CITATION: *R. v. Sandhu*, 2017 ONCJ 226
DATE: April 6, 2017
COURT FILE No.: Brampton 14-11665

ONTARIO COURT OF JUSTICE

2017 ONCJ 226 (CanLII)

B E T W E E N :

HER MAJESTY THE QUEEN

- and –

TANBIR SANDHU

Before Justice P.A. Schreck
Heard on March 9, 2017

REASONS FOR JUDGMENT

J. Graham ..... counsel for the Crown
D. Locke ..... counsel for Tanbir Sandhu

SCHRECK J.:

[1] Over seven years ago, the Supreme Court of Canada made it clear in *R. v. Suberu,* 2009 SCC 33 that s. 10(*b*) of the *Charter* requires that a person who has been arrested or detained must be advised of his or her right to counsel "immediately". This is one of many cases in which a member of the Peel Regional Police did not advise a person he had arrested of her right to counsel immediately and was apparently unaware that he was required to do so. As a result, the person he arrested, Tanbir Sandhu, has applied to exclude the evidence of breath sample results from her trial on a charge of operating a motor vehicle while the concentration of alcohol in her blood exceeded the legal limit. At the conclusion of the trial, I gave brief oral reasons for allowing the application and dismissing the charge but indicated to counsel that I would provide fuller written reasons at a later date. These are those reasons.

I. EVIDENCE

[2] In the early morning hours of September 8, 2014, Cst. Tyrus Darcy of the Peel Regional Police stopped a car being driven by Ms. Sandhu in order to conduct a sobriety check. Upon speaking to Ms. Sandhu, Cst. Darcy noticed an odour of an alcoholic beverage emanating from her breath. This, together with an admission from Ms. Sandhu that she had consumed alcohol, led Cst. Darcy to form a reasonable suspicion that she had been operating a motor vehicle with alcohol in her body. As a result, he made a demand that she provide a breath sample into an approved screening device ("ASD"). She did so and registered a "fail". At 1:50 a.m., Cst. Darcy arrested Ms. Sandhu for operating a motor vehicle with excess blood alcohol.

[3] After arresting Ms. Sandhu, Cst. Darcy handcuffed her and placed her in the back of his police cruiser. Following this, Cst. Darcy left the cruiser and had a conversation with a woman who had emerged from Ms. Sandhu's car. He then had a conversation with other passengers who were still in the vehicle and explained to them that they would have to find alternate means to get home as the car was to be towed. Cst. Darcy then returned to his cruiser and began to fill out his notes. After that, at 1:59 a.m., he advised Ms. Sandhu for the first time of her right to counsel and also cautioned her and made a demand that she provide breath samples. Ms. Sandhu declined to speak to counsel.

[4] Cst. Darcy testified that it was his understanding that when he arrested a person, he was obliged to advise him or her of his right to counsel "as soon as practicable".

[5] Cst. Darcy later took Ms. Sandhu to the police station, where she provided two breath samples into an approved instrument, resulting in readings of 155 and 158 mg. of alcohol per 100 ml. of blood. She was charged accordingly.

II. ANALYSIS

A. Section 10(*b*) of the *Charter*

[6] Section 10(*b*) of the *Charter* provides that upon arrest or detention, individuals must be advised of their right to retain and instruct counsel "without delay". The meaning of the term "without delay" was explained by the Supreme Court of Canada in 2009 in *R. v. Suberu* (at para. 42):

> To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(*b*) creates an ill-defined and unworkable test of the application of the s. 10(*b*) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel

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> must be avoided, particularly as it relates to a right that imposes specific obligations on the police. *In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b).* Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, *the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention*. [Emphasis added].

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[7] As the Court made clear, "without delay" means "immediately". It does not mean "as soon as practicable". It does not mean after the arresting officer has attended to other aspects of the investigation, such as speaking to the occupants of the vehicle or writing notes. Cst. Darcy clearly did not advise Ms. Sandhu of her right to counsel immediately. Crown counsel conceded that this resulted in a violation of s. 10(*b*) of the *Charter*. She was correct to do so.

B. Section 24(2) of the *Charter*

(i) The Seriousness of the Violation

[8] Whether a *Charter* violation results in the exclusion of evidence will depend on an assessment of the factors set out in *R. v. Grant*, 2009 SCC 32, beginning with the seriousness of the breach. In my view, the breach in this case was serious.

[9] As mentioned earlier, *Suberu* was decided over seven years ago. As the Court noted, the concept of immediacy leaves little room for misunderstanding. Despite this, the police in Peel Region have repeatedly demonstrated what is at best a failure to grasp the dictates of the judgment, or, at worst, an unwillingness to follow it. See, for example, *R. v. Athwal*, 2017 ONSC 26 at para. 230; *R. v. Kraus*, 2015 ONSC 2769 at paras. 36-37; *R. v. Moulton*, 2015 ONSC 1047 at paras. 86-89; *R. v. Grewal*, 2015 ONCJ 691 at paras. 41-44; *R. v. Medeiros*, 2015 ONCJ 707 at para. 30; *R. v. Singh*, 2015 ONCJ 643 at para. 39; *R. v. Ahmad*, 2015, ONCJ 620 at paras. 15-19; *R. v. Lam*, 2014 ONSC 3538 at para. 230; *R. v. Soomal*, 2014 ONCJ 220 at para. 39; *R. v. Ramocan*, 2014 ONCJ 692 at para. 66; *R. v. Volkov*, [2014] O.J. No. 5346 (C.J.) at para. 25; *R. v. Thomson*, 2013 ONSC 1527 at paras. 137-140; *R. v. Godday*, 2013 ONSC 1298 at para. 86; *R. v. Thompson*, [2013] O.J. No. 3570 (C.J.) at para. 5; *R. v. Dinh*, 2011 ONSC 5644 at para. 48; *R. v. Watson*, 2010 ONSC 448 at para. 109.

[10] Cst. Darcy is not the only Peel officer who seems to believe that he is obliged to advise people he has arrested of their right to counsel "as soon as practicable": *Kraus* at para. 36; *Medeiros* at para. 12. The term "as soon as practicable" is often used in the drinking and driving context as it appears in s. 258(1)(*c*)(*ii*) of the *Criminal Code* in relation to when breath samples should be taken. In that context, it means "within a reasonably prompt time in the circumstances" and does not mean as soon as possible: *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489 (Ont. C.A.) at para. 12. It clearly

does not mean “immediately”. Rather, it denotes a degree of flexibility that is simply not present in the s. 10(*b*) context.

[11] In *Lam*, which was decided in 2014, Hill J. stated (at para. 337):

> While the denial of the right to counsel, over 10 months after *Suberu*, was deliberate on the part of the officers in the sense of intended, it was without individual knowledge of its wrongness. However, once again, the PRPS as an institution failed to equip its officers with the knowledge required of a reasonably trained police officer by unreasonably delaying formal notification of its officers of this change in the law until an August 2013 Training Bulletin, over four years after the *Suberu* (SCC) decision - a Bulletin which still does not make it explicitly clear that both the informational and implementational duties of the s. 10(*b*) *Charter* right are to be provided immediately upon the imposition of investigation detention.

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These concerns, expressed by a very experienced and well-respected jurist in this jurisdiction, apparently remain unheeded as in this case, an officer with almost 10 years of experience still does not appreciate that the right to counsel has to be provided immediately. This appears to be a systemic problem, which renders the breach more serious: *R. v. Harrison,* 2009 SCC 34 at para. 25.

(ii) The Impact of the Violation

[12] Crown counsel acknowledged that the breach had some impact on Ms. Sandhu’s *Charter*-protected interests. Being made aware that one has the right to contact counsel may provide a degree of comfort to an individual who has been detained. As well, in the context of roadside detentions, the right to counsel is suspended during the investigation: *R. v. Orbanski; R. v. Elias,* 2005 SCC 37. As a result, by the time people in Ms. Sandhu’s situation are placed under arrest, they have already been detained for a period of time without being advised of their right to counsel. This makes it all the more important that they be advised of the right immediately upon arrest.

[13] I note, however, that in this case Ms. Sandhu declined to contact counsel, which in my view lessens the impact of the breach. In all the circumstances, I conclude that the impact of the breach in this case was moderate.

(iii) Society’s Interest in an Adjudication on the Merits

[14] With respect to the third branch, the evidence that is sought to be excluded is reliable and indispensable to the Crown’s case, factors which favour inclusion.

(iv) Balancing

[15] As the Supreme Court of Canada noted in *Harrison* at para. 36, "[t]he balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision." In this case, despite the reliability of the evidence and the limited impact of the breach, I have concluded that the seriousness of the breach is such that exclusion is necessary to maintain the long-term repute of the administration of justice. The protection of the constitutional rights of those who interact with the criminal justice system requires the cooperation of the courts and the police. While the courts can interpret the *Charter,* they cannot protect constitutional rights unless the police ensure that they are aware of what the courts have said the *Charter* requires of them and ensure that those requirements are met. When the police fail to do this, it falls to the courts to make clear to the public that *Charter* rights matter. The evidence must be excluded.

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III. DISPOSITION

[16] There being no admissible evidence of Ms. Sandhu's blood alcohol concentration, the charge is dismissed.

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Justice P.A. Schreck

Released: April 6, 2017.