PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Howlett*, 2017 NSPC 71

Date: 2017-12-14
Docket: 8089135, 8089136, 8089137
Registry: Truro

Between:

The Queen

v.

Michael Howlett

Judge:	The Honourable Judge Alain Bégin
Heard	December 13, 2017, in Truro, Nova Scotia
Counsel:	Laura Barrett, for the Crown Attorney Robert Hagell, for the Defendant

By the Court:

This is the decision relating to the ***Charter*** challenge in the matter of the Queen versus Michael Howlett.

[1] The facts are as follows:

1. The RCMP, Bible Hill detachment received a complaint of a suspicious person at 325 Truro Heights Road on or about February 12, 2017.

2. Cst. Reid was sent to investigate the complaint.

3. Cst. Reid arrived at 325 Truro Heights Road shortly after midnight on February 12, 2017. He noted a vehicle parked in the area. The car was running, the driver's window was down and the car radio was on at a high volume.

4. Cst. Reid observed a male in the vehicle. That individual was in the driver's seat, sleeping, with a seatbelt on and slumped over the center console. That individual was Mr. Howlett.

5. A door to the car was opened. Cst. Reid noticed a smell of alcohol coming from Mr. Howlett.

6. Cst. Reid arrested Mr. Howlett for care and control while under the influence of alcohol.

7. An altercation between Mr. Howlett and Cst. Reid and Cst. Julian took place.

8. At 28 minutes after midnight, Cst. Reid read Mr. Howlett his Right to Counsel. Mr. Howlett stated he wished to speak to counsel.

9. Cst. Reid took Mr. Howlett to the Bible Hill detachment of the RCMP.

10. At the detachment office, Mr. Howlett spoke to duty counsel as arranged by the RCMP. The duty counsel he spoke to was Mr. Blake Wright.

11. Mr. Blake Wright, on the date he gave advice to Mr. Howlett, was not authorized by the Nova Scotia Barristers' Society to provide legal advice as on January 5, 2017 Mr. Wright had been administratively suspended from the practice of law by the Nova Scotia Barristers' Society. He was still under that administrative suspension on February 12, 2017 when he provided advice to Mr. Howlett.

12. Mr. Howlett expressed no concerns to the police officers on the night and morning in question regarding the advice that he had received from Mr. Wright.

13. The police officers had no knowledge of Mr. Wright's status of practicing law on the night and morning in question.

14. Subsequent to receiving the advice from Mr. Wright, Mr. Howlett provided two breath samples into an Intox EC/IR II.

15. Mr. Howlett was charged with offences under sections 253(1)(a) and 235(1)(b) of the Criminal Code.

16. Legal Aid Nova Scotia sent a letter to Mr. Howlett dated March 10, 2017 advising him that the duty counsel that he had spoken with on February 12, 2017 was under an administrative suspension and was therefore "not authorized to give legal advice."

[2] There is no dispute that Mr. Howlett was detained by the police roadside and that this triggered his right to counsel as guaranteed under the ***Charter***.

[3] At issue is whether Mr. Howlett's right to counsel, as guaranteed under s. 10(b) of the ***Charter*** was violated.

[4] Section 10(b) of the ***Charter*** states:

> 10. Arrest or detention – Everyone has the right on arrest or detention
> ….
> (b) to retain and instruct counsel without delay, and to be informed of that right

[5] Counsel for Mr. Howlett questions whether Mr. Howlett actually retained and instructed counsel due to the facts of this case, and in particular, due to Mr. Wright's suspended status as a lawyer.

[6] Counsel for Mr. Howlett relies primarily on the case of ***R. v. Prosper*** **[1994] 3 SCR 236**. In that case Mr. Prosper was unable to contact a lawyer as the legal aid lawyers in the province were in a labour dispute and not taking calls from new clients. Consequently Mr. Prosper provided a breath sample without being able to speak with a lawyer.

[7] In ***Prosper*** the Supreme Court of Canada held that the police had to: (1) inform an accused person of the right to counsel free of charge, and (2) of the availability of duty counsel if available in the jurisdiction. This did occur for Mr. Howlett as he

was put in contact with what the police believed to be qualified duty counsel, Mr. Wright.

[8] Either Mr. Wright was "counsel" as alleged by the Crown, or Mr. Wright was not "counsel" as alleged by the Defence.

Mr. Wright was "counsel" as alleged by the Crown

[9] All of the cases relied on by the Crown can be categorized as an accused receiving inadequate or improper advice from counsel, versus an accused being denied their right to counsel.

[10] Counsel for the Crown asserts that there was no breach of Mr. Howlett's s. 10(b) ***Charter*** rights as alleged. They rely on the following points:

1. There is an incomplete evidentiary record for the Court to be able to make a determination.
2. The quality of legal advice received by Mr. Howlett is not subject to scrutiny under s. 10(b).
3. Duty counsel are not agents of the state and as such there is not a ***Charter*** remedy available for the conduct of Mr. Wright.
4. Any remedy would be civil in nature versus constitutional.
5. It was merely an administrative suspension for Mr. Wright and not a suspension calling into question the competency of Mr. Wright. For this the Crown relies on an email from the Nova Scotia Barristers' Society to the Crown dated September 14, 2017 which confirms that Mr. Wright was still a lawyer when he provided the duty counsel legal

> advice to Mr. Howlett on February 12, 2017. There is a technicality here of Mr. Wright being a "lawyer" by definition of the "Legal Profession Act" but he was not permitted to practice law at the time due to his administrative suspension by the Barristers' Society. There is also a letter from the day previous, September 13, 2017, from the Executive Director of the Nova Scotia Barristers' Society to Crown and Defence that states that as a result of an administrative suspension such as Mr. Wright was under that:
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> "a lawyer may not engage in the practice of law while suspended, and providing advice to persons detained by law enforcement and facing possible criminal charges through duty counsel would fall within the practice of law."

6. The Crown further argues that Mr. Howlett has not shown how he was prejudiced by Mr. Wright's actions.

7. Finally, the Crown argues that the exclusion of the evidence is an extraordinary and extreme remedy that should only be done in the clearest of cases. The Crown argues that this is not one of those extreme and extraordinary cases.

[11] I will address a couple of the Crown's points at the outset. First, I do not accept that this is a civil versus a constitutional issue for Mr. Howlett. This phraseology is taken from some of the caselaw relied upon by the Crown, but the reality is that Mr. Howlett is facing criminal charges and a criminal conviction. Possibly jail time. A civil remedy could not adequately address this for Mr. Howlett.

[12] Also, the Crown states that Mr. Howlett did not express any concerns to the police as to the advice provided by Mr. Wright. As I have previously stated, how would Mr. Howlett, a layperson, know if he had received the proper legal advice

from Mr. Wright? If Mr. Howlett knew what advice he needed to hear, he would not have needed to speak to a lawyer.

[13] I also need to emphasize that there was no blame in this matter by the police. There is no evidence, or reason to believe, that the police knew or ought to have known, that Mr. Wright, the on-duty duty counsel, was under suspension by the Barristers' Society on February 12, 2017.

[14] Crown provided the Court with the ***R. v. Beierl*** **[2009] O.J. No. 2708** which is an Ontario Superior Court of Justice case. In that case the appellant argued that his right to counsel was breached as duty counsel that he had contacted had erroneously advised him to not provide a breath sample. The trial judge held that the advice given, although wrong, did not amount to no advice. The appeal judge held that although the advice received from duty counsel was wrong, the manner in which the appellant was treated during his brief confrontation with the state remained fair to him, and that any remedy available to him would be civil versus constitutional in nature.

[15] In ***Beierl*** the appellant claimed that as the state provided and funded duty counsel that the state must take responsibility for the bad advice received. The Court referred to the ***R.v. Pea*** **[2008] O.J. No. 3887** which held that "duty counsel is an

independent source of legal assistance in the detainee's confrontation with the state" (para 20).

[16] Of note, in the ***Pea*** case private duty counsel had advised Mr. Pea to not provide a breath sample to the police.

[17] At para. 22 of ***Beierl***, Justice Boswell refers to the ***R. v. Brydges*** **[1990] 1 SCR 190** case, stating:

> 22 Justice Lamer spoke to the purpose of s. 10(b) in ***R. v. Brydges***, at para. 13:
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> In respect of s. 10 of the Charter, this Court has made clear that the right to counsel is, to cite the words of Wilson J. in ***Clarkson v. The Queen***, **[1986] 1 S.C.R. 383**, at p. 394, aimed "at fostering the principles of adjudicative fairness", one of which is "the concern for fair treatment of an accused person". It is of note that the right to counsel is triggered "on arrest or detention**". Fair treatment of an accused person who has been arrested or detained necessarily implies that he be given a reasonable opportunity to exercise the right to counsel because the detainee is in the control of the police**, and as such is not at liberty to exercise the privileges that he otherwise would be free to pursue. There is a duty then, on the police to facilitate contact with counsel because, as I stated in ***R. v. Manninen, [1987] 1 S.C.R. 1233****, at pp. 1242-43:*
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> **The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and**

> **obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. ... For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence. (emphasis added)**

[18] And at para. 24 in ***Beierl*** Justice Boswell stated:

> 24 **At no point has Supreme Court jurisprudence extended so far as to include a qualitative component to the right to counsel - in other words, to say that the right to counsel guarantees advice from a counsel meeting at least a minimum standard of competence.** The Court of Appeal for Ontario has expressly recognized that the matter remains an open question: see ***R. v. LaChappelle*****, 2007 ONCA 655 (Ont. C.A.)** and ***R. v. Pea***, *supra*. ***(emphasis added)***

[19] At paras. 42 and 44 in ***Beierl*** the Court referred to the duties of the police in these instances:

> 42 **In this case the police did what they are mandated to do. The Appellant was advised of the availability of duty counsel and was put in contact with duty counsel when he requested their assistance.** The police held off questioning the Appellant and **they waited for him to speak to duty counsel before proceeding, or attempting to proceed, to obtain samples of his breath.**
>
> …….
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> 44 Clearly, discussions between duty counsel and detainees are protected by solicitor and client privilege. **The police are not entitled to inquire about what information or advice was provided by duty**

> **counsel. As such, they have no ability to consider or assess the quality of advice given.** They are not, in any event, trained to assess the quality of such advice or the competence of the service provider. It is simply not their function to do so. **(emphasis added)**

[20] Of note, in ***Beierl***, contrary to in our hearing, there was some evidence presented to the trial judge as to the advice given to Mr. Beierl by the duty counsel. Unlike in our case, in ***Beierl*** the Court was able to assess the quality of advice given to Mr. Beierl. Justice Boswell stated at para. 53:

> 53 In this instance, the trial judge made certain factual findings that were available to him on the basis of the evidence before him. He found that 11 minutes of advice had been given in all the appropriate areas. A mistake had been made, quite clearly, but he did not find as a fact that the advice given amounted to "no advice". Moreover, **the trial judge found that the Appellant had not satisfied him, on a balance of probabilities, that the impugned duty counsel lacked basic competence. (emphasis added)**

[21] I do not have any evidence as to what, if any, advice was given to Mr. Howlett by Mr. Wright. I am not seeking further evidence on this for reasons that will become apparent further in my decision.

[22] The ***Beierl*** case was upheld on appeal at **2010 ONCA 697** wherein the Court stated:

> 1 The appellant seeks leave on two grounds: first, whether the guarantee of the right to counsel under s. 10(b) of the *Charter* ensures a minimum level of competency; and second, whether on this record, the police had a legal obligation to facilitate a further telephone call between the appellant and duty counsel.
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> 2 In our view, neither ground warrants granting leave. The first ground of appeal is largely foreclosed by the recent judgment of the Supreme Court of Canada in ***R. v. Willier*, [2010] S.C.J. No. 37 (S.C.C.)** where, at para. 41, the majority held that **the police have no obligation under s. 10(b) to monitor the quality of the legal advice received by a detainee from duty counsel.**
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> 3 The alternative argument that duty counsel himself (or herself) is a state actor and is required by s. 10(b) to give basically competent legal advice runs counter to the reasoning of our colleague, Gillese J.A., in ***R. v. Pea*, [2008] O.J. No. 3887 (Ont. C.A. [In Chambers])**, reasoning with which we concur. Thus, we decline to grant leave on the first ground.
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> 4 On the second ground, we agree with the Crown that **there is not a proper evidentiary record to consider the issue.** The issue was not raised at trial, and thus the Crown did not have an opportunity to explore matters that might reasonably bear on this issue. Leave to appeal on this second ground is therefore also refused. **(emphasis added)**

[23] The other case of note submitted by the Crown is ***R. v. Braithwaite*** **[2002] O.J. No. 1955.** This is an Ontario Superior Court of Justice decision where the Court was acting as a Summary Conviction Appeals Court. In that case the trial judge erred in finding that the advice received by the accused was the equivalent of receiving no advice and that his right to counsel was denied. Duty counsel acted entirely appropriately in advising the accused that his advice to not provide a breath sample could amount to counselling the commission of a crime. No evidence was led by the accused that he was prejudiced through the alleged lack of proper legal advice.

[24] In ***Braithwaite*** the person who acted as duty counsel testified as to the advice that was given to the accused. He covered issues such as the accused's right to remain silent, whether the accused had made any statements, issues about bail, and release procedures and the like. This did not occur in our case. I have no idea what advice, if any, was provided by Mr. Wright to Mr. Howlett.

[25] The first issue that arose in ***Braithwaite*** is the primary issue that I have with Mr. Howlett. Can I arrive at the conclusion that the advice given to Mr. Howlett

by Mr. Wright was tantamount to no advice such that Mr. Howlett's rights to counsel were violated?

[26] There is reference in ***Braithwaite*** to the case of ***R. v. Bartle*** **(1994) 92 CCC (3d) 289 (SCC)** at paras 14 & 15:

> 14. "…In ***Bartle***, the issue was not the adequacy of the advice given. Rather the issue was that no legal assistance or advice had been made available to the defendant because the defendant had not been apprised of his right to counsel or to the availability of free legal advice…**It was in the context of a situation where no advice had been obtained that the Supreme Court said that it would be wrong to speculate as to what advice might have been given.** In my view, that is a very different matter than embarking on an after the fact analysis of the quality of the advice that was given by duty counsel…" **(emphasis added)**
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> 15. It may be that there are cases…where the evidence shows that the advice is so bereft on inquiry and analysis that it could be characterized as being equivalent to not having been given advice at all. This is not the case…"

[27] At para. 19 of ***Braithwaite*** Justice Boswell stated:

> **It is inappropriate, in my view, to hold that advice that may not have been the best or most perfect advice that was capable of being given is a breach of the right to counsel, particularly in this setting where the advice being given is preliminary and in circumstances where the range of advice that can be given is, as Chief Justice Lamer said in Bartle, "limited." (emphasis added)**

[28] To paraphrase this, what advice could Mr. Wright have given to Mr. Howlett in these circumstances apart from the "blow or don't blow" advice, knowing that one cannot counsel someone to not blow but can merely advise the consequences of such a decision.

[29] It is also important to note the comments of Justice Boswell at paras 19-24:

> 20. ….As the Supreme Court said in ***R. v. Collins*** **(1987), 33 C.C.C. (3d) 1 (S.C.C.)** per Lamer J. at p. 19:
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> > **"Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair.** However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination." **(emphasis added)**

21. **The Supreme Court rejected an *ex post facto* review or speculation as to what the advice might have been had the individual been able to consult counsel.** That, however, is a different situation to the one here where the individual did consult counsel but then alleges that the advice was deficient. **In such circumstances, there appears to be more reason to cast a burden on the individual to satisfy the court that he would have acted differently had he received more fulsome or better advice.** As Chief Justice Lamer said in ***Bartle*** at p. 316:

> "Section 24(2) applicants thus do not bear the burden of proving that they would have consulted counsel had their s. 10(b) rights not been infringed. Of course, once there is positive evidence supporting the inference that an accused person would not have acted any differently had his or her s. 10(b) rights been fully respected, **a s. 24(2) applicant who fails to provide evidence that he or she would have acted differently (a matter clearly within his or her particular knowledge) runs the risk that the evidence on the record will be sufficient for the Crown to satisfy its legal burden (the burden of persuasion)." (emphasis added)**

and also at p. 317:

> "A review of past decisions by this court clearly demonstrates that exclusion of evidence, even self-incriminatory evidence, will not necessarily follow each and every breach of the right to counsel under s. 10(b)…..**If the party resisting admission of the evidence is unable to establish in an overall sense that its admission would bring the administration of justice into disrepute, the evidence should be admitted." (emphasis added)**

22**. It does not seem unreasonable to place a burden on an individual, who has received legal advice but contends that he would have acted**

differently if proper advice had been provided, to adduce evidence as to how that proper advice would have affected his conduct. In this regard, I consider that the individual is in a position which is akin to the individual who alleges that his legal representation at trial was incompetent. In such cases, the Supreme Court has held that there is a positive obligation on the individual to lead evidence to establish that claim. In ***R. v. G.D.B.***, [2000] 1 S.C.R. 520, Mr. Justice Major made this point, at pp. 531-532:

> "The approach to an ineffectiveness claim is explained in ***Strickland v. Washington***, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, **it must be established, first that the counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.**
> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment."

23. **To hold otherwise and exclude all such evidence places the police, and subsequently the Crown, in an impossible position. Since they cannot be privy to the conversation between the individual and the duty counsel (and I note that there is no reason why the same argument could not be made regarding private counsel), they have no way of knowing whether this allegation will be raised and no realistic way of preventing its occurrence and thereby avoid the inadmissibility of the evidence.** It is one thing for evidence to be ruled inadmissible where there has been action by the police which might have been relied upon by the defendant to take a different course of action had he or she received proper legal advice**. It is an entirely different matter for that result to occur where the police have acted entirely properly and in good faith, as the trial judge found was the case**

> **here.** The fact is that the police can ensure that an individual is able to receive legal advice but they cannot ensure the quality of the advice given. Consequently, placing an onus on the defendant to adduce evidence in support of his contention that his position was prejudiced through the failings of the advice received is not unreasonable and accords, as I have already said, with the approach where other forms of incompetence of counsel are advanced.
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> 24. **In this case, no evidence was led by the defendant as to how his position was prejudiced through the alleged lack of proper legal advice. Indeed, the evidence would suggest that the defendant had a choice between two unpalatable options. He could provide the breath sample and be charged with "over 80" or he could refuse to do so and be charged with "refusal to blow".** Either way, he was facing the imposition of a criminal sanction since the record is devoid of evidence that could have supported his refusal to provide a breath sample. **(emphasis added)**

[30] So, if the Crown's contention is correct that Mr. Wright was "counsel" on February 12, 2017, then Mr. Howlett did in fact exercise his right to counsel in speaking with Mr. Wright, even though Mr. Wright was administratively suspended at the time. This creates an evidentiary difficulty for the accused of not having provided any evidence to show that he would have acted differently had he had proper legal advice. There is none of that evidence before me.

[31] As well, as noted by the Ontario Court of Appeal in ***Beierl***, if Mr. Wright was "counsel" as alleged by the Crown, this Court cannot qualitatively assess the advice that may have been provided to Mr. Howlett by Mr. Wright.

[32] There is also no evidence before me that Mr. Howlett would have acted differently in his interactions with the police if he had received different advice from other counsel than the alleged improper, or no, advice from Mr. Wright.

[33] As well, as per ***Bartle***, it is improper for me to speculate as to what advice may have been given to Mr. Howlett by Mr. Wright, or from any other lawyer that Mr. Howlett might have spoken to.

[34] As noted, all of the cases relied on by the Crown could be categorized as an accused receiving inadequate, or improper, advice from counsel, versus an accused being denied their right to counsel.

[35] Crown's case relating to an alleged ***Charter*** breach fails if Mr. Wright was not "counsel" on February 12, 2017.

Mr. Wright was not "counsel" as alleged by the Defence

[36] Section 2 of the ***Criminal Code*** clearly defines the word "counsel" as:

> "counsel" means a barrister or solicitor, in respect of the matters or things that barristers, respectively, **are authorized by the law of a province to do or perform in relation to legal proceedings.**

[37] From the letter by Nova Scotia Legal Aid dated March 10, 2017, and from the email of Elaine Cumming from the Barristers' Society dated September 14, 2017, it is clear that Mr. Wright did **not** meet the definition of being a "counsel" pursuant to s. 2 of the Criminal Code or s. 10(b) of the Charter. The Charter does not provide a definition for "counsel" but one would believe that the same definition would apply to the Charter as to the Criminal Code. As well, the letter by the Barristers' Society dated September 13, 2017 clearly states that Mr. Howlett must not engage in the practice of law at the time in question.

[38] I find that Mr. Howlett's right to counsel on February 12, 2017 **was** breached as Mr. Wright **was not** "counsel" at the time in question.

Consequences of the Charter breach of s. 10(b) right to counsel

[39] A breach of Mr. Howlett's right to counsel does not lead to an automatic exclusion of the evidence as requested by his counsel. A 'Grant analysis' needs to be conducted. In ***R. v. Grant*** **2009 SCC 32** the Supreme Court of Canada established a test for judges to determine whether evidence obtained as a result of a ***Charter*** breach should be excluded.

[40] The first consideration under ***Grant*** in determining whether to exclude evidence is to examine the seriousness of the conduct which led to the discovery of the evidence. 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. This inquiry requires an evaluation of the seriousness of the state conduct that led to the breach.

[41] In our case, duty counsel is not a state actor so we would have to look at the actions of the police as the state actor. The police with Mr. Howlett followed the protocol for obtaining duty counsel advice for Mr. Howlett. The police did not act in bad faith. The breach of Mr. Howlett's right to counsel was not the result of either deliberate or egregious police conduct. Therefore the effect of admitting the evidence would not greatly undermine public confidence in the rule of law.

[42] The recent case of ***R. v. Snowdon*** **2016 NSSC 278** examined the issue of good faith and bad faith on behalf of the police. Justice Hunt stated as follows at paras 141 and 142:

> 141 To properly weigh a concept of good faith one must first understand that good faith and bad faith are terms of art in the section 24(2) weighing process. The absence of bad faith is not to be equated with good faith. Nor is the absence of good faith something that is to be

> equated with bad faith. Instead to fall at either end of the spectrum requires the state actor to possess a particular mental state at the time of the breach. **In order to commit a *Charter* breach in good faith the officer involved must have had an honest and reasonably held belief that he or she was authorized to act in the manner in which they did.** If the belief is not honest the error cannot be said to have been committed in good faith. If the belief is honest but not reasonably held, it too cannot be said to have been committed in good faith.
>
> ……
>
> 142. …..Good faith on the part of the police will also reduce the need for the Court to dissociate itself from the police conduct. However, ignorance of ***Charter*** standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith. Wilful or flagrant disregard of the ***Charter*** by those very persons who are charged with upholding the right in question may require the Court dissociate itself from such conduct.
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> To make a successful claim of good faith then the state must demonstrate that it had an honest and reasonably held belief at the time the breach occurred that it was acting in accordance with the law. If the belief is not honest it cannot be held in good faith. If the belief is honest but not reasonably held it can likewise not be said to have been committed in good faith. **(emphasis added)**

[43] I have already stated that the police did not act in bad faith in regards to Mr. Howlett. In fact, they acted in good faith. There is no evidence, or reason to believe,

that the police knew or ought to have known, that Mr. Wright, the individual understood by them to be the on-duty duty counsel, was under suspension by the Barristers' Society on February 12, 2017.

[44] The second consideration under ***Grant*** is whether the admission of the evidence would bring the administration of justice into disrepute from the perspective of society's interest in respect for ***Charter*** rights. The more serious the impact on the accused's interests, the greater the risk that the admission of the evidence could breed public cynicism and bring the administration of justice into disrepute.

[45] In this case, the ***Charter*** violation was a breach of the accused's s. 10(b) right to counsel. While the impact of the breach was not severe, it was more than minimal since it deprived the accused of his right to obtain legal advice from "counsel" to be able to make an informed choice as to how to respond to the police demand for samples of his breath.

[46] As previously noted, Justice Lamer in ***Bartle*** noted that "in this setting where the advice being given is preliminary and in circumstances where the range of advice that can be given is 'limited'" the impact on the infringement of the accused's rights under ss. 9 and 10(b) of the Charter would not be significant.

[47] As well, in ***Bartle*** the Court stated that it is not the judge's role to speculate as to what advice may have been given had Mr. Howlett spoken to a lawyer.

[48] The third consideration under ***Grant*** is to determine the effect of admitting the evidence on the public interest in having the case adjudicated on its merits. This requires a consideration of the reliability of the evidence and its importance to the proper adjudication of the case. In this case, the breathalyzer readings are presumably highly reliable evidence and would be essential to a determination on the merits.

[49] Society seeks that allegations of criminal conduct be evaluated and determined on the merits. However, this must always be balanced against the need to have a system which determines allegations without doing so in a way that undermines the ultimate or long term integrity of the system. Case law directs that the reliability and unreliability of the evidence may be weighed together with the nature and seriousness of the offence. The Courts in Nova Scotia, and across Canada, have consistently recognized the seriousness of the issue of impaired driving in Canada, underlined by the fact that there are four people killed per day in Canada by impaired drivers. This factor would tend to favour not exercising discretion to exclude the breathalyzer samples.

[50] When balancing the factors relevant to the s.24(2) analysis, I am to weigh the various factors which point to and away from the admission with the purpose of determining whether or not a reasonable person informed of all the relevant circumstances and values underlying the ***Charter*** would conclude that the admission of evidence in the proceeding would bring the administration of justice into disrepute.

[51] The breath samples obtained are presumptively reliable so long as the proper requirements for the obtaining of breath samples were complied with, and this can be determined at trial. They are obviously necessary. The evidence is informational as opposed to conscripted bodily substances obtained by a violation of bodily integrity. It was not the product of conduct which was flagrant or egregious. I am satisfied in all the circumstances the balancing exercise demanded by s.24(2) does not favour the exclusion of the evidence.

[52] Consequently, while Mr. Howlett's s. 10(b) ***Charter*** rights to counsel were breached on February 12, 2017, the results of the breathalyzer readings are admissible, and the application for exclusion is dismissed.

[53] Mr. Howlett is to return on March 26, 2018 for his trial.

Alain J. Bégin P.C.J.