Citation: R v Grogan, 2026 MBCA 29
Date: 20260401
Docket: AR25-30-10203

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***M. T. Gould*** *and*
HIS MAJESTY THE KING	)	***K. Fonseca***
	)	*for the Appellant*
Respondent	)	
	)	***M. Moorthy*** *and*
	)	***B. Roziere***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
ALEXANDER JOSEPH GROGAN	)	***January 9, 2026***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***April 1, 2026***

TURNER JA

Introduction

[1] The accused was the driver of a truck (the truck) that failed to stop at a stop sign at a rural intersection and collided with an SUV (the SUV). One occupant of the SUV was killed and the two other occupants suffered bodily harm.

[2] In Provincial Court, the trial proceeded by way of a *voir dire* in which the accused sought the exclusion of a statement he made to an officer

at the scene of the collision (the statement) and the results of the breath samples he subsequently provided (together, the evidence).

[3] The trial judge found that there were breaches of the accused's sections 8, 9, 10(a) and 10(b) *Charter* rights (see *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]). However, he concluded that the evidence should not be excluded pursuant to section 24(2) of the *Charter*.

[4] The accused subsequently invited convictions on one count of impaired driving causing death (see *Criminal Code*, RSC 1985, c C-46, s 320.14(3) [the *Code*]) and two counts of impaired driving causing bodily harm (see *ibid*, s 320.14(2)).

[5] The accused appeals his convictions, arguing that the trial judge erred in law when, for the purpose of his section 24(2) analysis, he applied the legal framework associated with spontaneous utterances as set out in *R v Hall*, 2018 MBCA 122 [*Hall*], to his characterization of the statement. The accused says that although the trial judge properly used the test enunciated in *R v Grant*, 2009 SCC 32 [*Grant*] (the *Grant* test), regarding section 24(2) of the *Charter*, his initial error on the law of spontaneous utterances led him to improperly weigh the considerations outlined in the *Grant* test.

[6] While I agree that the trial judge erred in the legal test he used to characterize the statement, the error did not impact the section 24(2) analysis. For the reasons set out below, I would dismiss the appeal.

[7] For completeness, I note that the Crown argued that the suspension of section 10(b) rights justified in *R v Orbanski; R v Elias*, 2005 SCC 37, should apply here and is not limited to circumstances of roadside stops. However, upon questioning by the panel at the appeal hearing, the Crown indicated that it would not pursue the issue if the accused's appeal was dismissed.

Background

[8] On March 11, 2023, emergency services, including police, attended to a significant collision in the Rural Municipality of Rockwood, Manitoba. Travelling at an estimated 98 to 100 km/h, the accused failed to stop at a stop sign. The truck collided with the driver's side of the SUV, which had the right of way and was occupied by three people.

[9] As noted above, one passenger of the SUV died from the injuries she sustained in the collision. The driver and the other passenger of the SUV suffered bodily harm.

[10] Officer Sonnenberg of the RCMP was dispatched to the collision minutes after it occurred. When he arrived, fire and paramedic personnel were already on scene. He observed the SUV in the ditch with a group of people beside it. The officer described the scene as "a lot of chaos going on".

[11] Officer Gilbody directed Officer Sonnenberg to take a statement from the accused. Officer Sonnenberg testified that he understood that the accused was a witness—neither a suspect nor an accused. The officer assumed that the accused was associated with the SUV, not the truck.

[12] Officer Sonnenberg asked the accused whether he would be willing to provide a statement, to which he agreed. The two walked to Officer Sonnenberg's police vehicle, the officer opened the back door, the accused got inside and the officer closed the door. The officer explained that they went to his vehicle because it was cold outside.

[13] Once in the police vehicle, Officer Sonnenberg gathered some basic information from the accused (i.e., name, address and contact information). Before continuing to take the statement, Officer Gilbody attended to the window of the police vehicle. After Officer Sonnenberg rolled down the window, Officer Gilbody asked to confirm that the statement being taken from the accused was a "warned caution", meaning that Officer Sonnenberg had informed the accused of his *Charter* rights. Officer Sonnenberg replied that it was not. Officer Gilbody indicated that it should be because the accused was the driver of the truck.

[14] Wanting to get further information from Officer Gilbody, Officer Sonnenberg moved to step out of the police vehicle. Before stepping out, he asked the accused whether he had any injuries, was on any medications or whether there were any reasons he should be seen by the paramedics. The officer testified that he asked these questions because he was going to step out of the vehicle for a moment and he did not want anything "negative" to happen to the accused while left alone.

[15] In response to Officer Sonnenberg's questions, the accused replied that he did not have any conditions or injuries but said that he had been drinking at a party and that he had only consumed two drinks. As a result of that response, and upon learning that the accused was the driver of the truck,

Officer Sonnenberg determined that he would make an approved screening device (ASD) demand of the accused.

[16] Officer Sonnenberg retrieved an ASD from another officer on scene and returned to the police vehicle, where he read the ASD demand for a breath sample to the accused, which the accused complied with and failed. As a result, Officer Sonnenberg advised the accused of his arrest for impaired driving causing death, advised him of his *Charter* rights and made a demand that the accused perform a breathalyzer test.

[17] At the police station, the accused provided two breath samples, both of which resulted in readings of 100 milligrams of alcohol in 100 millilitres of blood.

The Voir Dire in Provincial Court

[18] At the *voir dire*, Officer Sonnenberg testified for the Crown, as did two other police officers and a fire chief. The accused called no evidence.

[19] The accused argued that he was detained as soon as Officer Sonnenberg asked to speak to him, and that he should have immediately been informed of the reason for his detention and of his right to retain and instruct counsel pursuant to sections 10(a) and 10(b) of the *Charter*. Without being advised of same, Officer Sonnenberg improperly elicited comments from the accused, namely, that he had consumed alcohol prior to driving.

[20] The accused asserted the evidence should be excluded pursuant to section 24(2) of the *Charter*.

[21] The trial judge found that the accused's detention began when Officer Gilbody told Officer Sonnenberg that the accused was the driver of the truck, which occurred before Officer Sonnenberg asked the accused whether he had any injuries, was on any medications or needed to be seen by paramedics. He found that it was at that point the accused should have been advised of his rights pursuant to sections 10(a) and 10(b) of the *Charter*. Officer Sonnenberg's failure to do so resulted in a breach of the accused's *Charter* rights.

[22] Before proceeding to an analysis of whether the evidence would be excluded pursuant to section 24(2) of the *Charter*, the trial judge asked counsel to address whether the statement was a spontaneous utterance and what effect that may have on the section 24(2) analysis. In reply, defence counsel tendered a number of authorities and the Crown submitted *Hall*.

[23] After hearing arguments, the trial judge concluded, in his decision regarding section 24(2) of the *Charter*, that the statement was a spontaneous utterance and that the question posed by the officer did not provoke the statement.

[24] The trial judge went on to consider the *Grant* test to determine the admissibility of the evidence. He found that the *Charter* breach was "on the low end on a scale of seriousness", that the officer did not act in bad faith, that the breach was minimally intrusive to the accused's *Charter* rights and that there was great public interest in adjudicating this matter on its merits. As a result, the trial judge ruled that the evidence was admissible.

Standard of Review

[25] A trial judge's decision whether to exclude evidence under section 24(2) of the *Charter* is owed considerable deference on appeal.

[26] In *R v Côté*, 2011 SCC 46, the majority explained that a trial judge's determination on the exclusion or admission of evidence under section 24(2) of the *Charter* is owed considerable deference on appellate review when a trial judge has considered the proper factors and has not made any unreasonable finding (see para 44). An appellate court should only interfere with a trial judge's conclusion on a section 24(2) analysis if the trial judge has made "an 'apparent error as to the applicable principles or rules of law' or an 'unreasonable finding'" (*R v Law*, 2002 SCC 10 at para 32; see also *R v Farrah (D)*, 2011 MBCA 49 at para 7).

Analysis

[27] The only issue on appeal is whether the trial judge erred in his section 24(2) analysis. To determine that issue, I need not consider or revisit the trial judge's findings that the evidence was obtained in breach of the accused's *Charter* rights.

[28] The accused submits the trial judge was wrong to use the test articulated in *Hall* to assess whether the statement was a spontaneous utterance. That error led the trial judge to incorrectly consider the circumstances of the statement and their impact on the factors of the *Grant* test. Ultimately, the accused says that the trial judge erred in concluding that the statement should not be excluded pursuant to section 24(2) of the *Charter*.

[29] Section 24(2) of the *Charter* states:

Exclusion of evidence bringing administration of justice into disrepute	**Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice**
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	**(2)** Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administratio n de la justice.

[30] The accused does not dispute that the trial judge considered the appropriate factors in his section 24(2) analysis. In other words, the trial judge properly considered the factors outlined in the *Grant* test:

(1) the seriousness of the state's conduct, which infringed the *Charter*;

(2) the impact of the *Charter* breach upon the accused's interests; and

(3) the interest of society in the adjudication of the case on its merits.

[31] In my view, it was reasonable for the trial judge to first determine how the statement should be characterized. That was important in order to determine how he should consider the statement under the *Grant* test.

[32] Where the trial judge fell into error was in the legal test he used to characterize the statement. The trial judge's focus on the factors set out in *Hall* was inappropriate because *Hall* speaks to the admission of a witness' statement for its truth under a recognized hearsay exception.

[33] In *Hall*, the police took a statement from a witness to a murder minutes after it occurred. The witness died before the trial started; therefore, the Crown sought to introduce his police statement at trial. The trial judge admitted the statement because he found that it "met the requirements of the spontaneous (or excited) utterance exception to the hearsay rule" (*ibid* at para 36).

[34] In *Hall*, the accused argued that the witness' statement should not have been admitted. Justice Mainella set out the law on whether a witness' hearsay statement should be admitted under the spontaneous utterance exception (*ibid* at para 41):

> A spontaneous utterance resulting from a startling event is admissible if the circumstances in which it was made exclude the possibility of concoction or distortion and there are no special features of the case that give rise to a real possibility of error. The circumstances of the making of the statement provide the circumstantial guarantee of trustworthiness to alleviate any hearsay danger.
>
> [citations omitted]

[35] Justice Mainella went on to describe that a court should consider the proximity between the event and the statement (see *ibid* at para 45), whether the statement was elicited from the declarant (see *ibid* at para 47), the declarant's motive for providing the statement and whether there is a real possibility of error (see *ibid* at para 59).

[36] The test set out in *Hall* has no application to the factual determination that had to be made in the case at bar. Here, in the context of a section 24(2) analysis, the question of whether the statement was made spontaneously or was elicited by the police was relevant to an assessment of the impact of the *Charter* breach upon the accused's interests.

[37] By considering all the factors outlined in *Hall*, the trial judge subjected the statement to a more rigorous test than what was required. However, as I have said, the trial judge was not wrong to consider whether the statement was elicited by the police in determining the impact on the accused's *Charter* rights under the *Grant* test (see *Grant* at para 96).

[38] The trial judge found, as a fact, that the statement was not elicited by Officer Sonnenberg. The trial judge stated:

> To be clear, I do not agree that there's a linkage between the question posed and the answer received in this specific case.
>
> The question does not lead to or even hint at the officer inquiring about any alcohol consumption. It is simply proffered in a somewhat strange way by the accused.
>
> The evidence of [Officer] Sonnenberg, which I accept is that they simply came up when inquiries about . . . any potential medical condition arose.

> To put this succinctly, the answer was not provoked by the question.

[39] The trial judge's error in applying the test in *Hall* was not material to his ultimate conclusion. Moreover, his factual finding that the statement was made spontaneously was reasonably available to him on the record. He understood how that fact was to be considered within the *Grant* test. He noted that in *Grant*, circumstances may attenuate the impact of a *Charter* breach, including "when a statement is made spontaneously following a *Charter* breach" (*Grant* at para 96). The trial judge stated "that attenuation [of the impact of the breach], in fact, exists. This was a statement that was made spontaneously following a *Charter* breach that has already been detailed."

[40] The trial judge went on to further correctly consider and apply the *Grant* test to determine whether the statement should be excluded. He found that the *Charter* breach related to the accused's detention was a technical breach rather than a serious one. He recognized the chaotic situation with which Officer Sonnenberg was confronted and that the officer immediately stopped questioning the accused after he said he had been drinking. The trial judge reasonably noted that the impact to the accused was minimal, in part because ASD demands have been classified as minimally intrusive. Finally, on the third prong of the *Grant* test, he noted that an individual died and two others were injured; therefore, society had an interest in the adjudication of the matter on its merits.

Disposition

[41] Despite an error in the method by which the trial judge assessed the nature of the statement, he considered the appropriate factors regarding the

exclusion of the statement. His conclusion is owed considerable deference on appeal.

[42] For the above-noted reasons, I would dismiss the appeal.

Turner JA

I agree: Cameron JA

I agree: Simonsen JA