

Case Name:  
**R. v. McLean**

**Between**  
**Her Majesty the Queen, Crown, and**  
**Robert Andrew McLean, Accused**

[2014] A.J. No. 1137

2014 ABPC 231

Docket: 131243958P1

Registry: St. Paul

Alberta Provincial Court

**R.M. Saccomani Prov. Ct. J.**

Heard: July 30, 2014.  
Judgment: October 15, 2014.

(73 paras.)

*Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Right to retain and instruct counsel without delay -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Stay of proceedings -- Application by accused for stay of proceedings pursuant to s. 24(1) of Charter, or alternatively, exclusion of evidence pursuant to s. 24(2) on basis it was obtained in violation of his s. 10(b) Charter right allowed -- Accused was charged with impaired driving -- Accused alleged and officer confirmed that, while accused was in telephone room at police detachment, officer heard portions of accused's conversation with counsel -- Breach of accused's s. 10(b) Charter right occurred -- Right to retain and instruct counsel was one of most important rights of accused during police investigation -- Evidence was excluded.*

Application by the accused for a stay of proceedings pursuant to s. 24(1) of the Charter, or in the alternative, exclusion of evidence pursuant to s. 24(2) of the Charter on the basis it was obtained in violation of his s. 10(b) Charter right. The accused had been charged with impaired driving. Following the accused's arrest he was transported to the RCMP detachment, at which point he was given an opportunity to exercise his s. 10(b) rights to retain and instruct counsel and was placed in a small telephone room. The officer then

monitored the accused while the accused was in the room to ensure the accused was not "messaging around." The accused alleged and the officer confirmed that, while the accused was in the telephone room, the officer was able to hear portions of the accused's conversation with counsel clearly enough to record the conversations in the officer's duty book. At issue was whether the accused's s. 10(b) Charter right to counsel was violated on the basis of a privacy breach during his attempt to exercise his rights and, if there was a violation, the appropriate remedy under s. 24(2) of the Charter.

HELD: Application allowed. The s. 10(b) Charter right to retain and instruct counsel included the ability to do so in private without being overheard by police. An accused must have been able to communicate candidly with counsel with an expectation of confidentiality so as to not prejudice an accused in the exercise of his or her legal rights. Police had a duty to provide privacy to a detainee. However, an accused's speculation or unreasonable assumption that communications could be overheard was not sufficient to establish a breach of his or her s. 10(b) Charter rights. Even if a privacy invasion was not proven, an accused may establish a s. 10(b) infringement where there was 1) a subjective belief he or she could not retain and instruct counsel in private and 2) that the belief was objectively reasonable in the circumstances. The accused was credible and his testimony was accepted. He said he felt constrained to speak freely with counsel because he feared police would overhear his conversation. However, the officer who overheard the accused was also credible and acted in good faith in trying to ensure compliance with the accused's s. 10(b) Charter rights. Although the accused did not voice his complaint with the officer when it arose, there was no legal burden placed on the accused to do so. The accused's subjective belief was objectively reasonable and a breach of his s. 10(b) Charter right occurred. Regarding the remedy pursuant to s. 24(2) of the Charter, the officer was not willfully blind of a breach of the accused's s. 10(b) rights. The police telephone room and the way it was used did not satisfy its function as a private space for the accused to communicate freely with counsel. The adequacy of the room had to be considered. The intrusion was significant and the right to retain and instruct counsel was one of the most important rights of an accused during police investigation. Admission of the evidence would have brought the administration of justice into disrepute.

#### **Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 10(b), s. 24(1), s. 24(2)

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 253(1)(a), s. 253(1)(b)

Traffic Safety Act, RSA 2000, c. T-6, s. 115(2)

#### **Counsel:**

Mr. Randy Brandt, for the Crown.

Mr. Rory Ziv, for the Accused.

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## Ruling on a *Voir Dire*

R.M. SACCOMANI PROV. CT. J.:--

### INTRODUCTION

1 In the early morning hours of October 19th, 2013, Robert Andrew McLean ("the Accused") was pulled over for speeding near Cold Lake, Alberta and charged pursuant to Section 115(2) of the *Traffic Safety Act*.

2 As a result of the traffic stop, police also began an impaired driving investigation and subsequently charged the Accused as follows:

**Count 1:** On or about the 19th of October, 2013, at or near the City of Cold Lake, in the Province of Alberta, while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle, contrary to Section 253(1)(a) of the *Criminal Code of Canada*; and

**Count 2:** On or about the 19th October, 2013, near the City of Cold Lake, in the Province of Alberta, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred milliliters of blood operate a motor vehicle, contrary to Section 253(1)(b) of the *Criminal Code of Canada*.

3 The Accused filed and served a Notice seeking a Stay of Proceedings pursuant to section 24(1) of the *Charter* or alternatively, the exclusion of evidence (the Certificate of Analyses) gathered during the police investigation pursuant to s.24(2) of the *Charter* on grounds that it was obtained in violation of his section 10(b) *Charter* rights to retain and instruct counsel.

4 At the commencement of trial, the Crown confirmed it would not call any evidence on the section 253(1)(a) offence and accordingly, Count 1 was dismissed. Crown and Defence also agreed that evidence be heard in a blended *voir dire* with admissible evidence to be applied to the trial proper.

5 A brief oral ruling was rendered in this matter with an undertaking that written reasons would follow. These are my reasons.

### EVIDENCE

6 The Court heard from two witnesses in the *voir dire*; namely, Constable Simon Bouthillier ("Cst. Bouthillier") an experienced member with the Cold Lake RCMP and the Accused.

## **Summary of the Evidence of Cst. Bouthillier**

**7** On October 19, 2013, Cst. Bouthillier was in uniform, on duty, and operating a marked vehicle when he stopped the Accused for speeding. An impaired driving investigation began soon after.

**8** The Accused provided a sample into an Approved Screening Device which registered a fail. Cst. Bouthillier, having formed grounds, placed the Accused under arrest and then read the s. 10(b) *Charter* rights to counsel to him.

**9** The Accused confirmed his understanding of his Charter rights and informed Cst. Bouthillier that he did not wish to contact counsel "at that moment". The Accused was then transported to the RCMP detachment.

**10** Upon arrival at the Cold Lake detachment, the Accused was provided with a second opportunity to exercise his s. 10(b) rights and placed in a small room ("the telephone room") which was equipped with a telephone, a yellow page telephone directory, a counter and a chair.

**11** Cst. Bouthillier continually monitored the Accused by looking through the small window in the door of the telephone room to ensure that the Accused was not "messaging around." He explained that on the basis of past experience in impaired driving investigations, some accused persons "messed around" by eating pages from the telephone directory, by vomiting, and/or by sleeping rather than making earnest efforts to contact legal counsel.

**12** At one point during the Accused's conversation with counsel, Cst. Bouthillier overheard the words "Cold Lake" and "driving under the influence" through the shut door of the telephone room. Cst. Bouthillier surmised that the Accused was probably yelling in order to have overheard those spoken words through the closed door.

**13** Cst. Bouthillier also acknowledged that discussions between counsel and an accused person were to be conducted in private. He explained that after overhearing these words by the Accused, he "had to back down". In this regard, Cst. Bouthillier took two to three steps away from the closed door to the telephone room to avoid hearing any more of the conversation.

**14** Cst. Bouthillier recorded the words "Cold Lake" and "driving under the influence" in his duty note book. Aside from these utterances, Cst. Bouthillier did not overhear any other words spoken by the Accused while in the telephone room.

**15** The Accused was in the room for approximately ten minutes when he was observed hanging up the telephone. Cst. Bouthillier did not recall any unusual activity or noise in the detachment during this period of time.

**16** Cst. Bouthillier then opened the door to the telephone room and asked the Accused whether he was done. The Accused acknowledged that he had spoken to someone and

was satisfied with the discussion. The Accused was asked if he wished to place another phone call to which he responded "I am done and ready to proceed."

**17** Cst. Bouthillier explained that his customary practice in impaired investigations is to ask an accused person a series of standard questions following legal consultation. These questions include:

- \* Are you done? Yes or no?;
  
- \* Did you talk to someone? Yes or no?;
  
- \* Are you satisfied with the advice received in the last discussion? Yes or no?;
  
- \* Do you want to make another phone call? Yes or no?; and
  
- \* Are you ready to proceed? Yes or no?

**18** Cst. Bouthillier explained that if the Accused had expressed a desire to seek further legal advice, or if he had raised any other issue, such concerns would have been immediately addressed.

### **Summary of the Accused's Testimony**

**19** The Accused chose to testify in the *voir dire*. He told the court that after being escorted into the telephone room, Cst. Bouthillier directed him to a phone book, and advised him that he would be afforded privacy in order to contact a lawyer.

**20** The Accused then successfully reached a lawyer whose number he found in the yellow page directory. The legal advice received was described as helpful.

**21** The Accused acknowledged that while Cst. Bouthillier did not make any statements to him through the closed door, he could overhear conversations taking place outside the room when he was on the phone with legal counsel. Although he could not hear exactly what was being said, he was able to identify the voices of two investigating officers outside his door. He agreed that the officers were not yelling. Nonetheless, the Accused was unsure as to what the officers themselves could hear from inside the room during his conversation with counsel.

**22** As a result, the Accused concluded that his conversation was not private. This in turn made him reluctant to explore certain topics of legal inquiry with counsel. The Accused's primary concern is that he might be overheard. He testified: "I felt uncomfortable...I was nervous...the charges were serious...I was worried about them hearing what I had to say

on the phone...even though I spoke quietly, the officer was continually coming up to the window."

**23** The Accused admitted he did not then voice his privacy concerns to Cst. Bouthillier because he wanted to appear cooperative and thought that it would not benefit his cause to do so. He assumed that he could subsequently "sort it out with counsel".

**24** The Accused also noted that it was nearing four in the morning and given that he had to report to work within a few hours, he did not feel there was anything to gain by raising these issues. He made it clear, however, that he would have preferred additional legal advice at that time in order to help him understand the criminal process he was facing.

**25** The Accused flatly denied yelling any words at any time while in the telephone room.

## ISSUES

**26** The issues considered on the *voir dire* are as follows:

**Issue No. 1:** Whether the Accused's section 10(b) *Charter* right to counsel was violated on the basis of a privacy breach during his attempt to exercise his rights; and

**Issue No. 2:** If there was a violation, the appropriate remedy (if any) pursuant to section 24(2) of the *Charter*.

## LAW & ANALYSIS

### Issue 1 -- The Right to Retain and Instruct Counsel in Private

#### Legal Principles

**27** The s.10(b) *Charter* right to retain and instruct counsel includes the ability to do so in private without being overheard by police; *R. v. Dowell*, 2010 ABPC 389; *R. v. Rudolph* (1986), 32 C.C.C. (3d) 179 (Alta. Q.B.); *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.).

**28** An accused person must be able to freely and candidly communicate with counsel in a manner consistent with the expectation of confidentiality -- a hallmark of the solicitor-client relationship. It would defy common sense to expect an accused to properly instruct counsel if the conversation can be overheard; *R. v. Edgar*, 2013 ABPC 238 at para. 64; *R. v. Playford, supra* at para. 31.

**29** Conversations between a detainee and counsel typically require the provision of details or an explanation of the circumstances which led to the arrest. If such communications were overheard, they may be armed with the potential to seriously prejudice an accused in the exercise of legal rights; *R. v. Playford, supra* at para. 31; *R. v. Burley*, 2004 CanLII 9437 (ONCA).

**30** Police therefore have a duty to provide privacy to a detainee during his or her consultation with counsel. An actual lack of privacy in these circumstances is a breach of an accused's s. 10(b) *Charter* rights; *R. v. Hume*, 2013 ONCJ 380 (Ont. C.J.) at para. 30; *R. v. Carroll* (2002), 2002 CarswellOnt 987 (Ont. S.C.); *R. v. Playford*, *supra* at para. 40.

**31** Pure speculation or unreasonable assumptions on the part of an accused that communications could be overheard, however, would not be sufficient. On a balance of probabilities, there must be proof of a real or substantial possibility that a conversation was overheard; *R. v. Stacey*, 280 Nfld & P.E.I.R. 27 (Nfld. Prov. Ct.) at para. 25; *R. v. Luong*, 2000 ABCA 301.

**32** The applicable legal test in the circumstances is the 'reasonable apprehension test'. In the absence of a proven privacy invasion there may nevertheless be a s.10(b) infringement where an Accused establishes: 1) a subjective belief that he/she could not retain and instruct counsel in private; and that 2) said belief was objectively reasonable in the circumstances; *R. v. Dowell*, *supra*; *R. v. Edgar*, *supra*; *R. v. Watamaniuk*, 2012 ABPC 266; *R. v. Veness*, 2007 ABQB 283; *R. v. Cairns*, [2004] O.J. No. 210 (Ont. C.A.); *R. v. Miller*, 1990 CanLII 6490 (NL CA).

**33** In applying the test, the court must consider unique contextual factors including the actual location where the Accused was offered the opportunity to speak with counsel and events surrounding the alleged breach; *R. v. Stacey*, 2008 Nfld & P.E.I.R. 27 (Nfld. Prov. Ct.).

**34** There is no legal burden on an accused to advise police of privacy concerns at the time they arise. The presence or absence of a complaint is simply one of the contextual factors to be considered within the analysis of the totality of the circumstances; *R. v. MacKinnon*, 2013 NSSC 356 (N.S.S.C.) at para. 29; *R. v. Hume*, *supra* at para. 33.

*Relevant Cases: Section 10(b) Charter Breach Not Found*

**35** In *R. v. Edgar*, 2013 ABPC 238 (Alta. Prov. Ct.), the accused was placed in a telephone room that was alleged not to be soundproof. The room was separate from the rest of the station and doubled as a cell block monitored by CCTV without audio. There was no evidence that the accused was alert or aware as to whether he could be overheard. He did not testify that he was constrained in any of his communications with counsel. The court held that the accused's s.10(b) *Charter* rights were not breached.

**36** In *R. v. Rumpel*, 2011 SKPC 52 (Sask. Prov. Ct.) the investigating officer placed his ear to the door of the telephone room for approximately eleven seconds when the Accused may have been on the phone with counsel. There was no explanation or evidence as to whether the officer was actually able to hear anything at all from the telephone room. The court held there was no more than a theoretical possibility that the investigating officer heard anything. As such, this was insufficient to establish a s.10(b) *Charter* violation.

**37** In *R. v. Dowell*, 2010 ABPC 389 the court also held that it was only a theoretical possibility that the accused's call to counsel could be overheard outside a phone room

which was constructed inside a roadside Checkstop vehicle. The accused testified that he could hear footsteps, a door to the vehicle opening and closing, and the generator which heated the van but was unable to hear conversations outside the room. The officer testified that he was not able to hear what the accused said and that conversations conducted at normal tones could not be heard outside the room. The theoretical possibility was insufficient to establish a breach of s.10(b).

*Relevant Cases: Section 10(b) Charter Breach Found*

**38** Three Ontario cases alleging s.10(b) privacy breaches are of assistance.

**39** In *R. v. Burns*, 2005 ONCJ 387 (Ont. C.J.), the accused testified that she felt inhibited while speaking to counsel because she could not discern if the cell block door was closed or whether the neighbouring prisoner held in an adjacent cell could hear her discussions. Police agreed that the accused may not have been aware the adjacent prisoner had been moved to give her privacy. The court held that the accused's subjective belief and concerns were objectively reasonable in the circumstances and a s.10(b) breach was accordingly found.

**40** In *R. v. Carroll*, 2002 Carswell Ont 987 (Ont. S.C.J.) an accused's voice could be heard by an officer standing six to seven feet away from a phone booth constructed inside a R.I.D.E. program motorhome. Another officer also peered through the booth window making the accused feel hurried and inhibited in his conversation with counsel. The court held that the accused's subjective belief was objectively reasonable and that his s.10(b) *Charter* right to contact counsel in private was therefore breached.

**41** In *R. v. Ogbaldet*, 2010 ONCJ 477 (Ont. C.J.) an accused stated he was inhibited in speaking with counsel when he heard voices and noises from outside his interview room. The room had a camera and it was unclear whether it was powered on or off. As soon as the accused finished his call, an officer entered the room. The officer did not explain how he knew the conversation had finished. The court held the accused's concerns that he might be overheard in the circumstances (thereby inhibiting his discussions with counsel) were reasonable and constituted a breach of his s.10(b) *Charter* right to retain and instruct counsel.

Principles Applied

**42** There were no material inconsistencies in the testimony of the Accused and he impressed as a sincere and credible young man. The Accused stated he was uncomfortable, nervous, and felt constrained to speak freely with counsel because he feared he might be overheard by officers.

**43** The Accused concluded that his conversation was not private because he could hear police voices outside the telephone room while he remained inside on the phone. Throughout his conversation with counsel, he observed that he was being continually watched through the small window fitted in the door by the investigating officer.

**44** Resultantly, the Accused curbed his legal inquiries which he would have otherwise preferred to explore. I accept his testimony.

**45** Cst. Bouthillier similarly presented as a credible witness whose testimony did not have any material inconsistencies. I too accept the account that he provided. Cst. Bouthillier admitted that he overheard words spoken by the Accused while he stood outside the room. As he was aware that the Accused was entitled to privacy, he immediately backed away from the door and recorded what he heard in his duty book. Cst. Bouthillier acted in good faith and tried to ensure compliance with the Accused's s.10(b) *Charter* rights.

**46** In his testimony, Cst. Bouthillier speculated that the Accused was probably yelling certain words while in the telephone room in order to have been overheard by him. As the Accused expressly denied doing so, and given Cst. Bouthillier's concession that his conclusion was based on conjecture, I do not accept that the Accused yelled at any time while he was on the telephone with legal counsel.

**47** The Crown argued that the content of what was overheard was inconsequential considering that compliance with a breathalyzer demand is mandatory regardless of legal advice received. A similar argument was raised, considered, and rejected by our Court of Appeal in *R. v. Berger* 2012 ABCA 189.

**48** In *Berger*, the Court stated that if such an argument were accepted, its effect would be to "insulate s. 10(b) *Charter* breaches in the course of an investigation of an over .08 charge from any consequence because the accused person has little choice but to eventually provide a breath sample in any event" (*supra*, at paras. 24-35). The Court further explained that in the context of impaired driving cases, counsel may still provide an accused with important advice regarding interrogation strategies, release procedures, and the right to remain silent.

**49** In this case, the youthful Accused has had no prior experience dealing with the law. I believe him when he testified that he "wanted to appear cooperative" and did not think that "demands for privacy" would advance his cause.

**50** I have also considered that the Accused did not voice his complaint with Cst. Bouthillier at the time it arose. This factor, however, remains only one of various contextual factors to be considered in the circumstances. The law is clear that there is no legal burden at law placed on the Accused to unilaterally raise such a concern when it arises.

**51** In considering all the circumstances and relevant contextual factors in the totality of the evidence presented, I find that the Accused's subjective belief was objectively reasonable and, on the facts of this case, amounted to a breach of his s.10(b) *Charter* right to retain and instruct counsel in private.

**52** Having found a breach, the appropriate remedy, if any, must be determined.

## **Issue 2 -- Remedy**

## Legal Principles

**53** Pursuant to s.24(2) of the *Charter*, evidence obtained in breach of a guaranteed right or freedom shall be excluded if it is established, while having regard to all the circumstances, that its admission would bring the administration of justice into disrepute.

**54** In *R. v. Grant*, 2009 SCC 32, the Supreme Court of Canada established the relevant legal test to be applied when considering applications to exclude evidence pursuant to s.24(2) of the *Charter*. In deciding this issue, courts must balance the effects of the admission of the evidence with society's confidence in the administration of justice while having regard to:

1. the seriousness of the *Charter*-infringing state conduct;
2. the impact of the breach on the *Charter*-protected interests of the accused; and
3. society's interest in the adjudication of the case on its merits (at para. 71).

### *Seriousness of Infringing State Conduct*

**55** The first stage of the analysis is fact-specific. Evidence obtained by deliberate and egregious police conduct that disregards the accused's rights may result in the public concluding that the court implicitly condones such conduct; *R. v. Grant, supra* at para. 109.

**56** There will be a greater need for the court to dissociate itself from deliberate or severe state conduct that led to the *Charter* violation; *R. v. Ogbaldet, supra* at para. 69.

**57** Good faith shown by police will reduce the need for disassociation from the breach; however, negligence, ignorance or wilful blindness of *Charter* standards must not be encouraged or rewarded; *R. v. Grant, supra* at para. 75.

### *Impact of Breach on Charter-protected Interests*

**58** The second inquiry involves an evaluation of the extent to which the breach in question has undermined the Accused's interests protected by the *Charter* right. The impact of a breach can range from fleeting and technical to profoundly intrusive.

**59** The more serious the impact on the accused's interests, the greater the risk that admitting the evidence may signal the *Charter* protected right is of little help or benefit to citizens; *R. v. Grant, supra* at para. 76.

**60** Step two of the *Grant* inquiry considers the danger that the admission of evidence might also suggest to the public the *Charter* right in question "does not count, thereby

negatively impacting the repute of the justice system." *R. v. Grant, supra* at para. 109. The more serious the state intrusion, the more important it will be for a court to exclude evidence; *R. v. Ogbaldet, supra* at para. 70.

*Society's Interest in the Adjudication of the Case on its Merits*

**61** The third inquiry in the *Grant* test assesses whether the truth seeking function of the criminal trial process would be best served by the exclusion or admission of the evidence and focuses on having the case tried fairly on its merits; *R. v. Grant, supra* at para. 97. Factors such as the importance of the evidence to the Crown's case and the reliability of evidence should be weighed; *R. v. Ogbaldet, supra* at para. 71; *R. v. Grant, supra* at para. 83.

**62** In balancing the integrity of the justice system and the interests of truth, the court must assess whether the vindication of the *Charter* breach through the exclusion of evidence inflicts too great a toll on the truth seeking objective in criminal trials; *R. v. Grant, supra* at para. 82.

Principles Applied

**63** I have noted that Cst. Bouthillier acted in good faith and there was no evidence that he was wilfully blind of or deliberately attempting to bring about a breach of the Accused's s.10(b) *Charter* rights. This factor reduces (but does not eliminate) the need for dissociation of evidence obtained by virtue of the conduct that brought it about. Police conduct in the context of this case must necessarily extend to the appropriateness of the facilities provided to the Accused in order to fully exercise and protect the sanctity of his s.10(b) *Charter* right.

**64** The police telephone room, its construction, the manner in which it was utilized, or potentially a combination of these factors, created a space which failed to satisfy one of its primary functions [ie] a private space for the Accused to communicate freely and candidly with counsel. Although the precise reason the room failed was not the focus of inquiry at trial, evidence nevertheless established that the Accused heard conversations outside the room and that he too was overheard talking to legal counsel while inside the room.

**65** Although the Accused spoke in normal conversational tones, Cst. Bouthillier confirmed the inadequacy of the room when he told the court he heard portions of the conversation clearly enough to record bits of what was spoken by the Accused in his duty book. The room, therefore, was not a private space.

**66** In addition to state conduct, the adequacy of the facility provided by police to the Accused for the purpose of securing his s.10(b) rights must be considered together with the potential perception by the public. In these circumstances, the public could reasonably conclude that the court implicitly condones the use of such a non-private facility thereby raising questions regarding the importance and preservation of fundamental *Charter* rights.

**67** In the circumstances of this case, the breach in question seriously undermined the

Accused's s.10(b) *Charter* right to retain and instruct counsel. In my view, the intrusion was significant. The Accused's fear that he may not have been conducting his conversation in private and the subsequent constrictive effect on his ability to exercise and enjoy his right was more than a theoretical speculation. Cst. Bouthillier confirmed the failure of the telephone room when he testified he was able to hear portions of the Accused's conversation clearly enough to record them in his duty book.

**68** The right to retain and instruct counsel is one of the most important *Charter* rights an accused has when being investigated by police and later prosecuted by the Crown. Its preservation is a fundamental principle of any fairly conducted criminal trial proceeding.

**69** An accused's s.10(b) right becomes a 'straw man' if it cannot be exercised in private. An accused who is unable to communicate freely in an environment that preserves the sanctity of the solicitor-client relationship loses the ability (as occurred in this case) to explore, raise, and procure answers and receive advice in relation to material legal questions and concerns; *R. v. Edgar, supra* at paras. 65-67; *R. v. Playford, supra* at para. 31; *R. v. Rees*, 1986 CanLII 1298 (BC SC) at para. 14.

**70** The Certificate of Analyses and breath samples collected represent reliable and important Crown evidence. I have considered the public interest in a determination on the merits in criminal trials engaging impaired driving offences. Impaired driving is a serious offence which permeates Canadian culture and contributes to the cause of significant harm. These factors favour inclusion of the evidence.

**71** The public, however, also has a "vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high." *R. v. Grant, supra* at para. 84. Therefore, in all the circumstances of this case and with full consideration of the factors and prongs of inquiry articulated in the *Grant* test, I am satisfied that the admission of evidence in this case would bring the administration of justice into disrepute.

## **CONCLUSION**

**72** In the circumstances of this case, I conclude that the Accused's section 10 (b) *Charter* right to instruct and retain counsel in private was breached, that the breach was significant and that the balance falls in favour of excluding the Certificate of Analyses from the evidence.

**73** The remaining count pursuant to s. 253(1)(b) of the *Criminal Code* against the Accused is accordingly dismissed.

Dated at the City of St. Paul, Alberta this 15th day of October, 2014.

R.M. SACCOMANI PROV. CT. J.