Citation: *R. v. Rauguth,* 2025 YKTC 15

Date: 20250408
Docket: 23-11018
Registry: Dawson City

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

REX

v.

ERICH EMMANUEL RAUGUTH

Appearances:
Brad Demone — Counsel for the Crown
Timothy E. Foster K.C. — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Erich Emmanuel Rauguth proceeded to trial on a single count alleging that on October 29, 2023, he committed an offence contrary to s. 320.15(3) of the *Criminal Code* having refused to comply with a demand made pursuant to s. 320.28(1)(a)(i) of the *Criminal Code*, knowing at the time, or being reckless as to whether, he was involved in an accident that resulted in the death of another person.

[2] Prior to trial, Mr. Rauguth filed a Notice of Application alleging that the RCMP breached his ss. 7, 8, 9, 10(a) and 10(b) *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* ("*Charter*") rights. The trial proceeded in a blended

voir dire to address the alleged *Charter* violations. Crown called evidence from four RCMP members involved in the investigation, being Cpl. Nielsen, Cpl. Gilmar, Cpl. Penk, and Cst. Premerl, and one civilian witness, Kenneth Van Meter. Defence did not call evidence.

[3] On completion of the evidence, defence modified the focus of the *voir dire*, conceding that there were no allegations of *Charter* violations once Mr. Rauguth left the scene of the accident with the RCMP. The focus was on the circumstances regarding the s. 320.27(2) *Criminal Code* Approved Screening Device ("ASD") demand made to Mr. Rauguth at the roadside.

[4] The circumstances include that during the evening of October 28, 2023, there was a social event at the ski hill in Dawson City, Yukon. In the early morning of October 29, 2023, a Ford Explorer driven by Mr. Rauguth was traveling away from the event at the ski hill towards Dawson City when the vehicle stuck the metal gate of a fence. The gate was long and became progressively narrow horizontally moving away from the base. On collision, the vehicle struck the narrow end of the gate with sufficient force for the gate to protrude into the cab of the vehicle, through the dashboard and into the passenger seated in the front passenger seat, with enough force to push the seat into the rear seat area of the vehicle. The passenger, Samanroop Bisla, was struck by the gate and did not survive the injuries, passing away at the scene. Mr. Rauguth was subsequently the subject of an investigation during which he refused to provide samples of his breath on demand made pursuant to s. 320.28(1)(a)(i) of the *Criminal Code*.

[5] In this decision I will address:

1. *Viva Voce* witness evidence of:

    a. Kenneth Van Meter

    b. Cpl. Penk

    c. Cpl. Nielsen

    d. Cpl. Gilmar

    e. Cst. Premerl

2. Was the s. 320.27(2) *Criminal Code* ASD demand available to Cpl. Gilmar?

3. Was Mr. Rauguth operating a motor vehicle?

4. When was the ASD demand made to Mr. Rauguth?

5. Did Cpl. Nielsen form reasonable grounds prior to the ASD demand?

6. Did the delay in administering the ASD violate Mr. Rauguth's *Charter* rights?

Kenneth Van Meter

[6] During the evening of October 28, 2023, and the early morning hours of October 29, 2023, Mr. Van Meter volunteered as a driver to shuttle individuals between the Dawson City ski hill and the Westminster Hotel in downtown Dawson City. There was a Halloween party at the ski hill venue and he was providing sober rides to

individuals to and from the downtown location. He volunteered his time along with two of his rental vehicles for the event, driving the round trip 20 to 30 times prior to coming across the accident involving Mr. Rauguth.

[7] Mr. Van Meter came across the accident scene at the gate to the ski hill, approximately 50 metres from the venue, when he was driving towards the ski hill at approximately 1:45 a.m. He did not realize it was an accident scene at first, thinking that the vehicle had driven off the road. He pulled up close to the vehicle, which was facing the opposite direction, and aligned his driver's door window with that of the driver's door window of Mr. Rauguth's vehicle. He rolled down his window and spoke to Mr. Rauguth, who appeared to be in shock, was looking into the back seat, and asked Mr. Van Meter to call 911. Mr. Rauguth then tried to get out of his vehicle, but could not because Mr. Van Meter was parked too close, so Mr. Van Meter pulled his vehicle ahead and out of the way.

[8] Mr. Van Meter had a passenger in his vehicle, Jennifer Kwan, who called 911 while Mr. Van Meter was speaking with Mr. Rauguth. Ms. Kwan was a nurse, so she passed her phone to Mr. Van Meter, got out of the vehicle, and proceeded to the rear passenger side of the truck to assist a passenger in need of medical assistance. Mr. Van Meter stayed on the phone with 911 for several minutes. While still in his vehicle, he witnessed Mr. Rauguth take off a Halloween costume, then proceed to enter the rear drivers side door of the vehicle.

[9] Mr. Van Meter exited his vehicle, and he walked to Mr. Rauguth's vehicle where he observed the serious nature of the accident. He remained out of the way until RCMP

and Emergency Medical Services (“EMS”) arrived at the scene, noting that it took the RCMP about eight to 10 minutes to arrive after the 911 call. He did not see anyone possess alcohol or consume alcohol before the RCMP arrived.

Cpl. Penk

[10] Cpl. Craig Penk was off duty and received a callout from RCMP dispatch regarding the incident. During his testimony regarding the entries made in his notes, it became clear that his notes were not taken contemporaneously to his involvement in this matter, and he was not a reliable witness based on his memory.

[11] Cpl. Penk was later responsible for preparing an Information to Obtain (“ITO”) for a search warrant to search Mr. Rauguth’s vehicle. In the ITO, he included verbatim the contents of the dispatch ticket, being the written information generated by the RCMP dispatch regarding the initial callout of the officers to attend the incident. The information in the dispatch ticket included that there were three occupants in a vehicle involved in an accident, one was seriously injured, and the occupants were intoxicated.

Cpl. Nielsen

[12] Cpl. Leigh Nielsen has been a member of the RCMP for 18 years and was working in Dawson City, Yukon in relief from his full time posting in Saskatchewan. He was on duty when a call came in on October 29, 2023, regarding a single vehicle collision. He was the first of two on-shift officers to arrive at the scene, arriving at approximately 1:52 a.m. On arrival he observed the vehicle which appeared to have been travelling down hill from the ski hill. The vehicle appeared to have run into a metal

gate at the entrance to the ski hill, with the gate protruding through the passenger side of the vehicle. There was a female in the front passenger side seat, and she was pinned by the gate which had pushed her into the rear of the vehicle. Two individuals were assisting the female passenger, while a third individual was standing nearby.

[13] There was a female nurse, later identified as Jennifer Kwan, performing cardiopulmonary resuscitation ("CPR") on the female passenger with the assistance of Mr. Rauguth. The third individual, Mr. Van Meter, advised Cpl. Nielsen that Mr. Rauguth was in the driver's seat when he arrived at the scene.

[14] Mr. Rauguth was highly emotional and asking for an ambulance. Cpl. Nielsen thought he appeared impaired, noting his tired face and glossy eyes, but did not get close enough to him to smell alcohol on his person. Cpl. Nielsen noted that the two were continuing CPR efforts and he stayed out of their way. He proceeded to call for back-up, EMS, and the Fire Department. The second officer on duty, Cpl. Gilmar, arrived just before 2:00 a.m. and EMS arrived shortly behind her, at 2:02 a.m.

[15] Cpl. Nielsen requested Cpl. Gilmar deal with Mr. Rauguth, advised her that he was the driver, and told her that she needed to "form her grounds", meaning to assess Mr. Rauguth for signs of impairment. He does not recall sharing his observed grounds of impairment with her.

[16] Prior to Cpl. Gilmar's arrival at the scene, Cpl. Nielsen had called Cpl. Penk, a breath technician, advising of a likely impaired driving investigation. He intended for Mr. Rauguth to be detained for investigation once EMS arrived at the scene to take over care of the passenger.

[17] At 2:15 a.m. an EMS attendant asked Cpl. Nielsen to attend at Mr. Rauguth's vehicle and confirm that the female passenger was deceased. After confirming the death, he attended at Cpl. Gilmar's police vehicle to get the name of the deceased from Mr. Rauguth. At that time, he advised Mr. Rauguth that the female was deceased.

[18] Cpl. Nielsen took a statement from Ms. Kwan at 3:18 a.m. and noted that she was quite hostile towards him as a member of the RCMP. She advised that she had given Mr. Rauguth a drink of Jamieson's scotch and handed over an unopened bottle. He proceeded to search in the vehicle and around the vehicle for an opened alcohol bottle, but did not locate any. A colleague, Sgt. Wallace, later attended and did a 100-foot search around the vehicle for open liquor bottles, but did not locate any.

[19] The police vehicle operated by Cpl. Nielsen was equipped with a Watchguard audio and video recording system with two cameras, depicting an image from the dashboard of the vehicle forward and a second camera image of the back seat. The recording started when Cpl. Nielsen activated the emergency lights on the police vehicle, prior to his arrival at the scene, and remained on throughout his involvement at the scene. The system has portable microphones for the officers to wear and capture interactions during the investigation. In this case, Cpl. Nielsen was not wearing the portable microphone and the audio interactions outside the vehicle were not captured. The system is equipped with a time stamp on the video.

[20] The Watchguard video from Cpl. Nielsen's vehicle captures the arrival of the ambulance on scene at 2:02:10. The ambulance proceeded past the accident scene, turned around, and then parked near Mr. Rauguth's vehicle at 2:03:20. As the

ambulance came to a stop, Cpl. Gilmar can be seen walking towards Mr. Rauguth's vehicle from behind the ambulance. At 2:03:30 the first attendant from the ambulance is at the rear driver's side door of Mr. Rauguth's vehicle. At 2:03:55 the EMS attendant appears to step back and out of the way, then forward and into the vehicle. At 2:04:20 Mr. Rauguth was walking beside Cpl. Gilmar, holding onto to her, as they proceeded to her police vehicle.

Cpl. Gilmar

[21] Cpl. Pranchalee Gilmar has been a member of the RCMP for 12 years and was working in Dawson City, Yukon, in relief from her full time posting in Saskatchewan.

[22] She recalled the dispatch call in this matter about a single vehicle accident and relayed a third-party report of possible drinking involved. She learned either from the original dispatch or one immediately following that there was an individual on scene receiving CPR. She was at the detachment at the time and retrieved an ASD before attending at the scene.

[23] When she arrived at approximately 1:58 a.m., Cpl. Gilmar exited her police vehicle then spoke to Cpl. Nielsen and was told that EMS was on the way. Cpl. Nielsen further advised that he had talked to the third party who was the first to arrive on the scene with a female passenger who was assisting with CPR on the injured female. The third party believed Mr. Rauguth was intoxicated. Cpl. Nielsen did not share his observations of impairment with her. He advised Cpl. Gilmar that he did not wish to interfere with the life saving measures and had stayed out of the way.

[24] Cpl. Gilmar had the ASD with her and noted Ms. Kwan and Mr. Rauguth performing CPR on the female passenger. She asked Mr. Rauguth if he was driving and he confirmed that he was. Given the circumstances, and the cold temperature of about -15 Celsius, she went back to her police vehicle to return the ASD to keep it warm. She also moved her vehicle off the roadway so that the ambulance would be able to pass.

[25] Once EMS arrived, Cpl. Gilmar asked Mr. Rauguth to step away so that EMS attendants could take over the patient care. She advised Mr. Rauguth that he was not under arrest but because he was the driver of a vehicle that was involved in a collision, she would need to read him a demand and would require a breath sample from him. She told him that they were going to her police vehicle because it was cold out. He was dressed in running shoes, jeans and a wool coat, with no toque or gloves on.

[26] As Mr. Rauguth moved away from the ambulance, Cpl. Gilmar noticed that he was unstable on his feet. After a couple of steps, Mr. Rauguth asked if he could hold onto her for the walk, which she agreed to. Closer to her vehicle he let go of Cpl. Gilmar and bent over, put his hands on his knees, and strongly exhaled. As he exhaled, he exhibiting a strong odour of alcohol.

[27] Cpl. Gilmar explained that her original intention was to make a mandatory alcohol screening ("MAS") demand, referring to an ASD demand pursuant to s. 320.27(2) of the *Criminal Code*. After smelling the odour of alcoholic beverage on Mr. Rauguth's breath, she believed that she had the necessary suspicion for the ASD demand, referring to a demand pursuant to s. 320.27(1) of the *Criminal Code*. She ultimately proceeded with the MAS demand. To make the MAS demand, she believed that the requirements to

make the demand were met, being that he was the driver of the vehicle, RCMP were investigating a motor vehicle accident, and she had the ASD with her on scene.

[28] The police vehicle operated by Cpl. Gilmar was equipped with the Watchguard audio and video recording system, with the same camera configuration and portable microphone as the system in Cpl. Nielsen's police vehicle. Cpl. Gilmar was not wearing the portable microphone and the audio interactions outside the vehicle were not captured. There is also a microphone capturing the interactions inside the vehicle which, in this case, captured the exchanges once Mr. Rauguth was placed in the rear seat of the police vehicle.

[29] The recording started when Cpl. Gilmar activated the emergency lights on the police vehicle, prior to her arrival at the scene, and remained on until she later parked the vehicle in the RCMP detachment garage at 2:40 a.m.

[30] The video from the police vehicle depicts the following:

2:04:20 Mr. Rauguth walking from the back of the ambulance while holding onto Cpl. Gilmar.

2:05:15 Mr. Rauguth was placed in the police vehicle and the door was closed.

2:06:20 Cpl. Gilmar asked Mr. Rauguth if he was ok, and he answers "no" followed by "I'm ok" then became emotional and can be seen crying.

2:07:45 Cpl Gilmar begins asking pre-screening questions, including if the vehicle involved in the accident belonged to him. He asked what kind of vehicle it was followed by stating that if it was a green Explorer then it was his. She then asked whether he had anything to drink that night, how much, and what time. He told her it was a company gathering, that he drank between three and five drinks of wine approximately four hours ago. He tried to explain more about the event, but she cut him off stating that she could not ask him any more questions.

2:09:20 Mr. Rauguth saw a friend walk by and asked Cpl. Gilmar to open the window. She instead read the breath demand to Mr. Rauguth, stating “This is a mandatory alcohol screening. You are required to immediately provide a breath sample.”

2:11:00 Cpl. Gilmar opened the rear driver’s side door to the police vehicle and began to explain the ASD process to Mr. Rauguth.

2:11:30 The first sample was incomplete due to Mr. Rauguth blowing too hard.

2:13:10 The second sample indicated a fail and Mr. Rauguth was placed under arrest for impaired driving causing death. Mr. Rauguth responded to this by stating “Duh, I could have told you a long time ago”.

2:14:50 Cpl. Gilmar confirmed the arrest, then read the *Charter* rights and police warning to Mr. Rauguth. He responded that he did not understand and could not hear her very well.

2:16:40 Mr. Rauguth asked “do you guys have any information. How is she doing?” Cpl. Nielsen responded telling him that she passed away.

2:17:10 Cpl. Gilmar approached the rear door window and repeated the s.10(b) *Charter* rights to Mr. Rauguth. This time he indicated he did not fully understand his rights.

2:18:20 Cpl. Gilmar explained the rights in plain language and asked if he understood the right to call a lawyer. He confirmed he did understand, and he did not want to call a lawyer.

2:20:00 Cpl. Gilmar read the police warning to Mr. Rauguth and he indicated that he did not understand, so it was explained in plain language after which he indicated that he understood.

2:21:40 Cpl. Gilmar read the s. 320.28 *Criminal Code* breath demand to Mr. Rauguth, and he confirmed he understood.

2:22:30 Cpl. Gilmar asked Mr. Rauguth for his wallet or driver’s licence, which he did not have on him. This was followed by getting the correct spelling of his name and his date of birth.

2:24:30 Cpl. Gilmar contacted RCMP dispatch by radio to conduct a check to verify the identity of Mr. Rauguth.

2:26:20 The response from dispatch was provided over the radio.

2:29:30 Cpl. Nielsen is outside the vehicle speaking with a colleague.

2:30:00 Cpl. Gilmar asked Mr. Rauguth his passengers name and the spelling, her date of birth, where she was from, and how long she was in the Yukon. Mr. Rauguth confirmed they were colleagues working together and the name of the company they worked for.

2:31:00 Cpl. Nielsen asked follow-up identification questions, and if he knew the next of kin. Cpl. Nielsen confirmed the name of the deceased. Mr. Rauguth asked again if “she is gone”, which was confirmed.

2:32:10 Cpl. Gilmar asked Mr. Rauguth if he wanted a seat belt. He indicated he is ok. This is followed by radioing her status to dispatch.

2:33:30 Cpl. Gilmar begins to drive to the Dawson City detachment.

[31] Cpl. Gilmar arrived in the secure bay at the Dawson City RCMP detachment at 2:40 a.m. She escorted Mr. Rauguth inside and conducted an officer safety search of him with the assistance of Cst. Premerl, the qualified breath technician called in to assist. She then proceeded to acknowledge that Mr. Rauguth had declined to contact a

lawyer and advised him that he could contact one if he wanted, which he agreed to. He was placed in the interview room and Cpl. Gilmar left a call back number for Legal Aid.

[32] At 2:48 a.m., Mr. Rauguth asked for and received a glass of water. Water is generally not provided to an accused at this stage as it can interfere with the observation period for the breathalyser sample, but given the traumatic incident he was involved in it was provided.

[33] Legal counsel called at 2:51 a.m. and was advised that Mr. Rauguth was being charged with impaired driving causing death. The phone was passed to Mr. Rauguth and the call ended at 2:57 a.m.

[34] Mr. Rauguth received the breathalyser instructions from Cst. Premerl. Mr. Rauguth said to Cst. Premerl “the only thing the lawyer said is not to take one” in reference to providing a breath sample.

[35] At 3:12 a.m., Mr. Rauguth asked Cpl. Gilmar how the passenger was and about his vehicle. He was advised again that the passenger was deceased, and his vehicle would be impounded.

[36] At 3:17 a.m., Mr. Rauguth was escorted to the breathalyser room and asked if he would provide a sample. He responded by saying “no, I already gave one to her”, meaning to Cpl. Gilmar. The jeopardy of s. 320.15(1) of the *Criminal Code* regarding the charge for refusing to provide a breath sample was read to him, then repeated when he said he did not understand. After the second reading, he stated he understood and that he would not be providing a sample.

Cst. Premerl

[37] Cst. Philippe Premerl has been a police officer for approximately 13 years and was off duty when he was called to attend at the detachment in this investigation as the qualified breath technician. He was in the detachment when Mr. Rauguth arrived with Cpl. Gilmar and observed him weaving slightly side to side as he walked. He also appeared emotional and distraught.

[38] Cst. Premerl testified that the breathalyser was confirmed to be functioning properly and explained the steps he took with Mr. Rauguth to instruct him on providing a sample. He further testified to the circumstances of the refusal, consistent with the description of Cpl. Gilmar.

Was the s. 320.27(2) *Criminal Code* ASD demand available to Cpl. Gilmar?

[39] Cpl. Gilmar proceeded with an ASD demand to Mr. Rauguth pursuant to s. 320.27(2) of the *Criminal Code*, which states:

> If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle 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 that device and to accompany the peace officer for that purpose.

[40] The requirements for a peace officer to make an ASD demand pursuant to this provision are that the officer:

1. Has in his or her possession an approved screening device;

2. Makes the demand in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law; and

3. Makes the demand to a person who is operating a motor vehicle to immediately provide the sample.

[41] At the time of Mr. Rauguth's detention by Cpl. Gilmar, after the arrival of EMS, the ASD was in her police vehicle, and I am satisfied on the authorities reviewed that it was "in her possession" as required. (see: *R. v. Morrison*, 2020 SKPC 28; *R. v. Fisher*, 2023 ONCJ 9; *R. v. Wright*, 2023 SKKB 236)

[42] I am also satisfied on the facts that the initial detention and interaction with Mr. Rauguth was in the lawful exercise of her powers under the *Motor Vehicles Act*, RSY 2002, c 153.

[43] Mr. Rauguth's position is that the demand was not made to Mr. Rauguth at a time when he was operating a motor vehicle, rendering it invalid. He also argues that it was not made immediately, resulting in an arbitrary detention.

Was Mr. Rauguth operating a motor vehicle?

[44] When Mr. Van Meter arrived at the scene shortly after the accident Mr. Rauguth was in the driver's seat of his vehicle. By the time the RCMP members arrived on scene, he was assisting with life saving measures on his passenger. His argument is that he was not a "person who is operating a motor vehicle" as required by the section of the *Criminal Code* when the demand was made. Cpl. Gilmar was wrong to proceed

under s. 320.27(2) of the *Criminal Code* in these circumstances, he asserts, when s. 320.27(1) of the *Criminal Code* provides:

> 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...
>
> ...
>
> (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;
>
> [emphasis added]

[45] The language of what is now s. 320.27(1) of the *Criminal Code* has evolved over time, having previously required that the demand be to "a person who is operating a motor vehicle", which was the language prior to amendments in 2008 of the then s. 254(2) of the *Criminal Code*. It was amended to "the person has, within the preceding three hours, operated a motor vehicle" and that wording remained and was incorporated into s. 320.27(1) when s. 320.27(2) was brought into law.

[46] Numerous cases considered the wording "is operating" or "has the care and control" at the time the provision in s. 254(2) of the *Criminal Code* contained those words, including the British Columbia Supreme Court in *R. v. Lequereux*, 2007 BCSC 845, wherein the Court states at paras. 4 and 5:

> 4 ...The driver was identified at the scene as the driver of the car which caused the accident. The officer arrived quickly and performed investigatory tasks. The accused was standing beside the car with his keys awaiting the arrival of the police. There was no question about, and it is not disputed by counsel for the respondent, that there is clear

> identification of the respondent as having been the driver of the vehicle and having caused the rear-end collision.
>
> 5 After the officer served the notice of violation on the accused, the police officer, on reasonable and probable grounds, requested an ASD breath sample. The evidence to establish care and control in this circumstance was present, and to suggest that where an accused's car may be so damaged that it may not be driven prevents the officer from asking for an ASD sample, on reasonable and probable grounds where there is evidence of impairment, is to misinterpret this section by ignoring the clearly expressed obiter in *R. v. Campbell* (2005), 220 B.C.A.C. 106, 2005 BCCA 619, that past signification, subject to the limits indicated in *Campbell*, may be used to interpret the section and is determinative of whether the driver is in care and control at the time the demand is made.

[47] The British Columbia Court of Appeal in *R. v. Campbell*, 2005 BCCA 619, the case referred to in *Lequereux*, framed the question to be addressed in the matter before them in paras. 2 and 3:

> 2 It comes to this court with leave of Lowry J.A. on this question of law:
>
> > In order for a peace officer to make a valid demand under s. 254(2) of the Criminal Code, must the demanding peace officer actually observe the person upon whom the demand is made to be operating or in care and control of the motor vehicle at the time the demand is made?
>
> 3 On the facts of this case the only question that need be answered is whether a police officer must "actually observe the person upon whom the demand is made to be .... in care and control of the motor vehicle at the time the demand is made".

[48] The Court concluded that the words must be given some past significance in para. 13:

> 13 Virtually all the appellant's authorities implicitly or explicitly adopt this understanding of the application of s. 254(2) as do those submitted by the respondent. The words "is driving" or "has the care or control" are to be given some past signification. The cases differ in outcome as a result of factual findings as to whether the Crown has established on the evidence either that the accused's driving occurred within a time frame reasonably

> contemplated in giving "is" a past tense interpretation, or that the accused had care or control at the time of the demand.

[49] The Ontario Court of Appeal in *R. v. Campbell* (1988), 44 C.C.C. (3d) 502, cited in the British Columbia Court of Appeal *Campbell* decision, addressed the interpretation in paras. 12 and 14:

> 12 ...To interpret these words as having a strictly literal (present tense only) meaning could defeat the purpose of the provision and lead to absurd results. For example, as far as "has care or control" is concerned, if the provision is confined to a literal present tense meaning it would not apply to a person who, when a police officer approaches, steps out of his car and throws his keys away or who runs away and is finally caught by the police officer a substantial distance from the car. Other examples could be given.
>
> ...
>
> 14 Accepting that to avoid absurdity a past signification may properly be given to "has the care or control", on the facts of a case such as this I do not think that the justifiable time lapse after the "actual" care and control has ended should be longer than is reasonably necessary to enable the police officer to carry out his or her duties under the provision. In other words, the demand should be made as soon as is reasonably possible in the circumstances.

[50] The British Columbia Supreme Court in *R. v. Milos*, 2007 BCSC 1873, addressed the absurdity of the interpretation without the application of past significance in cases involving the care and control of a vehicle at paras. 15 and 16:

> 15 In my view, an equally absurd result would occur if the meaning urged by Mr. Milos was given to the words. It would mean that the provision would not apply to a driver involved in a police chase who has to stop the vehicle because of a flat tire caused by a spike belt or because he runs out of gas, as well as a driver who causes an accident that renders his car undriveable. An ASD demand could not be made of those drivers, whereas it could be made of a driver in the same situation whose vehicle was still driveable.

> 16 Similar sentiments were expressed in *R. v. Petit* by the Quebec Court of Appeal at para. 27:
>
> > I conclude my analysis by stating that accepting the appellant's submission would lead to an absurdity whereby s. 254(2) Cr.C. would not apply in cases of accidents in which a drunk driver's car was destroyed, while an ASD test could be ordered in cases where the vehicle remained roadworthy.

[51] I find that the absurdity addressed in these cases would apply to s. 320.27(2) of the *Criminal Code* on the facts of this case. Mr. Rauguth argues that it should not apply as Parliament addressed the absurdity through the inclusion of s. 320.27(1) and the available option to a police officer where an individual is located and no longer operating the vehicle. I disagree.

[52] A demand pursuant to s. 320.27(1) of the *Criminal Code* can be made to a person who has, within the preceding three hours, operated a motor vehicle. This is a significant window to make the demand and does not require a proximity to the driving at the time of the demand. Given this, a peace officer must establish that they held a subjective belief that they had reasonable grounds to suspect that the person had alcohol in their body, and that the belief is objectively reasonable. This is a higher standard than required in s. 320.27(2) for the obvious reason of its broader application.

[53] Cpl. Gilmar believed she held the reasonable grounds to suspect that Mr. Rauguth had alcohol in his body when she made the demand but, on the facts of this case, it would be absurd to require that to be the case. The reasonable suspicion has not been analysed, and if the Court were to conclude the suspicion was not

objectively reasonable, the result would be equally as absurd as the examples noted in the case law.

[54] I find, on the facts of this case, that the s. 320.27(2) demand was available to Cpl. Gilmar.

When was the ASD demand made to Mr. Rauguth?

[55] Mr. Rauguth is not asserting that the ASD demand should have been made while he was engaged in life saving measures. This approach on the issue of lengthy delay in similar circumstances has been supported in recent decisions, including *R. v. Dunn*, 2023 ONCJ 562. Mr. Rauguth's argument is that the demand should have been made as soon as possible after the arrival of EMS and not delayed until it was read to him in the police vehicle.

[56] When Cpl. Gilmar first addressed Mr. Rauguth after the EMS attendant took over the care for the passenger, while they were next to the ambulance, she immediately explained to Mr. Rauguth:

- that he was not under arrest;
- he was the driver of a vehicle that was involved in a collision, and she would need to read him a demand;
- she would require a breath sample from him; and
- they were going to her police vehicle because it was cold out.

[57] Cpl. Gilmar articulated that Mr. Rauguth was required to accompany her for the purpose of obtaining a breath sample from him because he was the driver of the vehicle involved in an accident.

[58] It is Mr. Rauguth's position that this exchange did not constitute an ASD demand. I note that the actual wording of the demand made to Mr. Rauguth in the police vehicle at 2:09 a.m. based on the RCMP pre-prepared wording was:

> This is a mandatory alcohol screening. You are required to immediately provide a breath sample.

[59] The Alberta Provincial Court addressed the issue of the particular wording of an ASD demand in *R. v. Azram*, 2019 ABPC 194, at para. 16:

> I agree that there is nothing in the Criminal Code that mandates what must be included in the Mandatory Alcohol Screening demand. *R v Unland*, 2015 ABPC 192; *R v Harasym*, 2008 ABQB 649 and *R v Evans*, [1991] 1 SCR 869 are guidance on this point.

[60] The decision continues to address the wording and circumstances of the demand at paras. 18 to 21:

> 18 In the case of *R v Knight*, 2008 ABPC 162, Anderson, PCJ determined that with regard to a reasonable suspicion roadside demand, that the officer must communicate:
>
> 1. The need for compliance is part of our criminal law and
> 2. There is a need for immediate compliance with a roadside demand.
>
> 19 All Canadians and visitors to Canada are presumed to know the law. All would know of the dangers of drinking and driving. All would know that the authorities are deterring drinking and driving. All know that motorists can be prosecuted and all know there are negative consequences if charged and serious negative consequences if convicted.

> 20 In the total circumstances of this case; a uniformed peace officer at an Alberta Check Stop, an officer at the motorist's door, an officer asking questions about recent alcohol consumption and then the officer's demand for a roadside breath sample -- it was obvious to this accused driver that these words were unequivocal and conveyed a legal requirement/obligation requiring immediate compliance by the motorist.
>
> 21 Had there been any evidence of hesitation or confusion by the motorist or questions put to the police, then there may have been a need to provide more information but these were not the circumstances of this case at Bar.

[61] The Court in *Azram* addresses the absence of specific wording at para. 26:

> The MAS demand need not refer to the Criminal Code, either generally or to a specific section. It need not refer to "an approved screening device" or some other words that conveyed it was a legitimate alcohol breath testing device in the circumstances of this case. I conclude it was obvious to the accused at Bar that this was a criminal investigation and there was a need for immediate compliance with the peace officer's demand for a sample of breath at the roadside.

[62] This Court in *R. v. Gaven*, 2019 YKTC 46, addressed the wording used by a peace officer when making an ASD demand at paras. 25 and 26:

> 25 The defence takes issue with the wording of the demand, as Cpl. Warren had suggested in his reports that he had read the demand, whereas in his testimony it became clear that he had given the demand to Mr. Gaven by memory.
>
> 26 The law is clear that the precise words of a breath demand do not have to be proved as long as the person receiving the demand understands what is being requested. In *Torsney* [*R. v. Torsney*, 2007 ONCA 67], the Court stated at para. 6:
>
> > We agree with the summary conviction appeal judge that the missing word "forthwith" did not render the demand invalid. The demand 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 of his or her breath forthwith. This can be accomplished through words or conduct, including the "tenor [of the officer's] discussion with the accused". See *R. v. Horvath*, [1992] B.C.J. No. 1107 (B.C.S.C.) (A.D.). What is crucial is that the words used be sufficient to convey to the

> detainee the nature of the demand. See *R. v. Ackerman* (1972), 6 C.C.C. (2d) 425 at 427 (Sask. C.A.) and *R. v. Flegel* (1972), 7 C.C.C. (2d) 55 at 57 (Sask. C.A.).

[63] The Ontario Court of Appeal decision of *R. v. Torsney*, 2007 ONCA 67, relied on by the Court in *Gaven,* continued at para. 7:

> In this case, the demand was made clear and the appellant understood. He knew that he was to provide a sample as soon as the machine arrived and he responded accordingly. Put differently, the appellant understood that the only event between the demand and his giving of the breath sample was the arrival of the ASD. ...

[64] Mr. Rauguth was the driver of a motor vehicle involved in an accident in which his passenger was killed. There were numerous RCMP members and EMS attendants in the area and it was clearly articulated to him that he would be required to provide a breath sample. There was no evidence proffered by Mr. Rauguth nor any utterances on the video and audio that suggest that he did not understand why he had been escorted to the police vehicle. I find that the words used by Cpl. Gilmar to Mr. Rauguth when they were beside the ambulance regarding the requirement to provide a breath sample were unequivocal and the ASD demand was made at that time. Mr. Rauguth has failed to establish a violation of his *Charter* rights arising from a delay on the part of Cpl. Gilmar in making the demand.

Did Cpl. Nielsen form reasonable grounds prior to the ASD demand?

[65] Mr. Rauguth argued that the ASD demand was not available to Cpl. Gilmar based on Cpl. Nielsen having formed his own reasonable grounds that Mr. Rauguth's ability to drive was impaired by alcohol. The authority relied on for this argument includes *R. v. Minielly*, 2009 YKTC 9, wherein the Court stated at para. 30:

> It would appear that if the lawful authority for the demand is solely for the purpose of elevating a police officer's suspicion to reasonable and probable grounds, then, once a police officer concludes that he or she has the reasonable and probable grounds to believe a s. 253 offence has been committed, the suspicion threshold has been passed and the s. 254(2) demand cannot be made, regardless of whether the individual has been arrested or not.

[66] As set out in the overview of his evidence, Cpl. Nielsen thought Mr. Rauguth appeared impaired, noting his tired face and glossy eyes, but did not get close enough to him to smell alcohol on his person. He was referred to his notebook and he had made an entry stating: “Male appeared impaired, emotional, tired face, glossy eyes, asking for help for passenger.”

[67] Later in his evidence, during cross-examination, there is the following exchange:

> Q: Okay. And I believe that’s what you’re trying to – you’re now telling me, is that – I think now you’re saying you had suspicion he may be impaired, but you didn’t go all the way to form reasonable and probable grounds.
>
> A: Thank you.
>
> Q: Okay. So you agree with that.
>
> A: I do.

[68] As to information relayed to Cpl. Gilmar from Cpl. Nielsen regarding the impairment of Mr. Rauguth, Cpl. Gilmar addressed the information in the following exchange:

> Q: What did, sorry, Cpl. Nielsen share with you?
>
> A: So he said that he spoke to the – male third party and the male third party believed that the driver was intoxicated.
>
> Q: Okay. Was there any other indicia or anything like that conveyed by Cpl. Nielsen to you about the driver?

A: Not directly about the impairment...

[69] On the facts of this case, it is not clear that Cpl. Nielsen formed reasonable grounds regarding the impairment of Mr. Rauguth. I find that he formed his own suspicion, as confirmed in cross-examination, and *Minielly* does not apply in these circumstances. It was proper on these facts for Cpl. Gilmar to make the ASD demand.

[70] Even though Cpl. Nielsen held the requisite suspicion for the making the ASD demand, there was no opportunity for him to do so prior to Cpl. Gilmar making the demand, as I have found, beside the ambulance. Nor was Cpl. Nielsen obligated to make the demand in this case, as decided in *Dunn*.

Did the delay in administering the ASD violate Mr. Rauguth's *Charter* rights?

[71] The Supreme Court of Canada addressed the meaning of the word "forthwith" in *R. v. Breault*, 2023 SCC 9, at paras. 53 to 58:

> 53 The Quebec Court of Appeal was correct in law in stating that unusual circumstances related to the use of the ASD or the reliability of the result that will be generated may justify a flexible interpretation of the word "forthwith" found in s. 254(2)(b) *Cr. C*.
>
> 54 As I mentioned above, it is neither necessary nor desirable for the purposes of this appeal to identify in the abstract, and in an exhaustive manner, the circumstances that may be characterized as unusual and may justify a flexible interpretation of the immediacy requirement. It is preferable for those circumstances to be identified on a case-by-case basis in light of the facts of each matter. However, it is important to provide some guidelines to assist lower courts in this inquiry.
>
> 55 First, the burden of establishing the existence of unusual circumstances rests on the Crown.
>
> 56 Second, as in *Bernshaw*, the unusual circumstances must be identified in light of the text of the provision (*Piazza*, at para. 81 (CanLII)). This preserves the provision's constitutional integrity by ensuring that courts do

> not unduly extend the ordinary meaning strictly given to the word "forthwith".
>
> 57 Like the provision at issue in *Bernshaw*, s. 254(2)(b) *Cr. C*. specifies that the sample collected must enable a "proper analysis" to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result.
>
> 58 That being said, courts might recognize unusual circumstances other than those directly related to the use of the ASD or the reliability of the result that will be generated. For example, insofar as the primary purpose of the impaired driving detection procedure is to ensure everyone's safety, circumstances involving urgency in ensuring the safety of the public or of peace officers might be recognized.

[72] This Court addressed the change in language in the *Criminal Code* relating to the ASD demand from “forthwith” to “immediately” in *R. v. Lucas*, 2020 YKTC 27, at para. 27:

> It should be noted that s. 320.27 is a relatively recent section, having come into force in December 2018. Its predecessor, s. 254(2), required the sample to be provided 'forthwith' rather than 'immediately'; however, the Supreme Court of Canada in *R. v. Woods*, 2005 SCC 42, held, at para. 13, that "'[f]orthwith' means 'immediately' or 'without delay'". It is reasonable, therefore, to conclude that the case law with respect to the meaning of 'forthwith' is equally applicable to the meaning of 'immediately' under the new provisions. . . .

[73] The delay in the matter before the Court that requires assessment starts at 2:04 which is when the demand was made by Cpl. Gilmar to Mr. Rauguth. At this point he is escorted to the police vehicle which takes about one and one-half minutes. Accompanying the police officer for the purpose of providing a sample is provided for in s. 320.27(2) which includes the words “and to accompany the peace officer for that purpose”. It was also cold outside and escorting Mr. Rauguth to the warm police vehicle in the circumstances, considering his attire, was reasonable. This is similar to the

determination in *R. v. Tosun*, 2021 ONSC 2895 that it was reasonable to escort Mr. Tosun to the officer's vehicle to administer the test out of the rain.

[74] Once Mr. Rauguth and Cpl. Gilmar are situated in the police vehicle, she takes the time to ensure that he is ok which results in him initially stating “no”, followed shortly thereafter with “I’m ok”, then with him crying. Mr. Rauguth was involved in a serious accident in which his friend was killed. A pause to see how he was coping, and to allow him the opportunity to compose himself, was certainly reasonable in the circumstances.

[75] The exchange that followed included some pre-screening questions often associated with administering the ASD, including when he last consumed alcohol. The Supreme Court of Yukon decision in *R. v. Scarizzi*, 2022 YKSC 27, while referencing the Ontario Court of Appeal decision in *R. v. Notaro*, 2018 ONCA 449, addressed pre-screening for an ASD at paras. 45 to 47:

> 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).

[76] Pre-screening questioning is reasonable prior to administering the ASD. Cpl. Gilmar did during this time ask him if he owned the vehicle involved in the accident which is not a pre-screening question. However, it is a short duration of the less than two minutes spent addressing the pre-screening concerns. Latitude is given to police officers as stated in the Supreme Court of Yukon decision *R. v. Smarch,* 2014 YKSC 27, at para 47:

> The trial judge found that Constable Baceda's conduct in checking the appellant's identity, licence status and history before making the demand was reasonable ... Again, I agree. In my view, Constable Baceda's practice in this regard simply amounts to a prudent police officer doing his duty to identify a suspect for a driving offence, who is not in possession of a driver's licence. As such, it falls squarely within the third consideration in *Quansah*, i.e. the time between the formation of the reasonable suspicion to the making of the demand and then to the detainee's response "must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2)."

[77] Mr. Rauguth then sees a friend and begins asking to talk to her, and for Cpl. Gilmar to assist him in doing so. Cpl. Gilmar declined and read the MAS demand from the prepared RCMP card to Mr. Rauguth, prepared the ASD, and explained the process to him. The brief delay involved in this sequence is partially caused by Mr. Rauguth seeing his friend and wanting to speak to her, as well as the reading of the MAS demand. The reading of the MAS demand, as I have already determined, was not necessary, but involved two short sentences and caused insignificant delay. The remainder of the delay can be attributed to the operation of the ASD and explanation to Mr. Rauguth.

[78] The time that lapsed from the demand beside the ambulance to administering the first sample is approximately seven minutes. There is some delay in between the

actions described, which may amount to up to two minutes at the most which I cannot clearly conclude to be necessary and reasonable, of unexplained delay. I am hard pressed to conclude that such a brief amount of time, split up within periods of reasonable delay, could be considered unreasonable delay resulting in an arbitrary detention, particularly not when measured against societal interest in addressing impaired driving offences.

[79] In the result, I conclude that Mr. Rauguth has not established a breach of his *Charter* rights arising from the delay between Cpl. Gilmar making the ASD demand and administering the ASD.

[80] If I am wrong in my conclusion, a two-minute delay, at most, would amount to a technical breach, one that would not, in my view, justify the exclusion of evidence under s. 24(2) of the *Charter*.

_____

PHELPS C.J.T.C.