

CANADA / JUDGMENT

R. v. Boufford

2025 BCSC 2381

COURT

Supreme Court of British Columbia

DECIDED

4 March 2025

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2025 BCSC 2381 R. v. Boufford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Boufford,

2025 BCSC 2381

Date: 20250304

Docket: 90415

Registry: Nanaimo

Rex

v.

Christanne Marie Boufford

Corrected Judgment: The case name on the judgment was corrected throughout on March 10, 2026.

Before: The Honourable Justice Thompson

Oral Reasons for Judgment on Charter Application

Counsel for the Crown:

N. Barber

M. Rahme, A/S

Counsel for the Accused:

J. Steele

D. Melville

Place and Date of Hearing:

Nanaimo, B.C.

January 6-7 & 14-17, 2025

Place and Date of Judgment:

Nanaimo, B.C.

March 4, 2025

- [1] The accused is charged with dangerous driving, impaired driving, and "80 mg or over." For each of these alleged offences there are two counts on the indictment because the Crown alleges that by committing these offences the accused caused the death of Raymond Ferguson, and bodily harm to Katherine Toews.
- [2] This voir dire was declared to address the accused's contention that her rights under ss. 7, 8, 9, and 10 of the Charter were infringed in the course of the police investigation. Most of the evidence on the voir dire was given by the investigating officer, Constable Steven Butler. The Crown also called Constables Michael Infanti and Grant Blanchette; their evidence addressed a discrete s. 7 issue arising out of lost evidence. Remedy issues will be addressed after I receive further submissions to take account of these reasons for finding various Charter infringements.

Background Facts

- [3] At 11:52 p.m. on 23 September 2021, Cst. Butler was dispatched to the scene of injuries resulting from a motor vehicle accident on the southbound side of the Trans Canada Highway south of Nanaimo. On the five or six minute trip to the scene, he received the further information that a vehicle had struck two workers and struck another vehicle at a construction site on the highway, and that the injuries to the workers appeared to be quite severe.
- [4] Cst. Butler was the first police officer to the scene and he arrived just before midnight. He parked his police vehicle so as to block traffic on the left of the two southbound lanes of the divided highway. The right lane was blocked and occupied by the paving crew which had been working that evening. An ambulance crew was on scene attending to two workers that had apparently been run down.
- [5] Cst. Butler exited his vehicle and walked southbound. He saw an old 50s or 60s Ford sedan parked in the left lane about 25 metres from where he had left his police vehicle. This car appeared undamaged. A worker approached him and gave him keys, indicating that they were the keys to the involved vehicle further up the road.

- [6] Cst. Butler continued his southbound walk for a further 50 to 75 metres, and approached a Honda Fit that had apparently rear-ended a dump truck parked in the right lane. The accused was the Honda's lone occupant and she was in the driver's seat; the airbag had deployed and was in a deflated state. The car's windshield was smashed, and there was a scrape on the driver's-side rear quarter panel. There was no blood on the accused or in the car, or other indication of injury.
- [7] The accused identified herself by name and date of birth in response to questions from Cst. Butler, and provided her driver's licence. He also asked what her destination had been. She replied that she had been on her way to Ladysmith to look after a friend's dog, and that she was not speeding. She asked what was going on. Cst. Butler testified that she was speaking deliberately and her speech seemed slurred. As he was talking to her, the accused reached for a cup in the cupholder in the centre console. Before it was close to her mouth, Cst. Butler told her she could not have anything to drink and he put the cup on the roof of the car. She told him it was just water. He did not detect any odour of liquor on her breath.
- [8] At the end of this conversation, Cst. Butler advised the accused that she was "detained for impaired operation of a motor vehicle causing injury." Cst. Butler testified that she said she understood and it appeared to him that she did understand. He then read her a caution from a card: "You are not obliged to say anything, but anything you do say may be given in evidence." Cst. Butler gave conflicting evidence on a matter of the time of detention, in each case given while referring to his notes: at one point in his evidence he read his note indicating that the time of detention was midnight; at another point, he testified that his note of the detention time was 12:04 a.m. This reference to 12:04 a.m. was an outlier - he repeatedly referred in his evidence to midnight as the time of detention.
- [9] Cst. Butler then had further conversation with the accused. He asked her if she had had anything to drink. She indicated that her last drink was a glass of red wine an hour ago, and that over the whole night she had three. Cst. Butler testified that he thought it unusual that the accused seemed nonchalant and not upset or crying, or otherwise showing any emotion about the event he was investigating. Cst. Butler's notebook indicates the time of her drinking statement as 12:04 a.m.
- [10] At a time which was not made clear in the evidence, Corporal Mayes was asked by Cst. Butler to bring his police car up so that Cst. Butler would have an approved screening device ("ASD") to use. Cpl. Mayes did so, and parked his car about 20 metres away from the accused's car. Meanwhile, another police officer brought up Cst. Butler's car and parked it alongside Cpl. Mayes' car.
- [11] While Cst. Butler was walking the accused to the police cars, they heard a radio dispatch indicating that one of the injured workers had died and requesting that a coroner attend. The accused said, "Oh, they say I killed somebody?" Cst. Butler replied in the affirmative, telling her that it appeared that one of the people hit in the accident had died.

- [12] When they arrived at the police cars, Cst. Butler did a pat-down search and placed the accused at the back of his police car while the ASD was prepared. He described the reason for the search as standard procedure when placing someone into a police vehicle, and because he wanted to make sure she had nothing with her to drink because he planned to make an ASD demand.
- [13] The ASD demand was made at 12:18 a.m. at the front of Cpl. Mayes' car. A fail result on the ASD test was obtained at 12:19 a.m. At 12:22 a.m., Cst. Butler read the accused a demand under s. 320.28 of the Criminal Code requiring her to accompany him to provide breath samples. The accused was then arrested for impaired operation of a motor vehicle causing death, and advised her of her right to retain and instruct counsel in private without delay. She indicated she wished to speak to a lawyer, but that she did not know who to call.
- [14] At 12:25 a.m., Cst. Butler handcuffed her and again put her in the back of his car. Before being placed in the car, the accused said she had "peed her pants" and asked Cst. Butler if it was okay to get in. He began transport at 12:30 a.m., and at 12:40 a.m. they arrived at the detachment.
- [15] Upon arrival, the first order of business was to get the accused to a bathroom, where she was accompanied by a female guard. Within ten minutes of arrival at the detachment, Cst. Butler had called legal aid and left a detailed message for duty counsel.
- [16] Cst. Butler took the accused to the "observation room." Some of the details of what was said by the accused and Cst. Butler will be detailed later in these reasons. At about 1:15 a.m., Cst. Gallimore came into the observation room and asked Cst. Butler if he wanted another call to be put in to legal aid, and Cst. Butler responded in the affirmative.
- [17] The legal aid lawyer called at 1:29 a.m., and, after a brief conversation with Cst. Butler, the lawyer spoke with the accused in private until 1:45 a.m. The accused was taken to the breathalyzer room and provided a first sample at 2:10 a.m., with a 130 mg/100mL result, and then returned to the observation room. She provided a second sample at 2:32 a.m., which yielded a 120 mg/100 mL result. Constable Tyler Cargill operated the breathalyzer machine.
- [18] At 2:59 a.m., Cst. Butler served various documents on the accused, including a 24-hour driving prohibition, an administrative driving prohibition, and the Certificate of a Qualified Technician that was prepared by Cst. Cargill. The accused accepted Cst. Butler's offer of a ride home, and they departed the detachment at 3:16 a.m. and arrived at her home at 3:21 a.m.
- [19] While at the detachment, the accused spent most of her time in the observation room, and at the hearing the Crown played the recording of the video of what occurred in that room. She was in a bathroom on two occasions, and the evidence satisfies me that there were no cameras which would capture video of her in that room - likewise when she was speaking to duty counsel in the "lawyer room." And, I have reviewed my notes and do not see any indication that there was ever a video camera operating in the breathalyzer room.

- [20] There were, however, cameras in place that I am satisfied likely captured video of the hallways and the booking area through which the accused moved at various times when she was at the detachment. The police officers tasked with obtaining this video for disclosure failed to do so. And, because of the 24-month retention period before the video elapsed, it is now irretrievably lost.
- [21] The accused alleges several Charter infringements. The material provisions are as follows:
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
 8. Everyone has the right to be secure against unreasonable search or seizure.
 9. Everyone has the right not to be arbitrarily detained or imprisoned.
 10. Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; . . .
- [22] I turn to the alleged infringements, and I address them in the order in which they are said to have occurred. In *R. v. Nolet*, 2010 SCC 24 at para. 4, Justice Binnie described a method of scrutiny for Charter compliance in situations such as this as proceeding "step by step through the interactions" of the police and the accused "to determine whether, as the situation developed, the police stayed within their authority."
- Was the roadside detention arbitrary, and thus a violation of s. 9?
- [23] The accused had been operating a vehicle that was in an accident. She therefore had obligations at the accident scene under s. 68 of the Motor Vehicle Act, and s. 320.16(1) of the Criminal Code. When Cst. Butler arrived, the injured parties were receiving professional assistance. When Cst. Butler asked, the accused identified herself and provided her driver's license to him. Barring a legal detention, she was at that point not obliged to stay at the scene.
- [24] I find that the accused was detained at 12:00 midnight. As mentioned previously, she was told at that time that she was "detained for impaired operation of a motor vehicle causing injury," and was cautioned: "You are not obliged to say anything, but anything you do say may be given in evidence." Cst. Butler did not tell the accused that her detention was for investigation. However, I accept the Crown submission that this is what he had in mind, i.e. use of the common law power of detention, as described in *R. v. Mann*, 2004 SCC 52. It was apparent during his testimony that, before he checked his notes and saw otherwise, he thought he had advised the accused that she was under detention for investigation.
- [25] The Mann framework sets a two-part test for determining whether a police officer acted within their common law powers (para. 24). The first consideration is whether the police conduct falls within the general common law powers. If so, the question is whether the use of the power was justified in the circumstances which includes an assessment of such

factors as "the duty being performed, the extent to which some interference with individual liberty is necessary in the performance of that duty, the importance of the performance of the duty to the public good, the nature of the liberty being interfered with, and the nature and extent of the interference" (para. 39). Justice Iacobucci summarized, at para. 45:

To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. . . .

[26] The "reasonable grounds to suspect" standard for employment of an investigative detention is both a subjective and objective standard. There must be "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation": *R. v. Simpson* (1993), 12 O.R. (3d) 182 at 202 (C.A.), cited with approval in *Mann*, at para. 27.

[27] Cst. Butler was asked for his reasons for suspicion that she had committed the crime she was being detained to investigate. His answer focused on his knowledge of the injuries, and the evidence that she had been operating the vehicle she was found in:

So, because of the severity of what we were investigating, knowing that two people had been injured, that EHS was on scene and there was a likelihood that somebody was seriously injured, because of the nature of the investigation and the severity of what was being investigated, I just wanted to ensure that she knew what was going on and to ensure that she knows she is to remain on scene and that we are going to proceed with the investigation and to let her know what the next steps were as we proceed with the police investigation. And since I found her in the vehicle, in the driver's seat, no one else in the car, the vehicle registered to her, I was confident that she was driving.

A follow-up question specifically asked about his reasons to suspect impairment. Cst. Butler said:

So, based on her admission of drinking, the fact that a collision took place in a well-lit-- with lights and well-marked construction site where the weather was good, the roads were dry, very little traffic, her slurred speech when I was talking to her about where she was going, as well as the lack of emotion.

[28] Cst. Butler was then asked why he did not arrest the accused at that point. He said:

I didn't arrest her at that point because we were still going to do the ASD demand and do the ASD test. I had the suspicion that she had been operating a motor -- er that she had alcohol in her body while operating a motor vehicle, so I was going to proceed with the next stage of the investigation, which would be directing her to the police car to do an ASD demand and then an ASD test.

[29] Cst. Butler's evidence on his grounds for detention reveal some confusion and presents difficulty when trying to assess whether his articulated grounds are objectively justified. At the time he detained the accused, at midnight, he did not have an admission of drinking.

And, he testified that he did not detect an odour of alcohol on her breath. On the subjective side of the analysis, I consider the possibility that Cst. Butler did not in fact form the required suspicion at the time he detained the accused. His reference to admission of drinking which he did not have at the time of detention as part of his grounds for the detention lends some support to this theory. However, on reflection, I think it is more likely that Cst. Butler was confused when giving his evidence, and I find on a balance of probabilities that his suspicion was triggered on grounds apart from any admission of drinking. I will assess the reasonableness of those grounds for an investigative detention (i.e., the objective side of the analysis) on this narrower basis.

- [30] The "reasonable grounds to suspect" standard requires "something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds": *R. v. Kang-Brown*, 2008 SCC 18. The police need not negative all exculpatory inferences, but the standard requires that the totality of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour: *R. v. Chehil*, 2013 SCC 49 at para. 6.
- [31] Notwithstanding the accused's statement that she had not been speeding and the fact that the accused had recently been in a heavy collision with the rear of a dump truck that might explain the slurred speech, I conclude that the totality of the circumstances known to Cst. Butler - including the slurred speech and the absence of any apparent alternative explanation for the collision with two workers and the truck in the construction zone - logically indicated a possibility of impaired driving causing injury. In the context of whether an officer had sufficient grounds to arrest, an unexplained accident is a proper consideration when examining whether there are sufficient grounds: *R. v. Rhyason*, 2007 SCC 39 at para. 19; it surely follows that an unexplained accident is relevant to the fact-based assessment of whether Cst. Butler had reasonable grounds to suspect impaired driving. I hold that the Crown has established that the reasonable person in the shoes of Cst. Butler would have held a reasonable suspicion that the accused had committed this criminal activity: *Chehil*, at paras. 35, 45-46.
- [32] Thus, I conclude that the 12:00 midnight detention fell within the common law power to detain for investigation. The next question is whether detention, at its outset, was reasonably necessary. I find that it was. Cst. Butler did not have grounds for arrest, but he did have specific investigative steps in mind that required the accused to remain in his presence. In particular, he intended to ask her questions about whether she had been drinking, when, and how much. And, I find that he intended to make use of a roadside screening device if his questioning revealed sufficient grounds to do so.
- [33] The fact that this investigative detention began lawfully does not, however, determine the s. 9 issue. In *Mann*, the Supreme Court of Canada emphasized that an investigative detention must be brief to avoid infringing s. 9 of the Charter, and it cannot be allowed to slip beyond the applicable limits of the authority so as to become a *de facto* arrest (paras. 22, 35, 45).

- [34] On the issue of whether the detention remained reasonably necessary, I begin with what Justice Abella said while writing for the majority in *R. v. Clayton*, 2007 SCC 32 at para. 31, about the temporal scope of investigative detentions:

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

[Emphasis added.]

- [35] The duration of the investigative detention must be tailored to the investigative purpose of the detention and the circumstances in which it occurs. This is a fact-intensive inquiry. In *R. v. Chaif-Gust*, 2011 BCCA 528, Chief Justice Finch held that a prolonged detention was justified in the particular circumstances of that case, but he made it clear that the length of an investigative detention "cannot be disproportionate to the requirements of the investigation involved" (para. 43).
- [36] From Cst. Butler's testimony and actions, I have concluded that the investigation he had in mind that necessitated the accused's detention was to determine if the accused had consumed alcohol at the time leading up to the accident, and, if so, how much. The legality of the continued detention must be assessed with regard to this purpose and the specific investigative steps he planned to further this purpose in mind (i.e., his plan to investigate by questioning the accused and the further, contingent plan to make use of an ASD). Cst. Butler did not say so, but it can be taken for granted that the further step of making a s. 320.28 breathalyzer demand would likely follow from an ASD fail; I assume that Cst. Butler understood that the use of an ASD is the first part of this two-stage procedure, as it was described by Justice Fish for the Court in *R. v. Woods*, 2005 SCC 42 at para 6.
- [37] At 12:04 a.m., Cst. Butler asked questions of the accused that obtained the admission of recent drinking. At this point in time, my impression is that Cst. Butler would have read the ASD demand if he had an ASD at hand. He could have made the demand and walked the accused to his car, which was 75 to 100 metres away, but he decided that it was inadvisable to walk her past the injured persons and other workers. Instead, he did not make an ASD demand, and called for Cpl. Mayes' car to be brought up with its ASD.
- [38] I find that the investigative detention that began at 12:00 midnight continued to be lawful up to and including 12:04 a.m. when Cst. Butler completed his first investigative step by asking the accused about her drinking that evening. The question becomes whether he had the basis to continue an investigative detention at that point in time. Cst. Butler did not regard an arrest as an option at that point: it is clear from his evidence that he did not think he had sufficient grounds for an arrest without something more (and he thought that an ASD result

might be that something more). And, I infer that Cst. Butler did not believe (and I think he was correct) that he had the grounds necessary to make the s. 320.28 demand either.

- [39] I conclude, therefore, that the legality of the accused's detention after 12:04 a.m. (and thus the question of whether it became arbitrary) is interwoven with the question of whether Cst. Butler followed a legally permissible ASD process, which was the only other investigative step in contemplation. The lynchpin to the argument that the investigative detention was unduly prolonged in the period shortly after it began is that the police engaged in a noncompliant roadside demand process. Later in these reasons, I will examine the delay in making the ASD demand when I discuss whether the ASD demand was compliant with s. 320.27(1). As I will explain, the failure to make a sufficiently prompt ASD demand undermined the legality of the ASD test process.
- [40] On this basis, I conclude that the accused's detention between shortly after 12:04 a.m. and her arrest at 12:22 a.m. was arbitrary. (Later in these reasons I also address the issue of the legality of her detention from 12:22 a.m. onward.) After 12:04 a.m., when Cst. Butler completed his questioning of the accused about her drinking, the Crown has not established that the accused's detention was "reasonably necessary" within the Mann doctrine because there was no other legally authorized investigative step contemplated by Cst. Butler that justified the use of the common law power to detain for investigation. The grounds for continued detention lapsed. The detention's proper "temporal scope" was exceeded; it was no longer reasonably responsive to the circumstances.
- [41] Because of this finding that the investigative detention escaped its proper bounds at the point in time after 12:04 a.m. when the delay in making an ASD demand became too long, it is unnecessary for me to decide whether - regardless of the legality of the ASD process - the investigative detention became a de facto arrest at the later point in time when the accused was searched and placed in Cst. Butler's police car in the minutes before the ASD demand was made at 12:18 a.m. There are cases, including *R. v. Strilec*, 2010 BCCA 198, that might be said to point in this direction. On the other hand, the use of a police vehicle to detain an individual does not, in and of itself, "render an otherwise reasonable detention a de facto arrest": *Chaif-Gust*, at para. 48.
- [42] I also acknowledge the accused's argument that her detention at midnight was a de facto arrest from the outset, despite what I find to be Cst. Butler's intention to detain the accused for investigation. I appreciate that the intention of the police officer is not determinative; the actions of the police and the substance of what the accused could reasonably be supposed to have understood from the words used must be considered: *R. v. Latimer*, [1997] 1 S.C.R. 217 at para. 24. One implication of a finding of a de facto arrest at 12:00 midnight would be that it would be an arbitrary detention - Cst. Butler's evidence is clear that he did not believe he had grounds for arrest at that time.

- [43] The accused did not testify on the voir dire, so I do not have the benefit of her evidence as to what she took from Cst. Butler's words. And, I cannot take anything from her acknowledgement to Cst. Butler that she understood what he told her after he said she was "detained for impaired operation of a motor vehicle causing injury". She might have meant that she understood that she was under investigative detention, or she might have meant she understood that she was under arrest, or she might have meant she simply understood that she was not free to leave. Cst. Butler's words were not accompanied by the seizure or touching of her body, but he did give her a direction not to drink from the cup that she had in hand.
- [44] If this was an investigative detention, Cst. Butler should have said so. He should have said: "You are detained for investigation of impaired operation of a motor vehicle causing injury." An arrest is a species of detention and neither a detainee nor the court should be in the position of having to come to grips with the ambiguity inherent in Cst. Butler's choice of words. I will have more to say about this ambiguity in the paragraphs that follow when discussing whether there was compliance with s. 10(a) of the Charter.
- [45] All that said, the burden of establishing the fact of an arrest is on the accused, and I do not have the clear and cogent evidence necessary to establish on a balance of probabilities that the detention at 12:00 midnight was a de facto arrest.
- [46] My holding that the detention of the accused became unlawful shortly after 12:04 a.m. amounts to a finding that the detention was arbitrary from that time; an unlawful detention is by definition arbitrary and infringes s. 9: *R. v. Grant*, 2009 SCC 32 at para. 54; *R. v. Tim*, 2022 SCC 12 at para. 22.

Was the accused informed promptly of the reasons for the roadside detention, i.e., was there a violation of s. 10(a)?

- [47] In *Mann*, at para. 21, the Court advised that "at a minimum, individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for the detention." While s. 10(a) is an adjunct to the s. 10(b) right to counsel, most fundamentally the right enshrined in s. 10(a) to be informed promptly of the reasons for detention is founded on the fact that a person is not obliged to submit to detention if they do not know the reasons for it: *R. v. Evans*, [1991] 1 S.C.R. 869 at 886-887. The right to this information is rooted in the common law requirement that "the detainee be informed in sufficient detail that he or she 'knows in substance the reason why it is claimed that this restraint should be imposed' (*Christie v. Leachinsky*, [1947] A.C. 573 at pp. 587-88)": *Evans*, at 875, per Sopinka J.
- [48] The accused in the case at bar was clearly informed of the reason for her detention in the sense that it related to "impaired operation of a motor vehicle causing injury." This is not a case where the accused was left in the dark about the subject matter of the detention. However, the accused's detention status was not made clear to her: was she detained for an investigation or was she under arrest? This matters. A clear statement about custodial status is critical to the decision to be made whether to submit to detention, because of the

significantly lower standard necessary to justify an investigative detention. In the case at bar, the accused would have been justified in resisting an arrest at 12:00 midnight for impaired operation of a motor vehicle causing injury, there being insufficient grounds for arrest at that time.

- [49] As instructed by Evans, I interpret s. 10(a) with its purposes in mind. To approach the interpretation of s. 10(a) so narrowly that it does not include an obligation to make the detainee aware of their custodial status would defeat the most fundamental purpose of this informational investigation. The reasons for the detention had two essential components. Why was the accused detained? It was for investigation. Investigation of what? The suspected offence of impaired operation of a motor vehicle causing injury. To interpret "reasons" for detention in s. 10(a) to only require the subject matter of the detention is to read "detention" in s. 10(a) as if it said "detention for investigation."
- [50] I appreciate that the "formalism of the precise words" does not govern the analysis of whether s. 10(a) was complied with; the question is whether what the accused was told, viewed in all the circumstances of the case, was sufficient to permit her to make a reasonable decision to decline to submit to the restraint: Evans, at 888. It would be unfair and potentially dangerous to abide significant ambiguity in roadside interactions with the police. From the perspective of detainee or police officer, the decision to resist police detention is fraught with potential for conflict and various unfortunate outcomes. Moreover, it is surely a principle of fundamental justice that a person who is deprived of their liberty by a state actor be advised without delay of their custodial status so they are equipped to decide whether to submit to the restraint of their liberty. For this reason, if I am wrong in interpreting s. 10(a) as requiring the transmission of this critical information, I would hold that the failure to do so is a breach of s. 7 of the Charter.
- [51] Later in these reasons I will be addressing authorities that hold that the informational and implementational components of s. 10(b) are suspended when police carry out roadside stops to investigate impaired driving. If these authorities apply to the circumstances of the instant case, I do not understand the Crown to argue that the s. 10(a) obligation is suspended. For the reasons I have already given, it would cut against the grain of fundamental common law principles to suspend 10(a). And, in *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37 at para. 31, one of the governing authorities regarding the s. 10(b) suspension in the case of roadside stops, Justice Charron observed: "I suspect every motorist would fully expect 'to be informed promptly of the reasons' why he or she is being stopped."
- [52] I return to the test as it applies to the facts of our case. The accused was advised that she was "detained for impaired operation of a motor vehicle." In all the circumstances of the case, was this sufficient to permit her to make a reasonable decision to decline to submit to the restraint? I think not.

- [53] The ambiguity is palpable. I think - but cannot be sure - that Cst. Butler had a common-law investigative detention in mind. I have found that the accused has not established that she was subjected to a de facto arrest at 12:00 midnight. However, some of Cst. Butler's actions, from the outset through to the time of the ASD demand at 12:18 a.m. might be said to be more consistent with the conduct of an officer with a person under arrest than a person under investigative detention. I refer to the directions given about not drinking from the cup, the taking of the accused in hand (before an ASD demand) to walk her to the police vehicles, the pat-down search that was outside the bounds of a permissible search in relation to an investigative detention (addressed below), and the depositing of the accused in the locked police car.
- [54] I conclude that the police officer infringed s. 10(a) by failing to clearly make the accused aware of her custodial status - i.e., whether she was under arrest or whether she was under investigative detention - in circumstances where clarity was necessary to fulfill a fundamental purpose of s. 10(a).

Was the accused entitled to be informed of her s. 10(b) right to retain and instruct counsel without delay while she was at roadside?

- [55] The s. 10(b) obligations arise upon detention, including the requirement to advise the detainee of their right to counsel. However, s. 1 of the Charter operates to suspend s. 10(b) where police come across circumstances which they have the authority to check the sobriety of a driver, provided that the procedures to check sobriety are performed at the site of the detention, with dispatch, and with minimal inconvenience to the detainee: *Orbanski*, at paras. 46, 52, 59. Depending on the circumstances, roadside screening techniques like questions about alcohol consumption, physical sobriety tests, and use of an alcohol screening device may fall within the scope of reasonable police authority and be permitted before advising a detainee of their right to counsel: *Orbanski*, at paras. 47-51; *R. v. Breault*, 2023 SCC 9 at para. 66.
- [56] The accused does not question the applicability of the *Orbanski* reasoning outside of a context where an individual is stopped by the police while operating a motor vehicle. Rather, her argument is that the failure to make a timely ASD demand eliminates the availability of s. 320.27(1) as a limitation "prescribed by law" that is capable of justification under s. 1 of the Charter; citing *R. v. Grant*, [1991] 3 S.C.R. 139 [Grant 1991]; and *R. v. Steele*, 2014 ONCJ 583.
- [57] In *R. v. Thomsen*, [1988] 1 S.C.R. 640, the accused refused a roadside screening demand. The police officer took the accused to his police car and there were further refusals. The accused was found to be detained as a result of the demand (pp. 649-650). However, the Criminal Code provision authorizing the roadside-screening demand implicitly limited the applicability of the s. 10(b) right to counsel (p. 653) and this limitation is justified under s. 1 (p. 655).

- [58] In *Grant* 1991, the police officer pursued and confronted a man suspected to have been driving while prohibited. The suspect was asked to enter the police car for questioning, and during this conversation the police officer smelled alcohol on the suspect's breath. A roadside-device demand was read, and when the device arrived 30 minutes later the suspect refused to comply with the demand and was charged accordingly. The Court held, at pp. 149-150, that the Criminal Code subsection providing for this demand was not available to authorize the absence of s. 10(b) advice upon detention because the demand was not made within the ambit of the authorizing provision - *Thomsen* only applies if the police action was within the bounds of their authority and the delayed test was not. Accordingly, the initial detention triggered the s. 10(b) right and the requirement to comply with s. 10(b) did not come to an end when the officer subsequently demanded a breath sample ostensibly on the basis of the authority in the Code (p. 151).
- [59] In *Orbanski*, at para. 52, the Supreme Court of Canada extended the *Thomsen* rationale to various roadside screening techniques preceding the screening-device demand which were used with the "very objective of determining whether there is a reasonable suspicion justifying the demand," and to screening measures that are the functional equivalent to the screening device, i.e., techniques conducted with the objective of determining whether there are grounds for a breathalyzer demand (i.e., the second-stage device). These techniques were all held to be authorized by law (paras. 49-51), and that the law limited the s. 10(b) right (i.e., there is a limit "prescribed by law") (para. 53). Further, it was held that this limit was justified under s. 1 (para. 60).
- [60] In *Steele*, the police officer pulled over the accused after noticing erratic driving. She smelled alcohol on the accused's breath. The accused responded to a police question by saying he had a couple of beers a couple of hours before. The police officer formed reasonable suspicion at that point but delayed making the ASD demand. *Paciocco J.* (as he then was) held that since the demand was not made forthwith, it was not a lawful ASD demand (para. 11). In the result, citing *Grant* 1991, at para. 20, he concluded that the Code provision authorizing the ASD demand is not available to authorize the absence of s. 10(b) compliance upon detention, and hence cannot constitute a prescribed limit that could found a justification under s. 1 (para. 11).
- [61] In *Breault*, at para. 35, the Court emphasized the importance to the constitutionality of the roadside screening regime, including the suspension of s. 10(b), that the detention be of very brief duration. In that case, there was held to be an impermissible extension of what was supposed to be a very brief detention as time passed while the police engaged in investigational steps that were out of compliance.

- [62] In the case at bar, the application of this body of law leads to the conclusion that any cover that might have been provided by a Thomsen/Orbanski suspension was lost at the point where Cst. Butler failed to make a timely ASD demand. For reasons that I will come to when considering this demand made 14 minutes after the accused's admission about alcohol consumption, it was outside the bounds of his authority.
- [63] When police are making use of powers at times when detainees are deprived of their access to advice about the extent of their obligations to comply with police requests or demands, I suggest it is particularly important that the police exercise rigorous attention to the scope of their powers. In this case, the accused was kept detained solely on the basis of contemplated participation by her in a self-incriminatory investigative process that was carried out in a manner that was not compliant with the Code. The accused had no opportunity to obtain advice about the legality of the delayed ASD demand, and whether it justified non-compliance.
- [64] In *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191, Chief Justice Lamer summed up the purpose of s. 10(b):

The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: *Brydges*, at p. 206; *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77; and *Prosper*. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

[Emphasis in original.]

- [65] The accused in the case at bar ended up in a substantially worse legal position by complying with an illegal ASD device than if she had refused it. This reality helps make it clear why the Thomsen/Orbanski cloak cannot be available where the police have finished taking the investigative steps encompassed by their authority to check for sobriety, or if the police exceed their authority. Cst. Butler's ASD demand was unlawful, as was the continued detention of the accused. In these circumstances, Cst. Butler was not excused from advising the accused of her right to retain counsel, and her s. 10(b) rights were infringed.

Was the roadside pat-down search unreasonable, and thus a violation of s. 8?

- [66] I conclude that there is no basis upon which this search of the accused can be legally justified. It was unreasonable and infringed s. 8. The power to search a person without warrant depends on their detention status. If the accused's status at the time of the search had become a de facto arrestee, then it was an arrest without sufficient grounds and unlawful. And, it is settled law that searches conducted incident to unlawful arrests are unreasonable and a breach of s. 8. See *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 13; *Tim*, at para. 50; *R. v. Zacharias*, 2023 SCC 30 at paras. 30, 63.
- [67] On the other hand, if the accused was under a lawful investigative detention, then the issue is whether the Crown has established that the search occurred within the parameters decided in *Mann*, at paras. 40, 45. The duty to protect life may authorize a pat-down search incident to an investigative detention where the officer believes on reasonable grounds that their safety, or the safety of others is at risk. The decision to search must be reasonably necessary in light of the totality of the circumstances. And, the pat-down search must be conducted in a reasonable manner.
- [68] Applying this framework, the justification for the search of the accused is very weak. I find that it was operationally convenient to have the accused locked in the back of a police car while the ASD device was readied, and it was a matter of police policy not to place a person in the car without a pat-down search. Further, Cst. Butler wanted to ensure that she did not have something to drink in her pockets.
- [69] I find that there were no safety concerns of the sort described in *Mann*. And, any concerns were a consequence of the decision to put the accused in the police car. There were at least two officers present. One could have readied the device, while the other watched the accused. The totality of the circumstances do not support the reasonable necessity of the search.
- [70] The accused argues that the search was conducted in an unreasonable manner because it was not carried out by a female police officer. There might be something to this complaint if a female officer happened to be nearby, but the evidence does not support such a finding. The pat-down search was unnecessary and not authorized by law, but it was carried out with appropriate sensitivity by Cst. Butler, and, I find, not unreasonably.

Was the taking of an ASD sample an unreasonable search or seizure?

- [71] Section 320.27(1)(b) provides the authority and sets the preconditions for making an ASD demand:

320.27(1) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug:

...

- (b) to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose; . . .
- [72] Cst. Butler's delay in making the s. 320.27(1)(b) ASD demand rendered it unlawful, and the taking of the ASD sample consequent upon an unlawful demand constituted an unreasonable search and seizure.
- [73] The prerequisites for making a lawful s. 320.27(1)(b) ASD demand include "reasonable grounds to suspect that a person has alcohol in their body and that the person has, within the preceding three hours, operated a conveyance." After he was told by the accused at 12:04 a.m. that her last drink was a glass of red wine an hour ago, Cst. Butler called for Cpl. Mayes' car (containing an ASD device) to be brought up. I find that he did so because he then had grounds to suspect the accused had alcohol in her body, and he knew that she had, within the preceding three hours, been driving her Honda Fit. The demand to provide the ASD sample was made at 12:18 a.m.
- [74] Section 320.27(1)(b) provides that "the peace officer may, by demand, require the person ... to immediately provide the samples of breath." But for this immediacy requirement, the roadside screen regime "would not pass constitutional muster": *R. v. Woods*, at para. 15. The immediacy requirement has an "implicit component" and an "explicit component." The implicit component requires the police to make an immediate demand: *Woods*, at para. 14; *Breault*, at para. 2. And, in *Breault*, at para. 44, the Court specified that the guidance provided by its judgment on the interpretation of the immediacy requirements of the predecessor section applies to s. 320.27(1)(b), which substitutes "immediately" for "forthwith". I conclude that the "implicit component" of the immediacy requirement precondition for making an ASD demand was not complied with.
- [75] Constitutionality of the roadside screening device regime depends on constraining the flexibility of the immediacy requirement: *Breault*, at paras. 50-51, 56, 65. The immediacy requirement is not synonymous with "time reasonably necessary" (para. 51). The Crown must establish "unusual circumstances" to justify any contended-for flexibility. One example of unusual circumstances is where there is delay caused by urgency in ensuring the safety of the public or the police (para. 58). In *Breault*, the issue was the absence of an ASD at the scene when the demand was made - i.e., in that case it was the "explicit component" of the authorizing section that was found by the Court to have been breached. In that context, it was said that the absence of an ASD at the scene was not, in itself, an unusual circumstance.
- [76] Cst. Butler was asked about the period of time that lapsed before the ASD demand was made at 12:18 a.m. He testified that in the time leading up to the demand after he spoke to the accused at 12:04 a.m., he went on his radio to ask Cpl. Mayes to bring his vehicle, which required Cpl. Mayes to walk back to his car, then drive up. Cst. Butler then walked the accused over to his own car (which someone had brought up alongside Cpl. Mayes' vehicle),

obtained an ASD, made some notes about the temperature and the device's serial number, and turned it on. It was also apparent that during this time he conducted a pat-down search of the accused, deposited her in his vehicle, and then retrieved her before reading the demand. Cpl. Mayes did not testify.

- [77] I was referred to several authorities with varying degrees of delay. In some cases the delay was before the ASD demand, in others after the demand. Determining whether unusual circumstances exist is a fact-intensive exercise, and these cases with their different circumstances are naturally of limited assistance.
- [78] In the vernacular, I accept that "there was a lot going on" around Cst. Butler during the delay, but other police officers were on the scene and carrying out various duties during the material time. This allowed for Cst. Butler's singular focus on the accused and the impaired driving investigation.
- [79] The Crown has the burden of showing unusual circumstances justifying the delay between the grounds for the demand being formed at or about 12:04 a.m. and the demand at 12:18 a.m. The evidence explaining the delay is patchy, and may or may not have been more compelling if Cpl. Mayes testified. Some of the delay was due to what I found to be an unreasonable search of the accused, and unnecessarily depositing her in and retrieving her from Cst. Butler's police car. The decision having been taken to not walk the accused back to his vehicle, it was incumbent on the police to act with an urgency consistent with the Criminal Code requirement to make the demand immediately. As Breault says, the immediacy requirement is not synonymous with "time reasonably necessary." After weighing the evidence, I conclude that it falls short of establishing unusual circumstances for the delay in making the ASD demand.
- [80] If Cst. Butler had made the ASD demand when he first had grounds to do so, and the delivery of the ASD took as long in those circumstances as it did, the process would have floundered on the failure to comply with the explicit component of the immediacy requirement: it would have been impossible for the accused to comply with the demand to provide a sample immediately: Breault, at paras. 63-65. Although he did not say so, it is possible that the explicit immediacy requirement of s. 320.27(1)(b) is what Cst. Butler had in mind when he delayed making the ASD demand.
- [81] Cst. Butler had options. He could have made the ASD demand and then called for the ASD to be brought to him while conveying the message that he needed the device immediately. He could have made the demand and walked the accused the 75 to 100 metres to his police vehicle where he had an ASD - Cst. Butler explained with some cogency why this was a less than attractive option. Or, he could have asked the driver to perform physical tests. When discussing the situation of a police officer without an ASD at hand when they suspect a driver has alcohol in their body, the Breault Court said, at para. 66:

[P]eace officers who have no ASD with them when they stop a driver who is suspected of having alcohol in their body are not entirely without options. They can require the driver to perform coordination tests, as permitted by the current s. 320.27(1)(a) Cr. C. These officers also have common law powers to check for sobriety. Where doing so is reasonable and necessary, they can, among other things, question a driver who is lawfully stopped about prior alcohol consumption or ask the driver to perform physical tests other than those provided for in the Criminal Code (*R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at paras. 43-49; *Leclerc v. R.*, 2022 QCCA 365, at paras. 45-48 (CanLII)).

[82] Cst. Butler may have found himself in a situation where he did not have all of the investigative tools at his disposal that he would have liked to access. If so, he was in a position made necessary by the constitutional order's attention to individual liberty interests. At para. 35 in *Mann*, Justice Iacobucci said:

Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order.

[83] Police officers act lawfully only if they exercise authority conferred by statute or derived from common law: *Dedman v. The Queen*, [1985] 2 S.C.R. 2 at 28. Policing in a free society is challenging because police cannot have all the powers required to achieve all their crime investigation goals effectively and efficiently. However, as Justice Binnie said in his concurring judgment in *Clayton*, at para. 68, "police powers are not co-extensive with their duties. A society that valued police efficiency and effectiveness above other values would be a police state." Justice Doherty made the same point in *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3) 223 at 251 (C.A.):

The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. . . . The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

[84] I conclude that the ASD demand in this case was invalid; the manner in which the search was carried out was not authorized by law. It follows that the consequent search and seizure - i.e., the ASD test - was unreasonable and a breach of s. 8.

Was the arrest at 12:22 a.m. an arbitrary detention?

- [85] Immediately following the "fail" ASD result, the accused was advised at 12:22 a.m. that she was under arrest for impaired operation of a motor vehicle causing death. For the reasons I have given, I conclude that for some minutes prior to that time the accused was in a state of arbitrary detention before this arrest. In any event, the arrest at 12:22 a.m. occurred without sufficient grounds because the key missing piece in the arrest grounds was the ASD result, which I have found to be the product of a search and seizure that infringed s. 8.
- [86] It is apparent from Cst. Butler's evidence that he did not have the subjective belief that he had sufficient grounds to arrest the accused before the ASD result. And, the question of whether the police can rely on the product of an unreasonable search as grounds for arrest was settled in *Zacharias*, wherein four members of the five-judge division held that in such circumstances the result of the s. 8 breach is a consequential s. 9 breach.

Was there a post-12:22 a.m. violation of the implementational aspect of the s. 10(b) right to counsel?

- [87] The accused makes two submissions in connection with events at the detachment. She did not press an argument that the accused ought to have been provided with access to counsel at roadside, immediately following her arrest at 12:22 a.m.
- [88] First, she submits that Cst. Butler was less than diligent in his efforts to arrange contact with legal aid counsel. Second, she argues that her s. 10(b) rights were infringed when Cst. Butler told the lawyer who called the detachment in response to messages that the accused was under arrest for "impaired" rather than for "impaired causing death." I find neither argument persuasive.
- [89] I find that after the accused was formally arrested at 12:22 a.m., Cst. Butler was intent on facilitating the accused's right to counsel before eliciting any evidence from her, either by way of statement or by provision of breath samples. To this end, he called the Brydges line promptly upon their arrival at the detachment. The accused did not know a lawyer to call, and she assented to this effort to access advice from duty counsel. Cst. Butler left a detailed call-back message which included the information the accused was under arrest for "impaired operation of a motor vehicle causing death."
- [90] The accused argues that letting 30 minutes go by without a call back from legal aid before following up amounted to an infringement of the s. 10(b) implementational obligation - i.e., the facilitation is criticized as lackadaisical rather than promoting the ability of the accused to retain and instruct counsel "without delay".
- [91] If a detainee has indicated a desire to exercise their right to counsel, the police have the obligation to provide them with a reasonable opportunity to exercise the right: *Bartle*, at 191-192. The circumstances matter in assessing whether facilitation efforts were sufficient. In the case at bar, an attempt was being made to contact a lawyer in the very early morning hours; the availability of lawyers in the time following arrest or detention is a relevant consideration in assessing whether a reasonable opportunity to exercise right to counsel has

been established: *R. v. Prosper*, [1994] 3 S.C.R. 236 at 269-270.

[92] I think waiting 30 minutes for a call-back was, in the circumstances, at the very upper end of a reasonable period before following up with another call to the Brydges line. However, in all the circumstances, including the time of day and the ongoing police compliance with the duty to avoid eliciting evidence from the accused, I am satisfied that the accused was provided with a reasonable opportunity to exercise her right to counsel.

[93] With regard to the second argument, I am not persuaded that it was a s. 10(b) breach for Cst. Butler to tell duty counsel that the accused was under arrest "for impaired," in the context of having left more complete detail in the earlier message. I think it highly unlikely that duty counsel was induced by Cst. Butler to operate on any misconception about the jeopardy the accused was facing.

Was the failure to provide the accused with a change of pants, a blanket, reasonable access to the toilet, and some shielding from camera view while at the toilet a breach of s. 7?

[94] It is uncontroversial that police treatment of a detainee that impacts the security of their person can amount to a s. 7 breach. See, for example, *R. v. Nasogaluak*, 2010 SCC 6; *Fleming v. Ontario*, 2019 SCC 45 at para. 65. Security of the person extends to their psychological security: *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 58; the effect of the state action is viewed objectively, and "need not rise to the level of nervous shock or psychiatric illness" but must have a serious and profound effect and must have a greater impact than ordinary stress or anxiety on a person of "reasonable sensibility" (paras. 59-60).

[95] The allegation that the accused was on camera when she was using the toilet at the detachment can be dealt with summarily. It is simply not supported by the evidence. However, the evidence supports the other allegations of ill-treatment.

[96] I summarize the evidence that bears on the failure to provide the accused with a change of pants and blanket and access to a toilet.

12:25 a.m.

When the accused was asked to get into the police car after her arrest she said she had peed her pants, and asked if it was okay to get in. She received assurances from Cst. Butler at that time about "getting proper clothing and everything back at cells."

12:40

Arrival at the detachment. The accused asks to go to the bathroom.

She confirms that wants to speak to legal aid, but "really have to go to the bathroom before I pee myself somewhere."

12:43

Into bathroom with a female guard.

12:51

In observation room, waiting for a call back from legal aid and waiting for arrival of the breath analysis technician, Cst. Cargill. On the way into the observation room, the accused says she is very, very cold. No response. Then she says her pants are very, very wet, and wonders if that means anything to him, and Cst. Butler says that he doesn't have a spare set of pants for her right now, don't worry about sitting down and making a mess.

12:59

The accused says she is very, very cold and sitting in wet pants, Cst. Butler says sorry, he doesn't have anything.

1:04 a.m.

The accused says her pants are wet, "just not that it means anything, but they're wet."

1:45

Lawyer call ends. The accused asks to go to the bathroom, refused because of observation period. Return to observation room.

1:47

Cst. Cargill begins explaining the breathalyzer process to the accused. When he finishes explaining, she asks if she will be able to go to the bathroom after she provides the breath samples; Cst. Butler indicates she will have to hold it for a few more minutes.

2:27

The accused says she really needs to go to the bathroom; Cst. Butler says another minute or so and this part will be done. The accused asks if she will be able to go to the bathroom afterward, and Cst. Butler says yes.

2:32

As soon as second breath sample provided, she asks again to go to the bathroom. She is told to wait until they are sure that the second sample is sufficient. She says, "Sorry. I just really don't want to pee on your chair . . . and I think I kind of maybe have."

2:35

The accused is allowed to use the toilet after Cst. Cargill explains the breathalyzer results to her. "Heather" and "Sally" are suggested by Cst. Cargill as available to watch her. A female is heard on the audio tape and she is in attendance with the accused in the washroom.

- [97] I find that the police could without difficulty have given the accused a blanket to keep her warm and followed through with their commitment to provide the accused with a clothing change. Cst. Butler's excuses for not doing so were feeble. And, her request to use the toilet could have been accommodated without hindering the investigation at 1:45 a.m. when she finished her telephone consultation with duty counsel. I appreciate that Cst. Cargill had told Cst. Butler that he was to start the observation period after the lawyer call, but there was no sound reason to not defer the start of the observation period for the few minutes it would have taken for the accused to relieve herself. As a consequence of the refusal, she became increasingly desperate to use the toilet over the next 45 to 50 minutes - and it seems that she was not able to hold it: I refer to her statement at about 2:32 a.m. that she did not want to pee on their chair, but "I think I kind of maybe have."
- [98] Cst. Butler testified that he did not notice any urine in the backseat of his police vehicle or on the chairs at the detachment, and did not notice the accused's soiled pants. All that may be true, but I consider it highly unlikely that the accused was mistaken about her incontinence or that Cst. Butler disbelieved her when she was telling him of her distress.
- [99] Cst. Butler testified that he was weighing his concerns about the accused's well-being "against the evidence that we needed to capture, and the timings we had, and the desire to get her processed and completed as soon as possible to get her out of the police station, out of the observation room, no longer in police custody, and get her back home." If I had doubt about whether providing the minimal comforts sought by the accused would have taxed the detachment's available resources or compromised the investigation in any way, this evidence explaining why the accused was treated in this fashion might be more persuasive. But I do not.
- [100] I was referred to *R. v. Moonie*, 2013 BCSC 1866. In that case Justice Ker found a "fairly significant" breach of the accused's s. 7 rights. The police treatment of the accused in the case at bar shares some similarities, but it pales in comparison to what Justice Ker justifiably characterized as treatment of a particularly vulnerable detainee as lacking in decency and denying him "any modicum of respect for his inherent dignity and value as a human being" (para. 49).
- [101] In our case, the accused repeatedly complained of being very cold, and I am sure she was humiliated by sitting in soiled clothing and having to repeatedly beg for access to the toilet. The Crown does not suggest that the failure to provide the accused with such minimal comforts can be excused. To frame this in s. 7 terms, the Crown's position as I understand it is that if the treatment the accused received amounted to a deprivation of her right to security of her person, then it does not seek to justify the infringement as being in accordance with the principles of fundamental justice.

[102] The accused in the case at bar was neither assaulted by police like Mr. Nasogaluak nor neglected as egregiously as Mr. Moonie. That said, Cst. Butler was responsible for his prisoner's well-being, and he failed her. The s. 7 test, however, is not the same or necessarily even similar to an assessment of whether the treatment of a prisoner was appropriate.

[103] There was a physical component to the mistreatment of the accused. She was not relieved from the physiological state of being "very, very cold." Further, it is a matter of common human experience that not having the opportunity to urinate when badly needed creates physical discomfort. On the psychological side, the issue is whether, in the circumstances, this police treatment of a detainee in all its aspects including leaving her in soiled clothing would have had a sufficiently significant psychological effect on a person of reasonable sensibility to impact on their security of the person. I find without hesitation that it would have a greater effect than ordinary stress and anxiety. I conclude that a person of reasonable sensibility, in the vulnerable state that any detainee is in while in custody at a police detachment, would in similar circumstances experience an assault on their dignity and would feel humiliated. I consider both the physical and psychological effects of the police mistreatment of their detainee, and I conclude that it is sufficient to constitute a deprivation of the accused's right to security of her person.

Did the taking of breath samples at the detachment constitute an unreasonable search and seizure?

[104] Section 320.28(1) provides:

320.28(1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable,

- (a) require the person to provide, as soon as practicable,
- (i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, or
- (ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to take one, the samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, are necessary to enable a proper analysis to be made to determine the person's blood alcohol concentration; and
- (b) require the person to accompany the peace officer for the purpose of taking samples of that person's breath or blood.

- [105] An attack on the legality of a s. 320.28(1) demand is appropriately made via s. 8 of the Charter: *R. v. Alex*, 2017 SCC 37 at paras. 42-43. The presence of "reasonable grounds to believe" is a constitutional requirement of a lawful search and seizure under s. 8: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 51; *R. v. Shepherd*, 2009 SCC 35 at para. 13.
- [106] Cst. Butler needed the result of the ASD test to form reasonable grounds necessary to underpin a lawful s. 320.28(1)(a) breathalyzer demand. And, I have found that the ASD results were the product of an unreasonable search. The question, then, is whether this unconstitutionally obtained ground is to be considered when assessing whether the police officer had reasonable and probable grounds to make the demand.
- [107] On a first reading, the Woods case seems to provide a clear answer. In that case, the admissibility of the breathalyzer results depended on whether the police had sufficient grounds to make the demand; and in that case it was common ground that the ASD result constituted the only grounds for the demand (para. 7). The Court indicated that it followed that the only issue in the case was whether the ASD result was legally obtained - if it was not, the conviction could not stand (para. 8).
- [108] However, Woods does not refer to s. 24(2). The reason why it was considered a forgone conclusion that the conviction could not stand might have been because the Woods case was litigated when the approach to s. 24(2) laid down in *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 37, typically resulted in exclusion of evidence that emanated from an accused. Referring to Woods, the Quebec Court of Appeal in *R. v. Piazza*, 2018 QCCA 948 at para. 85, said the consequence of noncompliance by police with the requirements for ASD use "suffers from a certain degree of ambiguity." In my opinion, most if not all of that ambiguity has been cleared away by the logic underpinning recent Supreme Court of Canada decisions.
- [109] In *Alex*, at para. 43, Justice Moldaver, for the majority suggests an analogy between the treatment of unlawful breath demands and the approach in a search warrant context:

This role that s. 8 fulfills in relation to unlawful breath demands is consistent with the approach taken when the police fail to comply with the requirements of other statutory provisions governing their authority. For example, non-compliance with the statutory search warrant requirements does not result in automatic loss of the evidence -- rather it is subject to challenge under s. 8 of the Charter: see *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 278 and 280.

In a typical search warrant context, facts gathered during a process that is non-compliant with statutory search warrant requirements leads to a s. 8 infringement. In the result, the impugned facts are excised from the ITO before the Court analyzes its sufficiency.

- [110] I conclude that the ASD result obtained after a non-compliant demand, constituting an unlawful search and seizure conducted in the course of an arbitrary detention, must be disregarded when considering if the police had reasonable grounds to make the s. 320.28 breathalyzer demand. This approach is logically consistent with the analyses of the

majority of judges in *Zacharias*, who held that the Crown cannot rely on the product of an unreasonable search in an assessment of whether there were grounds for arrest. I cannot think of any reason why the same principle would not have application to the two-stage search process established by ss. 320.27 and 320.28. The *raison d'être* of the first-stage (roadside ASD) search is "to determine if more conclusive testing is warranted" in the form of the second-stage (breathalyzer) search: *Woods*, at paras. 6, 30-31; *Breault*, at para. 33. If the first-stage was an unreasonable search, surely it cannot be relied on as grounds for the second-stage search.

- [111] Without the ASD result, it is apparent from *Cst. Butler*'s evidence that the Crown cannot establish that he had "reasonable grounds to believe" that the accused operated a vehicle while her ability to do so was impaired to any degree by alcohol. I conclude that the taking of s. 320.28 breath samples constituted an unreasonable search and seizure.

Is the loss of the cellblock area video an infringement of s. 7?

- [112] Little needs to be said on this issue because, as I understand its position, the Crown concedes a s. 7 infringement based on a failure to disclose relevant evidence. The concession is appropriate. All available video evidence of this impaired driving suspect was manifestly important. The police appreciated the relevance of this evidence and intended to preserve it but because of unacceptable negligence failed to do so. This resulted in a failure to meet disclosure obligations, a component of the right to make full answer and defence, which is a s. 7 principle of fundamental justice. See *R. v. Carosella*, [1997] 1 S.C.R. 80 at para. 37; *R. v. La*, [1997] 2 S.C.R. 680 at paras. 16-23.

Summary

- [113] I summarize my conclusions in 10 points:

1. The accused's detention between shortly after 12:04 a.m. and her arrest at 12:22 a.m. is arbitrary and an infringement of s. 9.
2. The police officer was in violation of s. 10(a) by failing to clearly make the accused aware of her custodial status - i.e., whether she was under arrest or whether she was under investigative detention - in circumstances where clarity was necessary to fulfill a fundamental purpose of s. 10(a).
3. When the police officer impermissibly delayed the making of an ASD demand, any suspension of s. 10(b) that might have been in place lifted; the failure to advise the accused of her right to counsel upon detention was a breach of the informational component of s. 10(b).
4. The pat-down search was unreasonable, and a breach of s. 8.
5. The ASD demand was not in compliance with the Criminal Code, and the taking of an ASD sample was an unreasonable search and seizure that infringed s. 8.

6. The accused was already arbitrarily detained at 12:22 a.m., but her formal arrest at that time constituted an overlapping arbitrary detention and further breach of s. 9.
7. There was no breach of the implementational component of s. 10(b) in the aftermath of the 12:22 a.m. arrest.
8. The taking of breath samples at the detachment following the demand was made without sufficient grounds was an unreasonable search and seizure that violated s. 8.
9. The accused's s. 7 right to security of her person was infringed by her treatment at the police detachment.
10. The accused's s. 7 right to make full answer and defence was infringed by the failure to make disclosure of some of the video recordings made at the detachment while the accused was in police custody.

"Thompson J."

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Prepared on 24 October 2026 · Esheria