction of evidence" concerns will not justify a suspension of the right to counsel …
>
> e. Police officers considering whether circumstances justify suspending the right to counsel must conduct a case by case assessment aided by their training and experience. A policy or practice routinely or categorically permitting the suspension of the right to counsel in certain types of investigations is inappropriate.
>
> f. The suspension of the right must be only for so long as is reasonably necessary… In this regard, the police should be vigilant to ensure that once the decision has been made to suspend the right to counsel, steps are taken to review the matter on a continual basis. The suspension is not meant to be permanent or convenient. The police must still comply with the implementational component as soon as circumstances reasonably

> permit. A decision to suspend rights that is initially justifiable may no longer be justified if the police subsequently fail to take adequate steps to ensure that the suspension is as limited as is required in the circumstances.
>
> g. The longer the delay, the greater the need for justification. The right to counsel must be given "without delay." The case law addressing the length of time the right to counsel has been suspended has examined periods of time as short as several minutes up to an extreme example of a suspension of the right to counsel for a period of approximately 26 hours… In the latter case, the police were executing a warrant to seize multiple firearms from a known violent family and the target of the search was known to be part of a criminal organization that was willing to confront and shoot police.
>
> h. The suspension of the right to counsel must be communicated to the detainee…

[133] Whether the delay in providing a detainee the opportunity to speak to counsel was reasonable having regard to all the circumstances will often turn on the specific circumstances of the case, including the arresting officer's explanation for the delay. Thus, this often requires the Crown to have the arresting officer articulate their reasons for delaying the detainee's right to speak to a lawyer in order for the court to assess whether the delay was reasonable in the circumstances.

Positions of the Parties

Crown's Position

[134] The Crown acknowledges that it has the burden to prove that the circumstances in this case were such that the delay in the implementation of the right to counsel was reasonable. In this case, the Crown submits that the first reasonable opportunity for Mr. McGrath to exercise his right to counsel in private was when he was at the Detachment, where contact information was available for potential contacts. Additionally, the Crown argues that despite a cell phone being available at the accident scene, it was reasonable in the circumstances that Mr. McGrath was taken to a nearby police detachment where it would be much safer, more practical and more private, an alternative that existed only minutes from the location.

[135] The Crown submits that the urgency of Mr. McGrath's medical condition required immediate attention and that, when it had been addressed, Cst. Thornley immediately took him to the Detachment, where Cst. Thornley promptly facilitated Mr. McGrath's private consultation with counsel. Thus, the Crown asserts that the

delay in implementing Mr. McGrath's right to counsel was as long as reasonably necessary in the circumstances and consistent with facilitating access to counsel in a private setting.

[136] In summary, the Crown submits that any delay associated with exercising Mr. McGrath's right to counsel and with transporting him to the Pictou Detachment was a result of Mr. McGrath's emotional state and of his medical situation. For these reasons, the Crown says that Mr. McGrath's right to counsel was not breached and therefore there has been no breach of his *Charter* rights.

Defence's Position

[137] The Defence submits that Mr. McGrath's right to counsel was breached after he asserted his right to speak to counsel at the roadside at approximately 4:37 am. The Defence argues that there was plenty of opportunity for Cst. Thornley to allow Mr. McGrath to speak with counsel at the roadside, all the while affording him privacy, as he was in possession of a cell phone and there was service at the location. The Defence further submits that Mr. McGrath's medical condition was not urgent enough to justify delaying his opportunity to speak to a lawyer. Moreover, the Defence says that Cst. Thornley had no intention of implementing the right to counsel at the roadside, notwithstanding his obligation to turn his mind to take proactive steps to provide Mr. McGrath the opportunity to speak to counsel.

[138] The Defence submits that Cst. Thornley never turned his mind to his obligation to take proactive steps, and therefore the Crown cannot discharge its burden of proving that the circumstances in this case were such that the delay in the implementation of the right to counsel was reasonable. Therefore, Mr. McGrath's constitutional right to consult with counsel was violated.

Analysis and Findings

[139] In this case, based on the evidence adduced in the *voir dire*, there is no evidence that Cst. Thornley turned his mind to whether it was possible to provide Mr. McGrath an opportunity to have a private phone call to speak to counsel at the roadside, and therefore no basis for assessing the reasonableness of the failure to facilitate access. In reaching this conclusion, I am mindful that Cst. Thornley acknowledged that he never turned his mind to the possibility of Mr. McGrath calling a lawyer at the roadside because he had decided to take him to the police detachment in Pictou, in accordance with his practice at the time.

[140] The evidence adduced in the *voir dire* regarding this issue is in paras. 50, 62, 63, 64, 68, 65, 66, 67, 68, 69, 70, and 71, as noted above.

[141] In my view notwithstanding Cst. Thornley's plan to take Mr. McGrath to the Detachment, the delay between the time when Mr. McGrath said he wanted to speak to counsel (at 4:39 am) and when it was determined (at 4:59 am) by the paramedics that Mr. McGrath was medically stable, was justified because it was necessary to treat his medical condition. I disagree with the Defence assertion that the circumstances involving Mr. McGrath at the roadside did not constitute a medical emergency of such proportions that communications between Mr. McGrath and his lawyer was not reasonably possible.

[142] However, after it was determined that Mr. McGrath's medical condition was stable and it was safe for him to proceed to the detachment, Cst. Thornley failed to take adequate steps to ensure that the suspension was as limited as was required in the circumstances. Indeed, he failed to turn his mind to the issue, as it was his practice to attend the Detachment. Therefore, there was a delay from about 4:59 am when Cst. Thornley could have provided Mr. McGrath with the opportunity to call a lawyer from the roadside, until around 5:27 am when Mr. McGrath was provided with the opportunity to call a lawyer at the Detachment. Thus, there was a delay of approximately 28 minutes in providing Mr. McGrath with an opportunity to call a lawyer.

[143] The result of Cst. Thornley's failure to turn his mind to the obligation to provide Mr. McGrath an opportunity to speak to a lawyer at the roadside at around 4:59 am is that there is no basis for assessing the reasonableness of the failure to facilitate access.

[144] It is difficult to see how this failure can be characterized as reasonable, and therefore, Mr. McGrath's s. 10 (b) rights were violated by the failure of the officer to take *any* steps to facilitate Mr. McGrath's requested access to counsel at the roadside.

[145] Having concluded that there was a breach of Mr. McGrath's right to counsel under s. 10(b) prior to his refusal to comply with the breath sample demand, the remaining issue is whether to exclude the impugned evidence under s. 24(2) of the *Charter*, which will be addressed later in these reasons.

Issue 4: Undermining the Right to Counsel

[146] The Defence additionally submits that Csts. Thornley and Spears both provided legal advice to Mr. McGrath at the Detachment, and that advice was wrong. Thus, Mr. McGrath's right to counsel was undermined, which had a direct impact on the admissibility of his statements to the effect that he was refusing to provide breath samples.

[147] As stated in *R. v. Burlingham*, [1995] 2 S.C.R. 206, it makes no sense for s. 10(b) of the *Charter* to provide for the right to retain and instruct counsel if the police are able to undermine either a detainee's confidence in his or her lawyer or the solicitor-client relationship.

Defence's Position

[148] The Applicant (Defence) cites *R. v. Dussault,* 2022 SCC 16, where the Supreme Court of Canada explained the circumstances that would give rise to a finding of derogation of counsel:

> [45] Simply put, the purpose of s.10(b) is to provide the detainee with an opportunity to obtain legal advice relevant to their legal situation. As noted earlier, the legal advice is intended to ensure that "the detainee's decision to cooperate with the investigation or decline to do so is free and informed". The legal advice received by a detainee can fulfill this function only if the detainee regards it as legally correct and trustworthy. The purpose of s. 10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it. Police conduct of this sort is properly said to "undermine" the legal advice that the detainee has received. If there are objectively observable indicators that the legal advice provided to a detainee has been undermined, the right to a second consultation arises. By contrast, the right to reconsult will not be triggered by legitimate police tactics that persuade a detainee to cooperate without undermining the advice that they have received. As *Sinclair* makes clear, police tactics such as "revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him" do not trigger the right to a second consultation with counsel: para. 60.

[149] The Defence submits that even unintentional conduct on the part of the police that derogates from or undermines counsel or the advice that counsel provides, constitutes a breach of s. 10(b). In this case, the Defence says, while Csts. Thornley and Spears did not set out to undermine Mr. McGrath's right to counsel, their actions left Mr. McGrath in a state of uncertainty.

[150] As stated *Dussault,* the *Sinclair* analysis does not distinguish between intentional and unintentional undermining of legal advice. The focus is on the effects of the police conduct. Where the police conduct has the effect of undermining the legal advice given to a detainee, and where it is objectively observable that this has occurred, the right to a second consultation arises. There is no need to prove that the police conduct was intended to have this effect (para. 41).

[151] The Defence submits that though Mr. McGrath was permitted to speak to counsel (Mr. MacIsaac) a second time, the actions of the police from the point that Mr. McGrath was detained to the point where he refused to provide breath samples could only have left him in a state of uncertainty regarding whether to cooperate with the police investigations.

[152] The Defence further highlights the dangers of undermining the right to counsel as referred to in *Dussault*, wherein the Court stated:

> [43] The case law also demonstrates that police conduct can unintentionally undermine the legal advice provided to a detainee… It is for this reason that the Court of Appeal for Ontario was correct to warn that "police tread on dangerous ground when they comment on the legal advice tendered to detainees"…The ground sometimes gives way, and the prohibited effect occurs, even where the intention to achieve it was absent.

[153] The Defence submits that Csts. Thornley and Spears were treading on dangerous ground when they openly questioned the advice that Mr. McGrath received from his counsel. The Defence cites *R v Azonwanna*, 2020 ONSC 5416:

> [44] Nor is there any principled reason to think that police conduct must amount to the "belittling" of defence counsel in order to "undermine" legal advice in the *Sinclair* sense of that term. Recall that *Sinclair* described the "undermin[ing]" of legal advice as being conduct which "may have the effect of distorting or nullifying [that advice]"… Conduct other than the express belittlement of defence counsel may have this effect … see, e.g., *R. v. Azonwanna*, 2020 ONSC 5416, 468 C.R.R. (2d) 258, at paras. 122 and 148-9, in which police undermined the legal advice that a detainee had received by providing a misleading and incorrect summary of his right to silence. There would be no point, however, in trying to catalogue the various types of police conduct that could have the effect of "undermin[ing]" legal advice in this context. The focus remains on the objectively observable *effects* of the police conduct, rather than on the conduct itself.

[154] The Defence submits that after Mr. McGrath finished his second consultation with counsel, Cst. Thornley continued to provide him with legal advice regarding the refusal to provide breath samples that was not correct in law.

[155] In essence, the Defence submits that undermining the right to counsel can lead to confusion on the part of an accused person as to whether to cooperate with the police investigation. In this case, the effect of the police conduct would impact the provision of breath samples. Such confusion goes directly to the reliability of the evidence pertaining to the refusal. In other words, where the right to counsel is undermined, the reliability of Mr. McGrath's response may be in doubt.

Crown's Position

[156] The Respondent (Crown) submits that the officers were merely trying to inform Mr. McGrath of the consequences of refusing to comply with the breath sample demand and did not in any way undermine his confidence in his lawyer's advice or the solicitor-client relationship. Indeed, the officers provided Mr. McGrath with a second opportunity to speak to his lawyer before they concluded that he was refusing to provide a sample of his breath for the purposes of administrating the breathalyzer test.

Analysis / Findings

[157] Having considered the entirety of the circumstances, including reviewing Exhibit VD 6 (the body cam video), I find that Csts. Thornley and Spears acted properly in their interaction with Mr. McGrath at the Detachment. They both struck me as professionally conscientious officers who were trying to do their best to impress upon Mr. McGrath the consequences of refusing to provide a breath sample. There is nothing in their interaction with Mr. McGrath that could be characterized as conduct undermining the legal advice he received from counsel. Nor did they say anything that could be construed as questioning the advice that Mr. McGrath received from counsel.

[158] In assessing whether Cst. Thornley has properly facilitated access to counsel, the police should not be held to a standard of perfection.

[159] In my view, Cst. Thornley simply tried to impress upon Mr. McGrath the consequences of refusing to take the breathalyzer test by emphasizing that refusing was tantamount or equivalent in seriousness to blowing over. As Cst. Thornley stressed in his evidence, his intention was never to provide legal advice, but only to

explain the consequences of refusing to provide breath samples, which is and of itself an offence. After the officers attempted to explain the consequences of refusing, including Cst. Spears's comment that there are "very limited defences to refusal especially when you are straight out saying 'I am not going to blow'." After this exchange, Mr. McGrath asked to speak to counsel again. The officers immediately provided Mr. McGrath with a second opportunity consult counsel, which he took.

[160] After Mr. McGrath spoke to counsel, he confirmed that he was satisfied with his call and remained steadfast in his responses that he did not want to do anything or say anything.

[161] It can be reasonably inferred from reviewing Exhibit VD 6 (body cam video) that Mr. McGrath had no intention of complying with the breath demand. His unwavering position was consistent throughout his interaction with the officers, which was that he had no intention to take the breathalyzer test. He repeatedly protested taking the breathalyzer test, saying things such as, they may as well put him in cells, because he was not going to say anything or do anything, and he was not going to participate unless a lawyer was present.

[162] It should be noted that when Mr. McGrath said he was unsure what to do, and wanted to speak to his lawyer again, the officers immediately facilitated a second opportunity for him speak to counsel. This is not a situation where Mr. McGrath was denied a second opportunity to speak to counsel.

[163] I find that Mr. McGrath was clear, concise and adamant that he was not going to take the breathalyser test after he consulted with counsel for a second time. He did not appear to be confused when he returned from his second consultation. Again, his position remained the same; he did not want to say or do anything, which is constructive refusal as that term is defined in the authorities.

[164] For all these reasons, I am not satisfied that Mr. McGrath's right to counsel was undermined by conduct of the officers that derogated from his confidence in the legal advice he received. Therefore, I am not satisfied that Mr. McGrath's right to counsel was breached.

Issue 5: Section 24 (2) of the *Charter*

[165] Having concluded that Mr. McGrath's 10(b) *Charter Rights* have been breached, due to the delay in providing his right to counsel, the final issue is whether the evidence should be excluded under s. 24(2) of the *Charter.*

[166] To determine whether the impugned evidence should be excluded in accordance with s. 24(2), I will undertake the analysis outlined by the majority in *R. v. Grant,* 2009 SCC 32. The Supreme Court developed a revised framework for determining whether evidence obtained in breach of *Charter* rights must be excluded under s. 24(2). The revised framework was intended to be more flexible than the prior approach utilized in *R. v. Collins,* [1987] 1 S.C.R. 265, and *R. v. Stillman,* [1997] 1 S.C.R. 607. The majority identified three criteria (avenues of inquiry) to guide courts in the delicate balancing exercise mandated by s. 24(2):

(a) the seriousness of the *Charter*-infringing state conduct;

(b) the impact of the breach on the *Charter*-protected interests of the accused; and

(c) society's interest in the adjudication of the case on its merits.

[167] In *R. v. McGuffie*, 2016 ONCA 365, Justice Doherty observed that the first two inquiries work in tandem, in the sense that both pull toward the exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the *Charter* protected interest, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interest in an adjudication on the merits, pulls in the opposite direction, toward admission of the evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case (para. 62). In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward exclusion. Justice Doherty noted that if the first and second inquiries make a strong case for exclusion, the third will seldom, if ever, tip the balance in favour of admissibility. Similarly, if both of the first two inquiries provide weaker support for exclusion, the third will almost certainly confirm its admissibility (para. 63).

[168] As Dickson J.A. stated in *R. v. Fan*, 2017 BCCA 99, multiple breaches may evidence a pattern of disregard for *Charter* rights which support exclusion of evidence, but they do not necessarily do so. No particular number of breaches signals a pattern and requires the exclusion of evidence under s. 24(2). Rather, a s. 24(2) analysis requires, a close examination of the nature and quality of each breach that is established, individually and cumulatively, and application of the *Grant* framework (para. 78).

[169] The majority in *R. v. Harrison*, [2009] 2 S.C.R. 494, observed, at para. 36:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[170] The *Grant* analysis is not meant to be about punishing the police or deterring them from misconduct, rather it is about looking forward to prevent further harm to the repute of the administration of justice (paras. 68-70, 73).

[171] There are a number of general propositions contained in paragraphs 67-71 of *Grant* that are very important in the consideration of the issues in the present case, and thus, it might be appropriate at this juncture to summarize them. They include:

1. The purpose of s. 24(2) is to maintain the good repute of the administration of justice which embraces the notion of maintaining the rule of law and upholding *Charter Rights* in the system as a whole;

2. The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining public confidence in and for the effectiveness of the justice system. The inquiry is objective;

3. The focus of s. 24(2) is both long-term and prospective. Section 24(2) seeks to ensure that the impugned evidence does not do further damage to the repute of the justice system;

4. The focus of s. 24(2) is societal. It is not aimed at punishing the police or providing compensation to the accused, but rather at systematic concerns. Its focus is on the broad impact of admission of the evidence on the long term repute of the justice system;

5. The three avenues of inquiry are each rooted in the public interests engaged by s. 24(2), viewed in a long-term forward looking, and societal perspective;

6. The court must assess and balance the effect of admitting the impugned evidence on society's confidence in the justice system having regard to

(1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits;

7. The court must balance the assessments under each of these three lines of inquiry to determine whether, on the totality of the circumstances, the admission would bring the administration of justice into disrepute; and

8. While the categories of consideration set out in *Collins*, are no longer applied, the factors relevant to the s. 24(2) determination enunciated in *Collins*, and subsequent cases are captured in the new framework of analysis.

[172] After describing the new framework of analysis, the majority in *Grant* then set out to clarify the criteria for consideration of *all the circumstances* in determining whether the admission of illegally obtained evidence would bring the administration of justice into disrepute.

[173] As stated, the majority in *Grant* identified three criteria (avenues of inquiry) to guide courts in the delicate balancing exercise mandated s. 24(2), namely (a) the seriousness of the *Charter* infringing state conduct; (b) the impact of the breach on the *Charter* protected interests of the accused; and (c) society's interest in the adjudication of the case on its merits.

(a) *Seriousness of the Charter- infringing state conduct*

[174] In considering the seriousness of the *Charter*-infringing conduct, the Court must consider whether admitting the evidence would send the message that the Court condones the state misconduct by allowing the prosecution to benefit from the fruit of the misconduct. At this stage, the Court must consider the nature of the police conduct that led to the *Charter* violation and the subsequent discovery of evidence. The Court must ask itself whether the police engaged in misconduct from which the Court should disassociate itself. This will be a case where the departure from *Charter* standards was major in degree or where the police knew (or should have known) that their conduct was not *Charter*-compliant (*Harrison,* at para. 22).

[175] In *Grant,* McLachlin C.J.C. and Charron J. for the majority explained that the evaluation of the seriousness or gravity of the offending state conduct focuses upon the level of fault of the breaching officers in the circumstances. In *R. v. Tim*, 2022

SCC 12, at para. 82, Jamal J. explained that there is a spectrum or scale of police misconduct. The more serious the offending conduct, the more pressing the need for the court to disassociate itself from the fruits of that conduct. Thus, it is recognized that state conduct resulting in *Charter* violations varies in seriousness. As expressed by the majority in *Grant*:

> [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.

[176] The majority stated that, while extenuating circumstances or good faith could attenuate seriousness of the misconduct or reduce the need for the court to dissociate itself, ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith.

[177] In *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), Doherty J.A., suggested an approach to characterize police conduct for purposes of considering this factor under s. 24(2), which was approved and endorsed by the Supreme Court of Canada in *Harrison*. Justice Doherty stated:

> [41] Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights... What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.

[178] As a threshold matter, the accused must establish that the evidence was *obtained in a manner* that infringed the *Charter.* In other words, the evidence obtained must have some connection to the *Charter* breach. The threshold is easily passed by the defence in this case. The Supreme Court of Canada said in *R. v. Black,* [1989] 2 S.C.R. 138, that the phrase 'obtained in a manner' "should not be interpreted to impose a strict causal nexus between the *Charter* breach and the evidence sought to be excluded" (para. 47). However, the Court has also held that "derivative evidence, obtained as a direct result of a statement or other indication made by the accused, is the only type of real evidence that may be said to be causally connected to violations of the right to counsel in these situations" (*R. v. Strachan,* [1988] 2 S.C.R. 980, at para 43). The same is equally true of statements made in violation of the right to silence.

[179] As stated, the more serious the state conduct, the greater the need for courts to disassociate themselves from it to preserve public confidence in the justice system. Where it is impossible to determine whether an act took place in good faith or not, the first factor is effectively neutral, and the remaining factors become more essential to the analysis.

[180] The Crown submits that if there is a breach, then the Court should find that the police conduct is on the "lower end of the spectrum" as the delay in facilitating the exercise of right to counsel was eminently reasonable in the circumstances and not as a result of wilful disregard, or ignorance of Mr. McGrath's *Charter* rights. The Crown further submits that exclusion when taken in the larger context of the entire situation that unfolded in the early morning hours of June 10, 2023, is "neutral in these circumstances."

[181] In contrast, the Defence describes Cst. Thornley's conduct as serious, arguing that his conduct fell far below acceptable standards and, he exhibited a fundamental misunderstanding of the implementation aspect of the right to counsel.

[182] The Defence asserts that Mr. McGrath needed legal advice at the roadside. He had been made aware that at least one of his friends and passengers was dead. Cst. Thornley knew that Mr. McGrath was distraught and was making statements and utterances that were contrary to his own interests. Mr. McGrath needed the "lifeline" that the right to counsel has been described in *Rover.*

[183] In *Rover*, while addressing the seriousness of the state misconduct, Justice Doherty referred to two concepts that directly at play in the case at bar. First, the fact that the police did not ever turn their minds to "the actual need to delay the appellant's access to counsel", this "showing no interest in mitigating the delay". In this case, the Defence says notwithstanding that Cst. Thornley understood that Mr. McGrath was entitled to speak to a lawyer at the roadside, his plan was to take him to the Detachment. Second, Justice Doherty stated in *Rover,* that the trial judge understated the seriousness of failing to connect the police misconduct to a police practice that routinely denied detainees access to counsel in situations in which the police were intending to apply for search warrants. Constitutional breaches that are the direct result of systemic or institutional police practices must render the police conduct more serious for the purposes of s. 24 (2) analysis.

[184] Unlike the case in *Rover,* I am not satisfied that Cst. Thornley's conduct is connected to or the direct result of systemic or institutional police practices which would clearly render his actions more serious. Cst. Thornley testified that in

impaired driving matters his practice was to take the accused person to the police Detachment to provide them an opportunity to speak to a lawyer in private. I infer from Cst. Thornley's evidence that he honestly believed that he was acting in compliance with the law by immediately taking an accused to the police station to provide them with an opportunity to speak to a lawyer in private, rather than at the roadside, which explains why it never occurred to him to ask Mr. McGrath if he wanted to call a lawyer from the roadside.

[185] The Defence further submits that Mr. McGrath's medical circumstances were not life threatening or urgent, and therefore, there was ample opportunity for him to speak with counsel before he reattached his insulin pump to his person. With respect, this suggestion is made after the fact and does not seem to recognize the unfolding dynamics of the situation. It is clear from the evidence that Cst. Thornley's priority at the time was ensuring that Mr. McGrath was medically treated and cleared before he continued his investigation. Indeed, Cst. Thornley stopped the investigating when he found the insulin pump while searching Mr. McGrath before putting him in the police vehicle. Prior to that, Cst. Thornley was fully engaged in administering the ASD.

[186] In my view, the police conduct in this case is not at the serious end of the spectrum, but the low end. The *Charter*-infringing conduct was inadvertent, not reckless. I find the breach was neither deliberate nor egregious. While the absence of bad faith is not to be equated with good faith, nor is the absence of good faith something that is to be equated with bad faith, I find that Cst. Thornley honestly and reasonably believed that he was complying with the law and thought he was respecting Mr. McGrath's *Charter* rights, based on his entire interaction with Mr. McGrath, including at the Detachment where he provided him with a second opportunity to speak to his lawyer of choice before he refused to comply with the breath demand.

[187] As stated by the Saskatchewan Court of Appeal in *R. v. Westgard*, [2025] S.J. No. 125:

> [72] While good faith police action, taken without deliberate disregard for *Charter* rights, may attenuate the seriousness of the breach, a mere absence of bad faith does not equate to good faith. In order for state misconduct to be characterized as a good faith error indicative of a less serious infringement of *Charter* rights, the state must show that the police acted in a manner consistent with what they subjectively, reasonably and non-negligently believed the law to be. … Police conduct that demonstrates negligence towards compliance

> with *Charter* standards does not amount to good faith. The reputation of the administration of justice requires that courts dissociate themselves from evidence obtained as a result of police negligence in meeting *Charter* standards (*Le* at para 143). While ignorance of the law is not good faith, good faith may sometimes be found when the police make a reasonable, non-negligent error in applying an established but indeterminate legal standard (*Grant* at para 133). Similarly, when police act on a mistaken understanding of the law where the law is unsettled, their *Charter*-infringing conduct is properly seen as less serious. …

[188] Cst. Thornley's failure to provide Mr. McGrath an opportunity to speak to a lawyer at the roadside, after Mr. McGrath was cleared by the paramedics, breached Mr. McGrath's s. 10 (b) rights. Although the breach arose out of a failure to provide Mr. McGrath with his right to speak to a lawyer at the roadside, he did provide Mr. McGrath with the opportunity to speak to a lawyer at the detachment. I accept Cst. Thornley's evidence that he never turned his mind to providing Mr. McGrath an opportunity to speak to a lawyer at the roadside because it was his practice to immediately take the accused the detachment to contact a lawyer.

[189] I have no hesitation in concluding that Cst. Thornley did not knowingly deprive Mr. McGrath the opportunity to speak to a lawyer at the roadside for an oblique reason or was wilfully blind. Given the historical practice of the police routinely taking suspected impaired drivers to the police detachment to speak to a lawyer in private, it is not surprising that Cst. Thornley did not turn his mind to asking Mr. McGrath if he wanted to speak to a lawyer at the roadside. Moreover, delay that was involved in this case was, in the circumstances, minimal and the police refrained from questioning Mr. McGrath until after he had a chance to speak with counsel of his choice.

[190] I find that during Cst. Thornley's entire interaction with Mr. McGrath he was acting in good faith, and at the time of the breach he had an honest and reasonably held belief that he was acting in accordance with the law. Notwithstanding that, I am mindful that ignorance of *Charter* standards cannot be rewarded or encouraged.

[191] Though it amounted to a *Charter* violation nonetheless, the breach in this case was unintentional, and made in good faith, by an officer who was trying to comply with the law. Cst. Thornley's entire interaction with Mr. McGrath clearly demonstrates that he was not insensitive to *Charter* values or Mr. McGrath's rights under the *Charter,* but quite alive to their importance.

[192] Accordingly, this factor only minimally favours excluding the evidence, given the nature and extent of the breach.

(b) *Impact on the Charter - protected interest of the Applicant*

[193] This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interest of the applicant. It is also a fact-specific determination, calling for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact is examined from the perspective of the applicant.

[194] In *Grant,* the majority commented on the impact of a *Charter* breach:

> [76] The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the Applicant's protected interests, the greater the risks that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[195] In *Harrison,* McLachlin C.J. said:

> [28] This factor looks at the seriousness of the infringement from the perspective of the accused. Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact? These are among the questions that fall for consideration in this inquiry.

[196] The second factor requires the Court to evaluate the extent to which the breach undermined the interests protected by the infringed right, namely the right to remain silent and not to participate in one's own incrimination. The interest of a detainee in not being compelled to incriminate themself is a vital one in our criminal justice system (*Grant* at paras. 77, 88-98). While there was a delay here in providing Mr. McGrath the opportunity to speak to a lawyer at the roadside, he did consult with counsel of his choice before he refused to comply with the breath sample demand at the Detachment.

[197] As for the impact of the breach of Mr. McGrath's s. 10(b) right at the roadside, I find that he had suffered minimal prejudice, as he was immediately taken to the police detachment where he was provided two opportunities to speak with counsel of his choice. After he had finished speaking to counsel, he confirmed with the police that he was satisfied with the call. He then refused to comply with the breath demand.

[198] It should be noted that I place little, if any, weight on the spontaneous utterances made by Mr. McGrath up to the point where he was medically cleared,

given Mr. McGrath's distraught mental state at the time. Moreover, given the nature of the allegation, his utterances have very little probative value.

(c) Society's Interest in the Adjudication of the Merits

[199] As recognized in *Grant,* "Society generally expects that a criminal allegation will be adjudicated on its merits" (at para. 79). The public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. Thus, the reliability of the evidence is an important factor in this line of inquiry. The majority stated:

> [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.

[200] In effectively doing away with the distinction between conscriptive and non-conscriptive evidence, the court in *Grant* instructed courts to consider the new third factor, the effect of admitting the evidence on the public interest in having a case adjudicated on its merits when assessing admission of all evidence, including real evidence.

[201] In *Grant,* the majority recognized that the importance of the evidence to the Crown's case, and the seriousness of the offence, are important factor that should be considered in this line of inquiry:

> [83] The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. ... we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.
>
> [84] [W]hile the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice

> system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[202] At this stage, the Court must consider factors such as the reliability of the impugned evidence and its importance to the Crown's case (*Harrison* at para. 33).

[203] In *R. v. Bjelland,* [2009] 2 S.C.R. 651, the Supreme Court of Canada considered the impact on society and the justice system if the Courts were to rely on evidence that was improperly obtained by the state. Fish J., dissenting, said:

> [65] Finally, we have long accepted that an acquittal that results from the exclusion of evidence is warranted by overriding considerations of justice. …The policy of the law in this regard was well put by Samuel Freedman, then Chief Justice of Manitoba, in this well-known passage:
>
> > The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony... . [T]he law makes its choice between competing values and declares it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at unlimited cost. "Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."

[204] In this case, the evidence of the refusal obtained as a consequence of the *Charter* breach is highly reliable. It is critical evidence, conclusive of guilt on the offence charged. The evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial. While the charged offence is serious, this factor must not take on disproportionate significance. As noted in *Grant,* while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. In this case, Mr. McGrath is charged with serious indictable offences.

[205] The exclusion of the evidence would leave the Crown with no case against Mr. McGrath. Exclusion would therefore seriously undermine the truth-seeking function of the trial. This factor weighs against exclusion of the evidence (see *Grant* at paras. 79-83). This is consistent with the position of McLachlin, C.J. for the majority in *Harrison.*

(d) Balancing the Factors

[206] The final step in the analysis of s. 24(2) is to balance the three factors. Regarding this balancing exercise, the Ontario Court of Appeal in *McGuffie* stated the following:

> [63] … If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility… Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence…

[207] The three lines of inquiry reflect what the court must consider in the totality of the circumstances of a case. In *Grant,* the following comments are instructive:

> [85] To review, the three lines of inquiry identified above - the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits - reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. 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.

[208] As explained in *Harrison,* the balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[209] Having considered the three inquiries and bearing in mind that the effect of those inquiries must be balanced and considered as a whole, I am not satisfied that Mr. McGrath has demonstrated that the admission of the impugned evidence would bring the administration of justice into disrepute (*Grant,* at paras. 67-71).

The Functional Equivalent of a Plea of *Nolo Contendere*: Modified s. 606 Plea Inquiry

[210] The parties agreed that based on the evidence adduced in the blended *voir dire*, and the rulings, Mr. McGrath would enter guilty pleas to the offences but maintained his right to appeal the rulings. The process followed is the functional equivalent of a plea of *nolo contendere* (no contest).

[211] While this process is not contained in the *Criminal Code*, it was discussed by the Ontario Court of Appeal in *R. v. R.P.*, 2013 ONCA 53, wherein the court conducted the functional equivalent of a plea inquiry with the accused person. Similarly, in this case, the Court followed the equivalent of a *Criminal Code* s. 606 plea inquiry with Mr. McGrath. He confirmed that he understood the process that was proposed by counsel. Mr. McGrath acknowledged that he was aware that he was giving up his right to a trial; that his counsel, Mr. MacDonald, K.C., would not be challenging the evidence that the Crown adduced; that findings of guilt would be made against him on the counts in the Indictment; and that he would be sentenced for the offences and could receive a term of imprisonment. Mr. McGrath also confirmed that his decision not to contest the Crown's case was made voluntarily, with assistance of his counsel, Mr. MacDonald, KC.

[212] Accordingly, sentencing has been adjourned until May 1, 2026, for the preparation of a Pre-Sentence Report and Victim Impact Statements.

Hoskins, J.