Citation: *R. v. Schmidt*, 2023 YKTC 32

Date: 20230710
Docket: 21-00242
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REX

v.

NICHOLLIS SCHMIDT

Appearances:
Leo Lane — Counsel for the Crown
Jennifer Budgell — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] COZENS C.J.T.C. (Oral): Nichollis Schmidt has been charged with having committed offences contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*. These offences are alleged to have occurred on June 5, 2021, in the City of Whitehorse.

[2] Counsel for Mr. Schmidt has filed a Notice of Application alleging a breach of Mr. Schmidt's s. 7 *Charter* rights, and seeks a remedy pursuant to s. 24(1) of the *Charter*.

[3] Counsel further alleges that Mr. Schmidt's ss. 8, 9, 10(a), and 10(b) *Charter* rights have been infringed and seeks a remedy pursuant to s. 24(2) of the *Charter*.

[4] The trial commenced in a *voir dire*. Cst. Cook, Cst. Fox, and Cpl. Dunmall testified.

Cst. Cook

[5] Cst. Cook had participated in approximately 10 prior impaired driving investigations before this investigation.

[6] On June 5, 2021, Cst. Cook responded to a complaint about a male passed out in a Dodge Ram truck (the "Truck") in front of the complainant's residence. He was assisting Cst. Fox, who was the lead investigator. The complainant had stated that the Truck had been "running outside her house for approximately two hours" and stated that the driver may be possibly intoxicated.

[7] Upon his arrival at the scene, Cst. Cook noticed the Truck parked on the street. The driver's side door was open, and he could observe a person's legs visible, and at least one leg hanging out the door resting on the door sill. Cst. Cook parked his police cruiser behind the Truck.

[8] As Cst. Cook approached the driver's side of the Truck, he observed a male in the driver's seat, slumped over towards the driver's door, sleeping. The male's face had blue paint on it. The vehicle was running. The male was subsequently identified from his driver's licence as being Mr. Schmidt.

[9] Cst. Fox approached the Truck at approximately the same time as Cst. Cook, who had arrived in a separate police cruiser. Cst. Fox parked his police cruiser on the opposite side of the street, parallel to Cst. Cook's vehicle, facing in the same direction.

[10] From the video recording, I note that Cst. Fox arrived at the driver's side door of the Truck approximately two seconds after Cst. Cook.

[11] Based upon his observations and the complaint that had been made, Cst. Cook suspected alcohol use was involved.

[12] Cst. Cook stated that when he turned his emergency lights on as he pulled in behind the Truck, the video recording in-car system ("VICS") was engaged. The first 30 seconds prior to the emergency lights being activated are recorded without audio. After that, the audio recording is also engaged inside the police cruiser. In order for anything to be recorded outside the police cruiser, the police officer has to activate the portable microphone. On this day, Cst. Cook was not using his portable microphone. He testified that, at that time, "It wasn't something I did. I don't believe I used it on any traffic stop." He testified that he had recently started doing so as a result of the on-the-job training he had received.

[13] Of note, there was also no audio recording of Cst. Fox's interaction with Mr. Schmidt, other than the audio recording in Cst. Fox's police cruiser after Mr. Schmidt was placed into the rear seat and being driven back to the Detachment, at which point in time Cst. Fox manually switched on the VICS. As of June 5, 2021, it was not Cst. Fox's practice to utilize a portable microphone on impaired driving investigations. He testified that he has since changed his practice and now uses a portable microphone.

[14] Cst. Cook turned the Truck off and kept the keys in his possession.

[15] Cst. Cook and Cst. Fox unsuccessfully tried to wake up Mr. Schmidt verbally, after which Cst. Cook applied a pressure point under his ear. This resulted in Mr. Schmidt waking up after what Cst. Cook stated was approximately 30 seconds.

[16] From the video recording, it appears to me that Mr. Schmidt was moving within a shorter period, approximately 18 seconds, after Cst. Cook arrived at the driver's side door.

[17] Cst. Cook testified that Mr. Schmidt was groggy at first, seemed confused, was difficult to understand, and was not making much sense. Cst. Cook stated that Mr. Schmidt did not answer the first questions asked of him, which were along the lines of asking who he was and what he was doing there.

[18] Cst. Cook observed Mr. Schmidt to start to appear to understand what was being said to him, but his answers were indicative of him not really understanding what he was being asked.

[19] Cst. Cook observed a wallet and took the driver's licence out, handing it to Cst. Fox.

[20] Cst. Cook testified that he asked Mr. Schmidt how many drinks he had had prior. Cst. Cook stated that Mr. Schmidt responded by saying that he had had three drinks prior. To Cst. Cook's recall, Mr. Schmidt was not asked when he had consumed these drinks, and no time was given for when these drinks had been consumed.

[21] This, in Cst. Cook's opinion, was the time that Mr. Schmidt first seemed to clearly understand what Cst. Cook was saying to him. Cst. Cook estimated that he asked

Mr. Schmidt this question approximately one to two minutes after arriving at the driver's side door. Cst. Cook stated that he believed Cst. Fox was standing beside him when he asked Mr. Schmidt this question and received the answer.

[22] Cst. Cook testified that he formed a suspicion at this time that Mr. Schmidt had been operating or had care and control of the vehicle with alcohol in his system. Cst. Cook informed Cst. Fox of this.

[23] Cst. Cook agreed in cross-examination that Mr. Schmidt was not belligerent and that he was cooperative. He agreed that there was no indication, such as slurring of words, or bloodshot or glossy eyes. He could not tell if Mr. Schmidt had a flushed face because of the blue paint on his face.

[24] Cst. Fox returned with the approved screening device ("ASD"), and he also asked Mr. Schmidt how much he had had to drink. Cst. Cook believed that Mr. Schmidt gave the same answer of three drinks. Cst. Cook estimated that it took 15 seconds for Cst. Fox to return with the ASD.

[25] From the video recording, it appears that approximately 29 seconds passed between the time Cst. Fox leaves his driver's side door and when he returns with the ASD.

[26] Cst. Cook stated that he did not include in his notes what Cst. Fox said to Mr. Schmidt because he felt that it was his responsibility to record his role, and it was Cst. Fox's responsibility to record what his interactions with Mr. Schmidt were.

[27] Cst. Cook believed that Cst. Fox read Mr. Schmidt the ASD demand from a card, although he did not recall the words of the demand such that he could say whether it was the s. 320.27(2) mandatory breath demand, or the s. 320.27(1)(b) demand based upon suspicion.

[28] Cst. Fox administered the ASD test while Cst. Cook stood by. Cst. Cook estimated that approximately 20 to 30 seconds had passed from the time Cst. Fox returned with the ASD to the time that he made the ASD demand. He stated that approximately another 45 seconds passed from the time of the ASD demand to the time that a "Fail" result was recorded.

[29] From the video recording, it is difficult, without audio, to determine the exact time that passed between events and what took place within this time. From the time that Cst. Fox arrived back at the driver's side door until he was putting the ASD away, it appears that approximately three minutes and five seconds passed. It also appears that approximately 57 seconds passed from the time that Cst. Fox seems to be administering the ASD test until he puts the ASD away, although this estimate is less clear from the video.

[30] Cst. Fox then arrested Mr. Schmidt and took him back to his police cruiser. Cst. Cook searched Mr. Schmidt prior to him being placed into the rear seat of Cst. Fox's police cruiser.

[31] Cst. Cook then returned to the Truck, where he observed empty alcoholic beverage cans in the cab in the box of the Truck. Cst. Cook took photos of the Truck

and the alcoholic beverage cans that were filed as exhibits in the trial — the photos, of course, being those filed.

[32] Cst. Cook testified that when a police officer has not activated the emergency lights that trigger the video and audio recording to start, there is nonetheless an automatic recording system. Cst. Cook testified that the RCMP police cruisers maintain the automatic video recording on an internal control centre that stays for a number of hours until it is overwritten by subsequent recordings. A police officer can retrieve this video recording if desired.

[33] Cst. Cook testified that the video recording from his police cruiser's VICS would have captured the entire investigation from the time he pulled up behind the Truck until Mr. Schmidt was placed into Cst. Fox's police cruiser. However, when he went to retrieve the audio recording from the VICS, there was no audio. He testified that he had previously experienced problems with the audio not being recorded as it should have been, all when using the same police cruiser. He could not say whether the audio had ever been captured in this case, or whether it had been captured and subsequently corrupted or lost. He testified that this audio recording would only, however, have captured what was occurring within his police cruiser and not what took place outside the police cruiser, according to his belief.

[34] He testified that it was not his practice to test the VICS at the start of a shift in order to ensure that it was working properly. He stated that there was a red light that came on the control panel when the video recording portion of the VICS was working

and an orange light for the audio recording portion of the VICS. He did not notice whether the orange light had come on in this case.

[35] Cst. Cook was unable to recall whether he had removed the USB from the VICS that day in order to preserve what had occurred, although he was able to say that he was pretty sure he had not been the one to transfer the data from the USB to the CD and/or computer system at the Detachment. Cst. Cook had never reviewed the recording captured on the USB. He testified it was not his practice to review the VICS recording if he was satisfied that his notes captured the necessary information.

[36] Cst. Cook arrived at the scene at 8:55 a.m., started making his notes at 9:15 a.m., and Capitol Towing arrived at 9:33 a.m.

Cst. Fox

[37] Cst. Fox had been an RCMP member acting in the role of a general duty officer for approximately two and one-half years at the time of his testimony. He had been involved in five or six prior impaired driving investigations.

[38] Cst. Fox testified that the complaint was received at 8:51 a.m. He believes that he arrived at the scene approximately 10 minutes later, shortly after 9:00 a.m., but that he did not record that time in his notes. He did not activate his police cruiser's emergency equipment due to Cst. Cook already being there and in a position to record the interaction with the driver. He believed that he closed his police cruiser's door when he left to walk over to Mr. Schmidt's vehicle.

[39] He observed that Mr. Schmidt was asleep and/or passed out lying half out of the driver's door of the running vehicle. He could not recall where Mr. Schmidt's arms or feet were. He stated that it took a few seconds, approximately 15, to rouse Mr. Schmidt because he seemed out of it. He was not sure exactly what steps were taken to rouse him. Mr. Schmidt seemed to be quite disoriented and confused when he woke up. Cst. Fox noted that Mr. Schmidt's face was painted blue, but observed no other distinguishing factors.

[40] Cst. Cook spoke to Mr. Schmidt first while Cst. Fox went to the rear of the Truck to obtain a licence plate number. Cst. Fox overheard Cst. Cook asking Mr. Schmidt how many drinks he had had, and Mr. Schmidt responding that he had had three drinks roughly four hours ago. Cst. Cook was at the driver's side of the vehicle towards the rear of the police cruiser when he overheard this. He did not record this in his notes. He stated that this conversation occurred approximately one and one-half to two minutes after he arrived at the scene.

[41] Cst. Fox testified that when he overheard Mr. Schmidt tell Cst. Cook that he had consumed three drinks roughly four hours earlier, he returned to where Mr. Schmidt was. He testified that he also asked Mr. Schmidt whether he had consumed any alcohol. He testified that he did so because he believed that, as the lead investigator, he should not rely on what Cst. Cook had asked and the answer he received, but needed to form his own grounds independent of Cst. Cook's. Mr. Schmidt again responded that he had had three drinks four hours ago. At this time, Cst. Fox stated that he formed his own suspicion that Mr. Schmidt had alcohol in his system while he was in care and control of the vehicle. Cst. Fox stated that he returned to his police

cruiser to obtain the ASD. He returned to the truck and read the ASD demand to Mr. Schmidt.

[42] I note that the times Cst. Fox recorded in his notebook differed from the timestamp on the video recording of events. This not a significant factor with any real bearing on the issues before me, as the actual time events occurred is not of particular importance as compared to the time that transpired between events. The timestamps and time captured between events in the video recording provide the most accurate information in this regard.

[43] The exchange between Crown counsel and Cst. Fox in direct examination reads:

> A … So I'd asked Mr. Schmidt again can — how much alcohol or had he had any drinks. And he replied again with the same answer, three drinks four hours ago.
>
> Q And so when you asked this again, how long after you first heard it did you ask it?
>
> A Oh, within — within a minute. Less than a minute, I'd say.
>
> Q Less than a minute? And so when you heard that again, what did that tell you?
>
> A So when he'd indicated that to me, I therefore had, you know, suspicion that he consumed alcohol or had alcohol in his system and was in care and control of the vehicle. So for me, that is grounds to read him the ASD demand, which I returned to my vehicle, I pulled out the ASD that I'd brought with me that morning, and I read the ASD demand to Mr. Schmidt.
>
> Q So just with respect to the timing, now, of when you read that ASD demand and you went to go get that ASD from the vehicle —
>
> A Yes.

> Q So you formed your ground, your suspicion.
>
> A Yes.
>
> Q Which came first? Going to get the ASD from the vehicle —
>
> A Going to get the ASD.
>
> Q Okay. And how long did that process take?
>
> A Again, seconds. So I just walked across the road, retrieved it from the front driver's side of my vehicle, and walked back across.
>
> Q Okay. And then when did you make the ASD demand?
>
> A At 9:06 a.m. I read the ASD demand.
>
> Q And why **did** you make that demand before you went to go get the ASD?

[44] I note that the question as transcribed is not consistent with the testimony of Cst. Fox, who testified that he made the ASD demand after obtaining the ASD from his police cruiser. I have reviewed the DARS audio recording of the evidence of Cst. Fox and it is unclear to me whether the word "did" should more properly have been the word "didn't", which is a more logical rendering counsel's question.

> A There's no great answer to that. It's just for me it's a process. I'll have the ASD handy, and then — and read the demand once I'm ready to and established.
>
> Q Do you — did you note down or did you remember the exact time that you can say that you formed your grounds versus suspecting that he had alcohol in his system?

[45] I note that this is perhaps an illogical question as Cst. Fox's grounds were comprised of his suspicion that Mr. Schmidt had alcohol in his system. The grounds

and the suspicion are not separate from each other but are the same thing. The other possible interpretation of the question is that Crown counsel is distinguishing between suspicion and reasonable suspicion. Cst. Fox's answer is understandably not directly responsive to the question.

> A I did not note down my exact timelines that I formed suspicion that he had alcohol in his system. But again, you know, the time it takes to walk across, grab that — if I read them at 9:06, it'd be 9:05, 9:04, in and around there.
>
> Q So if you're estimating between the time that you formed your suspicion and the time that you actually read the demand, what would be — how many minutes? What are we talking about?
>
> A A minute, two minutes.

[46] Further excerpts from the transcript of Cst. Fox's direct examination are as follows:

> Q What were your grounds for suspecting that he had alcohol in his system?
>
> A Admission on behalf of the driver, of Mr. Schmidt —
>
> Q Is there — the admission, was that the sole demand? Was there any — or sorry, was that the sole reason or was there anything else?
>
> A At that point in time, that was the sole reason for me — for my suspicion, yes.
>
> Q And so why did that answer, having three drinks in the last four hours, make you think that he had alcohol in his system and he was having care and control of a vehicle?
>
> A You know, through personal experience, through life, through even, you know, you see it during — it's alcohol stays in your system, depending on the

> amount that you consume, can stay in your system for that time period.
>
> You know, looking at the totality of the situation, his — that he had care and control of the vehicle, as the vehicle was running, key's in the ignition, the vehicle's running. He was sitting in the driver's seat. He admitted to having alcohol in his system. And again, at that point in time, I don't know how much. Did he have four beers or was it more than that? I don't know. You know, it's easy to say that alcohol can remain in your system for that long.

[47] Answer continued after a break:

> A So at that point, I'd heard Cst. Cook's conversation, and I would've confirmed by asking Mr. Schmidt the same question, you know, how much had you had to drink. And his response was three — I believe three drinks four hours ago. At that point, I now have formed my suspicion that he has, you know, in his circumstance care and control of a vehicle with alcohol in his system, which gives me grounds to use an approved screening device.

[48] I note that Crown counsel phrased his question as "having three drinks in the last four hours", although the testimony of Cst. Fox was that Mr. Schmidt admitted to Cst. Cook and himself to having had "three drinks about four hours ago", not "within the last four hours". I find that the only reasonable way to interpret the evidence is that Mr. Schmidt's admission to having consumed alcohol does not include any admission of alcohol consumption within the previous approximately four hours, only prior to that. I am satisfied that the testimony of Cst. Fox was clear on this point and that the mistaken phrasing of the evidence in the question Crown counsel put to Cst. Fox and Cst. Fox's failure to address this error in his response, cannot allow me to consider that

Mr. Schmidt had admitted to consuming any alcohol within the roughly four-hour period prior to Cst. Cook and Cst. Fox interacting with him.

[49] Certainly, had either RCMP officer engaged their portable microphones, what was said and when would have been clear.

[50] The ASD demand was made on the basis of Cst. Fox's suspicion. He did not make the s. 320.27(2) mandatory breath demand.

[51] Mr. Schmidt provided a breath sample that resulted in a "Fail" reading on the second attempt.

[52] Mr. Schmidt was arrested following the "Fail" result for impaired operation. Cst. Cook performed a cursory search of Mr. Schmidt after he was placed in the rear seat of Cst. Fox's police cruiser.

[53] Cst. Fox proceeded to read Mr. Schmidt his s. 10 *Charter* rights, and the police warning from the card that he carried.

[54] Mr. Schmidt indicated that he understood. Mr. Schmidt responded to the question from Cst. Fox as to whether he wanted to call a lawyer by stating, "I'm 19, man. I don't know what to do." Mr. Schmidt was again asked whether he wanted to speak to a lawyer and he responded that he did not.

[55] Within a minute or two, Cst. Fox transported Mr. Schmidt to the police Detachment. Cst. Fox then began the observation periods, and breath sample results of 150 mg% were obtained. Mr. Schmidt was cooperative throughout the investigation.

[56] Cst. Fox stated that the microphone in his police cruiser would not pick up anything from outside the police cruiser as they are not ultra-sensitive. He also stated that the way his police cruiser was parked it would not have captured any video that was relevant to the investigation.

Cpl. Dunmall

[57] Cpl. Dunmall has been in charge of the RCMP traffic division since 2019. She provided evidence as to how the WatchGuard and continuous evidence technology worked in the police cruisers, as well as evidence as to the failure of the audio recording to have worked in Cst. Cook's police cruiser. She believed that a wire had come loose in the police cruiser. Cpl. Dunmall stated that it is RCMP policy that police officers use both video and audio recording when interacting with individuals.

Alleged *Charter* Breaches

[58] Counsel for Mr. Schmidt submits that:

- Cst. Fox lacked the requisite grounds to suspect that Mr. Schmidt had alcohol in his body. As such, Mr. Schmidt was unlawfully detained contrary to s. 9 of the *Charter*;

- As the "Fail" result on the ASD provided the basis for Cst. Fox to make the breath demand for the approved instrument, the exclusion of the "Fail" result therefore

means that the breath samples were an unreasonable search and seizure contrary to s. 8 of the *Charter*;

- Cst. Fox's failure to read the ASD demand to Mr. Schmidt immediately was a breach of Mr. Schmidt's s. 9 *Charter* right, as well as breaches of his ss. 10(a) and (b) *Charter* rights to be informed of the reason for his detention, and of his right to counsel;

- The failure of the RCMP to take reasonable steps to retain relevant video and audio recording from Cst. Cook's police cruiser violated Mr. Schmidt's s. 7 *Charter* right to make full answer and defence;

- The ss. 8, 9, and 10(a) and (b) *Charter* breaches should result in the evidence of the breath sample results being excluded from trial; and

- The s. 7 *Charter* breach result in a stay of proceedings pursuant to s. 24(1) of the *Charter*.

Grounds to make the ASD Demand (s. 9 *Charter*)

[59] The reasonable suspicion standard is set out in ***R.*** v. ***Chehil***, 2013 SCC 49, and was explained in ***R.*** v. ***Anderson***, 2020 ONCJ 5, in paras. 16 and 17 as follows:

> 16 … Karakatsanis J. set out the nature of the reasonable suspicion standard:

> Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:
>
> > The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
>
> 17 Reasonable suspicion is a lower standard than reasonable and probable grounds, “as it engages the reasonable possibility, rather than probability, of crime.” Reasonable suspicion is “assessed against the totality of the circumstances”. This “inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation”. It “must be fact-based, flexible, and grounded in common sense and practical, everyday experience”.

(See also ***R.*** v. ***Sidney***, 2018 YKTC 37, at paras. 18 to 21).

[60] Cst. Fox testified that he formed the suspicion that Mr. Schmidt had alcohol in his body (while he was in care and control of his vehicle), solely on the admission by Mr. Schmidt that he had consumed three beers four hours earlier. While Cst. Fox referenced the “totality of the situation” in his testimony his answer to the admission by

Mr. Schmidt to having consumed alcohol roughly four hours earlier as being the sole reason for his forming his suspicion, was a clear yes. As such, the remaining observations and information cannot come into play in my analysis. Cst. Fox's subsequent reference to the "totality of the situation" simply was in regard to Mr. Schmidt sitting in the driver's seat of a running vehicle, and therefore obviously in care and control of it. It was not a reference to any indicia of alcohol consumption and any other indicia of alcohol consumption than admission.

[61] While it may be tempting for me to consider the other evidence, such as the length of time the complainant stated the vehicle had been running, the fact that the driver's door was open and Mr. Schmidt was partially out of vehicle, the blue paint on his face, his sleeping state, and the time it took to wake him up, these were not factors that Cst. Fox referred to at all in stating what the grounds for suspicion were.

[62] I understand the submission of Crown counsel that I should take into account these other circumstances that Cst. Fox was or should have been aware of. I am hesitant, however, to also attribute these to Cst. Fox's basis for his determination that he had the requisite reasonable suspicion, given his testimony. He easily could have included these other factors when he testified. He did not. I do not believe that it is my job to "fill in the blanks", so to speak, and conclude that Cst. Fox must have meant that the admission of drinking by Mr. Schmidt was actually not the sole factor on which he based his grounds to administer the ASD. In my opinion, that is a perilous road to set foot upon.

[63] Therefore, I am left with one indicia of alcohol consumption only, the admission by Mr. Schmidt that he had consumed three drinks four hours earlier. Cst. Fox's evidence is that:

> You know, through personal experience, through life, through even, you know, you see it during — its alcohol stays in your system, depending on the amount that you consume, can stay in your system for that time period.

[64] I have no evidence as to the percentage of alcohol of these drinks. I have no evidence as to what Cst. Fox's experience with respect to the generally accepted absorption and elimination rates of alcohol or expert evidence is. Is this submission by Mr. Schmidt enough on its own without any other indicia of the consumption of alcohol relied on by Cst. Fox? In my opinion, it is not. While it may be enough for a suspicion, it is not enough for a reasonable suspicion. While this suspicion likely formed a basis for Cst. Fox to continue his investigation by looking for other indicia of alcohol consumption consistent with alcohol still being present in Mr. Schmidt's body, he did not do so. Had the other available observations been referred to by Cst. Cook as contributing to his grounds, this would support a different submission. These were not.

[65] As stated in ***R.*** v. ***Mowat***, 2010 BCPC 430 at paras. 18 and 19:

> 18 It is whether the admission, taken in the whole of the context, of having had a drink three hours earlier provides objective support with nothing else that the defendant currently has alcohol in his body. Is it a reasonable suspicion, based on the fact that he last drank three hours prior, that there is still present alcohol in the body of the defendant? It is not just the fact that he has consumed. That is where I may differ with the case of *R. v. Gilroy* if it does actually stand for the bald proposition that an admission of

> consumption with nothing else is sufficient to found an objective basis for a reasonable suspicion.
>
> 19 In my view, there must be one further thing at least that the officer observes beyond the fact that he had a drink at some time prior. It is not sufficient to form the basis for the reasonable suspicion alone, without some other indication, for instance, an odour of alcohol on the breath of the person involved.

(See also ***R.*** v. ***Stewart***, 2014 SKPC 93, at paras. 16 and 17).

[66] Crown counsel submits that regardless of whether Cst. Fox had a reasonable suspicion to make the ASD demand, he nonetheless had lawful authority under s. 320.27(2) to make an ASD demand. I agree that Cst. Fox could have made a s. 320.27(2) demand, as the initial detention and interaction with Mr. Schmidt was in the lawful exercise of Cst. Fox's powers under the Yukon *Motor Vehicles Act*, RSY 2002, c 153, and he had an ASD in his possession.

[67] However, this was not the basis put forward by Cst. Fox for the ASD demand that he made. He founded the basis for his demand on s. 320.27(1) — i.e., "reasonable suspicion". I am not aware of any jurisprudence that holds that if a police officer fails on the reasonable suspicion basis, they can then successfully default to the mandatory s. 320.27(2) demand, nor am I prepared to make such a determination myself. If the police officer decided to proceed on the reasonable suspicion basis to obtain an ASD breath sample, then the Court should assess whether this standard has been met and not default to a finding based upon thinking along the lines of, "[w]ell, the officer could have used s. 320.27(2) regardless, so it doesn't matter".

[68] It is not a complex matter for a police officer to articulate the reason behind why the officer made the ASD demand. It would make sense, from an investigatory perspective, for a police officer who has an ASD in their possession, to always rely on the 320.27(2) demand, and only use a s. 320.27(1)(b) demand when they are required to wait for an ASD to be brought to the scene, subject, of course, to the limitations on waiting for an ASD to arrive on the scene as expressed by the Court in ***R.*** v. ***Breault***, 2023 SCC 9.

[69] Frankly, I am somewhat surprised in the cases before me by the continued reliance of police officers in the Yukon on the "reasonable suspicion" foundation for the ASD demand that is made, in circumstances where the officer has an ASD with them, when the much less challengeable pathway of the s. 320.27(2) mandatory breath demand is available.

[70] I do not, therefore, find the submission of Crown counsel on this point to be persuasive. As such, I find that Mr. Schmidt was arbitrarily detained in breach of his s. 9 *Charter* rights.

Section 8 *Charter*

[71] Without the ASD "Fail" result, there was insufficient evidence to make the breath demand for the approved instrument. Therefore, the obtaining of the breath samples at the Detachment was an unreasonable search and seizure and a breach of Mr. Schmidt's s. 8 *Charter* rights.

Delay in Reading the ASD Demand

[72] Section 320.27(1) of the *Code* reads in part:

> 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 ...
>
> …
>
> (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;
>
> …

[73] If the ASD is to be administered immediately, it is also implicit that the demand must be administered immediately once a requisite suspicion has formed in a police officer's mind, as I stated in ***R.*** v. ***Godbout***, 2022 YKTC (unreported):

> There is no question that the law is settled that a police officer has to require the detainee to provide a roadside breath sample forthwith, meaning "immediately", once the police officer has formed the requisite (reasonable) suspicion that a driver has alcohol in his or her body. "Forthwith" does not mean "within a reasonable time". Of course, context matters and there may be occasions where the circumstances allow for some delay, such as where the delay is required in order for the police officer to discharge his or her duty. Obviously, if the breath sample is to be obtained forthwith, the demand must also be made forthwith in order to allow this to happen.
>
> In the recent case of ***R.*** v. ***Breault***, 2023 SCC 9, the Court considered ***R.*** v. ***Quansah***, 2012 ONCA 123, and expressed concern about the broad approach in ***Quansah*** to the term "time reasonably necessary" for a police officer to discharge his or her duty, when considering the immediacy

> requirement for the period between the making of the ASD demand and the obtaining of the breath sample (paras. 47-52). The Court held that ***Quansah*** unduly broadened the immediacy requirement. The Court stated that "forthwith" is not the same as "time reasonably necessary" (para. 51). The Court qualified that when determining if there are "unusual circumstances", this must be determined in light of the text of the provision. This will ensure that courts do not improperly broaden the ordinary meaning of "forthwith" (para. 56). The Court stated that the absence of an ASD is not "in and of itself an unusual circumstance" (para. 60). Although the Court was dealing with the "forthwith" requirement of s. 254(2), it noted that the wording of s. 320.27(1) is substantially similar (para. 39). It is also noted that steps related to legitimate safety concerns, and steps taken to ensure that a proper analysis of the breath sample are obtained, can be within that, still in compliance with the immediacy requirement (paras. 57, 58).

[74] Cst. Fox was required to read Mr. Schmidt the ASD demand once he formed his belief that he had the reasonable suspicion to do so.

[75] There is some ambiguity in the evidence as to when Cst. Fox asked Mr. Schmidt whether he had consumed any alcohol. It was somewhat unclear to me as to whether:

- Cst. Fox returned to the driver's side door of the Truck after hearing Mr. Schmidt answer Cst. Cook's question about alcohol consumption (and was also informed of the answer by Cst. Cook), asked Mr. Schmidt this question himself, went to get the ASD from his police cruiser, then returned and made the breath demand; or

- Cst. Fox heard Mr. Schmidt answer Cst. Cook's question about alcohol consumption (and was also informed of the answer by

> Cst. Cook), went to get the ASD from his police cruiser, returned to the driver's side door of the Truck, asked Mr. Schmidt whether he had consumed alcohol, and then read the ASD demand.

[76] A further excerpt from the transcript of the evidence is as follows:

> Q Okay. So you're — now you've walked back — …
>
> A — that is from the rear of Cst. Cook's police cruiser —
>
> Q Okay. So you're — now you've walked back —
>
> A Uh-huh.
>
> Q — to the front driver's side. It's 9:07:58. What's happening here?
>
> A So I believe it was in and around there that I overheard Cst. Cook's conversation with Mr. Schmidt regarding alcohol and recent consumption.
>
> Q Starting again 9:07:58.
>
> (VIDEO BEING PLAYED)
>
> Q So stopping 9:08:09. You've now walked out of the frame. What's happening?
>
> A So at that point, I'd heard Cst. Cook's conversation, and I would've confirmed by asking Mr. Schmidt the same question, you know, how much had you had to drink. And his response was three — I believe three drinks four hours ago. At that point, I now have formed my suspicion that he has, you know, in his circumstance care and control of a vehicle with alcohol in his system, which gives me grounds to use an approved screening device.
>
> Q And I'm assuming that's what you're going to go get?
>
> A That is what I'm going to go get at this point.

[77] From the video recording, however, it seems quite clear to me that Cst. Fox only paused briefly at the driver's side door after coming from the rear of Cst. Cook's police cruiser and did not appear to engage in any real conversation with Mr. Schmidt until after he had returned with the ASD.

[78] Regardless, a *Charter*-compliance problem arises either way. Cst. Fox stated that he wanted to form his own opinion as to whether a reasonable suspicion existed, as he was the lead investigator. When he asked Mr. Schmidt the same question as Cst. Cook did and received the same answer, he stated that he now had a reasonable suspicion. However, he had no more information than he had before.

[79] Therefore, logically, Cst. Fox had the, in his opinion, "reasonable" suspicion Mr. Schmidt had alcohol in his body when he heard Mr. Schmidt tell Cst. Cook that he had consumed three drinks four hours earlier. Whether he questioned Mr. Schmidt about his alcohol consumption before or after he went to get the ASD, he had the suspicion that he relied on before he went to get the ASD from his police cruiser.

[80] Mr. Schmidt was clearly detained from at least the point that Cst. Cook asked him about his alcohol consumption and received the admission of previous drinking. He was clearly being detained for the purposes of an impaired driving investigation. However, Mr. Schmidt was never told of the reasons for his detention. I am not prepared to find in this case that simply being asked a question about whether he had consumed alcohol, and responding as he did, that Mr. Schmidt is to be presumed to have been aware of the reasons for his detention.

[81] I agree with the submission of Crown counsel that what is important is that the detained individual be aware that they are detained for the purpose of providing a breath sample into an ASD. The demand does not have to be in formal wording as it is the knowledge that the individual is to be detained for that purpose that matters, not adherence to the technical wording as set out in the ASD demand card.

[82] As stated in ***R.*** v. ***Horvath***, 1992 CarswellBC 1984 (BC SC), at para. 8:

> It is trite law that a "demand" for a breath sample under s. 254(3) need not be in any particular form, provided it is made clear to the driver that he or she is required to give a sample. In my view, that has equal application to s. 254(2). There is no particular form required for the demand, so long as it is made clear to the driver that he or she must provide a sample "forthwith". …

[83] I said as much in the ***Godbout*** case:

> If I accept the evidence of Cst. Cook that he advised Mr. Godbout that he would be returning with a roadside screening device in order to obtain a breath sample, in my opinion, this satisfies both the informational component of s. 10(a) and the s. 320.27(1) requirement with respect to the informational component of s. 320.27. If the ASD sample is to be provided immediately, it also means that the demand for the breath sample is to be made immediately.
>
> I am satisfied, on the evidence — and this is still out of the ***Godbout*** case — notwithstanding the lack of contemporaneous and detailed notes or an audio recording, that Cst. Cook did advise Mr. Godbout that he would be returning with an ASD and obtaining a breath sample. I am satisfied the Mr. Godbout would have known why he was being detained in the rear seat of a police cruiser for this purpose, as well as the detention for the *MVA* alleged offence.

[84] What distinguishes the circumstances in Mr. Schmidt's case, however, is that Cst. Fox did not say anything to Mr. Schmidt about what he was doing. He simply left and returned with the ASD. I am not satisfied that Mr. Schmidt was expected to understand that his response of "three drinks four hours ago" to Cst. Cook necessarily meant that he was being further detained so that he would be required to provide a breath sample into an ASD. He needed to be told that in some clear fashion. He was not.

[85] From the video recording, it appears that approximately 36 seconds passed between Cst. Fox returning to the driver's side door of the Truck from the rear and leaving and returning with the ASD. There appears to be a conversation between Cst. Fox and Mr. Schmidt for approximately 78 seconds, at which point Cst. Fox is getting the ASD ready for use. Approximately 107 seconds later, Cst. Fox is returning the ASD to its case. Even had Cst. Fox asked Mr. Schmidt at the Truck about his alcohol consumption before going to get the ASD from his police cruiser, the same delay would have occurred before the breath demand was made and Mr. Schmidt being informed for the reasons for his detention.

[86] It is not too much to expect that police officers at least make reasonable efforts to comply with the basic and rudimentary informational obligations that arise in an impaired driving investigation. This is not an onerous expectation, even in the often dynamic nature of policing.

[87] Therefore, Cst. Fox did not comply with the statutory requirement of s. 320.27(1)(b), making the demand unlawful. The detention of an individual for a lawful

ASD demand does not trigger a right to counsel, as this right has been determined to be suspended for the purposes of allowing the ASD test to be administered. If, however, the statutory requirements of s. 320.27(1)(b) are not met, then the s. 10(b) *Charter* right to counsel that arises upon detention is breached.

[88] Further, in this case, had Mr. Schmidt been provided the ASD breath demand or sufficiently equivalent information, when he should have, being when Cst. Fox logically formed his reasonable suspicion, Mr. Schmidt's s. 10(a) *Charter* right to be informed of the reasons for detention would have been met. There would have been no breach of his s. 10(a) *Charter* right.

[89] As such, I find that Mr. Schmidt's s. 10(a) and s.10(b) *Charter* rights were also breached. In saying this, I am aware of the short time frame involved and further aware that, if the ASD demand had been read, or sufficiently equivalent information provided to Mr. Schmidt when it should have been, there would have been no s. 10 *Charter* issues in play.

Evidence not Obtained and/or Preserved – Section 7 *Charter*

[90] Because Cst. Cook and Cst. Fox did not activate the portable microphones, there is no audio recording of the interactions between either of them and Mr. Schmidt. Certainly, some of the ambiguities in the evidence would have been avoided if they had bothered to activate their portable microphones.

[91] Further, because the audio recording technology in Cst. Cook's police cruiser was malfunctioning, there was no audio recording made within his police cruiser, and

none of what would have occurred outside within the ranges of what his VICS would have been able to capture. There was also no attempt by Cst. Cook to use other technology in order to try to obtain any recording that would otherwise have been captured and available for a period of time until overwritten.

[92] There are circumstances where a failure to obtain and/or preserve a recording, whether video or audio, have been found to justify either a stay of proceedings or the exclusion of evidence.

[93] In ***R.*** v. ***Azfar***, 2023 ONCJ 241, the Court stated:

> 20 On behalf of Mr. Azfar, Mr. Finlay submits that the deliberate muting of the audio on the body cameras of PC Ip and PC Corcoran was done by the officers with the intention of depriving the defence of the content of their discussion concerning their observations of Mr. Azfar, which PC Corcoran acknowledged was important to their investigation.
>
> …
>
> 22 On the totality of the evidence, I find that the action of muting the audio in the body-worn cameras was taken by the officers for the specific purpose of withholding from the defence information about the officers' observations of Mr. Azfar, and the extent to which their observations did or did not provide a basis for a reasonable suspicion that Mr. Azfar had alcohol in his body pursuant to s. 320.27(1), and therefore provided a basis for an ASD demand under that section.
>
> …
>
> 24 I agree with defence counsel's characterization of the police conduct in this case and with the defence submission as to the officers' motivation.
>
> 25 In my opinion, it is clear from the totality of the evidence that this was not the result of carelessness, or inadvertence, but rather was a deliberate decision by the officers to mute their microphones knowing that the result of that decision

> would be to deny to the defence, information concerning their investigation of Mr. Azfar which PC Corcoran acknowledged was important information in relation to the police investigation. In my opinion, it amounted to the deliberate suppression of evidence concerning the police investigation that otherwise would have been required to be disclosed to the defence.
>
> …
>
> 27 In *R. v. Khan*, 2010 ONSC 3813, Justice MacDonnell rejected the submission that the failure of the police to videotape the testing procedure in which the accused provided breath samples, in circumstances where the Detachment's supply of videotapes had run out, amounted to a breach of section 7 of the *Charter*. …
>
> > [13] The Crown's disclosure obligation does not extend to material that is not in its possession or control and does not require the Crown to bring evidence into existence. For example, both the Ontario Court of Appeal and the Supreme Court of Canada have declined to impose either a constitutional or common law requirement that the police record videotape or audiotape custodial interrogations. …
>
> 28 As noted by Justice MacDonnell in *R. v. Khan*, and Justice Durno in *R. v. Piko*, … cases of the inadvertent or negligent failure to use available recording technology are distinguishable from cases, such as the case at bar, in which the police deliberately stop an audio recording knowing that by doing so it will deprive the defence of information concerning their investigation of the accused acknowledged by the officers to be important to their investigation.

[94] In the present case, I find there was no attempt by Cst. Cook or Cst. Fox to deliberately avoid activating their portable microphones in order to avoid obtaining evidence of possible relevance to the right of Mr. Schmidt to make full answer and defence, or to cover up any police misconduct. Rather, it was simply their practice at the time not to do so, a practice which, with further training, they have now changed such that they now utilize their portable microphones in order to obtain an audio

recording. Their practice at that time was not in compliance with the RCMP policy, however, it was not a legal obligation that they were required to comply with.

[95] I find that the failure to audio record the interaction between Mr. Schmidt and either officer using the available portable microphones does not give rise to a possibility that evidence relevant to Mr. Schmidt's right to make full answer and defence has been at all compromised. There is no evidence of any indicia of impairment, such as the slurring of words, to which an audio recording would perhaps have been helpful. I have accepted the testimony of Cst. Fox that Mr. Schmidt said he had consumed three drinks four hours earlier, which is in the manner most favourable to the defence. I note that the statement has not been challenged as being false or mistaken either by the cross-examination of the officers or by any evidence that Mr. Schmidt could have provided had he testified. There is, in my opinion, no possibility that evidence that would have benefited Mr. Schmidt's right to make full answer and defence was not obtained.

[96] I conclude the same with respect to the failure to use available technologies in order to try to preserve any recording that would have been made in Cst. Cook's police cruiser. Firstly, in my experience in this Court in cases before me, Cst. Cook's audio recording equipment in the police cruiser would not, as he testified to, have captured any of the audio outside of the police cruiser, especially given the distance away that the interactions with Mr. Schmidt took place.

[97] In ***R.*** v. ***Turner***, 2017 YKTC 31, Chisholm J. entered a judicial stay of proceedings in the situation where the RCMP had failed to disclose a video and audio

recording of the police officer's interaction with the accused. It took over a year for the RCMP to locate the recording. However, once located, the electronic file was inoperable.

[98] As he stated in para. 14, the corollary of the requirement on the Crown to disclose all relevant evidence "…is that the Crown is required to preserve relevant evidence". It is not a far leap from this to say that all reasonable steps should be taken by the Crown (i.e., the RCMP) to obtain all relevant evidence.

[99] As Chisholm J. stated in para. 16:

> …The more relevant the evidence in question is, the greater the expectation that the police or Crown will make careful efforts to preserve it. …

Again, I would add that in front of the word "preserve", the words "obtained and" could be inserted. I do not say this as a legal requirement. I say it as a matter of common sense in order to allow investigations to proceed with the best information available.

[100] While there is always the potential that relevant evidence will not be obtained or preserved when audio recording equipment is not utilized to ensure that a recording is made and available to defence through disclosure obligations, in Mr. Schmidt's circumstances, I am satisfied that no relevant evidence to his right to make full answer and defence was not obtained or preserved.

[101] This said, where, absent exigent circumstances, police officers do not take advantage of available technologies in order to obtain and preserve evidence that may be relevant, it is the police who are likely going to find themselves on the wrong side of

a court finding or decision where there is uncertainty and/or ambiguity on a point of relevant evidence. This is somewhat analogous to contract law, where it is the person who has the expertise in drafting a contract and the power to ensure that the terms of a contract are clear, they may find themselves on the wrong side of a judicial interpretation and application of a term if there is ambiguity.

[102] As there was no relevant evidence lost or not preserved that impeded or compromised Mr. Schmidt's right to make full answer and defence, however, I find that there was no breach of Mr. Schmidt's s. 7 *Charter* rights.

Section 24 *Charter*

[103] Section 24 of the *Charter* reads:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[104] Once the breach of a *Charter*-protected right has been established, the sole question of deciding if the evidence obtained is a result of the breach should be excluded from a trial is whether, in the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

[105] The Court in ***R.*** v. ***Sakharevych***, 2017 ONCJ 669, referring to the decision in ***R.*** v. ***Grant***, 2009 SCC 32, stated, in para. 88, that:

> … a Charter breach in and of itself brings the administration of justice into disrepute. However, in their view, subsection 24(2) was concerned with the future impact of the admission/exclusion of the evidence on the repute of the administration of justice. In other words, the court was concerned with whether admission/exclusion would do further damage to the repute of the justice system. In doing so, the court noted that the analysis required a long-term view, one aimed at preserving the integrity of our justice system and our democracy.

[106] The three factors set out in ***Grant*** are as follows:

- the seriousness of the breach;
- the impact of the breach on the *Charter*-protected interests of the individual; and
- society's interest in the adjudication of the case on its merits.

The Seriousness of the Breach

[107] As stated in ***R.*** v. ***McColman***, 2023 SCC 8, at para. 57:

> The first line of inquiry focuses on the extent to which the state conduct at issue deviates from the rule of law. As this Court stated in *Grant*, at para. 72, this line of inquiry "requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that

> unlawful conduct". Or as this Court phrased it in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22: "Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?"

[108] I find that the breaches in this case, certainly cumulatively, are serious. The *Charter* right not to be arbitrarily detained is, arguably, less significant in this case as a result of the availability, albeit unused, of the s. 320.27(2) mandatory breath demand. Mr. Schmidt could have been lawfully detained had Cst. Fox decided to proceed by this means. However, he did not and therefore the nature of the arbitrary detention remains to be considered on the basis of the lack of the requisite reasonable suspicion. Detentions of individuals by the police are an intrusion into the freedom of individuals living in Canada. While such intrusions are at times justifiable, whether for investigative purposes or for arrest, detaining individuals without the necessary legal basis to do so is unacceptable. Police officers who detain individuals in Canada are expected to be aware of the boundaries of their ability to do so, and to make every reasonable effort to operate within these boundaries. When police officers do not do so, the courts should dissociate themselves from such conduct, whether intentional or careless.

[109] The s. 8 *Charter* breach is serious because of the intrusion into the privacy and liberty interest of Mr. Schmidt that resulted, both in time, and in the obtaining of the breath samples. Searches of persons and seizure of evidence by police that lack the requisite legal authorization are not to be condoned. While this search and seizure would likely have occurred if Cst. Fox had proceeded differently, he did not. This may mitigate the seriousness of the breach somewhat, but that does not mean it is not serious.

[110] The s. 10(a) *Charter* right to be informed of the reasons for one's detention by police officers is a long-standing and important right. It is not a new or developing area of the law. I appreciate that the time frame here appears to be approximately or just under one minute from the time the detention for investigative purposes for impaired driving can be said to have crystallized, and the time that Mr. Schmidt would have been clearly aware that this was the reason for his detention. However, while this may mitigate the seriousness of the *Charter* breach, as compared to a lengthy time of detention without a reason being provided, it does not detract from the fact that the breach is nonetheless serious.

[111] The s. 10(b) *Charter* breach is more of a technical breach because of the unlawfulness of the ASD demand in that it was not made immediately as required. In the normal course of events in an ASD impaired case, where the ASD is already at the scene at the time of detention, the s. 10(b) right does not usually come into play until after a "Fail" result has been recorded by the ASD. In the scheme of s. 10 *Charter* breaches, this is certainly on the less serious end of the scale.

[112] Cumulatively, I find that this branch of the ***Grant*** test favours exclusion of the evidence of the breath sample results.

The Impact of the Breach on the Charter-protected interests of Mr. Schmidt

[113] On this branch of the test, the Court, in ***McColman*** stated, in para. 66:

> The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to

> which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para.76

[114] Mr. Schmidt was arrested and detained for transportation to the RCMP Detachment to provide breath samples and be charged with impaired driving offences. He did not speak with legal counsel, having declined to do so, although I note that his response to Cst. Fox that he was only 19 and did not know what to do, might have alerted Cst. Fox to perhaps that uncertainty of what to do was expressed by Mr. Schmidt with respect to speaking with legal counsel. It may perhaps have been advisable to provide Mr. Schmidt an opportunity to do so once at the Detachment, rather than simply proceeding on the roadside "No" by a 19-year-old who had said he was not clear what to do. This is not an argument advanced by counsel and is not a factor in my decision, just an observation.

[115] I find that, cumulatively, the *Charter* breaches had a significant impact upon Mr. Schmidt's *Charter*-protected interests and that this branch of the test also favours exclusion of the evidence.

Society's Interest on an Adjudication of the Case on its Merits

[116] The third branch of the ***Grant*** inquiry was explained in ***McColman***, in paras. 69 and 70:

> 69 The third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This

> inquiry requires courts to consider both the negative impact of admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence: *Grant*, at para. 79. In each case, "it is the long-term repute of the administration of justice that must be assessed": *Harrison*, at para.36.
>
> 70 Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this Court has recognized that the final factor can cut both ways: *Grant*, at paras. 81 and 83-84. While the public has a heightened interest in a determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach: para. 84.

[117] Failing to admit the evidence of the breath test results will prevent the Crown from successfully prosecuting this case.

[118] As courts across Canada have repeatedly stated, myself recently in ***R.*** v. ***Vaillancourt***, 2023 YKTC 17, at para. 114:

> Impaired driving is a very serious societal problem. The tragic consequences from impaired driving leaves a legacy of destroyed lives, with a devastating ripple effect on families and communities. Legislative changes through the recent years reflect society's desire and intent to address the offence of impaired driving with increasingly severe sanctions for offenders. Courts have recognized the importance of imposing sanctions which reflect the concerns of society, through increasingly severe sentences.

[119] The third factor of the ***Grant*** test in impaired driving cases generally tends to militate in favour of the inclusion of the evidence, although, again as I stated in ***Vaillancourt***, at para. 115:

> …it cannot be lost that letting in evidence that accompanies a failure by the police to ensure that, in their exercise of

> powers, they have respected the *Charter*-protected interests of individuals, can have a broader and longer-term impact on society's perception of the administration of justice. Truth is important; so is Justice. The long-term interests of justice may be greater served by excluding the evidence in an impaired simpliciter case, with the possibility of encouraging greater *Charter* compliance in a future case, one that may involve an impaired offence where death and/or bodily harm has resulted.

Impact upon the Public Confidence and the Administration of Justice

[120] The balancing of the ***Grant*** factors requires both a short and long-term view of the justice system, and the public's perception of it, be taken into account.

[121] As stated in ***Grant***, in para. 84: "Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. …". At para. 86, it is made clear there is no "overarching rule" or "mathematical precision" governing how a trial judge is to balance the three factors.

[122] As I recently stated in ***Vaillancourt***, which I do not feel the need to restate in other words just to make it different:

> 118 The *Charter*-protected interests of individuals need to be recognized by the remedies that are granted when these interests are breached. If police actions fail to recognize these *Charter*-protected interests, yet the evidence that is obtained is routinely admitted into the trial, then this undermines the confidence can society have that their *Charter*-protected interests truly matter. Neither should evidence be routinely excluded, however, as each case must be assessed on its own circumstances.
>
> 119 In ***R.*** v. ***Thompson***, 2020 ONCA 264, the Court stated the following:
>
> > 106 The final step under the s. 24(2) analysis involves balancing the factors under the three

> lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision: *Harrison*, at para. 36.
>
> 107 If, however, the first two inquiries together make a strong case for exclusion, the third inquiry "will seldom if ever tip the balance in favour of admissibility": *Le*, at para. 142; *Paterson*, at para. 56; and *McSweeney*, at para. 81.

120 Impaired driving trials where counsel are bringing *Charter* applications arising from police investigative actions are becoming quite commonplace in the Yukon. I have commented on more than a few occasions about the deficiencies in the police investigative procedures in impaired driving cases here. To the extent that there is a somewhat of a pattern of *Charter* breaches in impaired driving cases in the Yukon, this is [a] factor that I can take into account in assessing the impact of this breach upon public confidence in the administration of justice (***R.*** v. ***O'Brien***, 2023 ONCA 197, at para. 25).

121 While s. 24(2) *Charter* remedies are not to be used to punish police officers for breaching the *Charter*-protected interests of individuals, the exclusion of evidence is a remedy to be applied when merited. …

122 With power comes responsibility. Our police officers, quite necessarily, have been granted considerable power. This power intrudes, again quite necessarily, into the privacy and liberty interests of individuals. It is to be expected in a fair and just society that police officers carry out their investigative duties in a manner that complies with the *Charter*-protected interests that Canadian society has deemed sufficiently important to merit constitutional protection.

[123] In this case, I am satisfied that a balancing of the ***Grant*** factors requires that the evidence of the breath test results be excluded from trial.

_____

COZENS C.J.T.C.