

Citation: *R. v. Nagano*, 2022 YKTC 42

Date: 20221012
Docket: 21-11010
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REX

v.

STEVEN ANDREW NAGANO

Appearances:
Adrian Switzer
Vincent Larochelle

Counsel for the Crown
Counsel for the Defence

**RULING ON *CHARTER* APPLICATION AND
REASONS FOR JUDGMENT**

[1] RUDDY T.C.J. (Oral): Steven Nagano is before me for trial on offences of impaired operation of a conveyance and failing or refusing to provide a breath sample. Both offences are alleged to have occurred in Dawson City, Yukon on June 4, 2021. Mr. Nagano has filed a Notice of Application asserting that his rights under ss. 8, 9, and 10(b) of the *Charter* were violated during the investigation.

[2] The *Charter* motions and trial proceeded by way of a blended *voir dire*. Date, identification, and jurisdiction were conceded by the defence at the outset. The only evidence called in the *voir dire* was that of the investigating officer, Cst. Vincent Madore.

[3] In brief, Cst. Madore says that on June 4, 2021, at approximately 10:00 p.m. he was in his police vehicle waiting in the line up for the Dawson ferry. As this was around

shift change, there would have been a delay of 30 to 40 minutes before the next ferry sailing. When the ferry was ready for boarding, Cst. Madore noted vehicles passing to the left of a pickup truck to get onto the ferry. Cst. Madore decided to do a wellness check on the pickup and noted Mr. Nagano to be asleep behind the wheel. After rousing Mr. Nagano, Cst. Madore says that he observed indicia of impairment, which caused him to make a demand for a sample into an Approved Screening Device (“ASD”), on the basis of reasonable suspicion. Mr. Nagano made five unsuccessful attempts at the roadside and an additional four unsuccessful attempts at the police detachment but failed to provide a suitable sample.

Issues

[4] Counsel have identified five issues for determination, two in relation to the *Charter* motion and three in relation to the trial proper. The *Charter* issues are:

1. Whether the officer had a reasonable suspicion to make the demand;
and
2. If so, whether the ASD demand was made forthwith?

[5] Counsel for Mr. Nagano does not seek exclusion of any evidence, but rather asserts that a favourable finding on either or both questions would necessarily mean that the demand was not lawful, an essential element of a refusal.

[6] With respect to the trial proper, the identified issues are:

1. Whether Mr. Nagano understood the consequences of failing or refusing to provide a breath sample;
2. Whether the evidence establishes that Mr. Nagano did indeed fail or refuse to provide a breath sample; and
3. Whether the evidence establishes, beyond a reasonable doubt, that Mr. Nagano's ability to operate a conveyance was impaired by alcohol?

Charter Issues

Reasonable Suspicion

[7] Turning to the first issue, as noted, the ASD demand in this case was based on reasonable suspicion pursuant to s. 320.27(1)(b) of the *Criminal Code*, which sets out two preconditions for a lawful demand. The section authorizes a peace officer to demand a breath sample into an approved screening device "if [the] 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".

[8] With respect to the latter precondition, namely operation of a conveyance, evidence of actual driving is not required. The definition of "operate" in s. 320.11 includes having "care or control" of a conveyance. In addition, s. 320.35 includes a rebuttable presumption that a person has been operating a conveyance if it is proven that the person occupied the seat "ordinarily occupied by a person who operates a

conveyance". In this case, the WatchGuard video ("the video"), filed as exhibit 1, clearly shows that Mr. Nagano was in the driver's seat of the pickup truck when approached by Cst. Madore, thereby establishing the necessary grounds to believe that Mr. Nagano had operated a conveyance.

[9] At issue, is whether the evidence establishes the remaining precondition for a lawful demand, namely reasonable grounds to suspect that Mr. Nagano had alcohol in his body at the time Cst. Madore made the demand. The officer's grounds must be both subjectively held and objectively reasonable.

[10] Defence counsel argues that the evidence falls short of establishing the requisite grounds because of concerns with the credibility and reliability of the officer's evidence. Crown concedes that Cst. Madore's credibility was shaken on cross-examination, but argues that there is nonetheless sufficient credible evidence, particularly in the video, to establish the necessary reasonable suspicion.

[11] Cst. Madore was asked to articulate his grounds on a number of occasions in both direct and cross-examination. There were some slight differences in each of the versions, but in totality, Cst. Madore made the following observations before making the ASD demand which must be considered in assessing whether he had reasonable grounds to suspect that Mr. Nagano had alcohol in his body:

- Mr. Nagano did not wake up when Cst. Madore knocked on the door of the truck and shook Mr. Nagano by the shoulder. Cst. Madore indicated he had to press a pressure point behind Mr. Nagano's ear to rouse him;

- The smell liquor on Mr. Nagano's breath;
- Bloodshot eyes;
- Slurred speech;
- Difficulty following simple instructions. Specifically, when asked for his driver's licence, Mr. Nagano instead put a sweater and a hat on. When reminded to produce his licence, Mr. Nagano fumbled around looking for his wallet and knocked over or dropped an open bottle of water on a pizza box;
- Once he had his wallet, Mr. Nagano had problems with what Cst. Madore first referred to as gross motor coordination, but later corrected that he had meant fine rather than gross motor coordination. Instead of producing his driver's licence, Mr. Nagano first produced a credit card and then a health card. He never produced a driver's licence.

[12] While this enumerated list, on its face, would clearly support a finding that there were indeed sufficient grounds to support a reasonable suspicion, such a finding is almost entirely dependent on an assessment of the credibility of Cst. Madore. As conceded by Crown, there were significant issues with Cst. Madore's credibility.

[13] Concerns with the officer's credibility relate to numerous inconsistencies between his testimony and written disclosure materials and between his evidence and what is observed on the video.

[14] To begin, as already noted, there were a number of variations between versions Cst. Madore provided throughout his testimony at trial when asked to enumerate his grounds. As an example, one recitation included slurred speech while another did not. One might hope an officer testifying at a trial in which one of the primary issues is the sufficiency of his grounds would be better prepared in giving his evidence, but it would be unfair to hold any witness, including a police officer, to a standard of perfection in assessing their evidence. Accordingly, these relatively minor variations in versions would not have caused me undue concern on their own, provided the totality of the evidence established the requisite grounds. The same cannot be said of the major inconsistencies between Cst. Madore's evidence and both the video and the notes and reports he prepared in relation to this investigation.

[15] In terms of his contemporaneous notes, Cst. Madore made absolutely no mention of any indicia he relied upon to support his reasonable suspicion. Indeed, the first note in his notebook is the time of the ASD demand. When asked why, he replied that he noted the time of the demand because he knows it's important, as if to suggest his grounds for the demand are not equally, if not more, important. On another occasion, when asked why he did not note something down, he replied that he did not have to as it was recorded on video. As the entirety of the ASD demand was captured on video while indicia such as smell of alcohol was not, his rationale for what to include and what not to include in his contemporaneous notes made little logical sense when one considers the purpose of taking notes as an aide memoire.

[16] When it was pointed out to Cst. Madore that he had considerable time standing beside Mr. Nagano's vehicle, while Mr. Nagano was looking for his wallet, during which

he could have made notes about indicia, Cst. Madore replied that he did not do so because it was raining and because of concerns for officer safety, describing Mr. Nagano as confrontational. As Mr. Nagano was inside his vehicle throughout this period of time, there is nothing to suggest that he posed a threat to Cst. Madore's safety at that point. I would further note that the video does not seem to support Cst. Madore's assertion that Mr. Nagano was confrontational throughout their interaction. Mr. Nagano is clearly upset and difficult throughout the video, including cursing and demanding Cst. Madore's badge number repeatedly; however, Mr. Nagano is neither physically nor verbally threatening. Cst. Madore referenced, at one point, body language of Mr. Nagano's that he said was confrontational, but that was not visible on the video. He offered absolutely no explanation as to what he meant by this, or why it would not be observable on the video. When asked at another point in his evidence to elaborate on what he meant by confrontational, Cst. Madore said that Mr. Nagano was upset, tired, and just wanted to go home, which is entirely consistent with the video, but not, in my view, confrontational.

[17] It was also pointed out to Cst. Madore that while Mr. Nagano was looking for his wallet, the officer was continually looking around. He explained that he was doing so again for officer safety reasons as a number of vehicles had pulled up and a crowd was forming to see what was going on. Again, the video contradicts Cst. Madore's evidence in this regard. The video shows one vehicle drive past as Cst. Madore is dealing with Mr. Nagano at the roadside, and when Cst. Madore turns his vehicle around to take Mr. Nagano to the RCMP detachment, there is only one other vehicle there and no crowd of people standing around. The fact that Cst. Madore was looking around is not

in and of itself a concern in my view. One would expect a police officer to be aware of their surroundings at all times. What is of concern, however, is that Cst. Madore is suggesting that there were concrete officer safety concerns which caused him not to take appropriate contemporaneous notes on a critical point. The fact that the video does not support his assertion regarding these so-called safety concerns raises an obvious issue with respect to Cst. Madore's credibility.

[18] Turning next to Cst. Madore's General Report, which was completed the following evening, there are notable differences in his descriptions of indicia between the report and his evidence at trial. In the report, he noted the following indicia as read into the court record:

NAGANO woke up and he appeared extremely disoriented, his eyes were bloodshot and his speech was slurred. ...

Cst. MADORE asked NAGANO to produce his driver's licence and he appeared confused, he started looking all over his vehicle looking for his wallet and then put on a sweater. Cst. MADORE had to remind NAGANO that he was looking for his driver's licence and NAGANO eventually found his wallet, looked through it several times and eventually produced his credit card and when Cst. MADORE told him it was not his driver's licence he produced his health card. ...

[19] The differences between Cst. Madore's report and his testimony at trial are significant. In his report, he makes absolutely no mention of the smell of alcohol on Mr. Nagano's breath, which, given that the demand requires an officer to have grounds to believe that a person has alcohol in their body, would arguably be the single most important observation to support a reasonable suspicion. Cst. Madore makes no mention of Mr. Nagano dropping or spilling the bottle of water on the pizza box. Nor does the report refer to Mr. Nagano fumbling or otherwise having any problems with his

fine motor coordination, another extremely important indicia in assessing reasonable suspicion.

[20] When these inconsistencies were put to him, Cst. Madore insisted that both his report and his evidence were the same, just in different words. With all due respect to Cst. Madore, the smell of alcohol and the water bottle are not referenced or alluded to in any wording in the report, and having difficulty finding a wallet and producing the wrong cards, while consistent with apparent confusion or disorientation, are simply not the same thing as fumbling and are not indicative of problems with fine motor coordination.

[21] The lack of clear grounds set out in the report clearly caused concerns for the reviewing Crown as an email was sent to Cst. Madore asking him to clarify which ASD demand he made, whether reasonable suspicion or mandatory, and, if suspicion-based, to explain his grounds. Cst. Madore replied by email on August 3, 2021, two months after the offence date. He does not expressly answer the question about which demand he made, but his response implies that it was suspicion-based as he articulates his grounds as follows:

My grounds were that during my initial interaction to ensure Mr. NAGANO's wellbeing, I could smell liquor on his breath, his speech was slurred, glossy and bloodshot eyes, when asked for his driver's licence he produced a number of different cards from his wallet but never produced a driver's licence.

[22] This is the first mention of smell of alcohol, but, again, there is no reference to either the water bottle or issues with fine motor coordination. There is, however, the addition of glossy eyes, indicia he had not testified to at trial or mentioned in his general report. When asked whether he had indeed seen glossy eyes, Cst. Madore responded

that he would have had to see them if he saw the bloodshot eyes and the dilated pupils and all the other symptoms. Setting aside the fact that “would have had to” is far from a definitive answer, Cst. Madore’s response seems to add yet another element to Cst. Madore’s grounds, namely dilated pupils. He was asked if he did, in fact, observe Mr. Nagano to have dilated pupils, to which he responded in the affirmative, and yet he had made no mention of dilated pupils in either his testimony to that point or in any of the written materials.

[23] This last-minute addition was not the only time Cst. Madore attempted to bolster his evidence on cross-examination. He was asked whether he agreed that Mr. Nagano’s balance was fair, to which Cst. Madore replied that he did not. He then suggested that he had seen Mr. Nagano stumble when he got out of the vehicle. He later suggested that Mr. Nagano was seen in the video to be holding onto the door and then walking backwards to lean against his truck, indications of issues with balance. There are two problems with this evidence. Firstly, Cst. Madore made absolutely no mention of issues with balance in his earlier testimony or in any of his written materials; and, secondly, the video does not support his assertion about balance issues. Mr. Nagano does indeed lean against his truck at one point, but there is no indication that he does so because of difficulty standing, and he does not otherwise display any noticeable problems with his balance or any other gross motor coordination issues.

[24] A final example of inconsistencies in Cst. Madore’s testimony, which must be addressed are inconsistencies in his trial testimony on the smell of alcohol. On direct examination, Cst. Madore testified that he smelled liquor on Mr. Nagano’s breath. On cross-examination, Cst. Madore agreed that it was possible that the smell came from

the vehicle rather than Mr. Nagano's breath. In addition, Cst. Madore initially agreed that he noted the smell as soon as Mr. Nagano spoke to him at the same time he noted the slurred speech. However, when pressed about the specific time when he formed his suspicion, Cst. Madore then suggested that he could not remember exactly when he smelled the odour of liquor.

[25] The cumulative impact of these identified inconsistencies causes me significant concern about Cst. Madore's overall credibility and reliability. Either he is unforgivably sloppy in his approach to maintaining appropriate records of his investigations or he is an entirely unreliable historian. Either way, I am persuaded that it would be unsafe to rely on any of Cst. Madore's evidence that is not independently confirmed in the video.

[26] Obviously, the video cannot confirm whether Cst. Madore did or did not smell alcohol on Mr. Nagano's breath, nor is it sufficiently clear to see whether or not Mr. Nagano's eyes are bloodshot. The video does, however, confirm some limited information. Mr. Nagano does appear to be sleeping at the outset, and it does take some effort on Cst. Madore's part to rouse him. Once awake, Mr. Nagano can be seen putting on a hoodie and hat, and does then appear to be looking around the cab of the truck, presumably for his wallet. He can also be seen moving a pizza box to the back seat, but there is nothing visible on the video of anything involving a water bottle.

[27] There is no audio recording to go with the initial minutes of the video as Cst. Madore did not take the mic with him when he exited the vehicle. As a result, there is no confirmation of the actual discussion between Cst. Madore and Mr. Nagano, so there is no confirmation regarding what was asked of Mr. Nagano nor what cards he

produced though the video does appear to show him producing at least one card of some kind. Nor is there any audio of Mr. Nagano's speech pattern prior to the ASD demand upon which to assess the degree to which his speech was or was not slurred. However, the remainder of the video does include audio, which presumably provides a fair representation of Mr. Nagano's speech throughout the interaction with Cst. Madore. Reviewing the audio, I would not characterize Mr. Nagano's speech pattern as obviously slurred. At times he mumbles; at other times, his speech is very clear. At best, one could say there is occasionally a slight slurring to his speech pattern.

[28] In the result, I am satisfied that the evidence establishes that Mr. Nagano was sleeping deeply enough in his vehicle that it was difficult to wake him up; he does put on a hoodie and appears to have some difficulty locating something in his vehicle, which may be indicative of disorientation, and he has a slight slur to his speech pattern. All of what can be observed is entirely consistent with fatigue, and does not rise to the level of indicia of alcohol consumption or impairment absent the smell of alcohol. This is not to say that smell of alcohol is always required to support a reasonable suspicion, but the indicia would certainly need to be more pronounced than this to support such a finding without the odour of liquor.

[29] Accordingly, in my view, this evidence falls well short of establishing the requisite evidentiary foundation to conclude that there were reasonable grounds to suspect that Mr. Nagano had alcohol in his body as required by s. 320.27(1)(b). As a result, I find that the ASD demand was not lawful, and Mr. Nagano was arbitrarily detained contrary to s. 9 of the *Charter*.

[30] In the normal course, the appropriate remedy would be exclusion of any breath readings obtained as a result of the unlawful detention. As no suitable samples were provided, there are no readings to exclude. It would be open to the Court to exclude the evidence of the failed attempts themselves. However, it is equally open to the Court to simply find that, absent a lawful demand, the offence of refusal cannot be made out. As noted by the Supreme Court of Canada in the 2017 decision in *R. v. Alex*, 2017 SCC 37, at para. 48, the offence of failing or refusing to provide a breath sample is “an offence which criminalizes disobedience in response to lawful compulsion. Notwithstanding the words “made under”, disobedience with unlawful compulsion is simply not criminal.”

[31] As the defendant has not sought an exclusionary remedy, nor have counsel made submissions on s. 24(2) of the *Charter*, it is appropriate to address this issue by finding that, as the Crown has failed to prove that the ASD demand was lawful, it follows that Mr. Nagano cannot be convicted of the offence of failing or refusing to provide a breath sample.

Delay

[32] Having reached this conclusion, it is, strictly speaking, unnecessary for me to address the second *Charter*-related issue, namely delay in making the ASD demand. However, I believe the issue should be addressed in any event.

[33] In terms of the relevant law, s. 320.27(1)(b) authorizes a peace officer with the required grounds to make a demand for an “immediate” sample of breath into an ASD. Much of the case law speaks to the predecessor section, s. 254(2), which required a

sample to be provided “forthwith”; however, in *R. v. Woods*, 2005 SCC 42, the Supreme Court of Canada held that ... “[f]orthwith’ means ‘immediately’ or ‘without delay’”. ... Case law under the new provisions have followed *Woods* to interpret “immediate” in s. 320.27 as meaning “forthwith”. Failure to comply with the requirement of “immediacy” has been held to result in an arbitrary detention contrary to s. 9 of the *Charter*. In assessing whether there has been impermissible delay, the question is not duration, but rather whether the reasons for any delay was necessary and reasonable.

[34] In the 2012 decision of *R. v. Quansah*, 2012 ONCA 123, the Ontario Court of Appeal offered guidance by articulating five factors for consideration. The second and third factors, set out in paras. 46 and 47, are particularly relevant to the decision to be made in this case:

46 Second, the demand must be made by the police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body. The immediacy requirement, therefore, commences at the stage of reasonable suspicion.

47 Third, “forthwith” connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee’s response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).

[35] At issue is when Cst. Madore formed his suspicion. The relevant time line is as follows; time references are with respect to the counter on the video rather than time of day:

1:09 Cst. Madore knocks on the door of the truck, shakes Mr. Nagano by the shoulder, and presses the pressure point behind Mr. Nagano's ear;

1:22 Mr. Nagano wakes up;

1:40 Cst. Madore begins speaking to Mr. Nagano;

1:55 Cst. Madore points towards the ignition, apparently asking for the keys;

2:00 Cst. Madore is heard on radio asking one of his colleagues to bring the ASD;

2:11 Cst. Madore takes the keys and places them on the roof of the truck;

3:30 Mr. Nagano appears to show Cst. Madore a card;

6:25 – 6:50 Cst. Madore asks dispatch to run Mr. Nagano's name and receives a response;

7:22 Cst. Madore asks Mr. Nagano to step out of the vehicle; and

7:42 Cst. Madore reads the breath demand.

[36] The time in between the noted events consisted almost entirely of Cst. Madore looking around while Mr. Nagano searches around his vehicle.

[37] Cst. Madore's evidence was not entirely clear as to the exact moment when he formed his suspicion. He says that his suspicion "crystallized" when Mr. Nagano

produced his health card, a time that is also not entirely clear from the video, though Cst. Madore did say that he would have formed his suspicion by the time he asked dispatch to run Mr. Nagano's name at 6:25.

[38] As already discussed at length, I had serious concerns with Cst. Madore's credibility. As a result, I have significant difficulty accepting that the production of the health care card was somehow the tipping point in forming the suspicion, particularly when Cst. Madore, if believed, had agreed that he would have noted the key indicia of both smell of alcohol and slurred speech within seconds of speaking to Mr. Nagano at 1:40. In my view, the most objective and reliable evidence in relation to when the suspicion was formed is when Cst. Madore asks for the ASD. Accordingly, I find that the suspicion was formed two minutes into the video. The delay between forming the suspicion and making the demand is five minutes and 42 seconds.

[39] In assessing the reasonableness of the delay, I note that approximately 15 to 20 seconds of the delay involved requesting checks on Mr. Nagano and receiving responses. In *R. v. Smarch*, 2014 YKSC 27, a decision of the Yukon Supreme Court, Gower J. considered delay resulting from routine background checks, and found at para. 47 that the:

... practice in this regard simply amounts to a prudent police officer doing his duty to identify a suspect for a driving offence, who is not in possession of a driver's licence. As such, it falls squarely within the third consideration in *Quanash*, i.e. the time between the formation of the reasonable suspicion to the making of the demand and then to the detainee's response "must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2)". Further, as is evident above at para. 22 of these reasons, in quoting from *Megahy*, in *R. v. Oduneye*, (1995), 169 A.R. 353, the Alberta Court of Appeal stated that some short delay will always be necessary."

“The police officer must identify the driver. He or she must be allowed at least a brief period of observation to ensure that his/her suspicion is reasonable...”

[40] Following *Smarch*, I find that 20 seconds of the delay in relation to background checks was necessary and reasonable in the execution of the officer’s duties. I further find that it was reasonable to take some time to identify Mr. Nagano, but find that Cst. Madore would have had that information when shown the card at 3:30 by Mr. Nagano, presumably the credit card that would have had Mr. Nagano’s name on it. Accordingly, I find that an additional one minute and 30 seconds of the delay was necessary and reasonable. This then leaves a remainder of three minutes and 52 seconds. I am not satisfied that any of this remaining delay was either reasonable or necessary, and it, therefore, amounts to an arbitrary detention contrary to s. 9 of the *Charter*.

[41] In terms of remedy, again, there is no request for a remedy under s. 24(2). If there were, it is unlikely that I would find that this amount of delay is so unreasonable as to warrant exclusion. However, the additional s. 9 breach does reinforce my view that the demand made in this case was unlawful as it failed to comply with the requirements of s. 320.27.

[42] Based on my conclusions with respect to the *Charter*-related issues, an acquittal must be entered on count 1.

Trial Issues

[43] Turning to the identified issues on the trial proper, having already entered an acquittal with respect to the refusal charge, there is no need to address the first two of the three issues on the trial proper, namely whether Mr. Nagano understood the consequences of failing to provide a breath sample and whether Mr. Nagano did indeed fail or refuse to provide a sample, except to say that neither were particularly strong arguments for Mr. Nagano.

Impaired Driving

[44] This then leaves the question of whether the evidence is sufficient to prove the remaining count of impaired driving. The law with respect to impairment has been well-established since the mid-1990s. In *R. v. Stellato*, [1993] 12 O.R. (3d) 90 (C.A.), the Supreme Court of Canada adopted the following passage from the lower Court decision of the Ontario Court of Appeal:

...[B]efore convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

[45] The law with respect to impairment was elaborated on in the oft-quoted decision of the Alberta Court of Appeal in *R. v. Andrews*, 1996 ABCA 23. In para. 29, the Court set out the following guiding principles:

- (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;

- (2) there must be impairment of the ability to drive of the individual;
- (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
- (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
- (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[46] As there is no actual erratic driving pattern in this case, an assessment of whether Mr. Nagano's ability to operate a conveyance was impaired by alcohol requires consideration of circumstantial evidence. The Court in *Andrews* stated the following at para. 31 with respect to circumstantial evidence on impaired driving cases:

...It is not deviation from normal conduct, slight or otherwise, that is in issue. What is in issue is the ability to drive. Where circumstantial evidence alone or equivocal evidence is relied on to prove impairment of that ability, and the totality of that evidence indicates only a slight deviation from normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment of the ability to drive, slight or otherwise.

[47] In applying the law to the facts of this case, based on my previous findings with respect to Cst. Madore's credibility, I am of the view that the circumstances upon which to assess the sufficiency of the evidence on impaired driving are similarly limited to the facts readily apparent on the video. This would include the fact that Mr. Nagano was found sleeping in his vehicle and was difficult to wake up; some confusion and difficulty finding his wallet, and a slight slur to his speech pattern. Added to these factors would

be some apparent short-term memory loss as Mr. Nagano asks on three or four occasions for Cst. Madore to explain what had happened.

[48] Crown argues that the only reasonable inference to be drawn from the facts in this case is that Mr. Nagano's ability to operate a conveyance was impaired by alcohol. However, in considering whether these facts are sufficient to support a conviction, I note that the list of indicia described is equally consistent with extreme fatigue. Furthermore, missing from the list are the more prominent indicia of consumption and impairment including the odour of liquor and problems with fine and gross motor coordination. In my view, the facts as found are indicative of only a slight deviation from normal conduct. As such, they are not sufficient to establish that Mr. Nagano's ability to operate a conveyance was impaired by alcohol to the requisite standard of proof beyond a reasonable doubt. Accordingly, an acquittal will also be entered with respect to count 2.

RUDDY T.C.J.