FOR THE
DEFENCE
CRIMINAL LAWYERS' ASSOCIATION NEWSLETTER
VOL. 43, NO. 4 — AUGUST 2023
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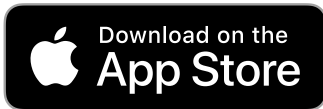

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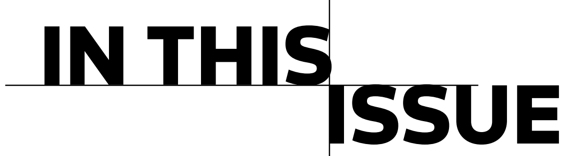


President's Message 2
Editor's Notebook 3

FEATURES

Rights to Counsel: Issue Identification in the Impaired Driving Context
by Adam Weisberg and Samiyyah Ganga 4

A Quick Refresher of the Changes in the Drinking and Driving Legislation as a Result of Bill C-46 Introduced in 2018
by Karen Jokinen 18

Highway Traffic Act Consequences in Criminal Driving Cases
by Laura Metcalfe and Jonathan Rosenthal 24

His Majesty the King vs. Walker McColman (2023 SCC 8)
by Michelle Johal 30

What do you do with the DUI disclosure once you've got it?
by Stephen Biss and Adel Afzal 34

What is a Conveyance? What does it mean to operate one? And why you should care?"
by John Erickson 42

In Custody Call Cheat Sheet
by Anna Brylewski 48

COLUMNS

Search Solutions and Techno Tricks: (How) Can the Plain View Doctrine Apply to Digital Searches?
by Wesley Dutcher-Walls 52

Wrenches for the Trenches: Taking Notes for the Crown: Defence disclosure of witness notes in criminal cases
by Hussein Aly 56

The Docket
by Lauren Wilhelm 60

Member Profile: Matthew Campbell-Williams
by Craig Bottomley 62

COVER ART Courtesy of Gabe Ramos.

PRESIDENT'S MESSAGE

Daniel

Brown

The landscape for defending drinking and driving prosecutions is continually evolving and defence lawyers have been forced to adapt to the many recent *Criminal Code* amendments impacting drinking and driving-related offences. This timely issue of *For the Defence* aims to review many of the new developments in drinking and driving law to help provide guidance and strategy to defence lawyers undertaking this challenging category of cases.

The significant risks to public safety posed by impaired drivers are well known and statistics reveal that impaired driving is the leading criminal cause of death and injury in Canada. In response to this alarming concern, Canada has implemented various legislative changes in recent years to strengthen its drinking and driving laws. These amendments to the *Criminal Code* seek to deter impaired driving, impose harsher penalties on offenders, and enhance public safety. However, these changes also have profound implications for criminal defendants facing drinking and driving charges, affecting their legal rights, defences, and potential case outcomes.

One notable change to Canada's drinking and driving laws is the introduction of mandatory alcohol screening. Introduced in December 2018 as part of Bill C-46's overhaul of the *Criminal Code*, this measure authorizes police to demand a breath sample into an approved screening device (ASD) at the roadside from anyone operating a motor vehicle, regardless of whether police have a reasonable suspicion of impairment or recent alcohol consumption as long as the police have the ASD present at the time the demand for a breath sample was made. Mandatory alcohol screening aims to increase the detection of impaired drivers and improve road safety, but it also raises concerns regarding civil liberties and potential racial profiling. When this change was introduced in 2018, the mandatory alcohol screening provisions were seen by many as an unconstitutional infringement on an accused person's s. 8 and s. 9 *Charter* rights. Surprisingly, our courts have seen few challenges to the constitutionality of this legislation, especially in Ontario, despite numerous prosecutions relying on this provision.

Recent changes to drinking and driving laws have also restricted certain defences available to defendants. The defence of "bolus drinking" (i.e., consuming alcohol after driving but before testing) has also been substantially gutted. Defendants also face a more difficult task in challenging the reliability and accuracy of breathalyzer test results, as these devices have gained greater acceptance as reliable evidence and statutory amendments along with subsequent appellate decisions have made it near impossible to undermine the reliability of this evidence.

Bill C-46's amendments to the *Criminal Code* in 2018 also resulted in harsher penalties for impaired driving offences including higher fines and longer mandatory jail sentences for repeat offenders.

Overall, the 2018 changes to Canada's drinking and driving laws were controversial and provide opportunities and challenges to lawyers defending these types of cases. We hope that this issue of For the Defence provides defence counsel with a framework to understand these amendments and offers a roadmap for understanding, scrutinizing, and defending these charges in court.

EDITOR'S NOTEBOOK

The sweeping overhaul of the drinking and driving provisions in the *Criminal Code* in December 2018 has had a profound effect on how lawyers approach defending these types of cases. Over the course of my practice of criminal law, I have seen numerous defences taken away as a result of legislative changes. This area of law is becoming more difficult to defend with the passage of time. Lawyers who practice in this area have to act with lightning speed in seeking disclosure before the expiry of 90 days in case their client wishes to take advantage of a resolution which includes a reduced suspension. Lawyers have to be knowledgeable and creative in finding triable issues to effectively defend their clients.

I knew that our Members would benefit if an entire issue of the magazine dedicated to defending drinking and driving cases. I am excited about this issue because the authors who contributed to this volume have gone above and beyond to share their wealth of knowledge and experience on various key topics - from the moment a client is arrested for a drinking and driving offence to the bitter end when lawyers have to advise their clients of the serious consequences they will face upon a finding of guilt and everything in between.

Anna Brylewski's article entitled "In-Custody Call Cheat Sheet" is an absolute must read for all lawyers, even those of us who don't want to do drinking and driving cases. Any one can receive a call from a client in the middle of the night advising they are being charged with a drinking and driving offence and the advice we provide at that moment can have a significant impact on the client and their case. In fact, I would suggest keeping a copy of this issue of For the Defence Magazine right on your nightstand in case you receive such a call.

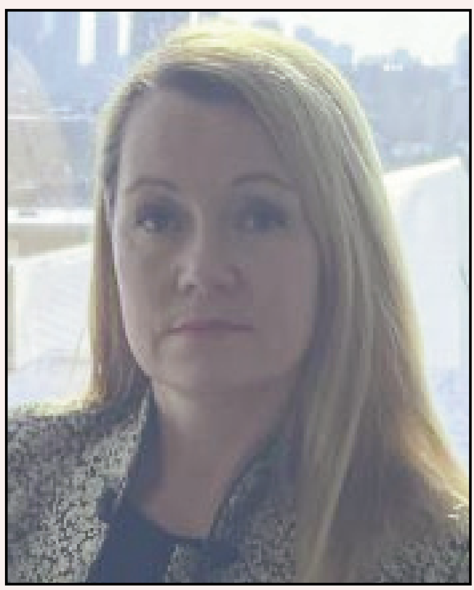
Karen Jokinen has written "A Quick Refresher of the Changes in the Drinking and Driving Legislation as a Result of Bill C-46 introduced in 2018" which will in no time bring you up to speed on the key legislative changes. This concise but comprehensive read is jam packed with information.

Adam Weisberg and Samiyyah Ganga's article is designed to help counsel identify s. 10(b) *Charter* issues in the impaired driving context. A *Charter* defence may be the only successful way of defending a client facing allegations of drinking and driving, given the legislative overhaul, and so this article is incredibly important and should be reviewed by all counsel contemplating taking on a drinking and driving case.

Disclosure, what to ask for and what to litigate for, has been a constant source of stress for lawyers. Stephen Biss (a legend in defending drinking and driving cases) and Adel Afzal tackled this issue in their article "What do you do with the DUI disclosure once you've got it?" Not only do they outline what disclosure to ask for, what sources to get it from, but also what use can be made and should be made of the disclosure that you do obtain in defending your client at trial.

Next, John Erickson was tasked with explaining, "What is a conveyance? what does it mean to operate one? and why you should care?" With all manner of new conveyances on our roads and waterways as changes in technology continue rapidly, this topic is a fascinating one. The article also deals with issues of what it means to "operate" and to have "care and control" of a conveyance.

Michelle Johal addresses the recent case of R. v. *Walker McColman* from the Supreme Court of Canada (2023) and the issue of whether the police can conduct random sobriety tests on



a private driveway. Although the Supreme Court declined to exclude the evidence under s. 24(2) of the *Charter,* Michelle tells us there is hope and explains how we should approach the issue of remedy under s. 24(2) of the *Charter* post *McColman*.

Finally, Laura Metcalfe and Jonathan Rosenthal have teamed up together to deal with the issue of *Highway Traffic Act* consequences in criminal driving cases, an issue which I am made to understand results in a lot of lost sleep for lawyers. Their incredibly helpful article sets out all you need to know about suspensions, interlock ignition devices, reduced suspension programs with ignition interlock, etc. The practice tips offered are invaluable and will surely help lawyers provide the best and timely information/advice to their clients and allow lawyers to rest easy in their sleep.

As always, I hope you find this issue informative, insightful, and helpful in your practice. Keep up the good fight friends!

Margaret Bojanowska

Rights to Counsel: Issue Identification in the Impaired Driving Context[1]

by Adam Weisberg and Samiyyah Ganga

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The purpose of this short paper is to assist defence counsel with identifying Section 10(b) issues in impaired driving cases.

In this area of the law – details matter. The *Charter* will almost always be your client's only chance at a successful defence in cases involving readings at 80 or over 80 mgs/100 ml of alcohol.

The old-timers will tell you about how back in the day all you needed was a toxicologist and four of your client's closest friends that meticulously watched him consume exactly two pints of beer and one perfectly measured shot of vodka over the course of six hours to win a case.

Most of the technical requirements that often went unfulfilled and resulted in acquittals have been simplified or removed as of late 2018. Your client's only hope at victory will often be the *Charter*. And, as I've said – in this area – details matter.

The Basics: Section 10(B) Right to Counsel

Section 10(b) of the *Charter* reads:

> "Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right."

Section 10(b) is intended to ensure that individuals know of their right to counsel and have access to it in situations where they suffer a significant deprivation of liberty, are vulnerable to the exercise of state power, and are in a position of legal jeopardy. Specifically, the right to counsel helps to mitigate the legal disadvantage faced by detainees and guards against the risk of involuntary self-incrimination. The right supports the detainee's right to choose whether to cooperate with the police investigation by giving them access to legal advice.[2]

Section 10(b) has two components.

First, the informational component requires that the detainee be advised of their right to counsel without delay. The informational component of s. 10(b) also includes the requirement that the detainee be informed of the existence and availability of duty counsel and Legal Aid.

Second, the implementational component requires that the detainee be given the opportunity to exercise their right to consult counsel. This component requires the police to refrain from eliciting incriminating evidence from the detainee until the detainee has had a reasonable opportunity to contact a lawyer, or the detainee unequivocally waived their right to do so.[3]

Issues in the Impaired Driving Context

A finding that an accused's s. 10(b) rights were violated could lead to the exclusion of evidence, and in the impaired context, most commonly the exclusion of breath test results. The onus rests on the defence to establish that the accused's s. 10(b) rights were infringed or denied. When assessing a case to determine whether a s. 10(b) breach occurred, counsel should consider the following questions:

1. Was the detainee informed of their right to counsel and the existence and availability of Legal Aid and duty counsel?
2. How long after arrest did the police read the detainee their rights to counsel?
    a. Was there any reason to justify a delay in reading the detainee their right to counsel?
3. Did the detainee understand their s. 10(b) rights?
    a. If not, was there any indication that the detainee did not understand their right?
4. Did the detainee request counsel of choice?
    a. What efforts did the police make to facilitate access to counsel of choice? Were there other ways the police could have contacted counsel of choice?
    b. How long until the detainee spoke to counsel? Was there an opportunity to speak with counsel at the roadside?
    c. If the detainee did not speak to counsel of choice, did they speak to duty counsel?
        i. Was the detainee made aware they could wait for counsel of choice?
        ii. How long was it before the police put the detainee in contact with duty counsel?
5. Was the detainee given a reasonable opportunity to exercise their right to counsel?
    a. Was the detainee given appropriate privacy to exercise their right to counsel?
    b. If the detainee did not speak to counsel, how long did the police wait before administering the breath test? Was there any urgency?
    c. Was the detainee reasonably diligent in exercising their right to counsel? If the detainee is found not to have been reasonably diligent in exercising their s. 10(b) right, the implementational component of s. 10(b) either does not arise or will be suspended.
6. Did police refrain from eliciting evidence from the detainee until they had a reasonable opportunity to contact counsel?
7. Did the detainee waive their right?

Where Do You Start?

The first place to start is a detailed interview of your client to determine if there are any s. 10(b) *Charter* issues at play. Some lawyers will state that they prefer to do this interview after receiving initial disclosure. Our office normally does a detailed interview immediately upon being retained and then another interview once the disclosure has been received. The reason for this approach is that there may be valuable evidence to be preserved that could be beyond your grasp four to six weeks after the initial arrest when you receive disclosure.[4]

The next step is to do appropriate follow-ups with the lawyer(s) your client spoke to or attempted to reach. If your client spoke to duty counsel, you can request those notes from the duty counsel service with a direction from your client.

Once disclosure has been received, we recommend the first thing you do is convert your disclosure into a chart that accurately reflects the timing of events. This small effort will help defence counsel be able to better identify all *Charter* issues in the case. Attached as Appendix "A" to this paper is a sample chart of an impaired driving case.

When is 10(B) a Live Issue?

The s. 10(b) right to retain and instruct counsel without delay is temporarily suspended during roadside investigations into the sobriety of drivers when the investigation is conducted with dispatch.

Police are not required to give a detainee their s. 10(b) rights during a

brief lawful *Highway Traffic Act* stop and investigation or roadside sobriety check. The s. 10(b) right is no longer suspended when the police form grounds for arrest.[5]

Roadside investigations, for the purpose of the suspension of rights, include public parking lots.[6]

Section 10(b) is suspended during the detention of a driver whose sobriety is being tested via a screening device. However, where there is a delay in accessing a screening device, the suspension of s. 10(b) is no longer in effect. Where there is a delay in getting the screening device, police must consider whether they can realistically fulfill the s. 10(b) rights before requiring compliance with the screening device. If a detainee could have reasonably consulted counsel in the time it took for the ASD to arrive, a s. 10(b) breach is established.[7]

Section 10(b) is suspended during the detention of a driver whose sobriety is being tested via a screening device. However, where there is a delay in accessing a screening device, the suspension of s. 10(b) is no longer in effect.

1. DELAY

The police duty to inform an individual of their s. 10(b) *Charter* right to retain and instruct counsel is "without delay" upon arrest or detention.

The words "without delay" mean "immediately" for the purpose of s. 10(b). The immediacy of this obligation is subject only to legitimate concerns for officer or public safety. Officers are entitled to take reasonable steps to ensure their safety, public safety, and the detainee's safety prior to reading the rights to counsel. This may include searching the detainee incident to arrest, placing the detainee in a safe location like the back of a police vehicle, or moving the vehicle if it poses a danger to the public. Assessing the reasonableness of delay in affording the right to counsel involves a fact-specific determination.[8]

Even minor delays in a detainee being read their rights to counsel have been found to be a s. 10(b) breach. For example:

- *R. v. Medeiros*, 2015 CarswellOnt 19110, 2015 ONCJ 707 (RTC read 4 min after arrest)
- *R. v. Soomal*, 2014 CarswellOnt 5824, 2014 ONCJ 220 (4 min)
- *R. v. Ahmad*, 2015 CarswellOnt 16712, 2015 ONCJ 620 (7 min)
- *R. v. Simpson*, 2017 CarswellOnt 7585, 2017 ONCJ 321 (7 min)
- *R. v. Davis*, 2018 CarswellOnt 3490, 2018 ONCJ 147 (8 min) (breach conceded by the Crown)
- *R. v. Kou*, 2019 CarswellOnt 22121, 2019 ONCJ 966 (7 min)
- *R. v. Maan*, 2022 CarswellOnt 4941, 2022 ONCJ 168 (6 min)
- *R. v. Foreman*, 2022 CarswellOnt 6337, 2022 ONCJ 214 (9 min)
- *R. v. Pillar*, 2020 CarswellOnt 12713, 2020 ONCJ 394 (8 min)
- *R. v. Tharmalingam*, 2022 CarswellOnt 9502, 2022 ONCJ 304 (5 min)
- *R. v. Ranger*, 2019 CarswellOnt 9718, 2019 ONCJ 413 (3 min)

2. COMPREHENSION

Section 10(b) requires police to inform a detainee of their rights in a manner in which they can understand.

Absent special circumstances indicating that a detainee may not understand, police can assume that a detainee fully understands the s. 10(b) caution. Relevant circumstances include factors such as age, education, sophistication, language, and mental condition. Where there is a positive indication that the detainee does not understand the rights read, then police must take steps to ensure the detainee understands.[9]

Special circumstances arise when there is some objective evidence that a detainee's comprehension of the English language may be inadequate. This requires more than a detainee having a strong accent. If there is some evidence that the detainee does not adequately understand English or French to understand their right, there is an onus on the police to take some meaningful steps to ensure that the accused understands their rights in a meaningful and comprehensible way. The failure of a detainee to ask for an interpreter or duty counsel who speaks a specific language is not determinative. Similarly, the fact that the detainee spoke with duty counsel is

**The police duty to inform an individual of their s. 10(b) Charter right to retain and instruct counsel is "without delay" upon arrest or detention.
The words "without delay" mean "immediately" for the purpose of s. 10(b). The immediacy of this obligation is subject only to legitimate concerns for officer or public safety.**

not necessarily conclusive, particularly where the conversation with duty counsel was brief. Courts have found s. 10(b) breaches even where the detainee spoke to duty counsel and neither the detainee nor duty counsel expressed any difficulty or dissatisfaction with that communication.[10]

A subjective belief by the officer that the detainee understood English is not sufficient to disprove a s. 10(b) breach where special circumstances exist that require the police to ensure the detainee understands their rights.[11]

Special circumstances can also include an apparent mental disability. Where a detainee is so intoxicated, they cannot understand their rights, police must delay questioning until the detainee is sufficiently sober to properly understand their rights and either exercise or waive that right. Other special circumstances can include where the detainee suffers physical injury such as a concussion and is unable to comprehend their rights as read to them.

3. ROADSIDE IMPLEMENTATION

As stated above, the right to counsel is suspended at the roadside – during a brief traffic stop or a roadside sobriety check. However, when the police form grounds to arrest, or there is a delay in accessing a screening device, the s. 10(b) right is no longer suspended.

When a detainee indicates a desire to speak to counsel, the police are obliged to take reasonable steps to facilitate access to counsel at the first reasonable available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances. The suspension of the right to counsel must only be for so long as is reasonably necessary.[12]

The suspension of the right to counsel will be permitted where there are reasonable grounds to believe that police or public safety may be imperiled if the right to counsel is permitted to be exercised immediately.[13]

The longer the delay, the greater the need for justification. In some circumstances, police may be required to facilitate contact with counsel at the roadside, particularly when there will be a considerable delay in transporting the detainee to a police station to conduct a breath test.

A short delay in putting a detainee in contact with counsel may be justified if there is no phone immediately available that would permit the detainee having a private conversation with counsel. However, detainees may have privacy in a secure police cruiser at the roadside and can use a cellphone.

The Quebec Court of Appeal has found a s. 10(b) violation, leading to the exclusion of evidence, where the police did not allow the detainee to use a cell phone at the roadside. The Court of Appeal found that once the detainee invokes their right to counsel at the scene of the arrest, the police must turn their minds to allowing the arrestee to consult with counsel at the scene. There will, however, be circumstances where it simply will not be feasible due to legitimate officer or public safety concerns.

In cases where the detainee is cooperative and there are no risks of flight or safety concerns, the police officer can take steps to verify who the detainee is calling, such as confirming with the recipient of the call that they are counsel - to address any lingering safety concerns. Where the detainee has all the tools to contact counsel at the roadside i.e., a phone number for counsel and a cellphone, the police may be required to facilitate that contact at the roadside.[14]

Defence counsel must query if there were any specific circumstances justifying the delay in facilitating access to counsel at the roadside and whether the police turned their minds to the issue. Some factors to consider include:

1. How long did police spend at the roadside prior to departing to the station? A longer wait may mean the police should have facilitated access to counsel at the roadside.
2. How long was the drive to the police station?
3. Was the accused cooperative? Were there any flight or safety concerns?
4. Were there any concerns about preserving evidence?
5. Where did the arrest take place? Was there a high volume of traffic causing safety concerns?
6. Was there a cellphone available? Did the accused have a lawyer's contact information or a way of looking for the contact information?

If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond.

The fall in a detainee's blood alcohol content by virtue of the process of metabolizing alcohol cannot plausibly be a factor (as it was in the past) for police cutting corners on a detainee's access to counsel or providing counsel to choice because s. 320.31(4) of the *Criminal Code* now allows a trier of fact to 'read-back' the BAC to the two-hour window following care or control if the tests were taken more than two hours after care or control came to an end.

4. COUNSEL OF CHOICE

Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact

their chosen counsel prior to questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on all the circumstances.[15]

a) *Counsel of Choice - Right to Contact Third Party*

When a detainee asks to speak to a third party to seek information about finding counsel or facilitating access to counsel of choice, the police are obliged to facilitate that contact.

This does not mean that a detainee must always be permitted to call friends or relatives. Unless the detainee explains that the purpose of the call to a third party is to obtain a lawyer's phone number, the police are not obliged to facilitate the contact. The police are not required to be mind-readers. However, where the officer is unclear as to the reason why the detainee wishes to speak to a third party, and it might relate to contacting counsel, the officer must clarify the issue.[16]

b) *Counsel of Choice - Sufficient Efforts*

When someone is detained, they are placed in a position of disadvantage relative to the state. That position of disadvantage extends to the detainee's ability to contact counsel. The police may not then further that 'position of disadvantage' by withholding the basic tools required for a detainee to locate counsel of their choosing for the purpose of immediate consultation. Where the police assume the responsibility of making first contact, as is the general practice in Ontario, rather than providing the detainee with direct access to a phone or internet connection, they must be taken to have "assumed the obligation to pursue the detainee's constitutional right to access counsel as diligently as they would have. However, while the police must be reasonably diligent in assisting the detainee in exercising the right to counsel, they are not required to exhaust all reasonable means for the detainee to speak with a lawyer. The test is not whether the police could have done more but rather whether the police provided the detainee with the necessary information and assistance to allow the detainee to exercise their rights.[17]

Often arrests for impaired driving occur late at night where it may not be easy to contact counsel of choice. It is not uncommon for police efforts to begin and end with a call to a single phone number and a voicemail. Arguably, this single call does not amount to reasonable diligence. The following are other steps the police could take to facilitate access to counsel of choice, the absence of which could amount in a failure to make sufficient efforts to contact counsel of choice:

1. use of a telephone book or law society directory to find a phone number for counsel;
2. use of an Internet search to locate any and all phone numbers for the detainee's counsel of choice;
3. locating a website for the counsel of choice which will likely include a phone number and/or email to contact counsel; or
4. contacting other associates at the law firm by telephone.

Alberta has adopted a different approach than in Ontario. In Alberta, a detainee is advised by virtue of the province-wide *Charter* caution that if they wish to contact any lawyer other than one from the free legal advice service provided, then police will provide the detainee with a telephone and telephone book. The police also commonly provide an iPad to the detainee so they may use that to find contact information for counsel themselves.[18]

c) *Counsel of Choice - Steering to Duty Counsel*

The police cannot suggest or recommend a specific lawyer to a detainee, including duty counsel. Detainees must be made aware of their right to make a reasonable effort to find a counsel of choice rather than being directed toward duty counsel believing that if they do not have a specific lawyer in mind, that is the only other option available. Alberta may be a useful comparison on this point where, as indicated above, the police will provide the detainee with a telephone and telephone book and/or iPad so that the detainee can find a counsel of choice. As such, every detainee is made aware that even if they do not have a specific lawyer in mind, they can still find a counsel of choice.[19]

The availability of duty counsel also cannot be used by the police as an excuse to ignore a request by the accused to speak with counsel of choice. The police should advise the detainee that they can wait for a reasonable period to find their counsel of choice instead of pushing them to speak with duty counsel. What consists of a reasonable period depends on the circumstances. The potential to exceed two hours until the breath test does not, by itself, give rise to a level of urgency that displaces the right to consult with counsel of choice. In particular, with the new read-back provision in the *Code*, there is no longer a two-hour time limit and urgency to displace the right to contact counsel of choice in an impaired driving case.[20]

The Crown has the burden of establishing that a detainee who invoked their right to counsel was provided with a reasonable opportunity to exercise their right.[21]

5. PRIVACY

The right to consult counsel in conditions of privacy is a fundamental component of s. 10(b).

A court must examine all of the circumstances in assessing whether there

has been a s. 10(b) breach based on an alleged absence of privacy. In some cases, even where there is actual privacy, but the detainee reasonably believes they could not speak with counsel in private, then s. 10(b) may be violated.

The fact that an accused person is in the hospital does not create a blanket exception to the right to consult counsel in private. Where the individual has requested access to counsel and is in custody at the hospital, the police have an obligation under s. 10(b) to take steps to ascertain whether private access to a phone is in fact available, given the circumstances. Since most hospitals have phones, it is not a question simply of whether the individual is in the emergency room, it is whether the Crown has demonstrated that the circumstances are such that a private phone conversation is not reasonably feasible.[22]

The police must refrain from eliciting evidence from a detainee until they have had a reasonable opportunity to consult with counsel. When a detainee who has previously asserted this right, indicates a change of mind and no longer wants legal advice, the police are obliged to advise of the right to a reasonable opportunity to contact counsel and their duty to hold off.

In *R. v. Comeau*,[23] the accused had his counsel call audio and video recorded by Peel Regional Police. Mr. Comeau had been charged with dangerous driving causing death and dangerous driving causing bodily harm. Defence counsel made an application for a stay under s. 24(1) of the *Charter* and the application was allowed. As noted by Justice Mossip at para. 43: "I find that there was an egregious breach of Mr. Comeau's s. 10(b) Charter right to counsel in private, a serious breach of the s. 7 principle of fundamental justice, and a flagrant invasion of solicitor client privilege, all of which is captured on a videotape under the control of the police, and by evidence of the Crown, potentially viewed by the police."

Recently, in Peel, a nearby breathroom video was capturing the audio of a detainee's private call with counsel. This apparent breach led to the Crown staying the charges. This may be a systemic issue in Peel which would exacerbate any future discovered 10(b) breaches of this nature.[24]

6. THE DUTY TO HOLDING OFF

The police must refrain from eliciting evidence from a detainee until they have had a reasonable opportunity to consult with counsel. When a detainee who has previously asserted this right, indicates a change of mind and no longer wants legal advice, the police are obliged to advise of the right to a reasonable opportunity to contact counsel and their duty to hold off. If the detainee indicates that they changed their mind or no longer want legal advice, the Crown is required to prove a valid waiver. The standard for waiver is high. The waiver must be unequivocal and the burden of proving a waiver is on the Crown.[25]

Booking questions not intended to elicit evidence will typically not breach s. 10(b). For example, an officer asking, "have you taken any drugs today?" is asking that question for prisoner safety – not to elicit evidence. However, courts may still exclude answers to booking questions on the basis of trial fairness where the Crown seeks to admit answers to standard booking questions.[26]

7. MISCELLANEOUS

a) Paralegals/Non-Lawyers

Once an officer learns that the 'counsel' requested by the detainee is not in fact a lawyer, they are obligated to tell the detainee that fact. The police have an obligation to facilitate contact with "counsel" not a paralegal. A paralegal is not competent to provide s. 10(b) advice. Where a detainee requests to speak to a paralegal. The police must explain the difference between a paralegal and counsel and assist the detainee in obtaining proper advice.[27]

b) Disparaging counsel

Police may not comment on the value of legal advice, nor may they denigrate the role of counsel in order to induce an accused to answer questions. An officer commenting that an accused would not reach their counsel at the time of night may discourage the accused from contacting counsel and could constitute a breach of s. 10(b). Police can also unintentionally undermine the legal advice provided to a detainee. Where police conduct causes the detainee to doubt the legal correctness of the advice they received or the trustworthiness of their lawyer, then police have "undermined" the legal advice that the detainee 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.[28]

c) Change in Jeopardy

Police are not generally required to provide a second consultation with a lawyer in between breath tests even upon the detainee's request. Police are constitutionally required to provide a detainee with another opportunity to contact counsel where there is an

objectively observable change in circumstances that suggest re-consultation is necessary in order to serve the purpose underlying s. 10(b).[29]

Unless the detainee indicates, diligently and reasonably, that the advice received was inadequate, the police may assume the detainee is satisfied with the exercised right to counsel.[30]

d) Waiver

Once a detainee asserts their right to counsel and is duly diligent in exercising their right but then indicates they no longer want legal advice, the Crown must prove a valid waiver of the right to counsel. In these circumstances, the police will have an additional informational obligation to give a *Prosper* warning. The warning must inform the detainee of their right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police, during this time, to not take any statements or require the detainee to participate in any potentially incriminating process until they have had that reasonable opportunity. Without this warning, a s. 10(b) infringement will be made out.[31]

8. ISSUES FOR SECTION 24(2)

The most common piece of evidence that is sought to be excluded in impaired driving cases are breath test results. In some cases, a refusal to provide a breath sample could be excluded based on a s. 10(b) breach.[32]

The analysis for exclusion of evidence is governed by the three factors set out in *R. v. Grant*:[33]

1. The seriousness of the *Charter*-infringing state conduct

The right to counsel is a fundamental protection of an accused's interests in liberty and autonomy. Section 10(b) breaches are serious. Where the accused was deprived of the right to speak with counsel, the violation is serious and not inadvertent – especially where there was no need to rush to take the breath samples. That the police did not act deliberately does not lessen the nature of the s. 10(b) breach. The law surrounding s. 10(b) has been settled for many years. The defence should argue that the police were not acting in good faith when breaching the accused's rights.[34]

An important factor to consider is whether the s. 10 (b) breach is systemic. For example, courts, including the Court of Appeal, have noted that there are numerous cases involving Peel Police delaying giving detainee rights to counsel. Courts have also noted a similar problem with the Ottawa Police Service. Similarly, there has been recent media attention to Peel Police 12 division recording detainee calls with counsel. Consider whether you can establish a pattern of breaching conduct by the police which is an aggravating factor favouring exclusion.[35]

A minor s. 10(b) breach, when compounded with other *Charter* breaches, can show a clear disregard for a detainee's *Charter* rights. Multiple *Charter* breaches tend to aggravate the overall seriousness of the violations.[36]

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

On the second branch of the *Grant* analysis, the court must consider the extent to which the breaches undermined the interests protected by the infringed right. In breath sample cases, the impact of the breach on the particular accused must be assessed. There is no automatic exclusion or inclusion. Delay in informing a detainee of their right to counsel may be found to have a low impact if the police did not attempt to elicit evidence. Where police fail to facilitate access to the accused's counsel of choice, the accused is deprived of a significant lifeline while detained. Where a detainee spoke to duty counsel and the police do not elicit any incriminating evidence, the impact of the breach is arguably lessened. However, this does not mean that a s. 10(b) breach will not have an impact on the accused, particularly the deprivation of guidance from a trusted counsel which affects the detainee's decision on whether to give samples of their breath. Courts have found breaches of s. 10(b) to cause the detainee prejudice even though they spoke to duty counsel.[37]

3. Society's interest in an adjudication on the merits.

Exclusion of breath samples will almost invariably gut the prosecution's case. However, while serious cases result in a general interest in prosecuting such cases on the merits, it should not be relied upon to justify the admission of evidence in all cases, particularly where the first two branches weigh in favour of exclusion. The public "also has a vital interest in having a justice system that is above reproach", especially where the stakes for the accused are high. Where the first two factors favour exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility.[38]

NOTES:

[1] This paper was originally prepared for the LSO Impaired Driving 2022" CPD program held on December 3, 2022.

[2] *R. v. Suberu*, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107, 2009 SCC 33 at para. 40; *R. v. Willier*, 2010 CarswellAlta 1974, 2010 CarswellAlta 1975, 2010 SCC 37 at para. 28; *R. v. Sinclair*, 2010 CarswellBC 2664, 2010 CarswellBC 2679, 2010 SCC 35 at paras. 26-28.

[3] *R. v. Suberu*, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107, 2009 SCC 33 at para. 38; *R. v. Brydges*, 1990 CarswellAlta 3, 1990 CarswellAlta 648, [1990] 1 S.C.R. 190 (S.C.C.) at 206 [S.C.R.]; *R. v. Bartle*, 1994 CarswellOnt 100, 1994 CarswellOnt 1164, [1994] 3 S.C.R. 173 (S.C.C.) at 191-192 [S.C.R.].

[4] Some examples of evidence that must be gathered expeditiously: phone logs of calls; web search history in the client's phone; texts to family members or lawyers; CCTV in public spaces; and independent witnesses.

[5] *R. v. Thomsen*, 1988 CarswellOnt 53, 1988 CarswellOnt 957, [1988] 1 S.C.R. 640 (S.C.C.); *R. v. Orbanski; R. v. Elias*, 2005 CarswellMan 190, 2005 CarswellMan 191, 2005 SCC 37.

[6] *R. v. Ndaye*, 2019 CarswellOnt 13580, 2019 ONSC 4967 (S.C.J.); *R. v. Droog*, 2022 CarswellOnt 12548, 2022 ONSC 5033 (S.C.J.).

[7] *R. v. Harris*, 2007 CarswellOnt 5279, 2007 ONCA 574; *R. v. Sillars*, 2022 CarswellOnt 9308, 2022 ONCA 510 at para. 36, leave to appeal refused 2023 CarswellOnt 4275, 2023 CarswellOnt 4276 (S.C.C.); *R. v. Beattie*, 2009 CarswellOnt 5768, 2009 ONCJ 456; *R. v. MacMillan*, 2019 CarswellOnt 9417, 2019 ONSC 3560 (S.C.J.); *R. v. Kubacsek*, 2021 CarswellOnt 10513, 2021 ONSC 5081 (S.C.J.).

[8] *R. v. Suberu*, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107, 2009 SCC 33 at paras. 41-42; *R. v. La*, 2018 CarswellOnt 17214, 2018 ONCA 830 at para. 39; *R. v. Brewster*, 2022 CarswellYukon 16, 2022 YKTC 6.

[9] *R. v. Bartle*, 1994 CarswellOnt 100, 1994 CarswellOnt 1164, [1994] 3 S.C.R. 173 (S.C.C.) at para. 19; *R. v. Evans*, 1991 CarswellBC 417, 1991 CarswellBC 918, [1991] 1 S.C.R. 869 (S.C.C.).

[10] *R. v. Nguyen*, 2017 CarswellOnt 9095, 2017 ONCJ 393; *R. v. Grichko*, 2006 CarswellOnt 3956, 2006 ONCJ 233; *R. v. Peralta-Brito*, 2008 CarswellOnt 125, 2008 ONCJ 4; *R. v. Oliva Baca*, 2009 CarswellOnt 2564, 2009 ONCJ 194; *R. v. Robi*, 2021 CarswellOnt 18361, 2021 ONCJ 628.

[11] *R. v. Ryrak*, 2007 CarswellOnt 4912, 2007 ONCJ 350.

[12] *R. v. Taylor*, 2014 CarswellAlta 1154, 2014 CarswellAlta 1155, 2014 SCC 50 at para. 24.

[13] *R. v. Rover*, 2018 CarswellOnt 14936, 2018 ONCA 745 at paras. 25-27.

[14] *R. v. Mitchell*, 2018 CarswellOnt 2823, 2018 ONCJ 121 at paras. 30-33; *R. v. Perez Mejia*, 2019 CarswellOnt 3387, 2019 ONCJ 129 at paras. 131-139; *R. c. Tremblay*, 2021 CarswellQue 2606, 2021 CarswellQue 431, 2021 QCCA 24 at paras. 52-53; *Freddi c. R.*, 2021 CarswellQue 1547, 2021 CarswellQue 23352, 2021 QCCA 249 at paras. 40-45; *R. v. Kalyanaramier*, 2020 CarswellOnt 11176, 2020 ONCJ 348 at paras. 22-26. See for example also: *R. c. Whitehead*, 2017 CarswellQue 5844, 2017 QCCQ 6788; *R. c. Boivin*, 2017 CarswellQue 6895, 2017 QCCQ 8130; *R. c. Maurice*, 2015 CarswellQue 12428, 2015 QCCQ 12023; and *R. c. Chassé*, 2012 CarswellQue 5275, 2012 QCCQ 2448.

[15] *R. v. Willier*, 2010 CarswellAlta 1974, 2010 CarswellAlta 1975, 2010 SCC 37 at para. 35.

[16] *R. v. Kumarasamy*, 2002 CarswellOnt 368, [2002] O.J. No. 303 (Ont. S.C.J.) at para. 25; *R. v. Yang* (April 5, 2019), Doc. CR-16-00006978-00AP, [2019] O.J. No. 2529 (Ont. S.C.J.) at para. 28; *R. v. Mumtaz*, 2019 CarswellOnt 597, 2019 ONSC 468 (S.C.J.) at paras. 25-28; *R. v. Jeyalingam*, 2021 CarswellOnt 11792, 2021 ONCJ 433 at paras. 27-31; *R. v. Zhang*, 2019 CarswellOnt 19428, 2019 ONCJ 851 at paras. 36-40.

[17] *R. v. Jarrett*, 2021 CarswellOnt 14831, 2021 ONCA 758 at para. 43.

[18] *R. v. Akot*, 2000 CarswellAlta 706, 2000 ABPC 100; *R. v. Willier*, 2010 CarswellAlta 1974, 2010 CarswellAlta 1975, 2010 SCC 37 at para. 35; *R. v. Alaia*, 2017 CarswellAlta 659, 2017 ABPC 74 at para. 107; *R. v. Bell*, 2020 CarswellAlta 1110, 2020 ABPC 107; *R. v. Carlson*, 2015 CarswellAlta 1407, 2015 ABPC 170 at para. 26.

[19] *R. v. Akot*, 2000 CarswellAlta 706, 2000 ABPC 100; *R. v. Bell*, 2020 CarswellAlta 1110, 2020 ABPC 107; *R. v. Willier*, 2010 CarswellAlta 1974, 2010 CarswellAlta 1975, 2010 SCC 37 at para. 35.

[20] *R. v. Kiritpal*, 2019 CarswellOnt 10137, 2019 ONCJ 434 at para. 95; *R. v. Vernon*, 2015 CarswellOnt 12030, 2015 ONSC 3943 (S.C.J.), leave to appeal refused 2016 CarswellOnt 3887 (Ont. C.A.); *R. v. Kumarasamy*, 2002 CarswellOnt 368, [2002] O.J. No. 303 (Ont. S.C.J.) at para. 20. *R. v. Edwards*, 2022 CarswellOnt 10060, 2022 ONSC 3684 (S.C.J.) at paras. 72, 83.

[21] *R. v. Luong*, 2000 CarswellAlta 1238, 2000 ABCA 301 at para. 12.

[22] *R. v. Taylor*, 2014 CarswellAlta 1154, 2014 CarswellAlta 1155, 2014 SCC 50 at paras. 31, 34.

[23] 2001 CarswellOnt 2737, [2001] O.J. No. 3036 (Ont. S.C.J.).

[24] *R. v. Gunn* (unreported), before Justice Pugsley on September 28, 2022 in Brampton on Information No. 21-002209.

[25] *R. v. Prosper*, 1994 CarswellNS 25, 1994 CarswellNS 438, [1994] S.C.J. No. 72 (S.C.C.).

[26] *R. v. Dupe*, 2010 CarswellOnt 10149, 2010 ONSC 6594 (S.C.J.); *R. v. Mullins*, 2015 CarswellOnt 3164, 2015 ONSC 1552 (S.C.J.); *R. v. Palumbo*, 2020 CarswellOnt 18310, 2020 ONCJ 584; *R. v. Glasgow-Oliver*, 2022 CarswellOnt 2254, 2022 ONCJ 72 at para. 297.

[27] *R. v. Gownden*, 2008 CarswellOnt 8455, 2008 ONCJ 719; *R. v. Augustine* (June 19, 2019), M. Henschel J., [2019] O.J. No. 3522 (Ont. C.J.); *R. v. Vukasovic*, 2010 CarswellOnt 10420, 2010 ONCJ 661; *R. v. Alenich*, 2022 CarswellOnt 4635, 2022 ONCJ 161.

[28] *R. v. Buck*, 2008 CarswellNS 846, 2008 NSPC 67; *R. v. Dussault*, 2022 CarswellQue 4917, 2022 CarswellQue 4918, 2022 SCC 16 at paras. 40-45.

[29] *R. v. Sinclair*, 2010 CarswellBC 2664, 2010 CarswellBC 2679, 2010 SCC 35 at para. 48.

[30] *R. v. Willier*, 2010 CarswellAlta 1974, 2010 CarswellAlta 1975, 2010 SCC 37 at para. 42.

[31] *R. v. Luong*, 2000 CarswellAlta 1238, 2000 ABCA 301 at para. 12; *R. v. Prosper*, 1994 CarswellNS 25, 1994 CarswellNS 438, [1994] 3 S.C.R. 236 (S.C.C.); *R. v. Fountain*, 2017 CarswellOnt 10618, 2017 ONCA 596.

[32] *R. v. Fletcher*, 2021 CarswellNS 884, 2021 NSPC 55.

[33] 2009 CarswellOnt 4104, 2009 CarswellOnt 4105, 2009 SCC 32.

[34] *R. v. Noel*, 2019 CarswellOnt 17940, 2019 ONCA 860 at paras. 23-25; *R. v. McGuffie*, 2016 CarswellOnt 7507, 2016 ONCA 365 at para. 80; *R. v. Mann*, 2021 CarswellOnt 1926, 2021

ONCA 103 at para. 29; *R. v. Rampersaud*, 2018 CarswellOnt 17146, 2018 ONCJ 697 at para. 48; *R. v. Ma* (January 31, 2017), C. Pirraglia J., [2017] O.J. No. 897 (Ont. C.J.) at para. 36; *R. v. Iftikhar*, 2022 CarswellOnt 11343, 2022 ONCJ 361; *R. v. Edwards*, 2022 CarswellOnt 10060, 2022 ONSC 3684 (S.C.J.) at paras. 91-92.

[35] *R. v. Thompson*, 2020 CarswellOnt 5461, 2020 ONCA 264 at paras. 92-94; *R. v. Kou*, 2019 CarswellOnt 22121, 2019 ONCJ 966; *R. v. Simpson*, 2017 CarswellOnt 7585, 2017 ONCJ 321; *R. v. Pillar*, 2020 CarswellOnt 12713, 2020 ONCJ 394.

[36] *R. v. Davidson*, 2017 CarswellOnt 4334, 2017 ONCA 257 at para. 48; *R. v. Adler*, 2020 CarswellOnt 4822, 2020 ONCA 246 at para. 26; *R. v. Brown*, 2020 CarswellOnt 5265, 2020 ONCJ 193 at para. 194, reversed 2021 CarswellOnt 13360 (Ont. S.C.J.).

[37] *R. v. Sefton*, 2022 CarswellOnt 2832, 2022 ONSC 1429 (S.C.J.); *R. v. McFadden*, 2016 CarswellOnt 21292, 2016 ONCJ 777; *R. v. Augustine* (June 19, 2019), M. Henschel J., [2019] O.J. No. 3522 (Ont. C.J.) at para. 28; *R. v. Iftikhar*, 2022 CarswellOnt 11343, 2022 ONCJ 361 at paras. 69-71; *R. v. Thompson*, 2020 CarswellOnt 5461, 2020 ONCA 264; *R. v. Edwards*, 2022 CarswellOnt 10060, 2022 ONSC 3684 (S.C.J.) at paras. 95-96.

[38] *R. v. Grant*, 2009 CarswellOnt 4104, 2009 CarswellOnt 4105, 2009 SCC 32 at para. 84; *R. v. Thompson*, 2020 CarswellOnt 5461, 2020 ONCA 264 at para. 107; *R. v. Brown*, 2020 CarswellOnt 5265, 2020 ONCJ 193, reversed 2021 CarswellOnt 13360 (Ont. S.C.J.); *R. v. McGuffie*, 2016 CarswellOnt 7507, 2016 ONCA 365 at para. 63.

APPENDIX A - EXAMPLE OF TIMING CHART

May 27, 2020		
Time	**Event**	**Source**
18:43	PLUMMER receives call information	PLUMMER notes
18:43:12	911 call from ELGAZA at 180 Rambelwood Ln. ELGAZA advises D is ex-boyfriend and won't leave the house, nothing physical	Detailed call summary
18:45:31	Call talker notes parties are screaming at each other. ELGAZA's brother also O/S, now D is leaving	Detailed call summary
18:46:11	Call taker thought it was heard that D was drinking and now leaving in his car	Detailed call summary
18:47	KING receives call information	KING notes
18:47:11	ELGAZA says no drinking involved but D didn't want to leave, D still standing outside	
18:47:53	KING and PLUMMER dispatched	Detailed call summary
18:48:06	KING en route	Detailed call summary
18:48:23	ELGAZA says D is outside in black Mercedes SUV. ELGAZA refusing to look outside to see what direction D may go	Detailed call summary
18:49:05	PLUMMER en route	Detailed call summary
18:50:24	ELGAZA refusing to answer questions, saying she does not want police now that D is gone	Detailed call summary
18:51:30	ELGAZA hangs up and does not answer call-backs	Detailed call summary
18:56:50	PLUMMER runs queries on D	Detailed call summary
18:59*	While speaking to ELGAZA, PLUMMER observed vehicle matching description down the road, east of the house, parked on the street facing west bound. ELGAZA said this was D's vehicle. KING parks behind vehicle, conducts queries on vehicle. R/O Sheila PATEL. PLUMMER speaks with D who ID's as ZD,. PLUMMER advises D stated he had been drinking. Vehicle parked with keys in ignition in on position, between 155-159 Ramblewood. Front right rim scratches. KING searches male, smell of alcohol from mouth area, unsteady on feet. D provided his number as his mother's. Speech slurred. KING called D's mother as she is the R/O of the vehicle. Advised of impound. Vehicle towed.	KING notes *All of these notes appear under the same margin time but could not all occur at 18:59, per detailed call summary
18:59:49	KING O/S	Detailed call summary
19:00*	PLUMMER O/S, speaks with ELGAZA. ELGAZA says once D saw she called 911 he left in his SUV. While speaking with ELGAZA, PLUMMER observes black Mercedes SUV a few houses down, facing west, that wasn't there when PLUMMER pulled up. Asked ELGAZA what D drove, she said black Mercedes SUV. PLUMMER asked ELGAZA if the vehicle was D's (pointing to it), she said yes that's him. PLUMMER and KING drove cruisers to the vehicle. PLUMMER sees a male reclined in the driver's seat. D exited vehicle and verbally ID'd as Zev. **PLUMMER asked D what he was doing. D said "I can't drive I'm drunk." PLUMMER activates ICC. PLUMMER asks D where the keys are. D advised "in it". Confirmed keys in ignition. D's eyes glossy, blood shot. Strong cologne smell. Couldn't smell any**	Detailed call summary PLUMMER notes *All of these notes appear under the same margin time but could not all occur at 19:00, per detailed call summary

	alcohol. Asked D what he was drinking. D said vodka. Asked D when he was drinking. D said an hour ago. PLUMMER reads ASD from back of notebook. D understood. PLUMMER has D stand in front of camera. PLUMMER tests Alcotest 6810, last calibrated May 25, 2020. D provides sample on first try and fails.	
19:12:06	KING runs queries on plate 501DRA	Detailed call summary
19:12:34	KING runs queries on D	Detailed call summary
19:14:15	PLUMMER reading from notebook to D	PLUMMER ICC
19:16:35	D provides breath sample into ASD, fails, is cuffed to rear	PLUMMER ICC
19:17:38	D under arrest for 80 plus [PLUMMER actually arrested him for C&C – see ICC]. PLUMMER "said care and control out of old habit." PLUMMER places D in rear of cruiser	Detailed call summary PLUMMER notes PLUMMER ICC
19:18:53	**PLUMMER provides RTC/caution for "care and control". PLUMMER does not ask 'DYWTSWALN'. D asks to call his mom. PLUMMER says "you can't but I can for you ok? When we get to the station"**	PLUMMER ICC
19:19:34	**PLUMMER provides RTC: "Yes I understand"**	Detailed call summary PLUMMER notes
19:19:49	PLUMMER provides caution: "Yes"	Detailed call summary PLUMMER notes
19:20:38	PLUMMER provides breath demand: "Yes I understand". PLUMMER removes D from cruiser to complete SITA	Detailed call summary PLUMMER notes
19:20:55	PLUMMER asks questions about car ownership. In course, D provides his mother's number	PLUMMER ICC
19:21:34	PLUMMER runs queries on D	Detailed call summary
19:23:53	D removed from cruiser for pat down search, then placed back in rear	PLUMMER ICC
19:24	Breath tech LEMMON r/c to attend breath facility. LEMMON en route to breath facility.	Alcohol influence report
19:25	Breath tech LEMMON O/S at breath facility	Alcohol influence report
19:25:25	PLUMMER transports D to station. While en route, D wanted to talk about personal relationships. Head kept dipping, possibly falling asleep. Hard to understand, mumbling.	Detailed call summary PLUMMER notes PLUMMER ICC
19:26:40	D asks for handcuffs to be loosened, denied	PLUMMER ICC
19:27:02	D asks for his phone, denied	PLUMMER ICC
19:29:37	Tow en route	Detailed call summary
19:30:12	PLUMMER and D have conversation where D repeats that he was parked and the car was off. PLUMMER says D was in the driver's seat with the keys in the ignition. D agrees.	PLUMMER ICC
19:32:56	KING runs queries on VIN	Detailed call summary
19:42:59*	PLUMMER arrives at station with D. Booked by JAMES. D searched in cell block and lodged in cell 2**. D stated he would like his mom called to get him a lawyer. KING speaks to mother, who provided lawyer Daniel BROWN: 416-898-2097**	Detailed call summary PLUMMER notes PLUMMER ICC
19:43:10	Arrive in Sallyport	Sallyport video
19:44:25	PLUMMER exits cruiser, D begins crying	PLUMMER ICC

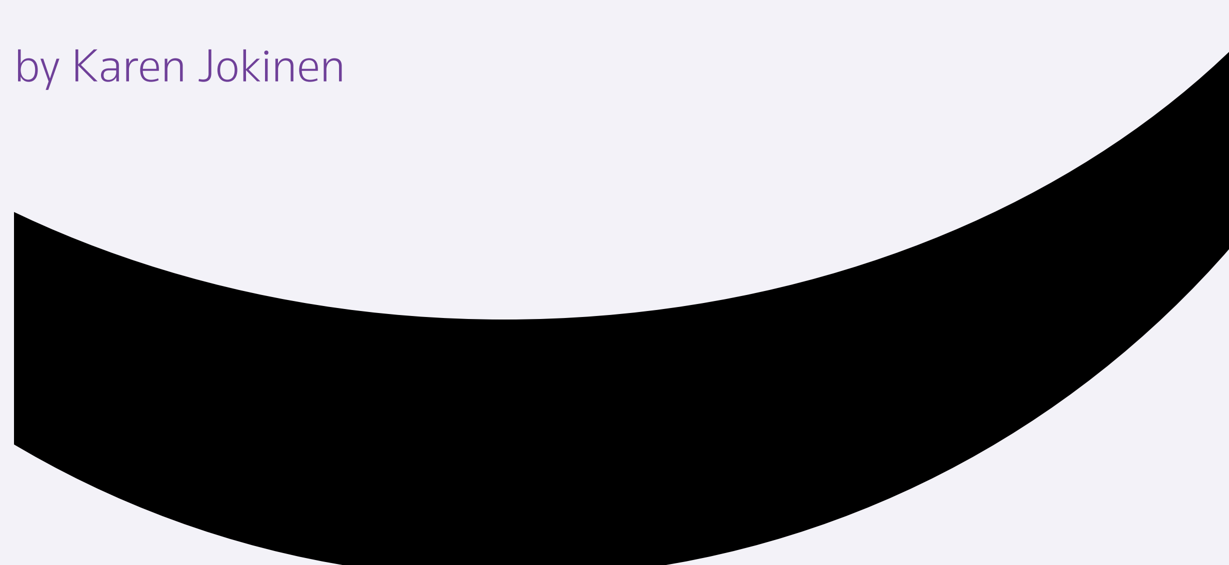
19:46:30	Officer and Booking sergeant have conversation. Booking sgt asks "lawyer?". Officer replies "I haven't got that far with him, probably duty counsel"	Booking desk overhead
19:47	**D booked into cells by JAMES. JAMES reviewed options for counsel with D: family (mom), Internet, D/C. D wanted to call his mother for a lawyer. Phone # retrieved from his phone.** D states that his car was parked during booking.	**Arrest/booking report JAMES notes**
19:48:20	D exits cruiser	PLUMMER ICC Sallyport video
19:48:40	In booking hall. Officer asks, "do you understand reasons for your arrest?". D says, "I was parked, my car was off, it was parked".	Booking desk overhead
19:49:25	**Asked if he remembers them reading RTC. D says yes. Asked if he wishes to call a lawyer. D says "my mom". Given options: "We can call your mom and she can give us a lawyer for you, can search the internet for a lawyer, if you have a personal lawyer, can call duty counsel" Asked if he wants to call his mom to get a lawyer, D says yes**	Booking desk overhead
19:50	KING completes statement of neighbour MAOR, who says he saw D driving the vehicle before and after police were O/S	KING notes MAOR statement
19:51:02	caution	Booking desk overhead
19:59:42	D says his mom's number is on his phone, says he doesn't remember it. Officer gives ZD his phone to look for the number	Booking desk overhead
20:04:03	D exits booking hall and enters cell	Booking hall videos and cell video
20:07	KING speaks to ELGAZA who refuses to give a statement PLUMMER provides breath tech LEMMON w grounds for arrest	KING notes PLUMMER notes
20:18	**KING speaks to D's mother. Was advised by PLUMMER that D would like mother's lawyer. Mother provided Daniel BROWN, 416-898-2097. Provided info to PLUMMER**	KING notes ***Why half an hour of delay until mother is called?**
20:22	ZD uses toilet in cell	Cell video
20:22	**PLUMMER calls BROWN and leaves a message**	PLUMMER notes
20:35	**PLUMMER advises D no reply by lawyer. Asks D if he wants D/C. "No wants to wait for lawyer"**	PLUMMER notes 8:32 acc to cell video. Conversation lasts approx. 1 minute
20:36	**PLUMMER calls and leaves another message for BROWN. Locates second number for lawyer on LSO. "Called – neg"**	PLUMMER notes
20:39	**PLUMMER asks D if he wants another lawyer tried or D/C as still no response by lawyer. D said he wants to talk to his mom. No other lawyer.**	PLUMMER notes ***PLUMMER should have allowed D to speak to mother again** 8:40 acc to cell video. Conversation lasts approx. 2 minutes
20:46	**PLUMMER calls lawyer – neg. Rings once now direct to voicemail**	PLUMMER notes

20:54	**PLUMMER calls lawyer, no rings**	PLUMMER notes
20:56	PLUMMER turns D over to breath tech LEMMON LEMMON notes D is orderly with watery eyes.	PLUMMER notes Alcohol influence report Cell video and cell hallway video and breath room video
20:39:53	D talking to officer	Cell video
20:40:30	D talking to officer	Cell video
20:57	**"Spoke to accused in cell. Advised of lawyer and D/C. says only lawyer. Explained lawyer – doesn't want anyone else"**	Alcohol influence report* *The first two sentences have no margin time noted (note: probably 20:40
20:57:25	**Tech:** ***the lawyer your mother provided, there's been several phone calls made, two voicemails left, there's been no return of his phone call.*** **ZD:** ***ok*** **Tech:** ***do you know of any other lawyer or do you want to speak with duty counsel before we commence?*** **ZD:** ***can I speak to my mom?*** **Tech:** ***no*** **ZD:** ***alright*** **Tech:** ***we can only facilitate that phone call, we only speak to her, you can't speak to her. But when they spoke to her that was the name and phone number, she provided*** **ZD:** ***Ok*** **Tech:** ***Unfortunately we've tried 4 times including calling his office, which then directs over to his cell phone, and [indiscernible – various people (?)]to voicemail. So we've had no contact with him*** **ZD:** ***Ok*** **Tech:** ***And he hasn't returned the voicemail calls or nothing like that. Is there any other lawyer or any, or do you want to speak to duty counsel before we commence?*** **ZD:** ***Uh, I'm not gonna talk, no***	Breath tech video Why no second call to mother? Not a clear waiver
20:58	**Breath tech LEMMON provides breath demand and secondary caution: "Ya" / "Alright"**	Alcohol influence report
21:00	**Tech:** ***if your lawyer does call between now and while we're commencing this test, we will stop it and then we will facilitate you speaking to him. If he checks his messages, whatever, like I said, <u>aside from sending out pigeons with notes and everything else, we've tried and exhausted all options to get a hold of him</u>*** D asks what will happen if he refuses to blow, breath tech LEMMON advises him re: legal ramifications	Breath tech video **Leaves D with impression that no other option of contacting counsel of choice. D clearly wants legal advice**
21:04	**First sample: 217**	Alcohol influence report
21:04:51	KING arrives at station	Detailed call summary KING notes
21:05	D escorted back into cell #2	Alcohol influence report Cell video
21:22	D back into breath room	Alcohol influence report

		Breath room video and hallway video
21:24:50	Tech: this is the mouthpiece etc ZD: oh I have to do it again Tech: yep, you do 2 of them, that's to benefit you	Breath room video
21:27	**Second sample: 202**	Alcohol influence report Breath room video
21:28:22	Tech: your first reading came out at 202, you're over the legal limit. You'll get released when your numbers come down	Breath room video
21:29	Breath tech LEMMON returns D to PLUMMER. D placed back into cell 2. PLUMMER completes release documents	PLUMMER notes Alcohol influence report Hallway and cell video ***D never speaks to a lawyer**
21:55:39	KING runs queries on ELGAZA	Detailed call summary
21:56:42	KING runs queries on D	Detailed call summary
22:15	ZD uses toilet in cells	Cell video
22:20	JAMES speaks to D's parents at front desk. Advises he is waiting for paperwork and wanted to ensure D had capacity to understand release forms	JAMES notes
22:42	Officer completing paperwork	JAMES notes
22:56	D exits cell to booking hall, receives docs	Cell video, booking hall videos, hallway video
23:06	JAMES stands by while D served documents to ensure his ability to understand. D released to parents	Arrest/booking report JAMES notes
23:08	D exits booking hall	Booking hall video
23:10	PLUMMER serves service documents in cell block w/ JAMES who served release documents. D escorted out of booking to parents. Impound slip provided to D's mother.	PLUMMER notes

A Quick Refresher of the Changes in the Drinking and Driving Legislation as a Result of Bill C-46 Introduced in 2018[1]

by Karen Jokinen



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Bill C-46 was not merely an impaired driving bill. It repealed and rewrote all of the driving provisions of the *Criminal Code*.

Structure of the Bill

Bill C-46 contained three parts. Part 1 of the Bill came into force on June 21, 2018, and amended a number of the provisions of the *Criminal Code* to update laws related to drug impaired driving. This was done in conjunction with the marijuana legalization Bill. Part 1 came into force at the time Bill C-45, the *Cannabis Act*, was enacted. Part 1 of Bill C-46 contained one summary conviction and two hybrid offences that established *per se* limits for Blood Drug Concentration (BDC). Like the old "over 80", offences "equal to and over BDC" offences now exist.

Almost six months later, on December 18, 2018, Bill C-46, repealed all driving provisions of the *Criminal Code* in sections 249 to 261 inclusive, including a number of driving related definitions. It then enacted a comprehensive scheme that largely rewrote existing law. A number of existing laws remained intact and largely unchanged, albeit with some updating of the legal language. A number of offences were repealed, including the specific offences relating to street racing. However, Bill C-46 enacted a number of new offences that significantly changed the arguments and defences available in drinking and driving cases. All section numbers relating to *Criminal Code* driving offences have changed. For example, instead of a s. 253 offence, it is now a s. 320.14 offence.

A Summary of the Major Changes

1. *Per se* limits

Drug impaired driving has been a criminal offence for decades. One of the difficulties in combating drug impaired driving is there were no '*per se*' limits for blood drug concentrations. Parts 1 and 2 of Bill C-46 introduced a legislative scheme intended to set limits on blood drug concentrations for a variety of drugs, with the limits being determined by regulation. There are three types of offences, which we refer to as "BDC equal to and over" (s. 320.14(1)(c)), "BDC under" (s. 320.14(4)) and "combined BDC and BAC equal to and over" (s. 320.14(1)(d)). The *per se* limits for drugs are set out in the *Blood Drug Concentrations,* SOR 2018-148.

2. BAC and BDC Equal to or Over Within Two Hours

Section 320.14(1)(b) of the *Criminal Code* replaced the "over 80 at the time of operation" offence with "80 or over within two hours of operation". Section 320.14(1)(c) continues the offence of "BDC Equal to or over" enacted in Part 1. A new defence under s. 320.14(5) specifies that individuals who consume alcohol or drugs after driving are not to be convicted, unless they consume alcohol when they have a reasonable expectation that they will be required to provide an alcohol sample.

The "new" offences of BAC- and BDC-equal to and over, do four things:

- They eliminate the need for the Crown to rely upon the presumptions of accuracy and identity required under the old legislation. This eliminated a number of defences that had been commonly argued under the old regime. In particular, it changed the "as soon as practicable" defence argument from a defense, into a *Charter* issue. Now, if there is an issue with samples not being taken quickly, Defense counsel will need to bring a s. 8 *Charter* application.
- The "new" regime criminalizes bolus drinking. The bolus drinking defence used to occur when individuals consumed a substantial amount of alcohol prior to driving, and then drove in circumstances where their BAC was "under 80" at the time of driving. This defence no longer exists.
- The "new" regime is directed at the behaviour of drivers who, after an accident, begin consuming alcohol or drugs when they know that the police are investigating and are likely to demand a breath or blood sample.
- This regime also addresses the standard police practice of truncating blood alcohol concentration results. Accordingly, a result of 89 mg of alcohol in 100 mL of blood is reported as 80. The previous offence was "over 80". The new offence is "80 or over", which means that truncated '80' readings will result in a charge.

3. Part 1 and 2: Presumption of impairment, relating to DRE's opinion

Specially trained police officers, known as Drug Recognition Experts, or Evaluating Officers, are entitled to conduct an evaluation of individuals when reasonable and probable grounds exist to arrest them for drug impaired operation. Under old law, the evidence of these officers was largely admissible, but the weight to be attributed to that officer's opinion was a matter for the trier of fact (*R. v. Bingley* [2017] SCC 12).

Under s. 254(3.6) of the *Criminal Code,* introduced under Part 1, and section 320.31(6) of the *Criminal Code,* introduced by Part 2, more weight will be attached to a DRE's opinion. Under these sections, an individual's ability to operate a vehicle will be presumed to be impaired by a drug when: the analysis of blood reveals the individual has a drug in their system; it is of the type that the evaluating officer has identified; and the Crown proves the individual's ability to operate a conveyance was impaired.

4. Conveyance

The old language in the *Criminal Code* impaired driving provisions relate to motor vehicles, aircraft, vessels and railway equipment. New section 320.11 contains a new term "conveyance", which is defined to mean a motor vehicle, vessel, aircraft or railway equipment. This new definition is a change in language only and leaves existing laws largely unchanged.

5. Operate

One committed the older "over 80" offence by either operating or having care or control of a motor vehicle while one's blood alcohol concentration was over 80 milligrams of alcohol in 100 milliliters of blood. For years, Crown and defense counsel have tangled in court over whether an information alleges an individual "operated" or "had care or control" of a motor vehicle. Section 320.11 of the *Criminal Code* resolves this battle by defining "operate" to mean drive or have care or control. Section 320.14 criminalizes "operation while impaired." Again, this is largely a language change that does not substantially change the law.

6. 10 basic transportation offences

As explained in the legislative summary, Part 2 of Bill C-46 introduced 10 basic transportation offences:

- Dangerous operation of a conveyance (section 320.13);
- Operating a conveyance while impaired (paragraph 320.14(1)(a));

- Having a BAC of 80 or more within two hours of operating a conveyance (paragraph 320.14(1)(b));
- Having a blood drug concentration (BDC) equal to or over the prescribed legal limit within two hours of operating a conveyance (paragraph 320.14(1)(c));
- Having a combined BAC and BDC equal to or over the prescribed legal limit within two hours of operating a conveyance (paragraph 320.14 (1)(d));
- Having a BDC over a prescribed limit that is lower than the BDC set under paragraph 320.14(1)(c) within two hours of operating a conveyance (subsection 320.14(4));
- Refusing to comply with a demand (section 320.15);
- Failure to stop after an accident (section 320.16);
- Flight from peace officer (section 320.17); and
- Driving a conveyance while prohibited (section 320.18).

With respect to these offences, many represent continuations of the law. By way of example, the offence of dangerous operation is largely the same as it was before. Certain offences have been repealed. In particular, the offences of dangerous operation or criminal negligence while street racing has been repealed. Under the new law street racing will be treated as an aggravating factor on sentencing.

7. Refusing to Comply

There are several changes in the offence of "Refusing to Comply" with a lawful demand. The *mens rea* of the offence is now specified as being knowledge of the demand being made. Some Courts support the Crown's theory that they only have to prove the accused was aware that the demand was made. However, since 2020, there are contrary decisions that indicate the Crown must prove that the fail/refuse was produced intentionally.

The onus on the defence asserting a "reasonable excuse" for refusing to comply is still up for debate. Section 794(2) of the *Code* indicated that a reasonable excuse lies with the accused on a balance of probabilities. Bill C-51 repealed this section in 2018. There are still contrary views in the case law. Many courts agree that once the defence raises an air of reality to the reasonable excuse, the Crown must disprove the defence beyond a reasonable doubt. Other cases rely on the common law indicating that despite the repeal of s. 794(2) the burden is still on the defence on a balance of probabilities. There are extensive discussions of this issue in a particular impaired driving book (second edition) recently published by Emond Publishing in 2023.

8. "Causing" Death or Bodily Harm

Driving offences that caused death or bodily harm have always been treated as aggravated offences and attracted significant jail sentences. The new legislation continues this practice.

The offence of impaired operation causing bodily harm or death remains unchanged in the new legislation. The provisions relating to equal to or exceeding the alcohol or drug legal limit now say, "causes death or bodily harm" rather than "causes an accident resulting in death or bodily harm". It would seem that not much will turn on this new wording. However, causation requirements have changed for several other aggravated driving offences. For example, the section relating to fail/refuse breath sample where bodily harm or death ensues has been changed to import not only knowledge but also recklessness as to whether they were involved in an accident. Furthermore, there is no longer a requirement that the accused knew (or ought to have known) they caused the accident. This change seems to put fail/refuse breath sample where bodily harm or death ensues in the same category as fail to stop after an accident where bodily harm or death ensues - one in which the manner of driving is irrelevant to the causation test. For defence counsel, this is a very scary change.

9. Sentencing Changes

There have been a number of changes to sentencing. The previous sentencing scheme involving a minimum fine on first offence of $1,000 (and increasing to a minimum 120 days for a third offence) is maintained. New minimum sentences are introduced by s. 320.19(3) and (4) where individual alcohol concentrations are equal to or above statutorily aggravating levels.

Section 320.24(10) allows for offenders to have the interlock device, in the case of a first offence, immediately; in the case of a second offence, three months after the sentence is imposed; and in the case of a subsequent offence, six months after the sentence is imposed.

Section 320.22 of the *Criminal Code* creates a new list of aggravating factors including:

- Causing bodily harm to or death of multiple people;

- Street racing;
- Driving with a passenger under the age of 16 years;
- a driver being paid for operating the conveyance;
- Driving with a blood-alcohol concentration of "equal to or over 120", lower than the current aggravating level of 160;
- Operating a large motor vehicle; and
- Committing the offence while being prohibited from driving.

Parliament specified, in s. 320.31, the requirements for admissibility of a breath sample. These include some technical requirements that the Crown must now prove. Care must be taken in reviewing these requirements as cases can be won if the Crown neglects to follow these requirements.

Alcohol ignition interlock device program

Section 320.24(10) allows for offenders to have the interlock device, in the case of a first offence, immediately; in the case of a second offence, three months after the sentence is imposed; and in the case of a subsequent offence, six months after the sentence is imposed. These time periods are of course subject to the court ordering a longer time period. Provincial highway traffic act legislation would also have to change in order to give effect to these new timelines.

Requirement to advise offenders of consequences

Section 320.24(7) appears to be Parliament's response to the Ontario Court of Appeal's decision in *R. v. Molina*.[2] According to that case, a failure of the court to inform an offender of the consequences of a prohibition order could be fatal to a subsequent driving while disqualified charge. Section 320.24(7) specifies the failure to inform does not affect the validity of the prohibition order. Essentially, the accused is now presumed to know the law.

10. Mandatory Alcohol Screening – s. 320.27

This is one of the very substantial changes in legislation. Under the previous legislation, police in a random stop could require an individual to provide a breath sample into an approved screening device only where an officer had reason to suspect the individual had alcohol in their body. Under s. 320.27, the police will be able to engage in "mandatory alcohol screening", also known as "random breath testing" on every individual they stop provided the officer has an approved screening device in their possession.

11. Breath Samples – 320.31

The breath samples are always taken later than the time of driving. Under the old legislation the Crown had to prove a series of legislative presumptions, or, if the breath samples were taken outside of the two-hour time-period, had to use a toxicologist in order to provide the necessary evidentiary link between blood alcohol concentration at the time of the taking of the breath sample, and blood-alcohol concentration at the time of driving.

The change in the offence from "over 80 at the time of operation or care or control" to "80 or over within two hours of operating a conveyance" means that the presumptions that were once required have now been eliminated. This eliminates the need for the Crown to prove, when relying on the presumption, that the samples were taken "as soon as practicable". A failure to do so meant the Crown couldn't prove BAC at the time of driving, so an acquittal would follow unless the Crown had called a toxicologist to provide a readback. This change in the law is a grievous blow to Defense counsel. However, all is not lost. Defense counsel can bring a s. 8 *Charter* challenge in an effort to exclude breath readings where the samples were not taken as soon as practicable.

Parliament specified, in s. 320.31, the requirements for admissibility of a breath sample. These include some technical requirements that the Crown must now prove. Care must be taken in reviewing these requirements as cases can be won if the Crown neglects to follow these requirements.

Parliament continues the use of properly taken breath samples as "conclusive proof", which continues the elimination of the *Carter* defense.

12. Judicial Calculators and Toxicologists

Historically, if the first breath sample was taken outside the two-hour limit from the time of driving, the Crown needed to call a toxicologist to establish blood-alcohol concentration at the time of driving. This need is eliminated by s. 320.31(4). Under this section, where an individual's blood or first breath sample is taken more than two hours after the time of operation, their blood-alcohol concentration is conclusively presumed to be the amount established by the test plus an additional 5 mg of alcohol in 100 mL of blood for every 30 minutes in excess of those two hours. This reflects the well-established alcohol elimination rates that are widely agreed upon. This will significantly reduce the need to call

toxicologists in routine drinking driving cases.

13. *Soules* amendment – s. 320.31(9)

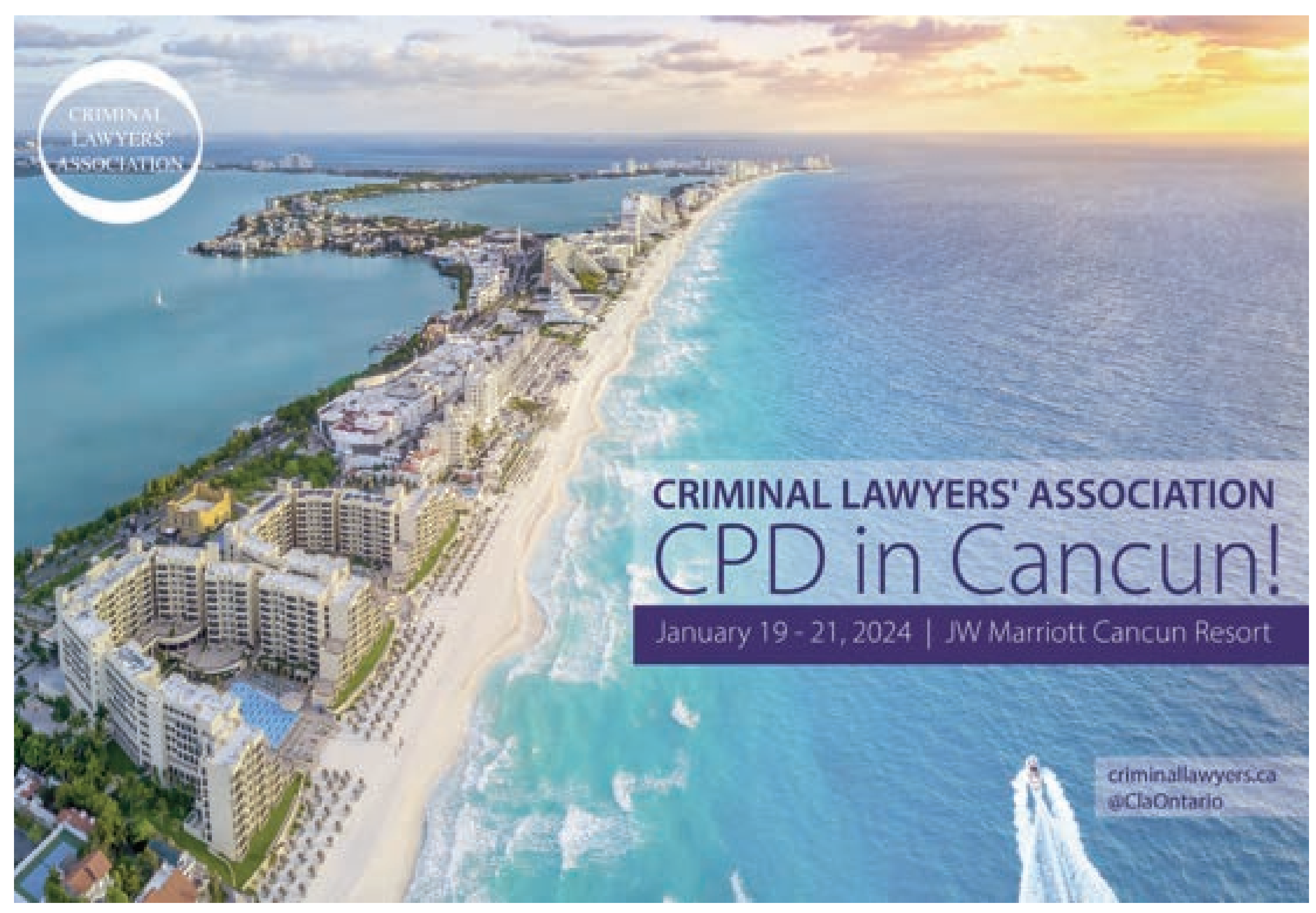
When drivers are involved in an accident, they are required by law to report the details to the police. The Ontario Court of Appeal in *R. v. Soules*,[3] ruled that such statutorily compelled statements cannot be used by the Crown to establish the basis for an officer's grounds to engage in a drinking and driving investigation or arrest. Section 320.31(9) now specifies that officers can use such statements for their grounds, and amounts to legislative repeal of *R. v. Soules*. This has been constitutionally challenged.

NOTES:

[1] Adapted from an earlier article written by Karen Jokinen and Peter Keen, co-authors of *Impaired Driving and Other Criminal Code Driving Offences*, Emond Publishing, Second Edition, 2023.

[2] 2008 CarswellOnt 1629, 2008 ONCA 212.

[3] 2011 CarswellOnt 4183, 2011 ONCA 429, leave to appeal refused 2011 CarswellOnt 14184, 2011 CarswellOnt 14185 (S.C.C.).



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Highway Traffic Act Consequences in Criminal Driving Cases

by Laura Metcalfe and Jonathan Rosenthal

Photo courtesy of Jennifer Houghton.

Photo courtesy of Jonathan Rosenthal.

The main reason impaired driving lawyers lose sleep is because they are awake worrying about potential *Highway Traffic Act* ("*HTA*") consequences they are unaware of.

In this article, we identify the ways in which a licence can be suspended under the *HTA* in Ontario when a person is charged or convicted of various driving offences, along with some potential pitfalls to watch out for.

After reading this article, we hope that the only thing interrupting your sleep are calls from the suspected intoxicated drivers or the absolutely hammered client in need of advice.

(We would have liked to identify similar issues for the rest of the Provinces and Territories but that falls outside of our scope of expertise)

1. Pre-Conviction suspensions under s. 48 of the *HTA*

90-day suspension

Under s. 48.3.1(1) and (3) of the *HTA,* a person's licence will be suspended for 90-days if an evaluating officer under s. 320.28(2) of the *Criminal Code* is satisfied that a person driving or in care and control of a motor vehicle or vessel was impaired by drug or alcohol, or if their blood alcohol level is 80 milligrams or more in 100 millilitres or they refuse to comply with a demand under ss. 320.27 or 320.28 *Criminal Code*: *HTA*, s. 48.3(2).

There is no exception to this mandatory suspension. Even if you get your client's charges withdrawn before the 90-days expire, their licence will remain suspended. However, the police have the discretion to withdraw the Notice of Suspension at any time. The lawyer could therefore urge the officer in charge to withdraw the Notice of Suspension if the charge is withdrawn.

Any driver who receives a second administrative suspension will have to complete a back on track program to get their licence back. On the third suspension, the driver will only be allowed to drive a car equipped with an Interlock device for six months.

The suspension runs concurrently with any of the below administrative suspensions: *HTA*, s. 48.3.1(4).

Short administrative suspension (three to 30 days)

50 milligrams or more

Under s. 48(2) of the *HTA*, the police may require any driver to surrender their licence if they register a "warn", "alert" or anything that indicates their concentration of alcohol is 50 milligrams or more in 100 millilitres of alcohol. Under s. 48(14), the person's licence will then be suspended for: (a) three days for a first suspension; (b) seven days for a second suspension within five years; or (c) 30 days for a third suspension within five years.

Young drivers (under 22 years old)

Under s. 48(4) of the *HTA,* any young driver who has any drugs or alcohol in their system will have their licence suspended for (a) three days for a first suspension; (b) seven days for a second suspension within five years; or (c) 30 days for a third suspension within five years. If that same driver is charged with driving while impaired, then the suspension will run concurrent with the 90-day suspension. The young driver will have to complete a back on track program to get their licence back.

Novice Driver (G1, G2, M1, M2)

Under s. 48.1(3)(4) of the *HTA*, any novice driver who has any drugs or alcohol in their system may have their licence suspended for (a) three days for a first suspension; (b) seven days for a second suspension within five years; or (c) 30 days for a third suspension within five years. If that same driver is charged with driving while impaired, then the suspension will run concurrent with the 90-day suspension. The novice driver will have to complete a back on track program to get their licence back.

Commercial motor drivers

Under s. 48.2.2 of the *HTA,* any person driving a commercial motor vehicle who has any alcohol in their system may have their licence suspended for three days.

2. Conviction suspensions under s. 41 of the *HTA*

If convicted of:

- Criminal Negligence Cause Death by means of a motor vehicle, street car or motorized snow vehicle (*Criminal Code*, s. 220)
- Criminal Negligence Cause Bodily Harm by means of a motor vehicle, street car or motorized snow vehicle (*Criminal Code*, s. 221)
- Manslaughter by means of a motor vehicle, street car or motorized snow vehicle (*Criminal Code*, s. 236)
- Dangerous Operation while driving or having care and control of a motor vehicle, street car or motorized snow vehicle (*Criminal Code*, s. 320.13)
- Fail to Stop After Accident while driving or having care and control of a motor vehicle, street car or motorized snow vehicle (*Criminal Code*, s. 320.16)
- Flight from Police while driving or having care and control of a motor vehicle, street car or motorized snow vehicle (*Criminal Code*, s. 320.17)
- Impaired or 80 plus while in care or control of a motor vehicle, street car, motorized snow vehicle or a vessel (*Criminal Code*, s. 320.14); or
- Refuse to comply with demand while in care or control of a motor vehicle, street car, motorized snow vehicle or a vessel (*Criminal Code*, s. 320.15)

The driver will receive the following suspension under s. 41(1) of the *HTA*:

- First Conviction: one year
- Second Conviction within 10 years of first conviction ("Subsequent Conviction"): three years
    * i.e., if convicted in 2010 and 2022 then the 2022 is treated as a first conviction, not a second conviction.

- Third Conviction within 10 years of second conviction ("Second Subsequent): Life but can apply for re-instatement after 10 years under s. 56(4.2) of the *HTA*
    * i.e., if convicted in 2004, 2015 and 2022 then the 2022 is treated as a second conviction, not a third conviction. But if convicted in 2004, 2013, and 2022 then 2022 is treated as a third conviction.

- Fourth Conviction within 10 years of third conviction: Life with no exception

Practice tip: If two convictions stem from a single transaction, the Ministry treats the matter as one conviction. But if the Information has one offence (impaired) occurring on April 1, 2023 at 11:30pm and the second offence (refuse) occurring on April 2, 2023 at 12:30am, the Ministry may treat the second offence as a second conviction.

Consider this nightmare: you convince the Crown to accept a plea to dangerous driving. They'll withdraw the impaired and 80 over and make a joint submission for a conditional discharge. No driving prohibition. A lawyer unaware of s. 41(5) of the HTA would not be aware of the mandatory one-year driving suspension under the HTA.

To avoid this issue, convince the Crown in your plea negotiation to amend the Information for the first offence the date of the second offence.

3. A conviction includes discharges and youth dispositions

Under s. 41(5)(a) of the *HTA,* a discharge under s. 730 of the *Criminal Code* or a youth sentence imposed under ss. 42, 59, 94, 95, or 96 of the *Youth Criminal Justice Act* must be treated the same as a criminal conviction.

Consider this nightmare: you convince the Crown to accept a plea to dangerous driving. They'll withdraw the impaired and 80 over and make a joint submission for a conditional discharge. No driving prohibition. A lawyer unaware of s. 41(5) of the *HTA* would not be aware of the mandatory one-year driving suspension under the *HTA*.

(Luckily, you have read this article and can get a good night sleep knowing this won't happen to you)

4. The suspension begins on the date the court makes a finding of guilt, not the date of sentencing

Under s. 41(5) of the *HTA,* a finding of guilt must be treated the same as a conviction. Practically, this means that the date the *HTA* suspension starts could be different than the date the *Criminal Code* driving prohibition starts if the lawyer adjourns the plea. Where this could create a problem is if the lawyer is delaying the sentencing to avoid triggering the 10-year prior conviction rule under s. 41(1) of the *HTA*.

Practical tip: If you are pleading your client guilty and adjourning the sentencing date to avoid triggering the 10-year prior conviction rule, you must ensure the Court makes the finding of guilt on the date of sentencing. A judicial pre-trial to canvass this issue before the plea is strongly recommended.

5. Interlock Ignition Device

To continue driving after a conviction for an impaired driving offence the driver must have an ignition interlock device installed. The length of time the device must be installed is as follows:

- First conviction: one year
- Second conviction: three years
- Third conviction: six years minimum (assuming licence was reinstated after 10 years under s. 56(4.2) of the *HTA*)

Practice tip: Stress to your client the importance of following the terms of the Interlock program. The Interlock Ignition condition may get extended if they violate the terms of the program by tampering with the device or missing an appointment with the service provider.

Practical tip: If you are pleading your client guilty and adjourning the sentencing date to avoid triggering the 10-year prior conviction rule, you must ensure the Court makes the finding of guilt on the date of sentencing. A judicial pre-trial to canvass this issue before the plea is strongly recommended.

6. Reduced Suspension with Ignition Interlock Conduct Program

Section 57 of the *HTA* provides the Lieutenant Governor in Council authority to make regulations establishing conduct review programs allowing eligible drivers to reduce their *HTA* licence suspension in return for meeting certain requirements. The current program in Ontario is the Reduced Suspension with Ignition Interlock Conduct Program. The eligibility requirements by Stream are found at https://www.ontario.ca/page/reduced-

suspension-ignition-interlock-conduct-review-program.

Only drivers convicted of alcohol offences are eligible. Impaired by drug, impaired by drug and alcohol, and offences involving bodily harm or death are ineligible. A driver is also ineligible if they were convicted of drive disqualified within five years for a first-time offender or drive disqualified within 10 years for a second-time offender.

Practice tip: The standard wording for impaired driving includes both alcohol or drugs. There is an "S" box at the top of the Information designating the offence as "Impaired by Substance". If the clerk inadvertently checks this box your client may be ineligible for the Reduced Suspension Program until this is corrected.

Practice tip: The standard wording for impaired driving includes both alcohol or drugs. There is an "S" box at the top of the Information designating the offence as "Impaired by Substance". If the clerk inadvertently checks this box your client may be ineligible for the Reduced Suspension Program until this is corrected.

The cautious lawyer (or the lawyer who values their sleep) would carefully check the eligibility requirements shortly after each client calls you for the first time to ensure there have been no changes.

The current Stream requirements are:

Stream A: three-month absolute suspension followed by nine months of an interlock ignition condition

- First offence;
- Plea guilty to offence;
- Be convicted, sentenced and subject to a driving prohibition order within 90 days of the offence;
- Remedial measures program assessment completed within 90 days of sentencing; and
- Lease agreement with service provider completed within 90 days of sentencing.

Stream B: A six-month absolute suspension followed by 12 months of an interlock ignition device condition

1. First offence only

Stream D: A 9-month absolute suspension followed by 18-months of an interlock ignition device condition

1. Second offence;
2. Plea of guilty to offence;
3. Be convicted, sentenced and subject to a driving prohibition order within 90 days of the offence;
4. Remedial measures program assessment completed within 90 days of sentencing; and
5. Lease agreement with service provider completed within 90 days of sentencing.

Practice tip: **Timing is everything.** If you don't plead within 90 days you lose stream A and stream D.

This is particularly significant when assisting a client with a prior conviction. The difference between Stream D and no stream is 27 months of an absolute driving prohibition (nine months no driving and 18 month interlock v. three years no driving and three years interlock)!

A further problem arises when trial counsel is missing substantial disclosure but the 90 days are running out (i.e., video disclosure) See *R. v. Malik*,[1] where the Court held the trial counsel was ineffective for pleading a client guilty without reviewing the videos at the station. If trial counsel is going to plea their client's guilty in this scenario, at a minimum they should:

- be able to show diligent efforts to expedite disclosure (e.g., disclosure letters, Crown and judicial pre-trials to explain the urgency);
- have written instructions confirming that the client is aware they are giving up the right to explore potential defences including *Charter* defences; and
- counsel considered, or brought, a disclosure motion well before the 90-days expired (the feasibility of this step will depend on when you are retained)

Practice tip: Timing is everything. If you don't plead within 90 days you lose stream A and stream D.

This is particularly significant when assisting a client with a prior conviction. The difference between Stream D and no stream is 27 months of an absolute driving prohibition (nine months no driving and 18 month interlock v. three years no driving and three years interlock)!

7. Drive Disqualified

Under s. 42(1) of the *HTA*, any driver convicted of driving while disqualified under s. 320.18 of the *Criminal Code* will receive the following suspension:

First offence: one year

Subsequent offences within five years of the first offence: two years

The suspension is consecutive to any outstanding suspension: s. 42(1) of the *HTA*.

Under s. 42(5) of the *HTA,* a discharge under s. 730of the *Criminal Code* or a youth sentence imposed under ss. 42, 59, 94, 95, or 96 of the *Youth Criminal Justice Act* must be treated the same as a criminal conviction.

8. Driving prohibitions under s. 320.24 commence after the driver is released from custody

Section 44(1) of the *HTA* requires the driving prohibition commence on the date the period of imprisonment ends.

9. Careless driving and the Novice Driver

Section 57.1 of the *HTA* provides the Lieutenant Governor in Council authority to make regulations governing Novice Drivers. If your client is a Novice Driver, you need to regularly check the regulations governing Novice Drivers. For example, a novice driver will be suspended for 30 days if convicted of careless driving or any offence that carries 4 or more demerit points under the *HTA*: Section 9 of Ontario Regulation 340/94. A second offence will result in a 90-day suspension. This means if you manage to convince the Crown to allow your client to plead guilty to careless driving as opposed to impaired driving, they will be suspended for at least 30 days This is a significant collateral consequence that lawyers can easily miss without careful attention to the regulations governing Novice Drivers. This should form part of your written instructions.

10. Help is just a phone call away

The Ministry's driver improvement centre 416-235-1086 is only a phone call away. When in doubt, call the Ministry to confirm that your understanding of the *HTA* consequences is correct. We are aware of situations where the Ministry will perform a mock-search by inputting the driver's information and the potential plea into their system to determine what *HTA* consequences would follow.

[1] 2014 CarswellOnt 832, 2014 ONSC 555 (S.C.J.).

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His Majesty the King v. Walker McColman (2023 SCC 8)

by Michelle Johal

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Mr. McColman was charged with Impaired Operation and Over 80 after police officers conducted a random sobriety check in a private driveway in the area of the Thessalon First Nation.

The Facts

At around 12:30 a.m. on March 26, 2016, Constables Lobsinger and Hicks of the OPP were on general patrol in the vicinity of the Thessalon First Nation. While on patrol, Cst. Lobsinger spotted an all-terrain vehicle ("ATV") parked outside a convenience store. Mr. McColman drove the ATV out of the parking lot and onto the highway, at which point Cst. Lobsinger directed Cst. Hicks to follow the ATV.

Cst. Lobsinger formed the intention on the highway to conduct a random sobriety stop of Mr. McColman pursuant to s. 48(1) of the *Highway Traffic Act (HTA)*. However, they did not signal for the driver to pull over when he was on the highway. At trial, Cst. Lobsinger conceded that Mr. McColman had *not* manifested signs of impaired driving that would have otherwise warranted a stop. Of note, by the time the police officers caught up to Mr. McColman he had pulled off the highway onto a private driveway that served his parents' home as well as a commercial establishment.

After stopping Mr. McColman, Cst. Lobsinger spoke with him and observed obvious signs of impairment, ranging from a strong odour of alcohol to his inability to stand up straight. Cst. Lobsinger arrested Mr. McColman for impaired driving at 12:36 a.m. and brought him to the police station.

At the police station, the breathalyzer test was delayed because Mr.

McColman vomited due to alcohol consumption. A breath technician eventually conducted two breathalyzer tests, which recorded his blood alcohol concentration level as 120 and 110 milligrams of alcohol in 100 millilitres of blood. The police charged Mr. McColman with impaired driving contrary to s. 253(1)(a) and with operating a motor vehicle with an excess of 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Criminal Code of Canada*. (s. 253 was repealed and replaced in 2018.)

While police officers may not conduct random sobriety stops of drivers on private property pursuant to s. 48(1) of the HTA, they may stop drivers if they have reasonable and probable grounds. The Court emphasized that their judgment does not constitute a blanket ban on police stops of drivers on private property.

At trial, Mr. McColman brought an application under s. 9 of the *Charter*, alleging his rights to be free from arbitrary detention were violated by the police stop on private property. Officers conceded there was nothing unusual about his driving, and relied on the power to conduct random sobriety checks under s. 48(1) of the *HTA*. The trial judge agreed, and Mr. McColman was convicted of Impaired Driving. The summary conviction appeal judge held that the trial judge erred in dismissing the *Charter* application, finding that there was no statutory authority under the *HTA* for Police to conduct a random sobriety check on private property, nor did the power exist at common law. The samples were excluded under s. 24(2) of the Charter on appeal, and an acquittal was entered. The Crown appealed to the Court of Appeal of Ontario, where the majority upheld the summary conviction appeal judge's decision for the same reasons. The Crown applied for, and was granted, leave to appeal to the SCC.

At the Supreme Court, the Crown argued that maintaining the majority of the Court of Appeal's reading of s. 48(1) of the *HTA* would create a sanctuary problem. (The sanctuary problem refers to the idea that in the future, impaired drivers will simply pull onto private property whenever they spot a police cruiser. It has also been referred to by others as being, "home-free".) The Court held the sanctuary problem was overstated by the Crown.

The Court noted that random sobriety stops are not the only tool available to police to combat impaired driving. While police officers may *not* conduct random sobriety stops of drivers on private property pursuant to s. 48(1) of the *HTA*, they *may* stop drivers if they have reasonable and probable grounds. **The Court emphasized that their judgment does not constitute a blanket ban on police stops of drivers on private property.** In fact, they delineated various factual scenarios which might give rise to reasonable and probable grounds. For example, if a driver is driving erratically, or purposely fleeing police, a police officer may have reasonable and probable grounds to pursue the driver onto private property. The driver pulling into a private driveway would not frustrate this kind of investigation, nor would they be "home-free".

Section 9

The Court held the random stop of Mr. McColman on these facts was unlawful, and a breach of Section 9 of the *Charter*. They held that while s. 48(1) of the *HTA* furnished the police officers with the legal authority to conduct random sobriety stops of drivers of motor vehicles, they did not have the authority to stop Mr. McColman because he was not a "driver" within the meaning of the *HTA* at the time of the stop. Since the stop was unlawful, the police officers breached Mr. McColman's s. 9 *Charter* rights.

Section 24(2) analysis

Despite agreeing with the Ontario Court of Appeal about a s. 9 breach, the Court disagreed about the appropriate remedy and their exclusion of evidence under s. 24(2). They held the evidence obtained from the unlawful police stop should ***not*** have been excluded under s. 24(2) of the *Charter*. At first blush, this finding seems like a huge loss to the defence. It has been suggested by some justice system participants that this case stands for the proposition that *Charter* breaches will not lead to exclusion in the context of *Criminal Code* driving offences given that with regard to the first branch, the Court found that it slightly favoured exclusion, the second branch moderately favoured exclusion, but the third branch favoured inclusion, resulting in the admission of the samples.

I would suggest that this cynical view of this decision is unwarranted. It is important to note that the Court found that the police acted without statutory authority in effecting the stop ***but*** given the legal uncertainty that existed at the time of the random sobriety stop, the breach was not so serious as to require the Court to disassociate itself from the police actions. They reasoned the legal

uncertainty pulled in favour of exclusion, but only slightly. The legal uncertainty surrounding this issue at the time of the stop seemed to feature prominently in their 24(2) analysis.

I would suggest that their reasons provide a glimmer of hope for counsel hoping to successfully advance this argument in the future. It is arguable now, given the Court's clear pronouncement on this issue, that a breach akin to the one in the McColman case is a much more serious, even an egregious intrusion on *Charter* protected interests. I would argue that a more serious breach would pull strongly in favour of exclusion, (as opposed to only slightly, as the Court found on the facts of this case.) I would suggest that the third factor would not tip the scale if it could be established that the breach was more serious and favoured even moderately toward exclusion.

It is also important to note that the Court's s. 24(2) analysis related to a finding of a single breach of the *Charter*, namely s. 9. If another Court were to find multiple breaches of the Charter, this would also militate in favour of exclusion.

In the end, I would urge counsel to be vigilant when their clients are subject to random stops by the police in a vehicle, and not assume that the police automatically have the power to detain under the *Highway Traffic Act*.

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What Do You Do With the DUI Disclosure Once You've Got It?

by Stephen Biss and Adel Afzal

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Get information necessary to make full answer and defence quietly, from a variety of sources that include collective past experience, Freedom of Information and Privacy Applications (FOIP), and what the Crown is required to give you under s. 320.34(1).

Introduction

Asking for disclosure can be dangerous. Don't give away your best

defence at a meeting with the Crown! Don't trigger a memo to the Officer-in-Charge (OIC) or the Centre of Forensic Sciences (CFS). Get information necessary to make full answer and defence quietly, from a variety of sources that include collective past experience, Freedom of Information and Privacy Applications (FOIP), and what the Crown is required to give you under s. 320.34(1).[1] *Do Not Send the Crown* a long list of demands that you do not understand and that you have no intention of litigating or using. If you ask, know why. Assume that every disclosure request will be litigated. Know your limits under s. 320.34(2) and (3). This article deals with ways to use the disclosure that you can get.

Absolute Key Disclosure

Ask for all of the handwritten or typed notes of the officers at all times including their scratch notes. Ask for audio and video at bracketing times you choose. Under section 320.34(1) the Crown usually gives us most of the Intoxilyzer® Test Records generated during the Qualified Technician's interaction with our client. Parliament does not explicitly state that the Crown must give us the identity of the simulator, the breath room video, or the Alcohol Standard Log, even though each of these items are readily available to the police, are directly related to the reliability of the subject tests of our particular accused client, and contain "information sufficient to determine"[2] in a fair evidence-to-the-contrary[3] hearing, compliance with the conditions precedent to conclusive proof.[4]

What Do You Do with the Disclosure Once You've Got It?

1. Read the handwritten notes of the officers, particularly the OIC

Think about the "when" and the context in which the notes were actually recorded. Were the observations of indicia of impairment at the scene recorded contemporaneously? Were they recorded or supplemented one hour later back at the station? Did the police compare times with each other to ensure consistency? Sometimes disclosure reveals officers concocting their notes to be consistent with each other. Knowing the time and context of recording will help you in cross-examination on many issues but particularly in constructing questions related to the difference between evidence of actual *impairment of ability to operate*, *when operating* versus rote notation of usual signs of impairment much later at the station.

Always ask a few questions on the *voir dire,* when the Crown is seeking permission for the officer to use notes to refresh memory. Ask "When were they made? Each segment. What actual times?" Question at the earliest opportunity in Court, if there is more than one version of notes. When were they photocopied and submitted for the Crown brief? Sometimes versions are altered a day or two later. Only one version may be disclosed to you. Use that information to identify re-drafted or undisclosed notes and devastate the Crown's use of the witness.

In your own notes, record the Approved Screening Device (ASD) serial number, model, the OIC's test result, last accuracy test date, and last calibration date. Make sure you understand the differences among these 3 ASD quality assurance tests.[5] If the officer is not aware of these differences, you have the beginnings of a section 8 application. It's only a screening test, but is it proper foundation for a further Intoxilyzer® demand?

Carefully note all the times, or lack thereof, of particularly Charter-related, key events in the OICs notebook. What times are missing? What are the significant gaps? You will use delay in essential steps in a section 8, 9, or 10 Charter application.

Consider the reason for the stop. Do you have all the audio, video, and notes that you can get, related to the details for the stop? Does the stop take place on a "highway", or a plaza, or other private property? You will use this information to build a Charter section 9 application.

Compare the notes of civilian witnesses and emergency responders. Who else was on the scene on OIC's arrival? You will contrast their observations and times with those of the officers.

Consider the noted indicia of impairment. How many places do these appear in the OIC's notes and in each witness' notes? Connect that with the "when" and context of the note-making. What is missing in the indicia? Omissions from the expected list of indicia will be a major focus of cross-examination and trial on the impaired.[6] Omissions from the expected list are also useful in winning an RPG Charter application on the 80 and above.

Build a comparison chart of indicia observed or not observed by each officer. How do indicia of impairment by the other officers connect with indicia observed by the OIC? How can you use the differences for cross-examination to establish your client was not impaired by alcohol.[7]

Study who actually read the RTC. Did another officer do something that the OIC should have done? Start building an argument that, if the accused responded with an intelligent answer, they are not impaired. Alternatively, if the accused responded with an unintelligent answer, challenge 10b.

Check the notes for responses by your client to arrest and breath demands. Can you use the note that they "understood" to demonstrate that they were not impaired?

Read the notes to start building challenges as to each officer's use of time. What could they have been doing that they did not do? For example, what was the OIC doing while the accused was in the cells? Were

they assisting the breath tech (qualified technician or QT) by observing the accused for regurgitation? If the breath tech gave any checklist or instructions to the OIC delegating the breath tech's observation/deprivation period, then did the OIC follow that direction? If no instructions were given or followed, the Crown may not be able to establish compliance with the manufacturer's and CSFS/CFS recommendations for an observation/deprivation period.

Study the notes to establish if the OIC recorded their interaction with the breath tech? Does the OIC tell the breath tech about the employment, hobbies, or health of your client? Start thinking about chemical interferents that may have interfered with the approved instrument. At what point did the breath tech have enough information to form grounds for a technician's demand? Maybe you will discover that the breath tech never had adequate information for that purpose.

Look for anything missing in the list of documents prepared and served on the accused. Did the OIC note indicia of impairment at the time of service?

2. Breath Program Disclosure Checklist

Some police services, such as the OPP, have checklists as to what disclosure goes into the Crown brief. Read the checklist carefully to find items that have not been disclosed. Why are some items missing? Who authored this checklist and have they given evidence before as to its contents?[8]

Note the Intoxilyzer® 8000C serial number and the wet-bath Simulator serial number. Consider whether you or your colleagues have litigated this particular combination of instruments before. Consider if you or someone on behalf of your local association should be bringing a FOIP application respecting the maintenance history of these instruments[9]. Does your local police service have more Simulators than Intoxilyzers®? Are these Simulators sometimes switched around with different Intoxilyzers® or used for accuracy checks or calibration checks on ASDs?

Ask for a "copy of the current *Intoxilyzer® 8000C Training Aid* (produced by the Crown from Intranet website)" as noted in the OPP Breath Program Disclosure Checklist. The Crown already has it, so it is disclosure, not production. At the very least it is relevant to full answer and defence on the section 320.34(3) issue of "working order".[10]

3. Breath Tech Handwritten Notes

Look for the time that the qualified technician was notified that a test would be required. Compare that to the time of formation of RPG and demand by the OIC. Consider that time as a possible starting point in your video disclosure request. Consider that time as a possible starting time of client-related measurement evidence gathering.

Check the notes of the setup of the Intoxilyzer® 8000C. Is it a full setup of the Intoxilyzer®, alcohol standard and Simulator – actually assembling the combination of instruments? Is it a cold boot – turning on the power on a cold 8000C and a Simulator? Please note that the Intoxilyzer® and Simulator require separate cold boots. Is it taking the 8000C instrument out of hibernation, yet the Simulator has been continuously running for days? Are there any notes of automatic diagnostics or crashes on instrument boot or taking the Intoxilyzer® out of hibernation? These actions are all done because of and in the context of your client's impending subject test measurements and so fit Justice Watt's test (see also *Jackson*,[11] *Gubbins*[12]) in *Stipo*[13] "The material issue in those cases [*Gubbins*] was how the approved instrument worked when it measured [the subject before the Court]".[14] Such QT collected notes and data, of normalcy or crash, are not "historical records relating to the performance of an approved instrument on other occasions".[15] They are directly relevant to measurement of your specific client's BAC.

In a pandemic-context refusal case, check for notes of instrument, table, and breath room cleaning between subjects.[16] Did the breath tech or police service protect the health of your client by choice of mouthpiece?[17] What was the local COVID-19 protocol for the breath room, Intoxilyzer®, and accessory equipment?

Hunt for the times and any printout, note, or video evidence of the three Quality Assurance[18] (QA) checks? Were there any failures or crashes during the QA checks? What "locations" are indicated on each printout of the QA tests? Is there any inconsistency related to the QA tests among breath tech notes, worksheet, test records, and video? Do you have video and audio of three QA checks? Was the breath tech physically present during all three QA checks?

Ascertain at what time the notes (OIC, breath tech, and the video) reveal that the instrument was ready to receive a breath sample? What interaction takes place among the breath tech, OIC, and accused at that moment? Can delay in that interaction (i.e. not "as soon as practicable"), trigger a Charter application?

Start preparing your argument that either or both breath demands lack grounds. What communication is noted between the OIC and the breath tech respecting grounds?

Research the relative locations of the breath tech and the accused during waiting periods. Did the breath tech control and note observations of your client for a continuous 15 or 20 minutes prior to each subject test? Has your client advised you as to reflux, vomit, belching? What are your client's hobbies and employ-

ment and did the breath tech control for chemical interferents?

4. Alcohol Influence Report

Scrutinize the Alcohol Influence Report (AIR) for any error in reasons for arrest. Does this error help you in a Charter argument as to grounds for an arrest or for a demand? Is there any error in times of arrest, RTC, caution, or demand?

Examine the AIR document for Intoxilyzer® serial number, Guth[19] Simulator model number, and Simulator serial number? As previously noted, have you litigated these instruments before or done an FOIP application on them before? Are they assigned to a particular detachment? Has either been moved recently? Consider the possibility of hospital use of the wet-bath Simulator with another test subject, followed by transportation of the Simulator in the trunk of a police vehicle, immediately prior to your client's testing at the detachment?

Study the AIR for notes of audio or video failures. Will you bring an application for destroyed or lost evidence?

Start planning your cross-examination of the breath tech on indicia. What are the qualified technician's checked boxes and omissions re indicia of impairment? How will you use checks or omissions in cross-examination on impairment?

Once you have interviewed your client as to employment, hobbies, and medical issues, start thinking about chemical interferents. Is your client a diesel mechanic, painter, plumber, furniture refinisher, hairdresser, or commercial cleaner?[20] What medical issues are identified in the AIR by the breath tech and can they mimic impairment? What steps were taken to control for chemical interferents?

Pull out your hair when you read what your client told the breath tech after being told to remain silent. Is the statement made by your client problematic? Will you need to get it excluded under s. 24(2)? Do the answers fit the questions asked?

Look for breath tech notes about physical tests done or not done? Are they described as standardized? Are they performed by the breath tech in accordance with standards?

5. Intoxilyzer® Test Records[21] (at least four)

Look for the "location" field[22] at the top left corner of each printout. An Intoxilyzer® stores this field, through manual entry by the qualified technician (QT or breath tech) using an Esc Esc "E" sequence". Is location the same on all 4 or more printouts? If not, do you have evidence that equipment was moved?

Look for the 000 indications. Are you aware that all air blanks ALWAYS indicate 000, even if there is five or 10 mg/100mls alcohol floating in the air? Do you understand masking by the Intoxilyzer® to deal with electronic noise? Do you understand the concept of floating zero on an IR machine? Consider: Where were the breath tube and mouthpiece during each of the at least 14 air blanks? Notwithstanding section 320.33 and statutory *prima facie* proof, (always subject to evidence-to-the-contrary) scientifically these 000s should have little or no probative value. Find an expert in IR measurement science to explain this to the Court.

Hunt for possible destruction of evidence. Does the breath tech rip up a failed diagnostics test or other test on video?

Examine alcohol standard information on each printout and each Certificate. How do the identity of the alcohol standard and the solution change date compare on the standalone cal. check, the subject test Intoxilyzer® Test Record(s), the Certificate of Qualified Technician, the breath tech notes, and most importantly the Alcohol Standard Log?[23]

Count the breath techs. Did more than one breath tech conduct your client's Approved Instrument breath tests? Think of a breath test as being, at least, the complete sequence from set up of the instrument at start of shift or taking it out of hibernation through to taking the final printout from the printer. Who else ran the QA tests? Who else pressed a button?

Judge the time when the breath room video actually starts. You need video AND audio from start of shift or taking the instrument out of hibernation. At the very least you and your expert will need video AND audio starting before the standalone QA checks. How else will you know about failed tests and crashes, in the context of your client being tested, that are not included in the three disclosed "passed" quality assurance checks?

In Ontario, study the decimal places in notes and printouts. Are Simulator temperatures recorded to one decimal place (e.g. 34.1) or to two decimal places (e.g. 34.00 or 34.02)? These temperatures are MANUALLY input into the Approved Instrument either by keying in (e.g. 34.00) or by pressing return to accept

a pre-populated number. Are simulator temperatures too good to be true?[24]

Survey the instrument printouts for handwritten annotations. Question their admissibility under section 320.33.

6. Breath Room Video

Retain an expert or ask a colleague to help you to review the breath room video. There is an incredible wealth of information in every breath room video. There are also statements and physical presentations by your client or by the breath tech that may hurt you or help you. The subject of breath room video analysis is worthy of a lengthy paper or CPD programme.[25]

Judge the time when the breath room video actually starts. You need video AND audio from start of shift or taking the instrument out of hibernation. At the very least you and your expert will need video AND audio starting before the stand-alone QA checks. How else will you know about failed tests and crashes, in the context of your client being tested, that are not included in the three disclosed "passed" quality assurance checks?

Disclosure or production of COBRA data[26] will be necessary if the breath room video and audio are not available for the complete time periods above. COBRA will solve the lost video evidence problem if stand-alone diagnostics cards or stand-alone cal. check cards were destroyed. COBRA does not save self-tests by the QT. COBRA will not solve the lost video evidence problem if there is a crash during start-up, or other automatic diagnostics, or the operator pulls the 120V plug out of the wall. Be wary of destruction of evidence by deliberate power interruption.

Watch the whole video, even the not-very-interesting bits. You may want to play the really boring parts to the Judge to bring home the reality of time delay, from your client's perspective. The unexciting events often contradict the viva voce evidence of the officers. If the Crown accidentally gives you video or audio of other accused persons, consider how you can use that evidence against the Crown's case? Consider this anecdote. The breath tech is seen wiping something gross on the floor of the breath room with his foot at start of shift, kicking the paper towel under the Intoxilyzer®, letting the breath tube hang down under the table during air blanks, and getting ambient fails later on as a result of a chemical interferent on the paper towel.

On Intoxilyzer® fail/refuse cases, pay careful attention to the words used by the breath tech in coaching the blow. Do they shout "harder, harder, harder" and intimidate the subject or do they follow their training and ask for a long steady blow?

7. Alcohol Standard Log[27]

It is respectfully submitted that local criminal defence lawyers' associations need to file FOIP applications to obtain Alcohol Standard Logs for all wet-bath Simulator – Intoxilyzer® 8000C instrument combinations in their jurisdictions. These logs contain no private information. FOIP disclosure of them does not offend section 320.36. Public access to these logs is essential to the integrity of the evidential breath testing in any jurisdiction. Public access to the information contained therein is essential to the scientific reliability and constitutionality of Parliament's s. 320.31(1) respecting conclusive proof. The Alcohol Standard Log is the primary method of tracking continuity[28] of individual bottles of alcohol standard as clear liquid poured into wet-bath Simulators.

In defending your client. you will need Crown disclosure of at least a portion of the Alcohol Standard Log, if you are to make full answer and defence at an evidence-to-the-contrary hearing.

It used to be normal practice for police to disclose the Alcohol Standard Log. See the footnote above re affidavit of Sgt. Kiss, filed by the Crown in *R. v. Jackson*.[29] Justice Watt at 133 describes "disclosure package typically provided . . . Intoxilyzer instrument log". The Alcohol Standard Log was filed and its disclosure relied upon by Justice Watt in his decision.

The CFS Toxicology Section in its *Intoxilyzer® 8000C Information Sheet* (as of 2016)[30] states:

> A calibration log or alcohol standard log provides a historical record of information concerning the alcohol standard solution. This Log tracks the results of the calibration checks and the changing of the alcohol standard solution over time.
>
> If the Information concerning the alcohol standard solution printed on the Intoxilyzer® Test Record was accurately entered into the instrument, the CFS Toxicologists do not need to review police service calibration log data to form their opinions regarding whether the instrument appears to be in proper working order.

Your trial Court, has a different task than a CFS scientist, at an evidence-to-the-contrary hearing under s. 320.31(1)(a) and *Interpretation Act*, s. 25. The defence is entitled under the *Interpretation Act* to make full answer and defence on the issue of whether or not "the Information concerning the alcohol standard solution printed on the Intoxilyzer® Test Record was accurately entered into the instrument". It may be the case that the information was entered incorrectly by the alcohol standard change breath tech or that someone changed the solution in between that date and the date of your client's subject tests. The best evidence of what was actually in the Simulator at the time of measurement of your client's BAC

will include the Alcohol Standard Log.

Ask for the Alcohol Standard Log entries for the Intoxilyzer®/Simulator combination for a period that straddles your client's subject tests.[31] You need the data from the solution change date immediately prior and the solution date immediately subsequent to your client's subject tests. The Alcohol Standard Log, assuming it is properly maintained by each of the many breath techs working in the detachment, is the best evidence of the clear alcohol standard that is actually contained in the wet-bath

Consider this anecdote: Two different Alcohol Standard Logs that contradict each other. One received by FOIP and one received by disclosure. During trial, the Court asks the Crown to consider whether or not they want to pursue the prosecution.

simulator at the time your client's BAC was measured. The Alcohol Standard Log is the best evidence of compliance or not compliance with "of which is within 10% of the target value of an alcohol standard that is certified by an analyst" in s. 320.31 (1)(a). The filing of a printout under 320.33 does not conclusively prove compliance with s. 320.31(a). The printout is prima facie evidence that may or may not survive an evidence-to-the-contrary hearing.

Consider this anecdote: Two different Alcohol Standard Logs that contradict each other. One received by FOIP and one received by disclosure. During trial, the Court asks the Crown to consider whether or not they want to pursue the prosecution.

See *R. v. Ocampo*[32] for an example of the incoming seal number on the subsequent Alcohol Log entry not matching the outgoing seal on the prior Alcohol Standard Log entry. The issue was solved through Court-ordered production of raw text COBRA data.

The alcohol standard data actually printed on an Intoxilyzer® Test Record (s. 320.33) depends entirely on manual entry by a breath tech who is probably not present at your client's trial. You may want to make them a witness. Watch for annotations in the Alcohol Standard Log as to cracks in the Simulator jar, or difficulties with tightening or loosening the jar. "Observations" are recommended by the *CFS 8000C Training Aid* at Appendix "D: Alcohol Standard Solution Log – Example".[33]

Conclusion

By careful consideration of the practical use you can make of the disclosure you can actually get, you will be better prepared to take next steps, that may or may not include asking for more disclosure. Don't risk the downsides of making non-useful requests. Make sure you understand why you are asking for any item of disclosure. Be prepared to litigate everything.

NOTES:

[1] An evidence-to-the contrary hearing under Bill C-46 has nothing to do with a *R. v. Carter*, 1985 CarswellOnt 2, 19 C.C.C. (3d) 174 (Ont. C.A.) defence, calling your client and a toxicologist. An evidence-to-the-contrary hearing results from the Crown's potential or actual use of the Intoxilyzer® Test Record[2]320.33, the Certificate of the Qualified Technician 320.32(1), or the Certificate of the Analyst[3]320.32(1). It should also result from the Crown's use of hearsay by the qualified Technician. Your client has rights under *Interpretation Act*, section 25 to call evidence-to-the-contrary. Call expert evidence from a measurement science expert based on disclosed, produced, or FOIP facts.

[4] *Criminal Code of Canada*, s. 320.34(1).

[5] *Interpretation Act*, s. 25(1): "Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then in any judicial proceedings the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence-to-the-contrary."

[6] *Criminal Code of Canada*, s. 320.31(1).

[7] Educate yourself through FOIP applications and CPD, as to police service protocols, CFS protocols, and the scientific differences among self-checks, control tests, and calibration on their ASDs.

[8] "Q.: If you had observed her doing X [from the expected list], you would have noted that. Right?"

[9] Maybe "impaired" in another sense, but not to effect on ability to operate a conveyance.

[10] The material before (para. 47(e) of decision) Justice Watt in *R. v. Jackson*, 2015 CarswellOnt 18194, 2015 ONCA 832, leave to appeal refused 2016 CarswellOnt 10527, 2016 CarswellOnt 10528 (S.C.C.) [*R. v. Jackson*], included an affidavit by Sgt. Kiss of Ottawa Police. Para. 46(e) listed QT obligations to disclose. Para. 42 of that affidavit stated: "Upon changing the Alcohol Standard Solution, the Quali?ed Technician performing the procedure is required to conduct a Calibration Check, independent of any subject breath test. The Quali?ed Technician must record the solution change and subsequent Calibration Check in a log. The resulting Alcohol Standard Solution change and calibration log is

also part of the Quali?ed Technician's disclosure obligations when a prosecution is commenced against a test subject."

[11] In Ontario, the wet-bath Simulator is every bit as essential an instrument as the Intoxilyzer®. No wet-bath Simulator is an "approved instrument" in Canada. Simulators (or alternatively "dry gas" in Western Canada) are "accessory equipment" (see Canadian Society of Forensic Science CSFS Alcohol Test Committee ATC https://www.csfs.ca/wp-content/uploads/2020/07/2020-05-29-Best-Practices.pdf) necessary to Parliament's section 320.31(1) scheme of conclusive proof.

[12] Keep different editions from different years in your long-term trial brief.

[13] *R. v. Jackson*, *supra*, footnote 8.

[14] *R. v. Gubbins*, 2018 CarswellAlta 2404, 2018 CarswellAlta 2405, 2018 SCC 44, [2018] 3 S.C.R. 35, <https://canlii.ca/t/hvqb7>.

[15] *R. v. Stipo*, 2019 CarswellOnt 13, 2019 ONCA 3.

[16] Justice Watt in *Stipo, ibid.*, at 109.

[17] *R. v. Stipo*, *supra*, footnote 13, at 109 and 126.

[18] *Statement from CMI in light of COVID-19*, Toby Hall, President, March 20, 2020.

[19] See: https://store.alcoholtest.com/5000-8000-9000-disposable-mouthpieces/.

[20] "Recommended Quality Assurance Checks at Start of Shift" p. 80 of 240 in *Intoxilyzer® 8000C® Training Aid,* Centre of Forensic Sciences, November 2018.

[21] Guth Industries manufactures most of the wet-bath Simulators used in Ontario. See *Training Aid*, p. 28 of 240. See slideshow on a "Brief History of Simulators" at Guth, Alcohol Breath Test Simulators page at https://guthlabs.com/simulators/.

[22] Bell, C.M. et al., *Diethyl Ether Interference with Infrared Breath Analysis*, Journal of Analytical Toxicology, Vol. 16, May/June 1992.

[23] To a measurement scientist (metrologist) you retain, there will be a big problem with considering "results" under 320.34(1) as being merely the "indication", either read on the instrument display, or printed on a piece of paper. To a scientist, "results" means a whole lot more, if the person is doing an "analysis" using an "instrument", especially for a forensic purpose. See http://viml.oiml.info/en/index.html.

[24] *CFS 8000C Training Aid,* November 2018, at 145 of 240.

[25] See standard disclosure package in *R. v. Jackson*, *supra*, footnote 8.

[26] Note, with respect, the error in scientific evidence given by experts, and facts found in *R. v. Fitts*, 2015 CarswellOnt 6935, [2015] O.J. No. 2431 (Ont. C.J.). The *Fitts* expert evidence is easily disproven experimentally.

[27] See for example <https://vimeo.com/183566822/38d5078598>.

[28] COBRA is software used to download internal data from an Intoxilyzer® 8000C. Measurement scientists (metrologists) call it an "audit trail". See OIML D 31, *General requirements for software controlled measuring instruments,* <https://www.oiml.org/en/files/pdf_d/d031-e19.pdf>.

[29] *R. v. Jackson*, *supra*, footnote 8.

[30] Think about the connection between the Certificate of the Analyst (at the CFS) and the actual contents in the wet-bath simulator of an alleged bottle that is a subset of lot used, by a group of Qualified Technicians including the QT who is testing your client for each of the subject tests. The contents of the simulator are sometimes changed between subject tests. The contents of the simulator are sometimes changed at start of shift. The contents of the simulator are sometimes changed by one qualified technician but used by many others including your QT, maybe on the same day, maybe at the same location, maybe 6 days later. Maybe other QTs used the same simulator/alcohol standard combination for calibrating/accuracy checking ASDs. Maybe the bottles froze on a loading dock on their way to the police station. How do you find these things out?

[31] *R. v. Jackson*, *supra*, footnote 8.

[32] *CFS Intoxilyzer® 8000C Information*, 2014-12-24, Amie Peaire, Section Head.

[33] *R. v. Ocampo*, 2014 CarswellOnt 12241, 2014 ONCJ 440. Subsequent log entry disclosed in course of disclosure argument, exhibit 15.

[34] *R. v. Ocampo*, *ibid.*

[35] *CFS 8000C Training Aid,* November 2018, at 84 and 195 of 240.

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What is a Conveyance? What does it mean to Operate One?

and Why You Should Care?

by John Erickson

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Introduction

Few sections of the *Criminal Code* are as fraught with confusion and uncertainty as those related to the "drinking and driving" offences in ss. 320.14 and 320.15. This is unfortunate given the seriousness of the social harm that they are meant to address. One would have thought that Parliament would have aimed to provide clear guidance not only to police, lawyers, and judges but also to Canadians to deter them from "drinking and driving". Instead, even concepts as basic as "what is a conveyance?" (*"a what?"*) and "what does it mean to operate one?" are so uncertain as to make it difficult for lawyers, judges and most importantly, laypersons, to predict what will and will not constitute criminal behaviour.

In this brief paper, I hope to provide an introductory outline for how to approach issues surrounding what is a conveyance (or, more specifically, a motor vehicle) and what does it mean to operate one. This paper is not intended to replace one's own research but only to offer a helpful staring point.

The Offence

At the outset, it is helpful to review what s. 320.14(1) stipulates.

> 320.14 (1) Everyone commits an offence who
>
> (a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;
>
> (b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

(c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or

(d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

The *mens rea* of these offences is the intent to operate a conveyance after the voluntary consumption of alcohol and/or a drug. The *actus reus* is the operation of a conveyance when the voluntary consumption of alcohol and/or a drug has either impaired one's ability to do so to any degree or caused one's blood alcohol to equal or exceed 80 mg of alcohol per 100 mL of blood

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As this paper's topic is limited to examining "what is a conveyance or, more specifically, a motor vehicle?" and "what does it mean to operate one?", I will not cover the issues related to impairment and blood alcohol concentrations although these, too, are of fundamental importance when dealing with "drinking and driving" related offences.

Conveyance

Dealing first with what is a conveyance, it is important to note that s. 320.11 defines *conveyance* to mean "a motor vehicle, vessel, aircraft, or railway equipment." Each of these are themselves defined terms.

The definitions for "motor vehicle" and "railway equipment" are found in s. 2 of the *Criminal Code*. Unfortunately, Parliament in its wisdom elected to provide little guidance as to what a vessel or an aircraft is when it repealed the definitions contained in s. 214 on December 18, 2018. As a result, the only definition for "vessel" in the *Criminal Code* now is in s. 320.11 which states "*vessel* includes a hovercraft" and there is even less guidance for "aircraft" as the *Code* contains no definition whatsoever. Instead, to find what a "vessel" and an "aircraft" is, we must go through the laborious process of referring first to s. 4(4) of the *Criminal Code*, then to s. 15(2)(b) of the *Interpretation Act*, and then to a multitude of other acts such as: the *Aeronautics Act, R.S.C. 1985*; *Canada Shipping Act, 2001*; *Canadian Navigable Waters Act, R.S.C. 1985*; *Excise Act, 2001*; *Fishing and Recreational Harbours Act*, etc.

As I indicated at the outset, however, this paper primarily concerns the operation of those types of conveyances.

Section 2 of the *Criminal Code* defines *motor vehicle* to mean "a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment". In *R. v. Saunders*,[1] the court held that the definition "contemplates a kind of vehicle, not its actual operability or functioning". Accordingly, even a car that is stuck in a ditch and cannot move under its own power is a "motor vehicle" despite posing no imminent danger to anyone.

Since *Saunders*, subsequent courts have held that a truck that has run out of gas is a "motor vehicle": see *R. v. Lloyd*.[2] Even a motorized wheel chair was held to be a "motor vehicle" despite finding that the Ontario Ministry of Transportation treats persons who rely upon them as pedestrians: *R. v. Shanahan*.[3]

However, there appears to be some judicial uncertainty as to whether an e-bike is a "motor vehicle" when it has been damaged and is no longer capable of being operated by anything other than muscular power. In *R. v. Morrison*,[4] the court held that since *Saunders* stands for the proposition that "motor vehicle" refers to the kind of vehicle, not its operability, therefore even an e-bike being operated exclusively by muscular power is still at "motor vehicle". However, in *R. v. Sherwood*,[5] the court held that an e-bike that has been damaged and is no longer capable of being operated by non-muscular power is not a "motor vehicle".

As technology advances and more modes of personal transportation become mechanized, Parliament and/or the courts ought to revisit what the definition of "motor vehicle" includes so as to restrict it to instances that pose a risk of harm. Indeed, there may be sound policy reasons why a car that has run out of gas and is being rolled down a hill or pushed along a highway should be deemed to be a "motor vehicle". However, the same policy reasons do not seem to apply to e-bikes or e-scooters that are being propelled solely by muscular power, especially given that an impaired bicyclist may pose as much risk of harm to

themselves and to others as someone using only muscular power on an e-scooter. Remember, an offence under s. 320.14(1)(a) is committed when one's ability to operate a conveyance is "impaired to *any degree*". Indeed, the need to revisit this issue has become even more pressing now that the concept of "care or control" has been subsumed by the definition of "operate". This, perhaps, is a good point to examine what it means to "operate" a motor vehicle.

What it comes down to is whether the Crown has proven that the accused was positioned such that it would take only a minor adjustment to "take the steering wheel and drive the car".

Operate

Section 320.11 defines to operate a motor vehicle to mean "to drive it or to have care or control of it".

Prior to the *Criminal Code* amendments which came into force on December 18, 2018, the now repealed s. 253 drew a distinction between "operate" and "care or control" such that they were held to be separate offences. This distinction led to some uncertainty as whether an accused charged with impaired operation could be convicted of impaired care or control and vice versa if the evidence proved only one but not the other. This distinction has now been repealed and a conviction for an offence in s. 320.14 may now be established by proof of operation either by driving or care or control.

Operation by Driving

To prove operation by *driving*, the Crown must prove that the accused exercised some control, no matter how transitory, over the movement of the vehicle, no matter how slight. For example, in *Bélanger c. R.*,[6] a passenger who momentarily grabbed the steering wheel of a car in motion was found to be "driving". In *R. v. M. (M.L.)*,[7] the court held that an accused who caused a vehicle to move even for just a short distance when trying to dislodge it from a snowbank by rocking it back and forth was "driving".

Operation by Care or Control

If the Crown is not able to prove operation by driving, it can still seek to prove operation by *care or control*. Care or control can be proven either by:

1. the statutory presumption contained in s. 320.35 which is triggered if the accused occupied the driver's seat, or
2. actual or *de facto* care or control which involves proof that the accused made some use of the vehicle, its fittings or equipment in circumstances that posed a risk to public safety.

It is important to note that the Crown is not required to give notice of its intention to rely on the statutory presumption contained in s. 320.35. As with actual or de facto care or control, it becomes engaged as soon as the evidence establishes its prerequisites.[8]

Section 320.35 Statutory Presumption

Section 320.35 provides that "if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, [then] the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion".

Triggering the Presumption

The statutory presumption in s. 320.35 is triggered if the Crown proves beyond a reasonable doubt that the accused "occupied" the driver's seat or the position ordinarily occupied by a person who operates the conveyance. Proving whether an accused occupied the driver's seat has not always been as straightforward as one might think, especially when dealing with an accused found sleeping in their vehicle. For example, in *R. v. Hatfield*.[9] an accused found sleeping on a fully reclined driver's seat was held to be occupying the driver's seat. However, in *R. v. Toews*,[10] an accused found lying across the front seats with his head on the passenger seat and his legs in a sleeping bag under the steering column was held not to be occupying the driver's seat. What it comes down to is whether the Crown has proven that the accused was positioned such that it would take only a minor adjustment to "take the steering wheel and drive the car".

There are many instances where an accused was found to be occupying the driver's seat and thereby triggering the presumption when observed sleeping in the driver's seat with their head and body slumped forward onto the steering wheel. In such instances, it would take only a minor adjustment to take hold of the steering wheel and drive the vehicle. However, some examples of where the presumption was triggered in more unusual scenarios are:

1. *R. v. Green*,[11] where the accused was passed out in a vehicle and positioned in such a way that he was seated behind the steering wheel with his head, arms and shoulders slumped forward but both feet planted on the ground outside the open driver's door.
2. *R. v. Henderson*,[12] where the driver's door was open and the accused was seated in the driver's seat with her left leg outside the vehicle as she was leaned over to

her right, looking for something in the centre console.

Some examples of where the presumption was not triggered because it was not proved that the accused occupied the driver's seat are:

1. *R. v. Huls*,[13] where the sleeping accused was found lying on the truck seat, covered with a blanket, with his head was on the passenger side and his feet were on the drivers' side.
2. *R. v. Ross*,[14] where the sleeping accused was found lying across the bench seat of his truck with his head on the driver's side and his feet at the passenger door.

To add to the uncertainty, however, *R. v. Sarasin*,[15] seems to have contorted the idea of "minor adjustment" to an extreme. Here, in upholding the appellant's conviction, the court held that the trial judge did not err when finding that the appellant occupied the driver's seat when he was found in a vehicle that was flipped on its driver's side with his head and shoulders resting on the driver's window and his legs pinned under the steering wheel.

Rebutting the Presumption

If the Crown does prove that the accused occupied the driver's seat or the position ordinarily occupied by a person who operates the conveyance, then the onus shifts to the accused to prove on the balance of probabilities that they did not occupy it for the purpose of setting the conveyance in motion.[16]

There are a few considerations to keep in mind when deciding whether the presumption has been rebutted. First, several provincial appellate courts have held that the relevant timing of what the accused's intention was when they first occupied the driver's seat, not when police arrived.[17]

Second, courts have held that the presumption is not rebutted if the accused got into the driver's seat with the intention of driving but only after "sleeping it off" or "sobering up". This is because they have held that the accused's occupancy began with an intention to drive albeit at a later time.[18]

Third, courts have held that the presumption is not rebutted by an accused who testifies that when they got into the driver's seat, they were undecided as to whether or not to drive. This is because the accused will have failed to prove that they did not intend to drive.[19]

These considerations raise some interesting, perhaps counter-intuitive, results. First, courts which have held that what is relevant is what the accused's intention was when they first occupied the driver's seat have ignored the fact that this has the effect of punishing individuals who might get into the driver's seat with the intention of driving but then have the good sense to immediately realize that they are too impaired to do so and decide to sleep it off or call for a taxi while remaining in the driver's seat. Such an accused will be deemed by s. 320.35 to be "operating" the motor vehicle even though the plain wording of the section appears to indicate that it does not apply to them because they are no longer occupying the driver's seat for the purpose of setting it in motion. An accused who finds themself in this position may wish that they had climbed into the backseat to sleep, or exited the vehicle to urinate or take a short walk, or even to have got out to call for a taxi before getting back into the driver's seat to keep warm while waiting for the taxi to arrive.[20]

Another interesting result is that whereas an accused who occupies the driver's seat with the intention of driving after first "sleeping it off" will be not be able to rebut the presumption. However, an accused who drove to a location and only began to drink after parking their vehicle will be able to rebut the presumption if they can prove that they did not intend to set the vehicle in motion after they began drinking.[21]

Perhaps what is most counter-intuitive when dealing with the statutory presumption is that unlike when dealing with de facto care or control which we will turn to shortly, the "risk of danger" analysis is not a relevant consideration when dealing with the statutory presumption. This is because s. 320.35 limits analysis to whether the accused occupied the driver's seat and what their intention for occupying it was. This means that an accused who occupies the driver's seat with the intention of setting a motor vehicle in motion will not be able to rebut the presumption even though it turned out that the vehicle in question was inoperable and posed no risk of danger to anyone.[22]

Actual or *De Facto* Care or Control

Where the statutory presumption does not apply, either because it was not triggered or because it was successfully rebutted, the Crown can still try to prove actual or *de facto* care or control.

In *R. c. Boudreault*,[23] the Court held that *de facto* care or control requires proof of three elements:

(1) an intentional course of conduct associated with a motor vehicle;
(2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit;
(3) in circumstances that create a realistic risk (as opposed to a remote possibility) of danger to persons or property.

The "intentional course of conduct" element requires proof of some act or acts by the accused involving the use of the vehicle, its fittings or equipment.[24] Although these judgements appear to have held that the accused's actions had to have created the risk that the vehicle might be put in motion, subsequent decisions have held that the risk of danger can also arise from a stationary vehicle.[25]

The "realistic risk of danger" element requires proof that the risk posed by the accused's conduct was a realistic risk as opposed to just a theoretically possible one but the Crown does not need to prove that it was "probable, or even serious or substantial".[26]

When engaging in a "risk of danger" analysis, the Ontario Court of Appeal in *R. v. Smits*,[27] cited with approval the non-exhaustive list of factors in *R. v. Szymanski*:[28]

(a) the level of impairment, which is relevant to the likelihood of exercising bad judgment and the time it would take for the accused to become fit to drive;
(b) whether the keys were in the ignition or readily available to be placed in the ignition;
(c) whether the vehicle was running;
(d) the location of the vehicle;
(e) whether the accused had reached his or her destination or if the accused was still required to travel to his or her destination;
(f) the accused's disposition and attitude;
(g) whether the accused drove the vehicle to the location where it was found;
(h) whether the accused started driving after drinking and pulled over to "sleep it off" or started using the vehicle for purposes other than driving;
(i) whether the accused had a plan to get home that did not involve driving while impaired or over the legal limit;
(j) whether the accused had a stated intention to resume driving;
(k) whether the accused was seated in the driver's seat regardless of the applicability of the presumption;
(l) whether the accused was wearing his or her seatbelt;
(m) whether the accused failed to take advantage of alternate means of leaving the scene;
(n) whether the accused had a cell phone with which to make other arrangements and failed to do so.

When engaging in a risk of danger analysis, the court in *R. v. Boudreault*,[29] held:

> [48] ... that "realistic risk" is a low threshold and, in the absence of evidence to the contrary, will normally be the only reasonable inference where the Crown establishes impairment and a present ability to set the vehicle in motion. To avoid conviction, the accused will in practice face a tactical necessity of adducing credible and reliable evidence tending to prove that no realistic risk of danger existed in the particular circumstances of the case. [underlining added]

The court in *R. v. Boudreault* signaled how the "realistic risk" test should be applied when it upheld the appellant's acquittals but only after calling the trial judge's conclusion on the facts as "surprising" and "unreasonable" (see para. 15). The facts were that after spending a very cold February night drinking in a friend's apartment, the appellant recognized that he was unfit to drive and asked his friend to call a taxi service, not once but twice. This was a special service that he had used before which sends two drivers, one to drive the inebriated customer home and the other to follow behind in the customer's vehicle. After waiting an unusually long time for the taxi to arrive, his friend called a second time but then, because she wanted to go to sleep, asked him to wait outside in his truck. When he went outside, it was very cold (-158C with winds blowing at 40 km/h). He got into his pick-up truck which was parked in a private driveway on level terrain, started the engine to turn on the heat, and fell asleep. The transmission was left in "park" and he did not, at any time, ever attempt to set it in motion or use any of its other fittings. When the taxi finally arrived and observed him sleeping in the driver's seat, they called police at 10:44 a.m. He was arrested shortly thereafter, transported to the station, and charged with impaired care or control and over 80 care or control after providing breath samples of 250 mg and 242 mg of alcohol per 100 mL of blood at 11:40 a.m. and 12:05 p.m., respectively. These are the facts which the court in *R. v. Boudreault* signaled could (*and should?*) have resulted in a conviction.

Is It Time to Revisit *R. v. Boudreault?*

R. v. Boudreault,[30] has created a new evidentiary rule that if the Crown establishes impairment and a present ability to set a conveyance in motion, then a conviction ought to almost invariably follow unless the accused adduces credible and reliable evidence tending to prove that no realistic risk of danger existed in the particular circumstances of their case.

The effect of the evidentiary rule is to criminalize present conduct for fear of what *might* happen because of it unless the accused presents evidence which tends to prove that there is no realistic risk that the potential danger will occur. While this may follow logically from the premise that "Parliament's purpose in enacting the care or control provision was preventive",[31] it provides fertile ground for unintended consequences.

The effect of the evidentiary rule is to criminalize present conduct for fear of what might happen because of it unless the accused presents evidence which tends to prove that there is no realistic risk that the potential danger will occur.

I have already discussed cases involving motorized wheel chairs, e-

bikes and e-scooters. The effect of *R. v. Boudreault* is that an accused who is impaired "*to any degree*" and has the present ability to set the wheel chair, e-bike, etc. in motion is now criminally liable and punishable by the same mandatory minimum sentences as one who is convicted in relation to operation of a car or truck.

Perhaps more surprising is that a canoe has been found to be a "vessel" under the now repealed s. 254(2).[32] It is almost certain that a canoe will still be deemed to be a "vessel" because when the initial draft of s. 320.11 provided that:

> "vessel" includes a hovercraft but does not include a vessel that is powered exclusively by means of muscular power.

However, when the amendments were finally passed, everything after "hovercraft" was deleted and so it is almost certain that "vessel" will continue to include a canoe. So does *R. v. Boudreault* mean that an accused who drinks at a campsite while leaning on or sitting next to their canoe is criminally liable and punishable under s. 320.14 too? It certainly seems so if the Crown establishes impairment *to any degree* and a present ability to set it in motion using a nearby paddle.

Finally, and perhaps most surprising, is that every case referred to thus far has involved an accused who operated the conveyance in question in a public setting or asleep in their driveway after a night of drinking. The concern that *R. v. Boudreault* raises, however, is that it makes an accused criminally liable for engaging in, say, "pre-drinking" at home while waiting for a taxi before going out if they do not adduce sufficiently credible and reliable evidence tending to prove that there was <u>no</u> realistic risk that they would have changed their mind before the taxi arrived and decided to drive their own car, e-bike, e-scooter, etc..

Given that *R. v. Boudrealt* was decided over a decade ago, now would be a good time for Parliament and/or the courts to revisit what I suspect are its unintended consequences, especially as newer modes of personal transportation become ever more common.

While there are many other issues related to the offences in ss. 320.14 and 320.15 that have not been addressed in this paper, I hope that what has been addressed will be of some assistance to at least a few.

NOTES:

[1] 1967 CarswellSask 41 (S.C.C.) at 290.

[2] 1988 CarswellSask 283 (Sask. C.A.).

[3] 2006 CarswellOnt 2590, [2006] O.J. No. 2022 (Ont. C.J.).

[4] 2015 CarswellOnt 18688, 2015 ONSC 7616 (S.C.J.) at para. 13.

[5] [2020] O.J. No. 493 (C.J.).

[6] 1970 CarswellOnt 193 (S.C.C.).

[7] 2007 CarswellAlta 1373, 2007 ABCA 283 at para. 13.

[8] *R. v. Journeaux*, 1992 CarswellOnt 24, [1992] O.J. No. 1400 (Ont. C.A.).

[9] 1997 CarswellOnt 1335 (Ont. C.A.) at paras. 13-14 [*R. v. Hatfield*].

[10] 1985 CarswellBC 744 (S.C.C.) at paras. 2 and 8 [*R. v. Toews*].

[11] 2007 CarswellAlta 1338, 2007 ABPC 286.

[12] 2009 CarswellOnt 5162 (Ont. S.C.J.).

[13] 1994 CarswellSask 391 (Sask. Q.B.).

[14] 1997 CarswellAlta 1175 (Alta. Q.B.).

[15] 2018 CarswellAlta 599, 2018 ABQB 237 at paras. 13 and 25.

[16] *R. v. Whyte*, 1988 CarswellBC 290, 1988 CarswellBC 761 (S.C.C.) at para. 28; *R. v. Tharumakulasingam*, 2016 CarswellOnt 23962, 2016 ONSC 2008 (S.C.J.) at para. 8; and *R. v. Panamick*, 2017 CarswellOnt 14753, 2017 ONSC 5582 (S.C.J.) at para. 42.

[17] *R. v. Hatfield*, *supra*, footnote 9, at para. 19; *R. v. Hudson*, 1989 CarswellAlta 235, 1989 ABCA 75; *R. v. Sarasin*, 2018 CarswellAlta 853, 2018 ABCA 169 at para. 13-15; and *R. v. Thomas*, 2020 CarswellOnt 12824, 2020 ONSC 5375 (S.C.J.) at paras. 2-5.

[18] *R. v. Fleming*, 2007 CarswellOnt 7088, 2007 ONCA 755; *R. v. Szymanski*, 2009 CarswellOnt 5150 (Ont. S.C.J.) at paras. 56-64.

[19] *R. v. George*, 1994 CarswellNfld 5 (Nfld. C.A.).

[20] *R. v. Wren*, 2000 CarswellOnt 685 (Ont. C.A.) at paras. 3 and 24, leave to appeal refused 2000 CarswellOnt 4192, 2000 CarswellOnt 4193 (S.C.C.) [*R. v. Wren*].

[21] *R. v. Legrow*, 2006 CarswellNS 592, [2006] N.S.J. No. 550 (N.S. Prov. Ct.) at paras. 36-37, affirmed 2007 CarswellNS 13, 2007 NSSC 4 at para. 14, affirmed 2007 CarswellNS 269 (N.S. C.A.), leave to appeal refused 2008 CarswellNS 32, 2008 CarswellNS 33 (S.C.C.).

[22] *R. c. Boudreault*, 2012 CarswellQue 10437, 2012 CarswellQue 10438, 2012 SCC 56 at paras. 40-42 and 67; and *R. v. O'Neill*, 2016 CarswellOnt 6481, 2016 ONCA 307 at paras. 7-10.

[23] *R. c. Boudreault*, 2012 CarswellQue 10437, 2012 CarswellQue 10438, 2012 SCC 56 at para. 9.

[24] *R. v. Ford*, 1982 CarswellPEI 1, 1982 CarswellPEI 24 (S.C.C.) at 249; and *R. v. Toews*, *supra*, footnote 10, at para. 10.

[25] *R. v. Boudreault*, *supra*, footnote 22, at para. 42; *R. v. Vansickle* (December 17, 1990), Doc. 1109/88, [1990] O.J. No. 3235 (Ont. C.A.), affirming (November 29, 1988), Wright J., [1988] O.J. No. 2935 (Ont. Dist. Ct.); *R. v. Wren*, *supra*, footnote 20, at para. 16 (Ont. C.A.); *R. v. Mallery*, 2008 CarswellNB 110, 2008 CarswellNB 111, 2008 NBCA 18 at para. 52; and *R. v. Coleman*, 2012 CarswellSask 430, 2012 SKCA 65 at para. 33.

[26] *R. v. Boudreault*, *supra*, footnote 22, at para. 34.

[27] 2012 CarswellOnt 9437, 2012 ONCA 524 at para. 63.

[28] 2009 CarswellOnt 5150 (Ont. S.C.J.).

[29] *R. v. Boudreault*, *supra*, footnote 22.

[30] *Ibid.*, at paras. 45 and 48.

[31] *Ibid.*, at paras. 32, 35 and 40.

[32] *R. v. Sillars*, 2022 CarswellOnt 9308, 2022 ONCA 510, leave to appeal refused 2023 CarswellOnt 4275, 2023 CarswellOnt 4276 (S.C.C.).

In-Custody Call Cheat Sheet

by Anna Brylewski

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It is usually the middle of the night when your phone rings and a police officer tells you they have so-and-so in custody for impaired driving. They've chosen to speak to you for legal advice. The advice you provide on that initial phone call can be crucial in ultimately mounting a successful defence for your client. I hope this brief cheat sheet is helpful to you as you navigate an impaired driving custody call.

As with everything in lawyer-ing, take notes!

— Note down the name and date of birth of the client, the name of the officer you spoke with, the time and duration of the call and any pertinent details regarding the circumstances of the arrest, your client's interactions with the police, and your conversation with the client.

Initial conversation with the Police

— Impaired by what?

- Your advice will differ based on whether the client has been arrested for impaired driving by alcohol or impaired driving by drugs. Ensure that you have this information so that you can properly advise your client what is legally required of them.

— What happened?

- If you are speaking with the arresting officer, it may be helpful to obtain some brief details about the circumstances of the arrest (Was your client pulled over for a traffic stop? Did they go through a RIDE program? Were they involved in an accident? If so, were there any injuries?).
- It is helpful to know whether

your client was arrested for a straight impaired or whether they were subject to an approved screening device or field sobriety test. You can also ask your client about this, but depending on their level of intoxication, they may be a less reliable source.

— Will your client be released from the station?
  - Generally, the answer is yes and you can advise your client of this to put their mind at ease.

Explain to your client that refusing or failing to comply with a lawful demand is a criminal offence with the same implications as an impaired driving offence.

  - In the event that your client is going to be held for show-cause, you'll want to obtain information from them about a possible bail plan and note down the contact information for potential sureties.

Your conversation with your client

— Be in control of the conversation.
  - Have a plan for what questions you will ask in order to obtain the information that you need.
  - Be direct with the advice that you provide.

— Ensure that you are speaking to your client in private.
  - Ask your client if they are in a private place (such a lawyer booth, with the door closed, out of earshot of police or other individuals).
  - Tell your client that they have a right to privacy during their call with you so that if anything changes they can let you know.
  - In the event that the client tells you that they are not in private, ask to speak to the police officer so that you can direct them to provide your client with privacy. Ask the officer to make a note of your request. In the unlikely situation where the police refuse to provide your client with privacy, remind them that this would be a violation of your client's right to counsel, object to providing legal advice in those circumstances and take down their name and badge number.

— Interview your client.
  - Confirm your client's name and date of birth and take down their contact information;
  - Ask about their prior criminal record, if any;
  - Obtain a brief overview regarding the circumstances of their arrest and their interactions with police (How did they come to the attention of police? Were any roadside screening tests done? Did they make any statements or admissions?);
  - Obtain a rough timeline of events (When they started and finished consuming alcohol, when they last drove, when they were arrested).

— Give your client legal advice.
  - Explain to your client what will happen next in terms of the testing procedure (breath tests or DRE evaluation), what those tests will look like and what is legally required of them.
    - For alcohol related offences, advise your client that they will be required to provide two suitable breath samples. It is helpful to let your client know that it may take more than one attempt to obtain a suitable sample. In an alcohol related arrest you will tell you client not to perform any physical evaluation tests.
    - For drug related offences, advise your client that they will be required to perform physical evaluation tests,

Make it clear to your client that the breath tests are mandatory, but the questions are not.

and possibly one breath sample. If the evaluating officer determines that they are impaired, they will demand a sample of bodily fluid (urine or blood sample).
  - Explain to your client that refusing or failing to comply with a lawful demand is a criminal offence with the same implications as an impaired driving offence.
  - Tell your client not to answer any questions. Then repeat yourself – a lot.
    - Advise your client that they will be asked questions during the process and that they are not required to answer them. Tell your client what kind of questions they will be

asked and explain that they are meant to elicit incriminating evidence regarding whether or not they were driving, their drug or alcohol consumption, and their level of impairment.

- Make it clear to your client that the breath tests are mandatory, but the questions are not. The Alcohol Influence Report and DRE Interview are intertwined into the testing procedure in a way that makes them seem as though they are part of the mandatory testing procedure, when in fact they are not. How many times have you watched a breath test video where despite being read multiple cautions, your client answers every question posed to them? The reality is that the scene is perfectly set. The Breath Tech is usually the nice guy. By the time your client is sitting in the breath room, the reality of their situation is sinking in. Human nature makes them want to explain and paint themselves in a better light. Throw in those pesky, nearly eternal, seventeen minutes between the breath tests and you have the perfect recipe for a conversation full of all kinds of incriminating admissions. Prepare your client for this. Remind them of their right to silence. Tell them that no negative inference will be drawn from their refusal to answer the questions. Invite them to make you the bad guy with the tried and true "my lawyer told me not to say anything".
- To prevent your client from repeating admissions they may have already made at the roadside, be sure to advise them that any prior statements likely won't be admissible in Court since they were made prior to them being read their rights and receiving legal advice.
- Advise your client that they will be audio and video recorded and that this footage may be played in Court one day.
  - If you notice any obvious signs of impairment, such as slurred speech, tell your client about them so they are aware of how they are presenting.

— Wrap it up.
- Satisfy yourself that your client understands your advice and answer any questions they may have.
- If your client is being released from the station, explain to them how that will look. Ask them to think about how they will get home and if anyone is available to assist in their release. Depending on their level of impairment, having a sober responsible person available to pick them up may decrease the amount of time they spend in custody. If you're feeling especially charitable, you can ask your client if there is anyone they would like you to call to advise of their arrest and to be on standby to pick them up when they've been released.
- If you know your client is being held for show cause, explain the process and obtain the information that will assist you in putting together a bail plan (including information about where they will live, where they work, who you can call to ask to be a surety, if one is required).
- Ask your client to write out a detailed summary of events upon their release. Have them label this document to clearly indicate that it has been prepared for you, their lawyer, so that it is protected by client-solicitor privilege.

Review your notes and get yourself back into bed, provided that it is actually the middle of the night or you are very, very tired. Good luck!

Citation/Further Reading;

— For more tips and a useful resource generally on driving related offences, see: Alan D. Gold, *Defending Drinking, Drugs and Driving Cases 2022* (Toronto: Carswell, 2022).

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Search Solutions and Techno Tricks

(How) Can the Plain View Doctrine Apply to Digital Searches?

by Wesley Dutcher-Walls

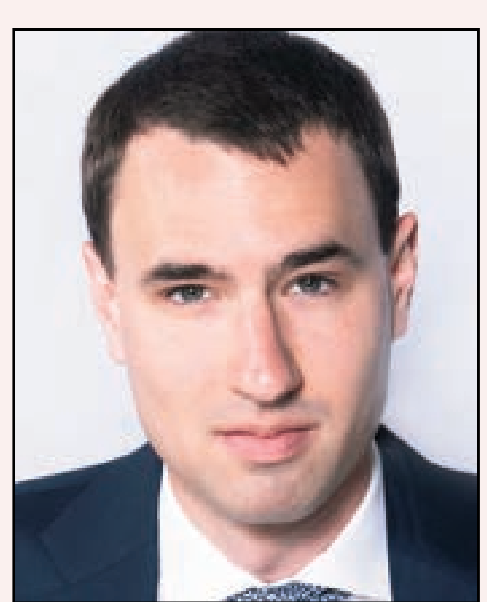

Photo courtesy of John Narvali.

The Supreme Court of Canada revived the debate of the application of the plain view doctrine to digital searches in *McGregor*.[1] There, investigators obtained a warrant to seize and search devices for a voyeurism investigation. During a preliminary search, investigators came across potential evidence of sexual assault. One of the issues for the Court was whether the prosecution could justify the search under the warrant; if not, it would be necessary to invoke the "plain view" doctrine. Justice Cote, for the majority, found the digital search was reasonable by relying on the application of "plain view" principles. Justices Karakatsanis and Martin found the search reasonable under the warrant and cautioned against applying the plain view doctrine without further consideration of how it could apply to digital searches – especially when the Court had never ruled on the issue.

The Court's brief exchange over the doctrine points to an unsettled area: whether and how the plain view doctrine can apply to electronic searches. Counsel should be vigilant in opposing the undue expansion of the doctrine in the digital space. As Justices Karakatsanis and Martin noted in *McGregor*: "There are special considerations associated with electronic data which suggest we should not assume that the plain view doctrine applies, or that it applies without modification."[2]

"Plain view" seizure powers have common law and statutory sources. In common law, an officer may seize evidence if: (1) they are lawfully in a space because of a warrant or other legal justification; (2) it is immediately apparent that the item is contraband or will provide evidence of a

criminal offence; and (3) police discover the evidence inadvertently and do not know in advance about the location of the evidence and intend to seize it.[3] Section 489(2) of the *Criminal Code* also provides a basis for plain view seizure upon reasonable grounds to believe an item will provide evidence of a crime.

Both allow for the seizure of evidence when a police officer is lawfully in a space. The rules confer *seizure* powers, not search powers. However, s. 489(2) is an expansion of the common law doctrine – not simply a codification.[4] Section 489(2) does not require that the discovery is inadvertent[5] and does not require that the incriminating nature of potential evidence is immediately apparent; instead, police need only have reasonable grounds. The police can expect or hope to find something beyond the scope of the search warrant – including something relevant to a completely different offence – and seize it if they can articulate a reasonable basis for doing so.[6]

The differences between physical and digital "spaces" present analytical challenges (and opportunities) for the Crown and attendant risks for the defence. Lisa Jorgenson identified several of the dangers in a 2013 article assessing the impact of *Jones*.[7] For example, what does it mean to be "lawfully" in a digital place? In *Jones*, Justice Blair likened a computer to a home with various subdivisions of space: "rooms, closets, cabinets, drawers, folders, files, safe vaults and the like".[8]

However, the analogy between physical and digital spaces breaks down quickly. Various courts' emphasis on a "lawful vantage point" as a precondition to the plain view doctrine in physical spaces[9] fits uncomfortably in a digital space. Investigators can explore physical spaces using the "prosaic human senses of sound, sight, touch and smell aided by forensic science".[10] However, as Jorgenson notes, the concept of "visibility" works differently in an electronic search.[11] This is especially the case when police use forensic software which organizes the presents the contents of a digital device in a different way than on the native device. Something may be in "plain view" in a Cellebrite extraction even though it would be concealed in a complex file structure on a user's laptop or phone.

Further, what does it mean for something to be in "plain view" in digital spaces? Traditionally, courts require that police can see a particular item without having to move anything.[12] In the digital space, the easiest distillation of the plain view principle is to say that investigators should be able to seize evidence where they can see it without having to "do anything" – click on any links, open any documents, or move any windows – that they wouldn't otherwise be doing in the course of executing the underlying lawful search. Unfortunately, courts have been inconsistent in applying this "passivity" requirement for plain view seizure. In *Fearon*, albeit in a different context, the Ontario Court of Appeal defined "plain view" as meaning that police could see something without needing to "manipulate the keypad" to open a different application.[13] The Saskatchewan Court of Appeal agreed in *Kossick*.[14] In contrast, the courts in *Jones* and *Dragos* found that the plain view doctrine included opening files to see their contents.[15] The dispute in the case law is one of form, not substance. The underlying issue is not whether police *did* anything before inadvertently discovering the evidence related to another offence but whether they had a lawful justification to take each step up until the moment of discovery. Defence counsel should focus on the issue of lawful justification, which transcends the thorny theoretical distinctions between physical and digital spaces.

Defence counsel should help the court identify the analytical difficulties in applying plain view principles digital spaces. In physical spaces, the defence has common-sense arguments to place limits on the plain view doctrine. For example, police wouldn't be able to justify a search of a small drawer containing cocaine if they were lawfully in a home to seize stolen televisions.[16] Those arguments are unavailable in the digital space. Instead, counsel should consider a purposive analysis: can the investigator justify each step they took with explicit reference to the lawful purpose for which police were in the digital space? The inevitable answer may be that the police were reviewing every part of a digital device looking for evidence of "ownership and identity",[17] but it is still important to ask the question. Unless the name or thumbnail of an item or folder is incriminating on its face, the plain view doctrine will not apply where the police are unable to articulate a lawful reason for opening a particular device, folder, or application.[18]

Finally, defence counsel should also advocate for a strict application of the sensory requirements of the plain view doctrine: a digital document is not within the scope of the rule unless police can see it from wherever they are lawfully allowed to be looking: a particular folder or subfolder, a particular point in a file path, a particular application, a particular tab on a browser, and so on. Similarly, unless police otherwise had a lawful reason to open a digital file, a particular file does not fall within the plain view doctrine unless its incriminating nature is apparent on its "outer surface" – for example, its file name, thumbnail image, or circumstantial indicators like the name or other contents of the folder in which police find the file. Defence counsel should ensure the court turns its mind to each of these requirements before applying the plain view doctrine in a digital search.

[1] *R. v. McGregor*, 2023 CarswellNat

335, 2023 CarswellNat 336, 2023 SCC 4.

[2] *Ibid.*, at para. 94.

[3] *R. v. Jones*, 2011 CarswellOnt 11405, 2011 ONCA 632 at para. 56 [*Jones*]; *R. v. Belliveau*, 1986 CarswellNB 16, 30 C.C.C. (3d) 163 (N.B. C.A.).

[4] *R. v. Makhmudov*, 2007 CarswellAlta 995, 2007 ABCA 248 at para. 19.

[5] *R. v. Sipes*, 2011 CarswellBC 3914, 2011 BCSC 1763 at paras. 208-209; Jørgensen, Lisa. "In Plain View?: *R. v. Jones* and the Challenge of Protecting Privacy Rights in an Era of Computer Search" (2013), 46 *U.B.C. L. Rev.* 791 at 802 [Jørgensen].

[6] *Ibid.*, citing *R. v. Yue*, 1995 CarswellBC 535, 61 B.C.A.C. 215 (B.C. C.A.).

[7]Jørgensen, *supra*, footnote 5.

[8] *Jones*, *supra*, footnote 3, at paras. 47-51.

[9] See e.g. *R. v. Lauda*, 1998 CarswellOnt 37, 122 C.C.C. (3d) 74 (Ont. C.A.), affirmed 1998 CarswellOnt 4332, 1998 CarswellOnt 4333 (S.C.C.): "the American authorities suggest that the doctrine applies to any evidence detected when a law enforcement officer is able to detect something by utilization of one or more of his or her senses while lawfully present at the vantage point where those senses are used." See also *R. v. Diamond*, 2015 CarswellNfld 518, 2015 NLCA 60 at para. 37, leave to appeal refused 2016 CarswellNfld 146, 2016 CarswellNfld 147 (S.C.C.), affirmed 2016 CarswellNfld 422, 2016 CarswellNfld 423 (S.C.C.) (White J.A. dissenting).

[10] *Jones*, *supra*, footnote 3, at para. 51.

[11] Jørgensen, *supra*, footnote 5, at 803.

[12] *R. v. Bonilla-Perez*, 2014 CarswellOnt 4167, 2014 ONSC 2031 (S.C.J.) at para. 38, affirmed 2016 CarswellOnt 10848 (Ont. C.A.).

[13] *R. v. Legare*, 2014 CarswellOnt 1398, 2014 ONCA 106 at para. 15.

[14] *R. v. Kossick*, 2018 CarswellSask 345, 2018 SKCA 55 at para. 49.

[15] *R. v. Dragos*, 2009 CarswellOnt 5831 (Ont. S.C.J.) at paras. 34-37; *Jones*, *supra*, footnote 3, at paras. 62-64.

[16]Jørgensen, *supra*, footnote 5, at 802.

[17] *Ibid.*, at 803.

[18] *R. v. Ricciardi*, 2017 CarswellOnt 21663, 2017 ONSC 2788 (S.C.J.) at paras. 67-71.

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WRENCHES FOR THE TRENCHES

Taking Notes for the Crown: Defence disclosure of witness notes in criminal cases

by Hussein Aly

Photo courtesy of Albussein Abdelazim.

Litigation causes panic in people because there are so many issues, and so many facts that must be recalled months and years later. It is often simply too much to remember, and many people resort to making notes. These notes often play a key role in trial preparation as they serve to refresh a witness' memory about what occurred.

For defence counsel, calling a witness to the stand is always a challenge. We attempt to anticipate all issues before they arise, so we are prepared to deal with them and to allow us to make correct decisions. To do this, we must consider what information the Crown has and knows. One consideration defence counsel will have to tackle is what notes a witness may have, and what can lead to these notes being disclosed during the trial. Understanding when and how defence disclosure may be ordered is a key component of trials where defence counsel is calling witnesses.

The Role of Litigation Privilege

Often, "in preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless".[1] To establish litigation privilege, the onus is on the party claiming the privilege to establish on a balance of probabilities that the notes were created "for the purpose of either preparing for trial or facilitating conversations with a lawyer in anticipation of litigation".[2] However, notes taken during these meetings lose the pro-

tection of privilege if the witness uses the notes to refresh their memory because "the litigant is putting that witness and the memory refreshing source before the court".[3] In these circumstances, "when a witness who has refreshed their memory from their notes or a previous statement is called by a litigant there is an implicit waiver of the litigation privilege" and the notes must be disclosed. The rational for the rule is that the "opposing party is entitled to test that reliability through cross examination, and where the witness has refreshed their memory from the notes, to explore the impact of those notes on the witnesses recall".[4]

More importantly for defence counsel, "the case law does not distinguish between witnesses at large and the subset of witnesses who are accused persons".[5] In *Sachkiw*, Justice Dawson ruled:

> I do not agree that litigation privilege for policy reasons should not end when an accused person testifies having refreshed their memory from notes. The reliability of an accused person's evidence is also in play. When the accused chooses to refresh his memory from notes to which litigation privilege would otherwise apply prior to taking the stand, the Crown is entitled to see such notes subject to the court's discretion. An accused person who has prepared notes to refresh their memory and uses those notes to the refresh their memory prior to testifying has waived any litigation privilege attached to those notes. It is important that the opposing party have the opportunity to test the memory of events and expose inaccuracies in memory.

Therefore, defence counsel must appreciate that any document used by an accused to refresh their memory can be ordered produced to the Crown. That said, an accused simply looking at notes "alone would not be sufficient to meet the evidential burden on the Crown that there was a waiver of the privilege".[6] The determining factor is whether the document had the impact of refreshing the accused memory; if an accused testifies that they looked at notes and that they had the impact of refreshing their memory production to the Crown will likely follow.

The Role of Solicitor-Client Privilege

The situation may differ if solicitor-client privilege is invoked. It is well established that "there are fundamental differences between solicitor-client privilege and litigation privilege that support a different approach to assessing whether there has been an implied waiver".7[IBD1] Primarily, solicitor-client privilege "recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it".[8] There are authorities which have held that an accused who refreshes his memory from his own notes or notes made by his counsel does not waive solicitor-client privilege,[9] as there is no express intention to waive, but these decisions have not been followed often. Rather, in recent years, the approach taken in *Fast* has been followed, where, after determining if solicitor-client privilege applies, courts have concluded that, "the judge should determine whether the probative value of a cross-examination has overcome the important policy objective of protecting the status of solicitor-client status or whether trial fairness and a disposition on the merits is more compelling in the circumstances than the damage that would occur from permitting a breach of solicitor-client privilege".[10] Situations where defence oppose disclosure based on solicitor-client privilege require trial judges to consider additional factors it does not close the door on production being ordered, so it should not be viewed as an impenetrable shield when preparing for trial.

Minimizing the Harm Done by Disclosure

If production of notes is ordered there may be some avenues available to ameliorate the situation. In *Fast*, the "the trial judge erred in giving the refresh document to Crown counsel without any review or redaction of the document" , so judicial editing can be requested prior to disclosure. Further, the scope of the cross-examination is within the discretion of the trial judge, and it should be kept in mind that "the refresh document should not be treated as a prior statement usable as an all-purpose impeachment document; a refresh document is probative only for the purposes of testing the credibility of the accused with respect to their testimonial memory and reliability".[11]

Final Thoughts

It is clear that notes taken by a witness, an accused, or counsel that are used to refresh a witness' memory for trial could easily be disclosed to the Crown. This being the case, it is important for defence counsel to know what notes exist and their contents when deciding if they will call a witness. Failing to do so could have disastrous consequences.

NOTES:

[1] *Blank v. Canada (Department of Justice)*, 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84, 40 C.R. (6th) 1, 2006 CSC 39, 2006 SCC 39, EYB 2006-109504, 51 C.P.R. (4th) 1, 270 D.L.R. (4th) 257, 352 N.R. 201, [2006] 2 S.C.R. 319, [2006] 2 R.C.S. 319, [2006] S.C.J. No. 39, [2006] A.C.S. No. 39 at para. 71 [*Blank*].

[2] *R. v. Fast*, 2009 CarswellBC 3286, 90 M.V.R. (5th) 233, 2009 BCSC 1671, 202 C.R.R. (2d) 356, [2009] B.C.J. No. 2421 at para. 30 [*Fast*].

[3] *R. v. Sachkiw*, 2014 ONCJ 287, [2014] O.J. No. 2910 at para. 62.

[4] *Ibid.*, at para. 60.

[5] *Ibid.*, at para. 62.

[6] *Ibid.*, at para. 64.

[7] *R. v. O.*, 2020 CarswellOnt 19703, 2020 ONCJ 654, [2020] O.J. No. 5973 at para. 8.

[8] *Blank*, *supra*, note 1, at para. 26.

[9] *R. v. Parker*, 1985 CarswellOnt 1458, [1985] O.J. No. 175 (Ont. C.A.); *R. v. Nesbitt* (October 18, 2007), Doc. 618, [2007] O.J. No. 5045 (Ont. S.C.J.).

[10] *Fast*, *supra*, note 2, at para. 62.

[11] *Ibid.*, at para. 64.

THE DOCKET

by Lauren Wilhelm

11(b) – unreasonable delay – defence delay based on unavailability

There is no bright-line rule that all delay until the next available date following defence counsel's rejection of an offered date is characterized as defence delay – defence delay is that which is waived or caused solely or directly by defence conduct – periods of time where the court or crown are unavailable cannot be classified as defence delay even if the defence is also unavailable – a bright-line approach ignores these important principles – a fact-specific approach must be taken to the apportionment of delay – all relevant circumstances must be considered.

R. v. Hanan, 2023 CarswellOnt 6573, 2023 CarswellOnt 6574, 2023 SCC 12; Côté & Rowe JJ. (Martin, Kasirer & Jamal JJ. concurring)

Summary dismissal – threshold test – manifestly frivolous

Applications in criminal matters should only be summary dismissed where they are "manifestly frivolous" – a high and rigorous standard is required to ensure protection of an accused's right to make full answer and defence – it balances trial efficiency with trial fairness – "manifestly frivolous" refers to applications where it is obvious on the face of the record that they will necessarily fail – this allows for the dismissal of application that would never succeed and would therefore waste court time while ensuring those that might, including novel arguments, are decided on their merits – the party seeking dismissal must demonstrate the "manifest frivolity" of the application – the applicant has the minimal burden of providing the court with: the legal principles, Charter or statutory provisions and how they've been infringed; the anticipated evidence and how it may be adduced, the proposed argument and the remedy requested – the application of the standard does not involve any weighing of evidence – the trier must assume the facts underlying the application to be true and take the applicant's arguments at their highest – on this basis an application will only be "manifestly frivolous" if its flaws are apparent on the face of the record.

R. v. Haevischer, 2023 CarswellBC 1103, 2023 CarswellBC 1104, 2023 SCC 11; Martin J. (Wagner C.J., Karakatsanis, Côté, Rowe, Kasirer, Jamal & O'Bonsawin JJ. concurring)

Impaired driving – presence of ASD – valid demand – immediacy requirement

A peace officer who has reasonable suspicion that a driver has alcohol in their body can demand the driver "provide forthwith" a breath sample into an approved screening device – where the "forthwith" or immediacy requirement is not met, the demand will be invalid – the issue was whether the officer must have immediate access to an ASD at the time a demand is made in order for that demand to meet the immediacy requirement – subject to unusual circumstances the word "forthwith" maintains its ordinary meaning – unusual circumstances may allow for a flexible interpretation of the word, but these are to be determined on a case-by-case basis and the burden to establish them rests with the Crown – the absence of an ASD at the scene at the time of the demand is not in itself an unusual circumstance – a demand in the absence of an ASD will not be valid.

R. c. Breault, 2023 CarswellQue 3340, 2023 CarswellQue 3341, 2023 SCC 9; Côté, J. (Wagner C.J., Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. concurring)

Re-open trial post-conviction – fresh evidence

The appellant was convicted of numerous sexual offences relating to his daughter – the case turned on the complainant's credibility – after he was convicted but before he was sentenced he discharged his counsel and retained new counsel – new counsel

obtained the complainant's phone records for the time frame of the last offence – taken at their highest, the records suggested the appellant was not at the location of the last offence – counsel moved to reopen that trial and sought a mistrial on the basis of this evidence – the application was dismissed and the appellant was sentenced to 10 years.

Trial judges sitting alone can vacate a finding of guilt prior to sentencing but should only exercise that discretion in exceptional circumstances where it is clearly called for – the Palmer fresh evidence test governs the analysis on applications to reopen – cogency of the evidence is a critical factor – the trial judge erred by treating the cogency factor as requiring the evidence to be decisive or potentially decisive – the proper question is whether evidence bears on a decisive or potentially decisive issue at trial and whether, if accepted it could reasonably, when taken with the rest of the evidence adduced at trial, be expected to have affected the result – while due diligence is an important factor, the more cogent the fresh evidence, the more that factor will bend – in this case while the records could have been obtained, there was no apparent tactical reason not to do so – the records were highly cogent making this a rare and exceptional case in which the findings of guilt should have been vacated and the trial reopened.

R. v. R.G., 2023 CarswellOnt 7188, 2023 ONCA 343; Fairburn A.C.J.O; (Doherty & Favreau J.A. concurring)

House arrest – Downes credit – delay as mitigating factor

Following a plea to manslaughter the appellant was sentenced to 7 years less 19 days pre-sentence custody – Downes credit for the 4 years and 10 months he spent on house arrest reduced the sentence by an additional 6 months – he argued on appeal that the trial judge erred in granting insufficient "credit" for the time spent on house arrest, which notably he did not breach, nor did he contribute in any way to the delay.

While noting that Downes credit is to be treated as a mitigating factor and a judge's decision regarding such credit is highly discretionary, an appellate court can intervene where there is an error in principle impacting on sentence – while the sentencing judge acknowledged the lengthy time on house arrest bail without incident, he failed to consider that the appellant was not responsible for any of the delay in his case – the blameless delay was a significant factor and the sentencing judge's failure to give it any weight was an error in principle that allowed the court to intervene – in conducting its own assessment of a fit sentence, the court found that an additional 6 months of Downes credit was appropriate.

R. v. Green, 2023 CarswellOnt 6755, 2023 ONCA 317; Feldman J.A.; (Thorburn & Coroza J.A. concurring)

Stay of sentence on appeal – exceptional case – significant positive transformation

The appellant, a 19-year-old first offender, appealed her convictions and sentence on several counts of possession for the purpose of trafficking – she received a sentence of 178-days time served plus 18 months custody to be followed by probation – she received bail pending appeal – at the time of appeal she abandoned her conviction appeal and no longer disputed the fitness of the sentence – a fresh evidence application was brought demonstrating the exceptional rehabilitative steps she'd taken while awaiting her appeal – she sought a stay of execution of her sentence or in the alternative, the substitution of a conditional sentence – substituting a conditional sentence would be inappropriate given the fitness of the original sentence.

However this was one of the rare cases that warranted appellate intervention on account of the appellant's significant positive transformation – the appellant had turned her life around in every possible aspect from overcoming drug use, to devoting herself to family, to achieving extraordinary academic success – there was no suggestion she had been gaming the system – it was not in the interests of justice to reincarcerate the appellant – doing so would only address general denunciation and deterrence but any gain in those objectives would be minimal and outweighed by the negative impacts on the appellant's rehabilitation – to the extent that the appellant's example and the court's decision encourage others to take very significant rehabilitative steps, this unquestionably serves the public interest.

R. v. Sauvé, 2023 CarswellOnt 6628, 2023 ONCA 310; Feldman J.A.; (Roberts & Coroza J.A. concurring)

MEMBER PROFILE

Reproduced with the permission of Matthew Campbell-Williams

Matthew Campbell-Williams

by Craig Bottomley

City/Town: Brampton

Year of Call: 2022

On February 24, 2021, a precocious young law student named Matthew Campbell-Williams tweeted that his goal in life was to be the subject of a FTD Member Profile. Naturally, this came to my attention and I tweeted back . . . "Careful what you wish for! Graduate, join the CLA, then remind me that I sent this tweet!"

Turns out, that was a binding agreement.

Now onto the questions!!!!

QUESTIONS

Finish the Sentence

1. If I never went to law school, I would have become a youth worker of some sort. *Probably the cool sort.*

2. If I could change careers tomorrow, I would become an HVAC technician. *Still cool. See what I did there?*

3. If I win 10 million dollars, I will donate most of it and give the rest to my wife to decorate and renovate the house.

4. If I could appoint the next Chief Justice of Canada it would be Nav Bhatia. *The Super Justice!*

5. Michael K. Williams (RIP) will play me in the movie based on my life.

6. Probably my wife will play my love interest in the movie. *You should probably show her a copy of this.*

7. Prime Minister Trudeau is allegedly Fidel Castro's son apparently.

8. Canada's next Prime Minister is hopefully not someone in the media yelling about bail reform. *I notice a suspicious silence when police officers get arrested.*

9. If I could pick one injustice to undo it would be slavery.

10. If I could solve one issue it would be capitalism and its destruction of society and environment. *Oh, sure . . . that.*

11. If I could represent/defend a historical figure it would be Assata Shakur. *Why? She's super good at escaping jail!*

12. If I was to be executed, my last meal would be a triple stacked cheese burger, apple pies and the sweetest vanilla milkshake you can find. *Best we can do is two cheese sandwiches.*

13. My greatest regret in life is getting caught throwing a party with alcohol in grade 9. *This would be my greatest accomplishment.*

14. Boy I really screwed up when I had to spend the summer before law school in summer school because I didn't take enough prerequisites to graduate.

15. My hero is Hulya Genc. *Hell ya.*

16. My favourite section of the *Criminal Code* is 742! We need less people in custody.

17. If I could legalize an activity it would be defending yourself!! See: media. *I don't know what this means, but I'll allow it.*

18. If I could criminalize an activity it would be circuses using animals.

19. Most people don't know that I used to be an Uber driver.

20. The strangest thing I have eaten is a macaroni and cheese sandwich. *You need to get out more!*

21. I really embarrassed myself when I crashed my mom's car at 17.

22. My pet peeve is people asking questions that they know I can't answer. *Ha!*

23. The toughest challenge in my life has been becoming a father.

24. If I could be reincarnated, I would come back as a coyote. Love those creatures. *You and Johnny Cash.*

25. I am afraid of horseback riding. Really. It is my biggest fear. *Those horses are a lot bigger when you stand beside them.*

26. I believe in ghosts.

27. In high school, I was in over my head. *Probably recovering from all those parties in grade 9.*

28. In undergrad, I was searching for my place in this world.

29. In law school, I was over it.

30. If my dog could speak s/he would say "I know you wish I was a cat."

31. Legal Aid Ontario needs to get their money up. *Indeed.*

Choices

1. Guiness or Molson Canadian? I'm Jamaican, so Guinness.

2. Grilled Rib Eye or Grilled Tofu? Neither. *I guess we'll just live in suspense, Matthew!*

3. Alfa Romeo or Mercedes Benz? Benz! Duh!

4. Romantic or Hunter/Provider? What's more romantic than a freshly killed sabretooth tiger? *Two freshly killed sabretooth tigers?*

5. Out late and sleep in or in bed by 10 and up at 6? I have a 10-month-old. I'm doing this at 5:28 am. There is no rhyme or reason to my sleep anymore.

6. Armani or Old Navy? Old Navy . . . I'm no fashionista.

7. James Bond or Lara Croft? Lara Croft. She's the tomb raider, right? If so, Lara Croft. If not . . . eh probably still Lara Croft. *Fair.*

8. Hockey or Soccer? Soccer. I don't like ANY activity that is done in cold temperatures. *Just say soccer.*

9. Classical music or classic rock? Classical music. Beethoven and all those people were pretty cool in my opinion.

10. Superman or Wonder Woman? Superman if I had to pick. Superheroes are not really my steez. Except Batman, he's cool. *I'm so cool that I had to Google "steez".*

11. Blended or Single Malt? Don't even know what this means. *Sigh. Come to my office immediately.*

12. Manolo or Crocs? I think Crocs should be illegal.

13. Mac or PC? I only have a PC to view ICC videos. Everything else is done on my Macbook.

14. Globe and Mail or The National Post? Globe.

15. Starbucks or Tim Horton's? Starbucks is good but that price point is just a killer. Tim Horton's me please.

16. Yoga or Treadmill? Basketball court or boxing ring. *Move to Dagestan and you can combine the two!*

17. 30 days jail or two year conditional sentence? Give me the 30.

18. Dog or Cat? Cat. No doubt about it.

19. Canoe or Speedboat? Speedboat man I am not rowing that thing.

20. Muskoka cottage or condo in Florida? Muskoka!! I love nature. Minus the bugs of course.

21. Star Wars or Star Trek? Have not watched either of them. . .sci-fi is my least favourite genre. *How. Dare. You?*

22. Prime Minister Doug Ford or 5 years of recession? Same thing? *This guy gets it.*

23. Cash paying drunk driving case or legal aid murder? Definitely murder.

24. Flowers or chocolate? Flowers! They're pretty.

25. Pinot Noir or Chardonnay? Chardonnay.

26. Android or iPhone? I will never get rid of the iPhone.

27. Drunk or stoned? Pass. I want my mom to read this. *She knows. Stoned.*

28. Naughty or nice? I'm so nice.

Favourites

1. Guitarist. Jimi Hendrix

2. Poet. Shel Silverstein

3. Author (Fiction) John Grisham

4. Author (Non-Fiction) Angela Davis

5. Prime Minister: none have ever impressed me

6. City: New! York! City!

7. Lawyer: Shane Martinez!!

8. Judge: There's a few. Chapman in 1911. Bernstein in Brampton. D. McLeod also.

9. Journalist: Brandon Gonez

10. Chef/Restaurant: Papa Guiseppe's

11. Hotel: Starfish in Jamaica

12. Theme park: Disney!! Some of my best memories in life have been at a Disney park.

13. Park: Algonquin. Went on a high school camping trip there and I had a blast. Or El Dorado Park in Brampton. OR Jack Darling Park. Don't know why I feel so strongly about parks.

14. Canadian: Dalano Banton probably

15. Sports team: The Knicks or the Raptors

16. Travel destination: Jamaica. Haven't been back since February 2020 but before that I've gone every year except one or two since I was a toddler.

17. Thrill seeking activity: Concerts. I'm the type to line up hours before doors open so I can be right in front of the stage.

18. Police force: Next!

19. Movie: Dark Knight with Heath Ledger is up there. Silverton Seige too. Lion King gets nostalgia points.

20. Actor: Michael K. Williams or Wood Harris

21. Band: System of a Down

22. Song: Dear Winter Bloody Fiegs by Westside Gunn

23. Intoxicant: Jacob's Creek Moscato Rosé

24. Supreme Court of Canada decision: Antic. I like Suberu also. *We're gonna fight.*

25. Hobby: reading, basketball, boxing

26. Political party: Black Panther Party

27. Ontario Premier: Which ever one forgives all OSAP debt

28. Historical figure: The Angola 3

29. Attorney General: To be honest, not one name comes to my head

30. Crown Attorney: Ella Brosh