

Citation: *R. v. Majiski*, 2023 YKTC 15

Date: 20230516
Docket: 22-00218
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

JENNIFER MAJISKI

Appearances:
Kimberly Eldred
Gregory Johannson

Counsel for the Crown
Counsel for the Defence

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

[1] Jennifer Majiski is before the Court on a two-count Information alleging that on July 4, 2022, she committed offences contrary to ss. 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Ms. Majiski alleging violations contrary to ss. 8 and 9 of the *Canadian Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the “*Charter*”). The parties agreed to proceed with a blended *voir dire*.

[3] The focus of the *Charter* argument relates to the reliance of the investigating officer on a failed Approved Screening Device (“ASD”) sample, provided pursuant to s. 320.27(1) of the *Criminal Code*, to form the grounds for arrest and subsequent breathalyser demand. The argument is that Ms. Majiski’s s. 8 *Charter* right to be free from unreasonable search and seizure was violated by Cst. Bouchard because he did not have reasonable and probable grounds to demand that she accompany him to the RCMP arrest processing unit (the “APU”) for the purpose of providing a breath sample pursuant to s. 320.28 of the *Criminal Code*. Without the requisite grounds to make the demand, it is argued that the further detention of Ms. Majiski was arbitrary and violated her s. 9 *Charter* right.

Facts

[4] On July 4, 2022, Cst. Davies and Cst. Bouchard were together in a police vehicle on patrol in Whitehorse, Yukon. Cst. Davies was responsible for training Cst. Bouchard who on this date had been an RCMP member for about one year.

[5] At approximately 1:11 a.m. the officers observed a small car driving on the Two Mile Hill Road towards the Alaska Highway and away from downtown Whitehorse. The vehicle, later determined to be a Kia Soul driven by Ms. Majiski, did not have the lights turned on and was travelling at a speed in excess of the posted speed limit. The officers conducted a traffic stop of the vehicle which stopped promptly and without incident. Ms. Majiski was the sole occupant of the vehicle.

[6] When the traffic stop was initiated, the police vehicle Watchguard audio and video recording was started. The video displayed the view from the front of the police vehicle, capturing the Kia Soul and the interactions of the officers with Ms. Majiski.

[7] Both officers exited the police vehicle and approached the Kia Soul after the stop. Cst. Davies approached the driver's side and spoke with the driver while Cst. Bouchard approached the passenger side to make observations for safety purposes. Cst. Davies engaged in a brief discussion with Ms. Majiski which concluded in him directing her to accompany him to the police vehicle for the purpose of providing a breath sample.

[8] Cst. Davies first engages Ms. Majiski at 1:13 a.m. and Ms. Majiski explained to him that she was fleeing a domestic violence situation. She was dressed in her pajamas and in an emotional state. The conversation then quickly turns to an impaired driving investigation with the following exchange:

Q: Have you had anything to drink tonight?

A: I had a few drinks.

Q: Ok. Fairly recently?

A: Yeah.

[9] Cst. Bouchard is seen returning to the police vehicle for the purpose of retrieving the ASD from the police vehicle.

[10] Cst. Davies escorted Ms. Majiski to the front of the police vehicle and engaged in the following exchange with Cst. Bouchard regarding the ASD demand:

Cst. Davies: “So yeah, she’s had a couple drinks tonight, so.”

Ms. Majiski: “Yeah.”

Cst. Davies: “If you just want to administer the ASD demand, that would be perfect”.

[11] Cst. Bouchard then proceeds to recite the ASD demand from the RCMP prepared card to Ms. Majiski and, after two attempts, obtains a valid sample which registered a fail at approximately 1:17 a.m. While administering the ASD, he noted the odour of alcohol on Ms. Majiski’s breath.

[12] At 1:18:00, Cst. Bouchard read Ms. Majiski the demand for a breath sample pursuant to s. 320.28 of the *Criminal Code*, arrested her for impaired driving, provided her information regarding her s. 10(b) *Charter* rights, and the police warning. As this is occurring, Cst. Davies briefly engages Ms. Majiski to retrieve her car keys, and at 1:19:38 is seen entering the driver’s side of Ms. Majiski’s car.

[13] At 1:19:59, Cst. Bouchard proceeded to explain to Ms. Majiski what was going to happen next in relation to a transport to the APU and the opportunity to speak with counsel when Cst. Davies stood up from the vehicle and held up an alcohol bottle.

[14] At 1:20:10, Cst. Bouchard finished providing Ms. Majiski her rights and she asked for a cigarette. Cst. Bouchard had a cigarette for her, and they both move to the side of the police vehicle out of the camera view. At 1:20:30, Cst. Bouchard is heard placing Ms. Majiski in the back seat of the police vehicle.

[15] At 1:20:50, Cst. Davies placed the partially consumed bottle of Bacardi rum, which had less than 1/4 remaining, on the front hood of the police vehicle. The bottle

was capped and was not open when discovered in the car. He proceeded to open the bottle and confirm through smell that the bottle contained alcohol, then poured it out onto the roadway and advised Cst. Bouchard, “so yeah, that was definitely rum.”

[16] Cst. Davies returned the empty bottle to the Kia Soul and the officers proceed to escort Ms. Majiski to the APU.

Did Cst. Bouchard have the Requisite Reasonable Suspicion Pursuant to s. 320.27

[17] The grounds required for a peace officer to make a demand for an ASD sample are set out in s. 320.27 of the *Criminal Code*:

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;

...

[18] The reasonable suspicion threshold is not onerous and, as stated by the Ontario Court of Justice in *R. v. Brisson*, 2022 ONCJ 523, at para. 37, “involves possibilities, rather than probabilities”.

[19] Cst. Bouchard testified that at the roadside he did not hear the specific exchange between Cst. Davies and Ms. Majiski but did understand that they would be

administering the ASD. Cst. Bouchard was asked a series of questions in relation to the reasonable suspicion required to make the ASD demand pursuant to s. 320.27 of the *Criminal Code*, beginning with the point in time when he left the side of Ms. Majiski's vehicle to retrieve the ASD from the police vehicle:

Q: At the point that you walk back to the police cruiser do you, yourself, have reasonable suspicion to ground an ASD demand?

A: Myself, no, but working in a team and being with my field trainer I at the time take certain queues from him. If another member indicated that we were going to start an ASD I would take that members judgement in the situation as reasonable suspicion to give me grounds to conduct the ASD demand.

[20] The Crown then asks Cst. Bouchard about the required reasonable suspicion after playing the Watchguard segment where the exchange occurs in which Cst. Davies directs Cst. Bouchard to administer the ASD:

Q: At this point do you have reasonable suspicion to ground your ASD demand?

A: Like I said, I was instructed by my field coach and if another member today were to tell me we were to conduct an ASD demand I would trust their judgement as police officers that have gone through the same training as I have, that they have reasonable grounds to conduct the ASD.

[21] Cst. Bouchard goes on to advise the Court that during this time period in his training, he was getting practice with the ASD and believed that is why he was instructed to be the one to make the demand.

[22] The Crown followed up with the following exchange:

Q: On the video we hear Cpl. Davies advise you that Ms. Majiski had had a few drinks.

A: Yes.

Q: And did you hear Ms. Majiski confirm that?

A: Yes.

Q: So, would that have affected whether or not you had reasonable suspicion to ground an ASD demand?

A: It would have confirmed it. Yes.

[23] The Crown argued that Cst. Bouchard, after this exchange with Cst. Davies, had his own reasonable suspicion to ground the demand for an ASD sample. She further argued that he could rely on Cst. Davies' grounds in order to make the demand.

[24] It appears on the evidence that Cst. Bouchard was under the understanding that he simply needed to be instructed by another police officer to administer the ASD demand and that would provide him with the grounds to do so. While direction may be sufficient for an officer to conduct a search in some circumstances, the specific wording of s. 320.27 of the *Criminal Code* requires a subjective belief on the part of the administering peace officer.

[25] The authority for the transfer of grounds from one officer to another was addressed by the Ontario Court of Justice in in *R. v. Arudselvam*, 2022 ONCJ 445, at para. 59:

In *R. v. Nahorniak*, 2010 256 CCC (3d) 147, a Saskatchewan Court of Appeal decision, the court explained it is not necessary for an officer to independently investigate and verify grounds of reasonable suspicion conveyed to him as long as he subjectively believes them. In this case, Officer Lashley conveyed to the demand officer, that he located a bottle of vodka in the BMW X3. The vehicle had sustained obvious and significant front-end damage. Another officer -- Cst. Price who was at the scene of the accident told PC Churchill that the damaged vehicle was driven by the defendant. This combination of information was sufficient to ground Officer

Churchill's reasonable suspicion in this case. The evidence is clear that Cst. Churchill was aware of these grounds at the time he made a formal breath demand in hospital, and he believed this information to be accurate. His belief was objectively and subjectively reasonable.

[26] Cst. Davies appeared to understand the requirement that he convey the grounds to Cst. Bouchard as he expressed in the following exchange:

Q: What was the purpose for giving him information about Ms. Majiski's alcohol consumption?

A: So, because I formed the grounds to suspect that she had alcohol in her body when she was operating a motor vehicle, in telling Cst. Bouchard that she has had a couple of drinks tonight that gives him the suspicion as well so that when he reads the ASD demand... Essentially that when they read from their card "I have reason to believe" would not be true if he didn't.

[27] Cst. Bouchard's evidence is that the information provided from Cst. Davies that Ms. Majiski had been drinking, along with the acknowledgement by Ms. Majiski of that information, did confirm his suspicion. The exchange was a transfer of knowledge from Cst. Davies to Cst. Bouchard for the purpose of giving him the requisite reasonable suspicion. I am satisfied that the direction from Cst. Davies along with the transfer of the information regarding drinking, and the acknowledgement by Ms. Majiski to drinking, provided Cst. Bouchard with evidence for a belief that was objectively and subjectively reasonable.

Did Cst. Bouchard have Reasonable Grounds to make the s. 320.28 Demand

[28] Section 320.28 of the *Criminal Code* requires an officer to have reasonable grounds for making a breathalyser demand:

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...

...

[29] Cst. Davies and Cst. Bouchard testified that, with the exception of the smell of alcohol coming from her person, they did not note any indicia of impairment during their roadside interactions with Ms. Majiski that would have provided them with the requisite grounds to make the breathalyser demand. The reasonable grounds, according to Cst. Bouchard, came from the ASD fail.

[30] The issue before the Court is whether or not Cst. Bouchard held the requisite subjective and objective reasonable grounds based on the ASD fail due to concerns over residual mouth alcohol. The Ontario Court of Appeal addressed the concern with residual mouth alcohol in *R. v. Notaro*, 2018 ONCA 449, at para. 41:

...It is "well-known by police officers that where a driver has consumed alcohol in the 15 to 20 minutes before the breath test is administered, the result of the test may be unreliable because of the presence of residual mouth alcohol": *Einarson*, at para. 14. Indeed, courts have taken judicial notice of this proposition: *Mastromartino*, at para. 33; and *R. v. Au-Yeung*, 2010 ONSC 2292, at para. 29.

[31] Cst. Bouchard confirmed that while he could not recall what the ASD manual stated about the presence of residual mouth alcohol, he was trained to wait 15 minutes

before taking a sample where there is evidence of recent drinking because residual alcohol in the mouth can cause elevated readings in the device. Members are encouraged through training to ensure that they can obtain a suitable sample in the ASD. The following exchange regarding residual mouth alcohol arose in direct examination:

Q: Did you consider whether or not Ms. Majiski might have recently consumed alcohol?

A: I did not, no.

Q: Did you ask Ms. Majiski any questions about that?

A: I did not, no.

[32] The obligations on a police officer when making an ASD demand were addressed by the Yukon Supreme Court in *R. v. Scarizzi*, 2022 YKSC 27, at paras. 45 to 48:

45 There is no legal obligation on the police to ask a suspect about when they last consumed alcohol, if they have an object in their mouth, or if they had a cigarette within the previous five minutes before administering the ASD test.

46 There is no legal obligation on the police to consider whether there may be reasons that the ASD test would be unreliable before administering it (*Notaro* at para. 30).

47 However, it is prudent for a police officer to turn their mind to these concerns. A police officer who does consider these issues will be alive to any indications that a suspect may have mouth alcohol, an object in their mouth, or may have smoked in the past five minutes. On the other hand, an officer who does not think about these factors will fail to recognize when it is not objectively reasonable to rely on an ASD result, and may find that their actions are subject to scrutiny (*Notaro* at para. 6).

48 Ultimately, if the police officer subjectively believes that the suspect has committed an alcohol related driving offence, and the objective

information they have sufficiently supports that belief, then they will have reasonable and probable grounds to demand a breathalyzer.

[33] On the evidence presented in this case, I am satisfied that Cst. Bouchard subjectively believed that Ms. Majiski committed an alcohol related offence based on the ASD fail.

[34] The Crown filed the case of *R. v. Hubbard*, 2005 YKSC 9, wherein Veale, J. found at paras. 28 and 29, that the investigating officer did not have the requisite objective belief based on a lack of training in relation to residual mouth alcohol and a misunderstanding of the requisite holding off period. Unlike the circumstances in *Hubbard*, I find that Cst. Bouchard had been trained on administering the ASD and correctly understood the requisite holding off period. The concern raised is that Cst. Bouchard did not consider whether there was residual mouth alcohol that could have provided a false reading on the ASD from Ms. Majiski.

[35] The question before me is whether the evidence available to Cst. Bouchard sufficiently supports his objective belief based on the ASD fail. The Court in *Notaro* stated the following regarding objective reasonableness at paras. 42 to 44:

42 It has therefore been accepted that the objective reasonableness of relying on an ASD fail result to form reasonable and probable grounds for an arrest and evidential breath demand can be undermined, on a case by case basis, by credible evidence known to an arresting officer that the suspect had residual mouth alcohol at the time of testing: *Einarson*; and *Mastromartino*. Certainly, as Sopinka J. noted in *Bernshaw*, at para. 51, "where there is evidence that the police officer knew that the suspect had recently consumed alcohol", reliance on a fail result will not be reasonable. By "recently consumed alcohol", he meant within the required waiting window established before the court, typically 15 minutes.

43 In my view, the effect of the law relating to the objective component of the reasonable grounds test can be put this way:

- * If the information known to an arresting officer about a suspect's residual mouth alcohol would make it unreasonable for the officer to rely on the accuracy of an ASD fail result, reasonable and probable grounds will not be established, whether or not the arresting officer turned her mind to the presence or effect of residual mouth alcohol.
- * If it is reasonable for the arresting officer to rely on an ASD fail result based on the information known to her, then the failure of the arresting officer to turn her mind to the presence or effect of residual mouth alcohol is immaterial.

44 As MacDonnell J. held in *R. v. MacLean*, 2013 ONSC 3376, at para. 27, "while [the officer] should have been aware of [the residual mouth alcohol issue], his lack of awareness did not make his reliance on the ASD result unreasonable in the absence of something to suggest that residual mouth alcohol was an actual concern."

[36] The areas of concern regarding the objective reasonableness raised by Ms. Majiski are the questioning of Ms. Majiski by Cst. Davies at the roadside about the recency of her drinking, and the discovery of the partially consumed bottle of rum when searching the drivers seat area of the car after the ASD sample was provided.

[37] When Cst. Davies confirmed with Ms. Majiski that she had been drinking he followed up with the question "fairly recently" as set out above. She responded in the affirmative and Cst. Davies proceeded to inform her that she would be required to provide a breath sample. Cst. Davies provided the following explanation for the question in direct examination:

A: I formed grounds that she had consumed alcohol, my suspicion, yeah, then asking how long ago kind of gives me a timeframe whether a little while ago to her is, you know, a couple months ago or a couple

minutes ago, yeah, I probably should have clarified that, if I could go back, but...

...

Q: And were you asking this question out of concern about mouth alcohol?

A: No, well, I, we are trained best practice is to ask if they had any alcohol in the last 5 minutes, for that sake, I am aware that mouth alcohol has the ability to cause false readings on the ASD as far as a false positive, so its something I was aware of and tried to make sure that she hadn't just drank a few seconds before I walked up to the window.

Q: Is it your understanding that that is what her response to your question meant?

A: So, the way I was asking it is 'have you drank in the last hour or so' is what I should have asked, umm, yeah.

[38] Cst. Davies was questioned on the exchange with Ms. Majiski in cross-examination and explained:

Q: You're well aware that mouth alcohol causes elevated reading. You are encouraged to try and find out if there was recent alcohol and you did that here, correct?

A: Yes.

Q: It sounds like you have a bit of a regret, and you would go back and enquire more?

A: In watching it back there's always different things you could say, different questions you could ask, you know, but uh, only one shot.

[39] Based on the evidence from Cst. Davies, he was not inquiring about the existence of residual mouth alcohol when he asked the question regarding recency. Regardless, combined with the positive response, the evidence does not establish that there was evidence of alcohol consumption within the 15 minutes prior to the ASD sample. "Fairly recently" is ambiguous and does not provide the requisite reliable

evidence of the timing of the consumption. However, the evidence should not be considered in a vacuum and must be viewed with all the evidence available at the time, including the discovery of the partially consumed bottle of alcohol in the car.

[40] The Ontario Court of Justice dealt with the discovery of an “almost empty” bottle of rum in the backseat of the car in *R. v. McGauley*, 2015 ONCJ 518, wherein the officer’s testimony on the open liquor in the vehicle included the following at para. 17:

...Constable Coutts testified that she was aware of the possibility of a false positive if the subject had been drinking in the 15 minutes prior to the sample being provided into the ASD. She stated that she relied on Mr. McGauley's statement that he had had one beer 30 minutes earlier. She said that it did not occur to her that he had been drinking from the bottle of rum found in the backseat during the 15 minutes prior to the test being administered.

[41] The Court in *McGauley* goes on to address the impact of the open alcohol in the vehicle on reasonable and probable grounds at paras. 47 and 48:

47 The effects of residual mouth alcohol on ASD testing are well known. Constable Coutts was aware of the fact that if there is consumption of alcohol within 15 minutes of use of the device there could be a false fail reading with the ASD. She accepted Mr. McGauley's statement that he had had one beer 30 minutes earlier and she was entitled to do so in my view in the circumstances of this case. The issue of residual mouth alcohol has been canvassed in a number of decisions, including by the Supreme Court of Canada in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, by the Ontario Court of Appeal in *R. v. Einarson*, [2004] O.J. No. 852 (C.A.) and by Mr. Justice Durno of the Ontario Superior Court in *R. v. Mastromartino* (2004), 70 O.R. (3d) 540 (Sup. Ct.). Some of the relevant principles are as follows:

- (i) Officers making ASD demands must address their minds to whether or not they would be obtaining a reliable reading by administering the test without a brief delay: *R. v. Mastromartino*, supra at para 23;

- (ii) Where the screening device used is an approved one, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary: *R. v. Bernshaw*, supra at paras. 80;
- (iii) The mere possibility that the driver has consumed alcohol in the previous 15 minutes is not enough to prevent an officer from relying upon a fail result from an ASD device: *R. v. Mastromartino*, supra at para. 23;
- (iv) The fact that a driver is seen leaving a bar moments earlier does not compel an officer to delay a breath demand in respect of an ASD device. It is only one circumstance to consider when the officer is deciding whether to delay the taking of a test: *R. v. Mastromartino*, supra at para. 23 and see *R. v. Einarson*, supra at para. 33;
- (v) Officers are not required to ask drivers when they last consumed alcohol: *R. v. Mastromartino*, supra at para. 23; and
- (vi) A flexible approach applies to the issue such that different officers may assess similar circumstances differently. The particular officer's assessment must be tested against the litmus of reasonableness: *R. v. Einarson*, supra at para. 34.

48 ...The fact that Constable Coutts knew there was open alcohol in the car did not change the honest belief she held as concerns her reasonable and probable grounds and she specifically stated this in cross-examination. The only issue is whether that view was objectively reasonable. In my view, it was objectively reasonable. Open alcohol in a car is not much different than a person leaving a bar and moments later being pulled over for a sobriety check. The law is clear that there is no bright line requirement that an officer must wait 15 minutes to make an ASD breath demand on a person seen leaving a bar. As far as I am concerned, the same is true as concerns open alcohol in the car.

[42] The Ontario Superior Court of Justice addressed an officer's observations of empty beer cans on the floor of the vehicle and the impact on reasonable and probable grounds in *R. v. Barr*, 2018 ONSC 2417. The facts regarding the challenge include the following at paras. 8 and 9:

8 Constable Meness had also noticed empty beer cans on the front passenger side floor of the pick-up truck. He did not know how many cans there were. In examination-in-chief he said he had been trained on and was aware of the necessity to wait 15 minutes before taking a roadside breath sample where there was a reasonable suspicion that alcohol had been consumed within the prior 15 minutes. He said he did not turn his mind to this possibility because there was no open alcohol in the vehicle and although there were empty beer cans, there was nothing on the respondent's lap or on the centre console to indicate the respondent had been drinking right before the stop.

9 In cross-examination, Constable Meness agreed he had not turned his mind to the issue of whether residual mouth alcohol ought to justify a delay. He also agreed he did not know if the cans on the floor of the truck were empty or what kind of beer they had contained and he did not ask the respondent when he had last had a beer. He agreed it would have been prudent to ask the respondent when he had had his last drink but he did not do so.

[43] The Court in *Barr* provides the following conclusions on the issue at paras. 27, 29, and 30:

27 As the Crown has phrased the issue, because an officer does not turn his mind to the possibility of residual mouth alcohol does not mean the objective component of reasonable grounds has not been met. As stated in *R. v. Su*, 2014 ONSC 5296, at para. 63, aff'd 2016 ONCA 58, and in *R. v. Jodhan*, 2015 ONSC 3183, at para. 29, an officer does not need to inquire as to whether there has been recent consumption and is not necessarily precluded from relying on the ASD reading. Instead, the issue is whether there is credible evidence to cause the officer to doubt the validity of the ASD sample.

...

29 There was no evidence before the trial judge that Constable Meness doubted the validity of the ASD sample. The trial judge concluded that Constable Meness "simply failed to consider" the issue of recent mouth alcohol and that he should have, given the evidence of the beer cans on the floor of the vehicle.

30 In coming to this conclusion, however, the trial judge was in effect speculating as to the timing of the respondent's last drink, even in the face of the evidence that there had been no consumption of alcohol during the 13 minutes between the traffic stop and the ASD test, and no evidence available to Constable Meness regarding alcohol consumption in the 2

minutes before the stop. To phrase it differently, the trial judge was speculating that in the 2 minutes preceding the 13 minutes that had passed in the company of Constable Meness, the respondent might have consumed alcohol and the trial judge then concluded that this possibility rendered the ASD test objectively unreliable and the arrest unreasonable.

[44] I agree with the statement that the discovery of open alcohol in a car is not much different than a person leaving a bar and moments later being pulled over. I note that in the evidence before the Court, the bottle was capped and not open at the time of discovery, although it was partially consumed. I would be speculating if I were to conclude that the discovery of the partially consumed bottle of rum was evidence of consumption in the 15 minutes prior to the ASD sample. Similarly, to conclude that Ms. Majiski had consumed alcohol within the previous 15 minutes based on a positive response to Cst. Davies asking if her consumption had been “fairly recently” would be equally as speculative. As set out in *Scarizzi*, there was no legal obligation on Cst. Bouchard to ask Ms. Majiski if she consumed alcohol in the 15 minutes prior to taking the ASD sample and no legal obligation to consider whether there may be reason that the ASD test would be unreliable.

[45] The combination of the answer regarding recency and the discovery of the partially consumed bottle of rum are consistent with a possibility that Ms. Majiski had consumed alcohol in the 15 minutes before providing the ASD sample. However, a mere possibility without more is not enough to find that Cst. Bouchard’s reliance on the fail result was unreasonable.

[46] I find that Cst. Bouchard's reliance on the ASD fail to form the reasonable and probable grounds to make the breathalyser demand to be both subjectively and objectively reasonable. Ms. Majiski's ss. 8 and 9 *Charter* rights were not violated.

[47] There is insufficient evidence on the record to make a finding of guilt on Count 1 and I find Ms. Majiski not guilty on the offence contrary to s. 320.14(1)(a) of the *Criminal Code*.

[48] A Certificate of a Qualified Technician was filed confirming that Ms. Majiski provided two breath samples into an approved instrument recording 180 and 170 milligrams of alcohol in 100 millilitres of blood respectively. I find Ms. Majiski guilty on Count 2 for the offence contrary to s. 320.14(1)(b) of the *Criminal Code*.

PHELPS T.C.J.