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Docket: CR 22-02-02253
(Brandon Centre)
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COURT OF KING'S BENCH OF MANITOBA
(CRIMINAL DIVISION)

B E T W E E N:

HIS MAJESTY THE KING,	)	Reid Girard
	)	Nikki Boggs
respondent,	)	for the respondent
	)	
- and -	)	
	)	
JOSHUA ALLEN HECTOR ROBBINS,	)	Mark Wasyliw
	)	for the appellant
appellant.	)	
	)	
	)	
	)	Judgment Delivered:
	)	March 03, 2025

ABEL J.

INTRODUCTION

[1] The appellant was convicted of driving over the legal blood alcohol limit and was sentenced to a fine of $2,500.00 and an eighteen-month driving prohibition.

[2] The trial judge made several findings of fact, as well as addressed the appellant's arguments that his rights pursuant to the **Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c.11** (the "***Charter***") were violated by the conduct of the police.

[3] The appellant appeals the decision of the trial judge, arguing that the trial judge erred in not finding breaches of his ***Charter*** rights, and erred in not excluding evidence pursuant to s. 24(2) of the ***Charter***.

[4] The appellant's right to appeal is found in s. 813 of the ***Criminal Code***, R.S.C., 1985, c. C-46 (the "***Code***") .

FACTUAL BACKGROUND

[5] The following are the facts as found by the trial judge and contained in their Reasons for Decision dated November 16, 2023 (Reasons).

[6] On October 10, 2022, Julie Suppes (Suppes) a homecare worker employed at Fairview Personal Care Home (Fairview) in Brandon, Manitoba, observed the appellant leave the room of Helen Gibson (Gibson), who was a resident at Fairview. Suppes recognized the appellant as the grandson of Gibson.

[7] Suppes was advised by co-workers that they had smelled alcohol from the appellant, although Suppes never interacted with the appellant directly. She observed the appellant leave Fairview and drive away. Suppes called her

"charge nurse" to report the incident. The charge nurse, Cindy Smith (Smith) called 911 to report the appellant.

[8] Constable Michel Latreille (Latreille) of the Brandon Police Service (BPS) was dispatched to be on the look out for a possible impaired driver at Fairview. Latreille attended Fairview and was met by Smith, who took Latreille to Gibson's room.

[9] Latreille knocked on the closed door of the suite of Gibson. The appellant opened the door, Latreille introduced himself and explained he was following up on an impaired driving complaint. Latreille asked the appellant to step out of the room into the hallway. Latreille took a step in to stop the door with his foot from closing when the appellant moved away from the door and into the suite. Latreille testified that he did this to maintain a visual for officer safety.

[10] The trial judge specifically found that Latreille did not open the door himself, in response to Gibson saying come in, and found that Latreille did not take a couple of steps into the room.

[11] The appellant stepped out of the room and spoke with Latreille. Latreille noticed a faint odour of alcohol on the breath of the appellant. After further questioning of the appellant, Latreille formed the necessary suspicion and articulated an approved screening device (ASD) demand.

[12] The ASD was in the police car. Latreille escorted the appellant out of Fairview stopping at the washroom at the request of the appellant. While escorting the appellant, Latreille made observations of the appellant, resulting in

Latreille believing he had grounds to arrest the appellant for impaired operation, and abandoned the ASD demand.

[13] The appellant was arrested and provided with his ss. 10(a) and (b) ***Charter*** rights.

[14] The appellant advised that he wanted to speak to legal counsel. Latreille attempted to clarify whether the appellant wanted a specific lawyer or duty counsel. The appellant did not provide a specific answer but was struggling to find the words for what he wanted. Latreille asked the appellant "duty counsel?" to which the appellant agreed.

[15] Latreille facilitated a call to duty counsel at the BPS station, dialing the number and passing the phone to the appellant. The appellant did not articulate a request to speak to a specific or different lawyer.

[16] Following the phone call and following the breath sample being taken from the appellant, Latreille arrested the appellant for operation of a motor vehicle with a blood alcohol concentration over the legal limit. Latreille again read the appellant his ***Charter*** rights pursuant to ss. 10(a) and (b). The appellant again indicated a desire to speak to counsel. Latreille again called Legal Aid duty counsel. The appellant did not specifically ask to speak to duty counsel, nor did the appellant ask to speak to a specific lawyer, nor ask for a phone book.

[17] To the extent that it is necessary to refer to additional evidence in these reasons, or make different factual determinations than the trial judge, based on

the evidence, I will do so in the context of the issues identified and discussed by the appellant or the Crown.

STANDARD OF REVIEW

[18] Subsection 686(1) of the ***Code*** allows an appeal if the appellate court is of the opinion that either the verdict is unreasonable or cannot be supported by the evidence, the trial judge rendered a wrong decision on a question of law, or on any ground where there has been a miscarriage of justice.

[19] Subsection 686(1)(b)(iii) of the ***Code*** allows this court to dismiss an appeal notwithstanding that the trial court made a wrong decision on a question of law if the court is of the opinion that no substantial wrong or miscarriage of justice occurred.

[20] The standard of review applicable to this case where a ***Charter*** concern is raised is set out in ***R v. Farrah***, 2011 MBCA 49 (CanLII), 269 Man R (2d) 11 (***Farrah***). ***Farrah*** has set out a series of inquiries and the attendant standard of review to guide the court's determination in an alleged ***Charter*** breach, as follows (at para. 7):

> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed.

> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness…
>
> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered…

ISSUES RAISED ON APPEAL

[21] The appellant argues that the trial judge made the following errors:

a) In finding that the appellant did not have a privacy interest in the personal care home suite;

b) In finding that the appellant's rights were suspended upon an investigative detention in the hallway of the personal care home;

c) In finding that the police did not "stream" the appellant to legal aid; and

d) In failing to exclude the impugned evidence obtained as a result of ss. 8 and 9 ***Charter*** violations, pursuant to s. 24(2) of the ***Charter***;

[22] Following the analysis set out in ***Farrah***, the issues to determine are as follows*:*

a) Did the trial judge properly state the legal principles applicable to a ss. 8, 9 and 10 ***Charter*** review, a matter of correctness?

b) Did the trial judge apply the legal principles to the facts of the case, again a matter of correctness?

c) Bearing in mind the measure of deference to be accorded the trial judge, did the trial judge find the relevant facts without any palpable and overriding error?

d) If, unlike the trial judge, I find that the appellant's ***Charter*** rights were breached, would an appropriate s. 24(2) ***Charter*** analysis provide a remedy to the appellant, namely exclusion of the evidence?

[23] In considering the correct legal principles, the application of those principles to the facts of the case, and findings of fact made by the trial judge, I will deal with those considerations in the context of the issues raised on appeal by the appellant.

FACTUAL DETERMINATIONS

[24] Key to the appellant's argument relating to his ss. 8 and 9 argument, are certain factual determinations made by the trial judge. Specifically, the trial judge found that Latreille did not enter several feet in the appellant's grandmother's suite. The trial judge preferred Latreille's evidence that he only held the door to the suite open, with his foot, when the appellant retreated to the suite after having answered the door (Reasons at paras. 17 and 18).

[25] In his direct-examination, Latreille testified that as the appellant went back into the room, he took one step in to hold the door open with his foot and

just watched the appellant as he walked deeper into the apartment (at page T39).

[26] In cross-examination, it was suggested to Latreille that he did not wait for the door to be answered, that he opened it up himself and walked into the suite, where he was met by the appellant, which Latreille denied (at page T54).

[27] In direct-examination, the appellant testified that in response to a knock at the door, his grandmother said come in, and the officer took a couple of steps in (at page T73).

[28] In cross-examination, it was suggested to the appellant that the officer stood in the doorway and talked to the appellant, to which the appellant said he entered about three feet into the room, which was equal to the bathroom (at page T79).

[29] There were two competing versions as to how the officer gained entry into the suite, and how far the officer entered. The trial judge preferred the evidence of Latreille, in that he did not enter the suite, other than one step to hold the door open, and only after the appellant had answered the door.

[30] There was evidence to support the trial judge's conclusions regarding those findings. Given the level of deference owed to the trial judge, the trial judge made those findings without any palpable and overriding error.

ANALYSIS AND DECISION WITH RESPECT TO THE SS. 8, 9 AND 10 *CHARTER* REVIEW?

Sections 8 and 9 of the Charter

[31] With respect to the argument of the appellant in relation to his ss. 8 and 9 ***Charter*** rights, the appellant argues that the trial judge erred in failing to find a ***Charter*** breach, as a result of a breach of the implied license to investigate, as well as the trial judge failing to consider a qualified expectation of privacy.

Implied license to investigate

[32] In ***R. v. Evans***, [1996] 1 SCR 8 (***Evans***), the Supreme Court of Canada recognized the common law principle of an implied license to attend a private residence. An occupier of a dwelling house gives an implied license to the member of the public, including police on legitimate business, to attend private property and approach the door of a house.

[33] The implied license does not extend so far as to permit police to approach a residence with the intention of gathering evidence.

[34] Police do not exceed the implied license to knock simply because they are intent on investigating a potential criminal offence. A police officer who is looking for information or evidence about a suspected offence, or even about an actual offence, which the police officer has reasonable grounds to believe has been committed, is not conducting a "search" for s. 8 purposes for that reason alone (see ***R. v. Rogers***, 2016 SKCA 105 ("***Rogers***") at para. 27).

[35] The investigation of the crime of drinking and driving necessarily entails the potential to obtain evidence from conversing with or observing the person

answering the door. However, if a trial judge finds on all the evidence a police officer knocked on the door to a residence *for the purpose* of securing evidence against the occupant, the officer is conducting a search within the meaning of s. 8 of the ***Charter*** (*emphasis added*) (See ***Rogers*** at para. 29).

[36] As noted in ***Evans***, the implied invitation to knock extends no further than is required to permit "convenient communication with the occupant of the dwelling" (at para. 18). The issue then becomes whether police conduct in approaching someone's door in any given case is "associated with the purpose of communicating with the occupant" (***Rogers*** at para. 31). The officer's intention in knocking on someone's door determines whether the police engaged in a search (***Rogers*** at para. 32).

[37] The Saskatchewan Court of Appeal in ***Rogers*** also noted that in cases where police approach someone's home to investigate a crime like drinking and driving where it is likely that by engaging the occupant in conversation, the police will be able to gather grounds to make an ASD demand (***Rogers*** at para. 45).

[38] In ***Rogers***, the trial judge made a specific finding that the police had knocked on that suspect's door for the purpose of obtaining evidence against the occupant (***Rogers*** at para. 52).

[39] In the present case, the trial judge found that Latreille was in the earliest stage of a general investigation. The trial judge further found that Latreille was gathering information to assess whether an offence had been committed, not

seeking incriminating information having already decided the accused had committed the offence (Reasons at para. 22).

[40] In ***Evans***, the officers attended to that accused's doorway, with the express intention of gathering evidence, to get a whiff or a smell of marijuana. In ***Rogers***, in cross-examination, the officer confirmed that the minute that accused opened the door he would start making observations, to gather evidence against the accused (at para. 53).

[41] The evidence in this case results in circumstances different than in ***Evans*** or ***Rogers***. Latreille confirmed in cross-examination that his priority was to find the person who had been driving (at page T50). Latreille confirmed in cross-examination that if no one had answered the door, or if the occupant had refused to answer questions, there was nothing more that could be done (at page T52).

[42] The accused frames the issue as the officer making observations about the demeanor of the suspect from the start, building grounds for an ASD demand, then an arrest. There is only one reference in the evidence where Latreille states that his observations while the accused was in the residence was being used to enhance his grounds in the investigation (at page T56).

[43] The issue is whether the trial judge found the relevant facts without any palpable and overriding error, keeping in mind the level of deference owed to the trial judge in making those findings of fact.

[44] I cannot conclude, based on my review of the evidence, and the reasons of the trial judge, that the trial judge made a palpable and overriding error.

[45] The appellant wishes to have the Court consider a binary analysis of the police conduct. Either the police attend for some innocuous reason, in which case they have not breached the implied license, or the police are attending to investigate a specific crime, in which case the only reason to attend is to gather evidence, being a breach of an accused's s. 8 ***Charter*** rights.

[46] A more contextual approach is required, wherein there is a balance between the police's duty to investigate criminal offences and an individual resident's ability to withdraw the license if they wished the police to leave the private property. In this case, the appellant chose not to withdraw that license.

[47] It was open to the trial judge, based on the evidence, to conclude that the purpose of the police in attending the suite was not to gather evidence against the appellant, a finding which I cannot conclude was made with any palpable and overriding error.

[48] Accordingly, the trial judge made no error in concluding there was no breach of the appellant's s.8 ***Charter*** rights in relation to the implied license to knock.

[49] I am satisfied that the trial judge's findings of facts were supported by the evidence, that the trial judge stated the correct legal principles and properly applied the facts to those principles

Qualified expectation of privacy

[50] The appellant also argues that the trial judge erred in concluding that the appellant had no reasonable expectation of privacy in his grandmother's suite, by undertaking a categorical approach and by failing to consider a qualified expectation of privacy.

[51] The trial judge found that the appellant had no ownership or property interest in his grandmother's suite, did not stay in the suite, did not store any personal belongings there or did not contribute to rent or household expenses and as such had no reasonable expectation of privacy (Reasons at paras. 24 and 26).

[52] The Supreme Court of Canada in ***R. v. Le***, 2019 SCC 34 ("***Le***"), found that invited guests can, in some circumstances, have reasonable expectations of privacy in their host's property. The determination of when, and to what extent, these guests have a reasonable expectation of privacy will be fact and context specific (***Le*** at para. 137).

[53] I agree with the appellant that the trial judge did not undertake any such analysis to determine whether the appellant, as a guest, had a reasonable expectation of privacy. However, such a failure by the trial judge is not determinative of this appeal, given the factual findings made by the trial judge.

[54] The appellant argues that the police entered into a private dwelling house without the consent of the owner and without a warrant, detained the appellant

inside the dwelling house and directed him to leave the suite, again without his consent or without warrant (at para. 36 of the appellant's brief).

[55] Such submissions by the appellant are not consistent with the facts as found by the trial judge, there being no palpable and overriding error with those factual determinations.

[56] The police did not enter into the dwelling house, but rather, held the door open when the appellant retreated into the suite, the purpose being for officer safety. The police did not detain the appellant within the suite, and did not direct the appellant to leave the suite.

[57] In addition to the analysis in these reasons regarding the evidence as to how far the police stepped into the residence of the appellant's grandmother, the evidence does not support the assertion that the police directed the appellant to leave the suite.

[58] The trial judge found that the appellant had agreed to step out into the hallway (Reasons at para. 27).

[59] The evidence of the police that she did accept, confirms this version of events. Further, the appellant, in his direct-examination, confirmed that the police officer asked him to step into the hall, and he did (at page T73).

[60] Even if I conclude that the appellant had a reasonable expectation of privacy in his grandmother's suite, as a guest, given the facts as found by the trial judge, and supported by the evidence, there was no breach of the appellant's privacy rights.

[61] Any questioning done by the police was not done in the suite, but rather, in the hallway of the personal care home, the appellant agreeing to leave the suite and enter the hallway.

[62] As such, there was no breach of the appellant's privacy rights, should they have existed.

Arbitrary detention

[63] The appellant argues, ancillary to the privacy argument, that the trial judge could have determined that the appellant was arbitrarily detained by the police and erred in failing to do so.

[64] Again, the appellant argues that the police entered into a private dwelling house without the consent of the owner and without a warrant, detained the appellant inside the dwelling house and directed him to leave the suite, again without his consent or without warrant (at para. 36 of the appellant's brief).

[65] As previously considered, such argument is not consistent with the facts as found by the trial judge.

[66] As a result, there was no arbitrary detention, the trial judge not erring in failing to find such a detention.

Section 9 of the Charter - Arbitrary detention and ASD demand

[67] Once the appellant is outside of the suite, and in the hallway of the personal care home, there are potentially two moments when the appellant was detained.

[68] Firstly, immediately upon exiting the suite and engaging in conversation with the police, the appellant argues that there was a psychological detention, triggering the requirement of the appellant to be advised of his s. 10(b) right to counsel, an issue not addressed by the trial judge.

[69] Secondly, and as found by the trial judge, a detention crystallized when Latreille articulated the ASD demand, the appellant no longer being free to walk away. The trial judge found however that there was a suspension of his right to counsel for the purpose of administering the screening test.

[70] The trial judge did conclude that as the ASD test was not administered immediately, the detention became arbitrary (Reasons at para. 35), and with the invalid detention, the justification for the suspension of the appellant's s. 10(b) rights were removed (Reasons at para. 36).

[71] The appellant testified and stated that he had no interest in speaking to the police that day, he was kind of scared, that he thought he had to leave the suite when asked by the police, that he thought he would be arrested if he did not leave the suite, that he thought he had to answer the questions of the police, that he did not have a choice, and that if he did not answer the police's questions, he would be arrested for not complying (at pages T73 and T74).

[72] In support of the appellant's argument regarding a psychological detention, the appellant refers to the Manitoba Court of Appeal decision in ***R. v. Dolynchuk (E.N.)***, 2004 MBCA 45 (***Dolynchuk***).

[73] In ***Dolynchuk***, the Manitoba Court of Appeal provided guidance for making a determination of when, during an exchange of questions and answers between police and private citizens, individuals will feel themselves to be psychologically detained.

[74] There are two elements to the concept of psychological detention. There must be a demand from the police officers coupled with a reasonable belief on the part of the accused that there is no other option but to comply with that demand (***Dolynchuk*** at para. 19). The testimony of the accused as to his subjective belief that he was compelled to reply to the police is certainly very powerful evidence as to the existence of a reasonable belief (***Dolynchuk*** at para. 20).

[75] This Court has the evidence of the appellant, who subjectively believed that he was detained when he was asked to leave the suite. The subjective belief of the appellant alone is not determinative, as the belief of the appellant must be reasonable. To find otherwise would permit any accused to testify and state they felt detained, despite the totality of the circumstances.

[76] As noted by the Manitoba Court of Appeal in ***Dolynchuk***, there are several factors to consider when deciding whether the inference of psychological detention can be drawn from the totality of the circumstances (at para. 26).

[77] In assisting the Courts in making such a determination, the Manitoba Court of Appeal in ***Dolynchuk*** directs the Court to consider certain factors, as set out at para. 28, as follows:

> - the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
>
> - whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated; and
>
> - the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt.

[78] In considering the above factors, I am also mindful of the factual determinations made by the trial judge, entitled to deference.

[79] The trial judge found that Latreille was in the earliest stage of a general investigation. The trial judge further found that Latreille was gathering information to assess whether an offence had been committed, not seeking incriminating information having already decided the accused had committed the offence (Reasons at para. 22).

[80] The question was of a general nature designed to obtain information, rather than confronting the accused with evidence pointing to his guilt. The only questions put to the accused were whether he would step into the hallway to speak with the officers, and when did he last have something to drink.

[81] In ***Dolynchuk***, the officer had also testified and confirmed that he would have detained the accused for investigative purposes once he had determined the identity of the accused (at para. 26). In the present case, the evidence, which the Court accepted, was that Latreille would have left the personal care home, had the appellant refused to speak with him.

[82] In considering the totality of the circumstances, including the evidence of Latreille regarding the stage of the investigation and the nature of the questioning, as well as the appellant's subjective belief, I conclude that there was no psychological detention of the appellant when he was first questioned by Latreille.

[83] As there was no psychological detention of the appellant, there was no requirement for the appellant to be advised of his rights pursuant to s. 10(b) of the ***Charter***.

Suspension of rights

[84] With respect to the second detention, the trial judge confirmed that it crystallized upon Latreille making the ASD demand. The trial judge found that Latreille, as required, promptly informed the appellant of his reason for detention, but did not advise the appellant of his s. 10(b) rights, those rights having been suspended for the purpose of the ASD test (Reasons at paras. 28 and 29).

[85] Factually, there is no dispute as to whether the appellant was provided with his s. 10(b) rights. The issue is whether the trial judge correctly applied the law, a matter of correctness.

[86] In considering the law, the trial judge referred to the Ontario Court of Appeal decision in ***R. v. Sillars***, 2022 ONCA 510 at paras. 52 to 69 (***Sillars***).

[87] In ***Sillars***, the issue before the Ontario Court of Appeal was whether there was a breach of s. 10(b) rights, as his right to counsel was delayed until after he was arrested.

[88] The accused in ***Sillars*** attempted to argue that the suspension of the right to counsel only applies to a roadside ASD demand. As that accused was in a hospital when the demand was made, he argued that his right to counsel was not suspended. The Ontario Court of Appeal did not agree.

[89] The Ontario Court of Appeal concluded that police are entitled to make the ASD demand within three hours of the suspected offence and to investigate suspects, wherever they are found. In the case of ***Sillars***, this was at the hospital (at para. 59).

[90] In the present case, Latreille testified that given his observations and answer from the appellant as to when he last drank, as well as the information they had previously about when the appellant had ceased operation of his vehicle, within the preceding three hours, he had grounds to make the ASD demand (at page T40).

[91] Accordingly, there was no error made by the trial judge in concluding that the appellant's right to counsel had been suspended upon being provided with the ASD demand.

[92] I am satisfied that the trial judge stated the correct legal principles and properly applied the facts to those principles.

Streaming to Legal Aid

[93] Upon arrest, the appellant was advised of his right to counsel. The appellant was provided with the standard advice by Latreille, which included the following:

a) He had the right to retain and instruct counsel without delay;

b) He could call any lawyer he wished or get free legal advice from duty counsel immediately;

c) If he wanted to call duty counsel, the officer would provide a telephone and telephone numbers; and

d) If he wanted to contact any other lawyer, a telephone and telephone book would be provided.

[94] At the end of being provided with that information, the appellant was asked if he understood and was asked if he wanted to call duty counsel or any other lawyer.

[95] Latreille testified that the appellant responded that he understood (at page T43) and replied that he wanted to speak to legal counsel (at page T44). In cross-examination, the officer confirmed that the appellant saying "legal counsel" was very specific (at page T62).

[96] Latreille testified that he wanted to clarify whether the appellant had a lawyer of choice or if he wished to contact duty counsel (at page T44). In cross-examination, Latreille confirmed that he asked the appellant again if he had a lawyer of choice or would like to contact duty counsel (at page T62).

[97] Latreille testified that as the appellant was replying, Latreille felt that the appellant was searching for a term, saying "uh, uh" and so to help the appellant, Latreille said, "duty counsel?". Latreille testified that the appellant said "yeah, if that's all right" or something to that effect (at page T44).

[98] Latreille denied in cross-examination that he did not let the appellant answer (at page T62). Latreille in cross-examination denied that he did not let the appellant finish his sentence, as there was no sentence to finish. Latreille testified that he assumed that the appellant was looking for the term "duty counsel" (at page T62).

[99] Upon returning to the BPS station, Latreille confirmed that he was the one that dialed the phone number for legal aid (at page T63). Latreille confirmed in cross-examination that upon return to BPS, he did not offer the appellant a phone book, or access to the internet so he could look up his own lawyer (at page T64).

[100] Latreille further confirmed in cross-examination that he did not ask the appellant if he was satisfied with that call, as it was not his practice to do so (at pages T64 and T65).

[101] After having collected the breath sample, the appellant was again provided his ***Charter*** rights and police caution, which included the right to counsel. Latreille testified that the appellant did not ask to speak to a specific lawyer and wished to speak to legal aid once again (at page T46).

[102] In cross-examination, Latreille confirmed that the appellant in response to the question as to whether he wanted to call a lawyer, did not say "legal aid", contrary to what he testified to in direct (at page T66).

[103] Latreille clarified in cross-examination that any omission in his notes regarding what the appellant said was a mistake in the lack of detail in his notes and stated that he was confident that the appellant was given the option, after the collection of the breath sample of who he wanted to call, because that is his practice with everybody that he has in custody.

[104] In direct-examination, the appellant testified that he did not know what duty counsel was (at page T74). In response to the specific question as to what he recalled about what choices he had when it came to a lawyer, the appellant responded, "I don't really remember but I just – they phoned some number and talked to someone" (at page T74).

[105] Further, the appellant testified that had he been given time and some resources, he would have found his own lawyer (at page T74).

[106] In cross-examination, the appellant confirmed he did not remember being told he could find his own lawyer or be in contact with legal aid but did remember being read his rights (at page T80).

[107] In cross-examination, the appellant could not recall when he spoke to counsel, or if he spoke to counsel once or twice (at page T81). The appellant confirmed that he was satisfied with the advice he got, and did not tell the police that he wanted to speak to a different lawyer (at page T81).

[108] The trial judge preferred the evidence of Latreille to that of the appellant, specifically noting that the appellant struggled to recall details surrounding the exchanges he had with the officer about speaking with a lawyer (Reasons at para. 17).

[109] The evidence as considered in these reasons is consistent with the factual determinations by the trial judge. Given the deference owed to the trial judge, I cannot conclude that the trial judge made any palpable and overriding errors in their factual determinations around the appellant's choice of counsel.

[110] Specifically, the trial judge concluded that the appellant's response was unequivocal, he agreed he wanted to speak to duty counsel (Reasons at para. 41). The trial judge concluded that there was no evidence that the appellant ever did or said anything to communicate a different preference or even uncertainty about duty counsel, again a finding supported by the evidence and not a palpable and overriding error (Reasons at para. 41).

[111] The evidence supports the trial judge's conclusion that after having had a breath sample collected and being provided with his s. 10(b) ***Charter*** rights again, that the appellant did nothing to indicate any desire or even a question about contacting someone other than duty counsel (Reasons at para. 42). Again, such a finding is supported by the evidence and not a palpable and overriding error.

[112] The trial judge was aware of the concerns raised by the appellant finding that what happened was not ideal (Reasons at para. 39), and that the officer

could have done or said more (Reasons at para 41). However, the trial judge concluded that in the circumstances of this case, what the officer did was reasonable.

[113] The appellant argues that the trial judge failed to consider the evidence of the appellant, specifically as it related to his not understanding of technical terms that were being said to him and that he did not feel like he had any resources or choice when it came to who he could speak to.

[114] While the trial judge did not address this specific issue in their reasons, they did address the concerns raised by the appellant. The evidence is that the appellant did not raise any concerns. He did not ask any questions. The trial judge found that the appellant's response was unequivocal, in that he asked to speak to duty counsel (Reasons at para. 41). Having found that the appellant was unequivocal in his choice of counsel and having found that the appellant did nothing to communicate a different preference or any uncertainty about duty counsel (Reasons at para. 41), there was no reason to engage in an analysis of what resources were not provided to the appellant by the police.

[115] In ***R. v. Bartle*** [1994] 3 SCR 173 ("***Bartle***") the Supreme Court of Canada provided guidance to the Courts in considering whether s. 10(b) of the ***Charter*** has been infringed. The Supreme Court of Canada set out the duties of state authorities who arrest or detain a person, with respect to s. 10(b) (at pages 191 to 192), as follows:

> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[116] The Supreme Court of Canada in ***Bartle*** further noted that the first duty is an informational one and the second and third duties are more in the nature of implementation duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel. The Alberta Court of Appeal in ***R. v. Luong***, 2000 ABCA 301 ("***Luong***"), provided eleven considerations in offering guidance to trial judges when adjudicating breaches of s. 10(b), noting that such adjudication is an "onerous task" (at para. 12). Relevant to the case at bar are the following considerations from ***Loung***:

> …
>
> 5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)". …
>
> 6. The second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)". …
>
> 7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
>
> 8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.

> 9. If the trial judge is persuaded that the first implementation duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the exercise of his rights….
>
> 10. If the detainee, who has invoked the right to counsel, is found not to have been reasonably diligent in exercising it, the implementation duties either do not arise in the first place or will be suspended. … In such circumstances, no infringement is made out….

[117] ***Bartle*** and ***Luong*** were both considered in ***R. v. Laquette***, 2021 MBQB 177 ("***Laquette***"). In considering the implementational duty, where a detainee wishes to exercise the right to counsel, the Court in ***Laquette*** found that the implementational duty requires that the police allow the detainee a reasonable opportunity to access legal counsel and, *where requested*, chosen legal counsel (*emphasis added*) (at para. 35).

[118] In ***Laquette***, the accused was provided with her right to counsel. When asked if she wanted to call duty counsel or any other lawyer, the accused said "yeah" and agreed that she had said legal aid while in the police vehicle (at para. 90).

[119] The accused in ***Laquette*** argued that there was a duty on the officers to provide a listing of private lawyers who undertook legal aid cases, and to further explore the issue of "chosen" counsel with the accused. The Court found that on two occasions the accused said she wanted to speak with legal aid counsel (at para. 90).

[120] The Court in ***Laquette*** concluded that the accused was provided with a reasonable opportunity to exercise her right to counsel, after a consideration of

the totality of the circumstances. The Court found that the officers were not under an obligation to advise that private counsel undertook legal aid cases and to provide a listing of those lawyers (at para. 90).

[121] The accused in ***Laquette*** testified that prior to being arrested at her residence, she told her daughter to retain a lawyer, and steps were taken in that regard after the accused was arrested (at para. 91).

[122] The officers were unaware of the possible involvement of a law firm or that the accused had a specific lawyer in mind. The Court in ***Laquette*** found that these were facts within the specific knowledge of the accused and that the accused took no steps to inform the officers of a chosen counsel. The Court asked how were the officers to know and act upon what the accused may have had in her mind (at para. 92).

[123] The Court in ***Laquette*** concluded that while there were matters that could have been handled differently and more effectively, the Court found that there was no breach of the accused's s. 10(b) rights principally on the basis that the accused was initially provided with her right to counsel, and she had access to counsel (at para. 96).

[124] Such are the circumstances in the present case. The trial judge found that the appellant was unequivocal in his decision to wish to speak to duty counsel. While the appellant may have felt differently or felt that if given time he would have spoken to counsel of choice, none of this was communicated to Latreille, nor was in within the knowledge of Latreille.

[125] After a consideration of the totality of the circumstances, I am satisfied that the trial judge's findings of facts were supported by the evidence, that the trial judge stated the correct legal principles and properly applied the facts to those principles.

[126] Accordingly, there was no breach of the appellant's s. 10(b) ***Charter*** rights, as it related to counsel of choice.

DID THE TRIAL JUDGE ERR IN FAILING TO EXCLUDE EVIDENCE PURSUANT TO S.24(2) OF THE CHARTER?

[127] The trial judge did find that the police violated the appellant's ss. 9 and 10(b) ***Charter*** rights by failing to make the ASD demand and administer it immediately (Reasons at para 44). The trial judge did not exclude the results of the breath test, after undertaking a ***Grant*** analysis, pursuant to s. 24(2) of the ***Charter*** (Reasons at para. 55).

[128] The appellant asked that the results of the breathalyzer sample be excluded from evidence, there having been a breach of his rights pursuant to ss. 9 and 10(b) of the ***Charter***.

[129] The trial judge undertook the analysis in accordance with s. 24(2) of the ***Charter***. The analysis required by s. 24(2) entails the balancing of three factors to determine whether the administration of justice would be brought into disrepute by the admission of the evidence, as set out in ***R. v. Grant***, 2009 SCC 32 ("***Grant***"). That analysis considers the following:

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

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

c) society's interest in the administration of justice on the merits;

all of which were undertook by the trial judge.

Standard

[130] It bears repeating the role this Court has in considering an appeal regarding a ***Charter*** decision by the trial judge. The decision on whether to exclude under s. 24(2) of the ***Charter*** is an admissibility of evidence issue which is a question of law and therefore the standard is one of correctness. However, because this determination requires the trial judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered.

Seriousness of the Charter-infringing conduct

[131] As recognized in ***Grant***, conduct which leads to a breach of an individual's ***Charter*** protected rights range from minor or inadvertent behaviour to willful and reckless disregard of ***Charter*** rights.

[132] The more severe or deliberate the conduct that led to the ***Charter*** violation, the more likely the court should be to exclude the evidence to maintain public confidence in the rule of law (see ***Grant***, para. 72).

[133] The trial judge found the s. 10(b) to be very serious, the s. 9 breach being less so, as it was coincidental to the more serious s. 10(b) breach (Reasons at para. 47).

[134] The trial judge found that Latreille was acting in good faith, the ASD being available in the cruiser and a delay of a few minutes not being fatal, as was the law prior to the Supreme Court of Canada's decision in ***R. v. Breault***, 2023 SCC 9 ("***Breault***") (Reasons at para. 48).

[135] The appellant argues that ***Breault*** did not change the law, but rather was a restating of the existing law in relation to what, if any delay in accessing an ASD was reasonable.

[136] I do not agree with the appellant's assessment of ***Breault***. The impact of ***Breault*** has already been considered by this Court in ***R. v. Beardy***, 2023 MBKB 103 ("***Beardy***"). Specifically, at para. 12, the Court writes:

> The fact that neither officer made a note as to whether there was an ASD at the scene at the time of the demand is not surprising. At the time of the offence, the law in Manitoba as well as other provinces appeared to be that it was irrelevant in respect of a refusal charge of this nature as to whether an ASD was on scene at the time of the demand for an immediate breath sample for the demand to be valid. That was clarified very recently with the decision of the Supreme Court of Canada which held in ***R. v. Breault***, 2023 SCC 9, [2023] S.C.J. No. 9, that subject to "unusual circumstances" in order for a demand to be valid, the officer must be in a position to demand that the driver provide a sample forthwith, which means that that the officer must have immediate access to an ASD.

[137] The trial judge's assessment of ***Breault*** and its recalibration of the law, rather than being a restatement of the law, has already been confirmed by this Court in ***Beardy***, the trial judge making no error in such a conclusion.

[138] The trial judge found that the detention was relatively short, the delay in moving the appellant to the police cruiser being extended due to the appellant's request to use the washroom on the way out of the personal care home.

[139] The appellant argues that his mobility rights were violated over an extended period of time and detention, the sole purpose of which was to convenience the officer as opposed to the detainee (Brief at para. 62).

[140] This was not an extended period of time. However, the appellant goes on to argue that the timing of the delay is immaterial, the reason for the delay becoming imperative (Brief at para. 63). The appellant argues that any delay was unnecessary and unreasonable, as Latreille ought to have had the ASD immediately available so as to have been able to have administered the ASD contemporaneously with the demand.

[141] Such an argument again ignores the law prior to ***Breault*** that it was not necessary for the ASD to be on scene at the time of the demand for an immediate breath sample for the demand to be valid.

[142] The trial judge found that this factor favoured inclusion and as the trial judge considered the appropriate factors in considering this factor and as such, deference is owed to their determination in this regard.

Impact of the Charter breach

[143] The impact of a breach of one's ***Charter*** rights can vary in degree of seriousness.

[144] The trial judge found that this factor favoured exclusion, the appellant not disagreeing with that determination.

[145] The trial judge concluded that the most significant impact was that the police garnered evidence in the form of observations which then constituted

grounds for the appellant's arrest, noting that without the arbitrary detention and observations made, Latreille did not have grounds to arrest the appellant for impaired driving or to make the breath demand (Reasons at para. 52).

[146] The trial judge also noted that the failure of the appellant to have exercised his right to counsel with respect to having been given the ASD demand was minimal, as it was unlikely counsel would have assessed the demand as invalid at the time given the state of the law preceding ***Breault*** (Reasons at para. 51).

[147] The appellant relies on ***R. v. Black***, [1989] 2 SCR 138 ("***Black***") where the Supreme Court of Canada states:

> In my opinion, it is improper for a court to speculate about the type of legal advice which would have been given had the accused actually succeeded in contacting counsel after the charge was changed. If the Crown's argument on this point were sound, each time an accused was asked to blow into a breathalyzer there would be no need to advise the accused of his s. 10(*b*) rights since it might be assumed that counsel would advise the accused that he should submit to the breathalyzer on the basis that failure to do so constitutes a criminal offence. …

[148] I agree with the appellant that it was improper for the trial judge to have speculated what advice the appellant might have received, regardless of the state of the law prior to ***Breault***. This is the very caution provided for in ***Black***.

[149] However, ultimately, the trial judge determined that the detention of the appellant, and the observations made during that time, were serious, which favoured exclusion of the evidence. This determination was made regardless of the trial judge's misapplication of the principles enunciated in ***Black***.

Society's interest in the administration of justice on the merits

[150] Society has a significant interest in the prosecution of criminal offences and the punishment of those who have violated the criminal law. There is a societal interest in having a case adjudicated on its merits.

[151] The trial judge found the breath test to be minimally intrusive, highly reliable and fundamental to the Crown's case, resulting in this factor favouring inclusion (Reasons at para. 54).

[152] The appellant argues that as the police did not have continuity of the appellant from the time of driving until administration of the ASD, as would be the case at a roadside stop, the readings could not be considered reliable as found by the trial judge.

[153] There was no evidence to suggest that the reading would not be reliable. The appellant testified and did not raise anything factually that would have suggested that the results would not be reliable.

[154] The appellant argues that the evidence was not crucial to the Crown's case, as they could have proceeded solely on the impaired driving charge. While there were two charges laid against the appellant, only one of which required the breathalyzer results, those results were crucial to the Crown's case as it related to that specific charge.

[155] Lastly, the appellant argues there was no serious balancing of the rights of the appellant by the trial judge, such that the Court ought to have distanced itself from the conduct of the police.

[156] In looking at the reasons in a wholesome rather than piecemeal manner, I do find that the trial judge did engage in a balancing of the relevant factors.

[157] At each stage of the ***Grant*** analysis, the trial judge considered whether the specific factor favoured inclusion or exclusion.

[158] The trial judge at para. 55 of the Reasons confirmed that those factors were weighed, concluding that admitting the evidence in the circumstances would not bring the administration of justice into disrepute.

[159] The decision of whether to admit evidence is a question of law, and therefore one of correctness. As noted in ***Farrah***, it is not correctness in isolation, but also considering the considerable deference owed to that determination by the trial judge. The trial judge considered the appropriate factors in making the determination to admit the evidence, and as such, the trial judge's decision is entitled to considerable deference.

[160] Accordingly, I cannot conclude that the trial judge made an error in admitting the evidence.

CONCLUSION

[161] Accordingly, there is no basis to intervene with the ultimate decision of the trial judge to admit the evidence of the breathalyzer results, on the basis of the issues as raised by the appellant.

_____J.