Citation: *R. v. Benoit-Richardson,* 2023 YKTC 29

Date: 20230728
Docket: 20-00737
Registry: Whitehorse

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

REX

v.

KENTON MICHEL BENOIT-RICHARDSON

Appearances:
Leo Lane — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Kenton Michael Benoit-Richardson has been charged with having committed an offence contrary to ss. 320.15(1) of the *Criminal Code* (the "*Code*"). The Crown has entered a stay of proceedings on a charge contrary to s. 88 of the *Code*.

[2] Counsel for Mr. Benoit-Richardson has filed an Amended Notice of Application alleging breaches of Mr. Benoit-Richardson's ss. 8, 9, and 10(b) *Charter* rights. Counsel has abandoned a s. 15 *Charter* argument.

[3] Counsel raises three issues in the trial.

- First, counsel submits that Cst. Breton was not acting in the lawful exercise of his duties when he stopped the vehicle Mr. Benoit-Richardson was driving and made the mandatory breath demand under s. 320.27(2);

- Second, counsel submits that Mr. Benoit-Richardson did not have the necessary *mens rea* to commit the offence; and

- Third, the s. 320.27(2) breath demand is unconstitutional.

[4] Cst. Breton testified in a *voir dire*.

[5] Following his testimony, submissions were made regarding the first issue. Counsel agree that my ruling on this issue could be determinative of whether the trial would continue.

[6] Counsel for Mr. Benoit-Richardson submits that, on an analysis of both the statutory powers under s. 106 of the Yukon *Motor Vehicle Act*, RSY 2002, c. 153 (the "*Act*"), and the common law power of the police, neither authorizes the traffic stop conducted by Cst. Breton.

[7] In order to conduct a traffic stop, there must be a legitimate reason for pulling the vehicle over, or otherwise an authority granted in the applicable territorial legislation. Authority for the stop in this case cannot be implied in the wording under s. 320.27(2) of the *Code*. Further, the *Act* does not provide the RCMP with a recognized power to conduct a random roving stop for the purpose of checking a driver's sobriety.

[8] There is no basis to conclude that random roving stops to check for driver sobriety is necessary in the Yukon. It cannot be argued that the current scheme in place with respect to investigating impaired drivers is not doing the job, and that such random roving stops will fill the gap. Such a random, roving stop is neither necessary, nor reasonable.

[9] Crown counsel submits that the traffic stop was authorized under both.

Testimony of Cst. Breton

[10] For the purposes of resolving this first issue, I will only put forward as much of the testimony of Cst. Breton as is necessary.

[11] Cst. Breton was on patrol in Whitehorse on December 12, 2020. At 20:45 hours, while driving northbound on the Alaska Highway just south of Whitehorse, he observed the white van being driven by Mr. Benoit-Richardson in front of him apply his brakes and swerve into the oncoming lane. Cst. Breton said that the roads were slippery at the time but he did not believe that there was any reason for the brakes to have been applied. As a result, Cst. Breton decided to pull the van over, in order to check for driver sobriety.

[12] Cst. Breton testified that Mr. Benoit-Richardson told him that he applied the brakes because he had seen a coyote, and because he thought that Cst. Breton was following too closely.

[13] Cst. Breton had an approved screening device ("ASD") with him. He testified that his intention in pulling the van over was for the purpose of making a s. 320.27(2) mandatory breath demand.

[14] There was no indicia of impairment in this case. Cst. Breton testified that the sole purpose for the traffic stop was to make the s. 320.27(2) breath demand.

Statutory Authority

[15] Section 106 of the *Act* provides the statutory authority for police officers to conduct traffic stops.

> POWERS OF PEACE OFFICERS AND OFFICERS
>
> 106 Stopping for peace officer
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> Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately:
>
> (a) bring their vehicle to a stop;
>
> (b) furnish any information respecting the driver or the vehicle that the peace officer requires; and
>
> (c) remain stopped until they are permitted by the peace officer to leave.

[16] In ***R.*** v. ***Rowat***, 2018 YKSC 50, Gower J considered the scope of s. 106 of the *Act,* stating:

> 14 This section is similar to legislation in other provinces which has been interpreted by the Supreme Court of Canada as authorizing arbitrary detentions of motorists for purposes legitimately connected to highway safety concerns. The arbitrary detentions generally occur in the context of organized police check stops or random patrols by roving police vehicles. The Supreme Court has said repeatedly that the stops are justified under s. 1 of the *Charter* because they help to ameliorate the pressing and

> substantial problem of death and destruction on our highways. They also facilitate the detection of highway safety offences, which are otherwise nearly impossible to investigate without stopping the drivers concerned. Examples are: invalid registration documents; invalid insurance; the non-existence or suspension of a driver's licence; a vehicle which is mechanically unfit; and impaired drivers. The Supreme Court has also said that these arbitrary stops are justifiable because they help to deter drivers from committing these types of highway safety offences.
>
> 15 However, the authority to make such arbitrary stops is not unlimited. Here, I agree with the submissions of Crown counsel, which were unopposed by the respondent accused. The two principal limitations are as follows.
>
> 16 First, police cannot use the authority to arbitrarily detain under s. 106 of the Yukon *MVA* (and other related similar legislative provisions) in a discriminatory manner. For example, they cannot stop drivers based on their sex or race or any other discriminatory basis: *Brown v. Durham Regional Police Force*, [1998] 43 O.R. (3d) 223 (O.N.C.A.) ("*Brown*"), at para. 38.
>
> 17 Second, police cannot use these powers to further a criminal investigation unrelated to traffic safety.

[17] Therefore, according to ***Rowat***, a random stop must be related to the act of driving a vehicle. It cannot be for any other non-driving related purpose. Random stops also cannot be conducted on a discriminatory basis, such as profiling of the driver.

[18] Even though there is an overlap of the use of s. 106 to conduct a *Code* investigation under s. 320.27(2), the overlap is justifiable, as the act of driving a motor vehicle in the Yukon as related to the issue of impaired driving, is dealt with in ss. 255 to 259 of the *Act*.

[19] In ***R.*** v. ***Labillois***, 2020 ABQB 200, in dismissing an appeal from conviction, the court dealt with a random, roving stop of a vehicle solely for the purpose of making a

s. 320.27(2) breath demand. The police officer testified that this was the only reason for the traffic stop.

[20] The court considered a number of cases, including ***R.*** v. ***Dedman***, [1985] 2 S.C.R. 2; ***R.*** v. ***Ladouceur***, [1990] 1 S.C.R. 1257; and ***R.*** v. ***Orbanski***, 2005 SCC 37, and found that, while the police officer was incorrect when he stated that s. 320.27(2) of the *Code* gave him authority to conduct a traffic stop, there was nevertheless authority under s. 166 of the Alberta *Traffic Safety Act*, RSA 2000, c. T-26 (*ATSA*) to conduct a traffic stop even if the sole reason for doing so was to make a s. 320.27(2) breath demand.

[21] Section 166 reads, in part:

> 166(1) For the purposes of administering and enforcing this Act or a bylaw, a peace officer may
>
> (a) with respect to a vehicle,
>
> (i) signal or direct a driver of a vehicle to stop the vehicle, and
>
> (ii) request information from the driver of the vehicle and any passengers in the vehicle…

[22] Section 166(2) of the *ATSA* reads:

> 166(2) When signalled or directed to stop by a peace officer who is readily identifiable as a peace officer, a driver of a vehicle shall
>
> (a) forthwith bring the vehicle to a stop
>
> (b) forthwith furnish to the peace officer any information respecting the driver of the vehicle that the peace officer requires, and

> (c) remain stopped until permitted by the peace officer to leave.

[23] In paras. 25, 33 to 35, Yamauchi J. states:

> 25 The *ATSA* s 166(1) permits peace officers randomly to stop drivers to check for things like mechanical fitness of the vehicle, and the possession of a valid licence and proper insurance, as that is part of administering and enforcing the *ATSA* or a bylaw. There is no general stop provision contained in *ATSA* s 166(1) to check for a driver's sobriety, although the peace officer may suspend a driver's license if the peace officer "reasonably suspects" that the driver has consumed alcohol pursuant to *ATSA* s 89(1).
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> …
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> 33 *ATSA* s 166(2) contains the general, random stop power to which Cory J referred in ***Wilson***. The comment that the Alberta Court of Appeal made in ***Dhuna*** concerning the "wide constitutional power to stop motorists, at random" refers specifically to the general stop power contained in the *ATSA* s 166(2).
>
> 34 Cst. Debow was incorrect when he told Mr. Labillois that, "the new law gives me authority to stop you." *ATSA* s 166(2), however, gives the police in Alberta the ability randomly to stop drivers. As well, the police in Alberta have the common law power to stop motor vehicles pursuant to ***Dedman***, according to ***Orbanski*** at para 41. As a result, there is no necessity for *Criminal Code* s 320.27(2) to create a stand-alone power to stop. It already exists pursuant to the common law and *ATSA* s 166(2), which are embedded in the wording of *Criminal Code* s. 320.27(2), when it refers to "the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law." The "new law," however, gives Cst. Debow the authority to make the Demand.
>
> 35 In summary, Cst. Debow was acting in the course of the lawful exercise of his powers under *ATSA* s 166(2), an Act of the Alberta legislature, or arising at common law pursuant to ***Dedman***, in conducting the stop of Mr. Labillois's vehicle. Thereafter, *Criminal Code* s. 320.27(2), allows Cst. Debow to make the Demand. Of course, Cst. Debow had to have had an approved screening device, which he did, and Mr. Labillois had to have been operating a motor vehicle, which he was. Cst. Debow was not limited to asking questions "related to driving offences": ***Ladouceur*** at 1287. *Criminal Code* s 320.27(2) authorizes him to make a Demand, even if he did not have reasonable and probable grounds, or a reasonable suspicion.

[24] As in ***Rowat***, Yamauchi J. held that targeted stops on a discriminatory basis are not permissible (para. 40).

[25] In ***R.*** v. ***DeRoach***, 2021 NSPC 44, the police officer conducted a traffic stop after watching the driver slightly stumble or stagger, while walking to her parked car, and driving away. The officer testified that he stopped her to check for her sobriety.

[26] Van den Hoek J. stated at paras. 3, 30 and 34-36:

> 3 I find the officer had grounds to stop Ms. DeRoach's vehicle based on her slight stumble before driving, and in any event the stop did not require such a foundation. The officer's testimony that the stop was aimed at checking sobriety was sufficient to render it lawful. These are my reasons for reaching this conclusion, but first my findings of fact.
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> …
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> 30 Finally, it is not necessary that the officer specifically invoke the MVA during testimony, so long as his intention "satisfies the aim of the statute": See *R. v. Houben*, 2006 SKCA 129, and *R. v. Mellenthin*, [1992] 3 SCR 615. Instead, the Court can infer such a connection based on the evidence. I find Cst. Smith's evidence served to do just that, the stop was addressed at checking sobriety pursuant to the MVA and as a result was lawful.
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> …
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> 34 Counsel argues Cst. Thomas required reasonable suspicion, not evident in his testimony, to stop Ms. DeRoach. Gower J. in *R. v. Rowat,* 2018 YKSC 50, at paragraph 21, addressed a similar argument - whether there is the need for reasonable suspicion versus no need. His comments are apropos, "*Ladouceur* makes it unnecessary to distinguish between arbitrary and non-arbitrary stops because both are constitutional. (para. 51)".
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> At paragraph 26:
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> > ...if there is a reasonable suspicion, then the stop is not arbitrary. However, even if a stop is selective, if it is not based upon a reasonable suspicion, then by default it must be considered to be random and arbitrary. We know from *Ladouceur* that random and arbitrary stops under

> legislation like s. 106 of the Yukon MVA are justifiable under s. 1 of the *Charter*.
>
> 35 With respect, reasonable suspicion to believe an offence has occurred is not required so long as an arbitrary stop complies with the aforementioned scope that includes a sobriety check. (*Ladouceur, supra, Mellenthin, supra, Elias, supra*)
>
> 36 It is worth noting, drinking and driving is not in itself illegal and an officer checking for driver sobriety may or may not reach the conclusion that *Criminal Code* mandatory alcohol screening should occur; it is available to him to make that decision after the vehicle is stopped pursuant to the highway safety objective. Such stops are justifiable because they deter drivers from committing highway traffic violations.

[27] I note that in ***R.*** v. ***Maxwell***, 2022 QCCQ 9020, Hebert J. discussed the decision in ***Luamba*** v. ***Procureur Général du Québec and als***, 2022 QCCS 3866, in which both the statutory and common law authority for random stops was determined to be unconstitutional.

[28] The argument in ***Luamba***, (the accused was a black man who had been randomly stopped three times within a 14-month period), was as follows:

> 16 According to Luamba, the common law rule and the *HSC* provision at issue in this case have been diverted from their main purpose, highway safety, to allow for racial profiling. Thus, Luamba asked the Superior Court to invalidate both the common law rule and the *HSC* provision at issue in this case, pursuant to s. 52(1) of the *Constitution Act of 1982*

[29] Hebert J. noted the decision of the Court in ***Luamba*** in para. 18:

> After reviewing the evidence, the Superior Court decided that the common law rule and the *HSC* provision at issue in this case resulted in an arbitrary detention and therefore violated s. 9 of the *Charter*, a finding which is consistent with the Supreme Court decision in *Ladouceur*. However, the Superior Court found that the common law rule and the *HSC* provision at issue in this case could not be justified in a free and democratic society, within the meaning of s. 1 of the *Charter*, a finding that departs from the Supreme Court decision in *Ladouceur*. Consequently, the Superior Court

> invalidated the common law rule articulated in the *Ladouceur* decision and the provision of the *HSC* that authorized random stops of motorists.

[30] However, Hebert J., noting that the decision in ***Luamba*** was under appeal, held that there was still both statutory and common law authority for random stops of motorists, pending the decision of the Court of Appeal in ***Luamba***, stating in paras. 20 and 112:

> 20 The *Luamba* decision was however appealed, and its conclusions are suspended pending the appeal. This means that as of today, the common law rule articulated in the *Ladouceur* decision and s. 636 of the *HSC* are still in force. Otherwise said, the law still authorises police officers to perform random stops of motorists, even if they are not participating in an organized "spot-check" or "checkpoint" program
>
> …
>
> 112 However, and as previously explained, if the *Luamba* decision had not been appealed, the Court would have found that the random stop of the Jaguar, pursuant to the *HSC*, violated Reddick's and Maxwell's rights not to be arbitrary detained guaranteed by s. 9 of the *Charter*. In that scenario, the Court would have had to decide if the firearm should be excluded from the evidence admissible at trial.

[31] It appears that neither ***Luamba*** nor ***Maxwell*** have yet been cited in cases outside of Quebec, although I would expect that if the Court of Appeal rules on the issue, this may change.

[32] I agree with the reasoning in the ***Labillois*** case, and that this reasoning is applicable in the Yukon. In my opinion, there was statutory authority under s. 106 of the *Act* to allow Cst. Breton to stop Mr. Benoit-Richardson's vehicle solely for the purpose of making a s. 320.27(2) breath demand. If Cst. Breton has the authority to randomly stop vehicles to check for driver sobriety, then it is logical that he can do so by making the

mandatory breath demand. Mr. Benoit-Richardson was operating a motor vehicle and Cst. Breton had an ASD with him.

[33] As such, I find that the traffic stop in this case was authorized by law. It is therefore not necessary for me to embark on an analysis of whether there is common law authority for the traffic stop conducted by Cst. Breton in this case. The common law considerations of necessity and reasonableness do not come into play when considering whether a statutory authority exists of not.

[34] This said, when considering the necessity and reasonableness of random, roving stops of motorists to check for driver sobriety, I note the following comments of Punnett J. in ***Macleod*** v. ***British Columbia (Superintendent of Motor Vehicles)***, [2023] BCSC 325:

> 205…A recognized factor and main impetus for s. 320.27(2) was the existing limitations on the ability of police officers to detect suspected impaired drivers. Section 320.27(2) seeks to increase protection of the public given the limitations of the reasonable suspicion approach.
>
> 206 Professor Robert Solomon appeared before the Standing Committee on Justice and Human Rights and testified concerning the purpose and use of the MAS scheme:
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> > This measure would authorize the police to demand a roadside breath test from any driver they have lawfully stopped. The test is conducted while the driver remains seated in the car, and the average stop takes approximately two minutes. The results of the screening test are not admissible in court, but rather are used exclusively as a screening mechanism to determine if there are grounds for further testing. The Criminal Lawyers' Association and others have claimed that mandatory alcohol screening is not necessary, and that Canada's impaired driving laws are working well. It's difficult to see how anyone can credibly make that claim given that impairment- related crashes kill about 1,000 Canadians a year, injure almost another 60,000

> more, a disproportionate percentage of whom are teenagers and young adults. Those between the ages of 16 and 25 represent 13% of the population but 31% of alcohol-related crash deaths.
>
> Our current law has left Canada with one of the worst impaired driving records among comparable countries. Consistent with earlier studies, the United States Centers for Disease Control reported that Canada had the highest percentage of alcohol related crash deaths among 20 high-income countries in 2013. Although Canadians drink considerably less than their counterparts, they're much more likely to die in an alcohol-related crash. For example, Canada's per capita rate of alcohol- related crash deaths is almost five times that of Germany, even though Canadians consume 33% less alcohol. They drink more, we die more.

207 He also explained that countries with comprehensive MAS programs do a better job than Canada does at separating drinking and driving.

208 MAS is only an investigatory tool. The resulting ASD results cannot be used to establish guilt under the *Criminal Code*. The petitioners however submit that a MAS demand for a breath sample is asking a driver to incriminate themselves.

209 In *Goodwin*, Karakatsanis J. distinguished the provincial automatic roadside prohibition scheme where the ASD result gives rise to immediate and automatic administrative consequences from the "markedly different" criminal context which limits the ASD result to an investigative role: para. 62; see also *Orbanski*/*Elias* at para. 27.

210 Regarding the alleged potential for self-incrimination in *Orbanski/Elias*, Charron J. explained that various methods used to check for sobriety are equivalent, stating:

> 48 ...[T]he different methods used to assess impairment at the roadside do not involve different degrees of self-incrimination because almost all the information relevant to assessing impairment during a regulatory police stop will come from the accused. Physical sobriety tests, roadside questioning regarding alcohol consumption, and roadside questioning in order to assess whether the driver's speech is slurred are all intended to use evidence emanating from the driver in order to assess the driver's level of impairment...

211 Roadside screening provisions provide a two-step system to curb impaired driving. The first step is to determine whether more conclusive

testing is warranted to pursue a criminal charge. There are reduced *Charter* protections at this screening stage. Those reduced protections however are counter-balanced by the limited use to which the roadside test can be put. The results from the ASD test after a MAS demand can only be used to investigate the matter further, to determine whether at step two there are grounds for a further breath demand on an approved device on the basis that there are reasonable grounds to believe the person has committed an impaired driving offence under the *Criminal Code*. The MAS results cannot be used as direct evidence of impairment.

212 This purpose must be considered in the context of the evidence that impaired driving continues to be a serious problem given impaired driving was, for example, in 2006 the leading cause of criminal death in Canada with 907 individuals killed in accidents with drivers who had consumed alcohol. Such deaths are preventable.

213 As stated in *Orbanski/Elias* at para. 55, "[t]here is no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective". Ten years later in *Goodwin*, the Supreme Court of Canada stated that the "objective of removing impaired drivers from the roads is compelling", as is the "purpose of preventing death and serious injuries on public highways": paras. 58-59. Six years later in *Brown,* the Provincial Court of Nova Scotia observed:

> 42.There can be no reasonable argument that the purpose of s. 320.27(2) of the *Code*, to deter, detect and remove impaired drivers from the streets and highways of Canada is highly compelling. Despite the efforts of government and society over decades, impaired driving remains the most significant criminal cause of death in Canada. This legislative purpose or intent is clear from the preamble to Bill C-46 and s. 320.12 of the *Criminal Code*.

214 That preamble states:

> Whereas dangerous driving and impaired driving injure or kill thousands of people in Canada every year;
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> Whereas dangerous driving and impaired driving are unacceptable at all times and in all circumstances;
>
> Whereas it is important to deter persons from driving while impaired by alcohol or drugs;
>
> Whereas it is important that law enforcement officers be better equipped to detect instances of alcohol-impaired or drug-impaired driving and exercise investigative powers in a

> manner that is consistent with the *Canadian Charter of Rights and Freedoms;*
>
> Whereas it is important to simplify the law relating to the proof of blood alcohol concentration;
>
> Whereas it is important to protect the public from the dangers posed by consuming large quantities of alcohol immediately before driving;
>
> Whereas it is important to deter persons from consuming alcohol or drugs after driving in circumstances where they have a reasonable expectation that they would be required to provide a sample of breath or blood;
>
> Whereas it is important that federal and provincial laws work together to promote the safe operation of motor vehicles;
>
> And whereas the Parliament of Canada is committed to adopting a precautionary approach in relation to driving and the consumption of drugs, and to deterring the commission of offences relating to the operation of conveyances, particularly dangerous driving and impaired driving...
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> 215 All Canadians are at risk of injury or death because of impaired drivers. Such individuals are also a risk to themselves. The need to curb such behavior is clear and the objectives set out in the preamble weigh heavily in favour of finding the MAS demand is reasonable given the balancing required. Indeed, s. 320.12 of the *Criminal Code* notes the need for detection and deterrence.

[35] These comments would appear to support that such random roving stops are, today, in particular in consideration of the increased awareness of the harm caused by impaired driving, as well as the risk of harm, and the increased legislative action that has been taken to address the issue of impaired driving, both with respect to investigation and punishment, that these random, roving stops are both necessary and reasonable within the scope of the duty of police officers “to prevent crime and to protect life and liberty by the control of traffic”. Obviously, if such stops are conducted

for the prohibited purposes Gower J. noted in ***Rowat***, these stops would be neither necessary nor reasonable.

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COZENS C.J.T.C.