

Citation: *R. v. Anderson*, 2024 YKTC 5

Date: 20240322
Docket: 22-00608
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

LISA MARIE ANDERSON

Appearances:
Leo Lane
Jennifer Budgell

Counsel for the Crown
Counsel for the Defence

RULING ON *VOIR DIRE*

[1] Lisa Marie Anderson is before the Court on a two-count Information alleging that on or about November 4, 2022, she committed offences contrary to ss. 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Ms. Anderson alleging violations contrary to ss. 8, 9, 10(a), and 10(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the “*Charter*”). The parties agreed to proceed with a blended *voir dire*.

[3] The circumstances of the investigation involved a call to the RCMP regarding a single vehicle accident on McLean Lake Road in the City of Whitehorse on November 3, 2024. At approximately 11:40 p.m. RCMP were dispatched along with Emergency Medical Services (“EMS”) and the fire department. The vehicle was located down a steep embankment with one occupant, Ms. Anderson, seated in the driver’s seat with her seatbelt on. Ms. Anderson argues that her ss. 8, 9, 10(a) and 10(b) rights were breached during the ensuing investigation by the RCMP leading up to her arrest and a s. 320.28(1)(a)(i) *Criminal Code* breath demand.

[4] The Crown called two witnesses, both RCMP officers, and the defence did not present any evidence.

[5] In these reasons I will address:

1. Evidence of Cst. Isaac Pickell;
2. Evidence of Cst. Anthony Dowling;
3. Section 10(a) *Charter* Argument;
4. Sections 9 and 10(b) *Charter* Argument;
5. Sections 8 and 9 *Charter* Argument;
6. Conclusion.

Evidence of Cst. Isaac Pickell

[6] Cst. Pickell is a seven-year member of the RCMP and on the evening of November 3, 2022, was on general duty in Whitehorse. The weather was cold and snowing and driving conditions, according to Cst. Pickell, were less than optimal. At approximately 11:40 p.m., he was dispatched to a single vehicle accident reported to have occurred on the McLean Lake Road. The complainant who called about the incident indicated that the driver was possibly intoxicated and upset. She also indicated that the driver was the lone occupant of the vehicle.

[7] Cst. Pickell's vehicle was equipped with Watchguard video and audio recording equipment. The video depicts two views, being a view forward from the dashboard of the vehicle and a view showing the back seat of the vehicle. Audio recording was captured inside the vehicle as well as having the capability to capture audio on a portable microphone. Cst. Pickell was wearing the portable microphone when he arrived at the scene of the accident.

[8] The Watchguard video is time stamped on a 24-hour clock.

[9] At 23:56:00 Cst. Pickell arrived at the scene of the accident. The complainant, Amber Clough, was waiting outside of her vehicle parked on the side of the road near the scene of the accident. Ms. Anderson's vehicle was situated down a steep embankment and stopped approximately 10 to 20 metres from the road.

[10] Cst. Pickell could see Ms. Anderson in the vehicle, noting that the windshield wipers were operating, and the headlights were on.

[11] EMS arrived at the scene approximately 30 seconds after Cst. Pickell. There were two EMS attendants, and they proceed to Ms. Anderson's vehicle along with Cst. Pickell. Ms. Andersen's vehicle was not captured by the video given its location in the ditch. The microphone continued to record and captured conversation.

[12] According to Cst. Pickell, EMS took the lead when they arrived at the vehicle to begin their assessment of Ms. Anderson. The vehicle was not running and Cst. Pickell placed his hand on the hood of the vehicle, noting that it was warm. The vehicle was stuck in the snow in the ditch and on viewing the vehicle tracks, Cst. Pickell concluded that there had been unsuccessful attempts to drive the vehicle out of the ditch.

[13] As EMS attendants were dealing with Ms. Anderson, they are heard on the audio telling Ms. Anderson to put her vehicle in park. She then proceeds to advise the EMS attendants that she has been stuck in the ditch for a couple of hours. At 23:59:15, Cst. Pickell can be heard interacting with Ms. Anderson by asking her last name which she provided to him. He then advised her that she was under investigation for operating a motor vehicle while impaired by alcohol and that she was subject to a motor vehicle stop, pointing out to her that his police vehicle emergency lights were activated. Her immediate response was "that's fine", but when further asked if she understood she seems to indicate that she did not. No further attempts were made to ensure that she understood as Cst. Pickell considered his words to be clear. He was trying to stay out of the way of EMS and not to interfere with their work.

[14] Cst. Pickell confirmed that he considered Ms. Anderson to be detained at this point. His observations of her included:

- Glossy eyes;
- Flushed face; and
- Heavily slurred speech.

[15] At approximately midnight, Cst. Dowling, the lead RCMP on the file, arrived at the scene. EMS can be heard speaking to Ms. Anderson and then proceed to escort Ms. Anderson out of the ditch with the assistance of fire personnel.

[16] At 00:01:20, Cst. Pickell updated Cst. Dowling on his observations as follows:

- Ms. Anderson had glossy eyes, flushed face, and slurred speech;
- The vehicle was warm to the touch;
- When he arrived at the scene the vehicle lights and windshield wipers were on;
- Ms. Anderson advised EMS she had been there for approximately two hours; and
- He provided Ms. Anderson with the police warning but she said she did not understand after first saying she did understand.

[17] Cst. Pickell, at this point, passed the investigation to Cst. Dowling. He proceeded to take photographs of the scene depicting where Ms. Anderson's vehicle drove off the road at an angle into the ditch and ultimately to where it stopped. The pictures, entered into trial as an exhibit, show recent attempts to move the vehicle forward as the tracks in

the photograph were not yet covered by the snowfall. One photograph depicts debris on top of the snow behind the front tires indicating that they had been spinning in an attempt to move the vehicle.

[18] Cst. Pickell spoke with Amber Clough who advised that she was running her dog when she came across the vehicle already down the embankment.

[19] Under cross examination, Cst. Pickell agreed that in light of his observations made, it was likely that Ms. Anderson was intoxicated by alcohol. However, he did not proceed with an approved screening devise (“ASD”) demand at that time because he did not make observation of either:

1. The odour of alcohol on Ms. Anderson's breath;
2. Open liquor in the vehicle; or
3. An admission by Ms. Anderson that she had consumed alcohol that evening.

[20] According to Cst. Pickell, he would require one of these three observations before he would have a reasonable suspicion that is required to make the ASD demand.

[21] Cst. Pickell did not provide Ms. Anderson with her section 10(b) *Charter* rights, indicating that he believed them to be suspended during the impaired driving investigation. He acknowledged that nothing was preventing him from providing her with her right to counsel.

Evidence of Cst. Anthony Dowling

[22] Cst. Dowling has been a member of the RCMP for approximately three years and was on general duty the evening of November 3, 2022.

[23] He arrived at the scene of the single vehicle accident and noted that EMS were assisting Ms. Anderson by her vehicle in the ditch. He proceeded to the car and ran the license plate on the vehicle confirming that it was registered in the name of Ms. Anderson.

[24] Cst. Dowling stayed out of the way of the EMS attendants but was close enough to the vehicle to smell alcohol in the air. Given his distance from the vehicle, he could not verify where the smell of alcohol was coming from at that time. His observations of Ms. Anderson included:

- Slurred speech;
- She was wearing the seat belt and seated in the driver's seat; and
- The fob for the ignition was beeping in the vehicle.

[25] Fire personnel had arrived at the scene and joined them at the vehicle. The EMS attendants, along with two fire personnel, escorted Ms. Anderson out of the ditch and to the ambulance. Cst. Dowling noted that Ms. Anderson was unsteady on her feet and required assistance walking once she was on the flat roadway.

[26] At approximately 00:04:38, Cst. Dowling walked over to the ambulance door, which was open. Ms. Anderson was in the ambulance being assessed by EMS attendants and Cst. Dowling was standing nearby with the ability to observe.

[27] Cst. Dowling's observations of Ms. Anderson at the ambulance included:

- Her speech was slurred;
- A smell of liquor was coming from the ambulance which he concluded was coming from her;
- She was mostly cooperative but became upset when her finger was pricked by the EMS attendants; and
- She appeared confused at times by the EMS attendant's questions.

[28] Cst. Dowling waited for the EMS attendants to medically clear Ms. Anderson. During this time, Ms. Anderson told the EMS attendants that she wanted to go home and Cst. Dowling reminded her that Cst. Pickell had advised her that she was under investigation. He also overheard Ms. Anderson advising the EMS attendants that she had been in the ditch for 30 minutes, which was a different timeline than he had been given from Cst. Pickell, so he confirmed with her that it had been 30 minutes.

[29] Ms. Anderson was medically cleared by the EMS attendants at 12:12:00, at which time Cst. Dowling arrested her for impaired driving and verbally advised her of her right to counsel and her right to remain silent. He noted that his reasonable grounds for arrest included:

- The observations of Cst. Pickell relayed to him when he arrived;
- His observations of slurred speech;
- Ms. Anderson being unsteady on her feet;
- The smell of alcohol coming from the ambulance which he concluded was coming from Ms. Anderson;
- Ms. Anderson was seated in the driver seat of the vehicle with her seat belt on when he arrived at the scene;
- The tracks in the snow were recent given that they were not yet covered by the snowfall; and
- Her statement that she was in the ditch for 30 minutes.

[30] Cst. Dowling escorted Ms. Anderson to the police vehicle, assisting her along the way by holding onto her arm. While placing Ms. Anderson in the vehicle he reminded her of her right to talk to lawyer and to remain silent. She was somewhat argumentative with him, but he remained calm and explained to her what was going on, and ultimately, placed her in the rear seat of the police vehicle without being handcuffed.

[31] At 00:19:00, Cst. Dowling again advised Ms. Anderson she was under arrest for impaired driving, and he proceeded to read Ms. Anderson her *Charter* rights. This was followed by a s. 320.28(1)(a)(i) *Criminal Code* breathalyzer demand.

[32] Cst. Dowling confirmed that he formed his reasonable grounds while Ms. Anderson was still in the ambulance being attended to by the EMS attendants. He

estimates that this conclusion was formed by him within five minutes of the time he placed her under arrest, while she was still being assessed in the ambulance. He believed it was at about 00:09:00.

[33] Under cross examination Cst. Dowling confirmed that he did not consider giving Ms. Anderson an ASD demand prior to her being medically cleared by the EMS attendants. Her medical condition was his number one priority at that time. Cst. Dowling understood from the information relayed to him by Cst. Pickell that Ms. Anderson had been detained by Cst. Pickell while still in the motor vehicle.

[34] Cst. Dowling testified that in order to make an ASD demand he would have required:

1. The smell of alcohol coming from Ms. Anderson;
2. An observation of open liquor in the vehicle; or
3. An admission by Ms. Anderson that she had been consuming alcohol.

[35] According to Cst. Dowling, this requirement was based on his training. He has never made the demand without meeting one of these three criteria.

[36] Cst. Dowling acknowledged that providing Ms. Anderson with her *Charter* rights was important. Given that he engaged briefly with her on two occasions while she was in the ambulance, he acknowledged that it was possible to provide her with those rights while she was with the EMS attendants. However, Cst. Dowling chose not to interfere with the EMS attendant's medical assessment of Ms. Anderson.

[37] Cst. Dowling further testified that he did not form the reasonable suspicion required for the ASD demand until he confirmed the smell of alcohol coming from Ms. Anderson. By that time, based on all of his observations combined with those of Cst. Pickell, he had formed reasonable grounds for arrest. He felt that pausing for an ASD demand would have been unreasonable in the circumstances.

[38] When asked why he did not arrest Ms. Anderson earlier when he formed his reasonable grounds, Cst. Dowling indicated that he was waiting for EMS attendants to finish assessing her and to determine whether she was going to the hospital.

Section 10(a) *Charter* Argument

[39] Ms. Anderson's allegation that there was a breach of her s. 10(a) *Charter* rights involves the interaction with Cst. Pickell at 23:59:15, as set out in the evidence of Cst. Pickell. Her position is that Cst. Pickell did not do enough to ensure that she understood what he was telling her about being detained.

[40] Section 10(a) of the *Charter* states:

10. Everyone has the right on arrest or detention:

a. to be informed promptly of the reasons therefor.

[41] Cst. Pickell was clear in his evidence that he informed Ms. Anderson that she was under investigation for operating a motor vehicle while impaired by alcohol and that she was subject to a motor vehicle stop. While he deferred to the EMS attendants as they dealt with Ms. Anderson, she was not free to leave.

[42] A review of the audio does not provide clarity with respect to the exchange between Cst. Pickell and Ms. Anderson. Her responses to the EMS attendants as well as to Cst. Pickell were difficult to understand given that her speech was slurred, she was mumbling, and she did not appear to appreciate the questions being posed to her. She seems to have been in a state of confusion with respect to where she was and the current state of her vehicle being in a ditch and inoperable.

[43] Cst. Pickell testified that Ms. Anderson 's initial response to being advised that she was under investigation for impaired driving and subject to a traffic stop was “that's fine”. When further asked if she understood, she at first did not respond then followed with “no”. Cst. Pickell elected not to pursue the matter any further as his statements were made clearly to Ms. Anderson and her initial response was that she understood what he was saying.

[44] The question before me is whether Cst. Pickell was obligated to provide any further clarification to Ms. Anderson regarding the reason for her detention at that point. He was clear in his evidence that he was deferring to the EMS attendants who were there to provide medical assistance to Ms. Anderson.

[45] Cst. Pickell had no further direct interaction with Ms. Anderson in relation to the investigation of the matter before the Court. The EMS attendants, with the assistance of fire department personnel, proceeded to remove Ms. Anderson from her vehicle and assist her out of the ditch and to the ambulance.

[46] The purpose of s. 10(a) of the *Charter* was addressed in the decision of *R. v. Black*, [1989] 2 S.C.R. 138, at para. 24:

Moreover, s. 10(b) should not be read in isolation. Its ambit must be considered in light of s. 10(a). Section 10(a) requires the police to advise an individual who is arrested or detained of the reasons for such arrest or detention. The rights accruing to a person under s. 10(b) arise because he or she has been arrested or detained for a particular reason. An individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy.

[47] The Supreme Court of Canada again addressed s. 10(a) of the *Charter* in *R. v. Evans*, [1991] 1 S.C.R. 869, at paras. 31 and 35:

31 The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

...

35 When considering whether there has been a breach of s. 10(a) of the Charter, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b).

[48] The Alberta Court of Appeal, in confirming that *Evans* is still the applicable law on s. 10(a) of the *Charter*, addressed the informational component in *R. v. Lund*, 2008 ABCA 373, at paras. 11 and 16:

11 Whether the informational requirement under s. 10(a) can be met without requiring specific words was addressed by this Court in *Carrier*. *Carrier* sought leave, relying on *Mann* and *Orbanski*, to argue that where a person is being investigated for impaired driving, a police officer is

required to specifically inform the individual as to the purpose of the investigation rather than relying on the context or circumstances to determine if sufficient reasons were provided or were obvious as required in **Evans**. Hunt J.A. held that the statements relied on by Carrier in **Mann** and **Orbanski** were *obiter dictum* as neither case raised s. 10(a) breaches. She concluded that the law on s. 10(a) remains to be governed by **Evans**, as applied in **Latimer**, that when considering whether there has been a breach of s. 10(a), it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, that matters. Leave to appeal was denied.

...

16 In my view, the law surrounding the informational component of s. 10(a) is settled. **Carrier** concluded that **Evans** remains the law and the informational requirement of s. 10(a) can be inferred from the context or circumstances in each case. The inquiry must be whether, substantively, the accused can reasonably be supposed to have understood the basis for the investigation. That is the precise issue raised here.

[49] When applying the law to the case before me, there are a number of considerations. Cst. Pickell advised Ms. Anderson in clear language the purpose of her detention and received confirmation from her initially that she understood. A careful review of the audio at the roadside depicts that Ms. Anderson was confused in her dealings with both EMS and Cst. Pickell. It is not clear on the evidence that further efforts by Cst. Pickell would have resulted in any change.

[50] Ms. Anderson was located seated in her vehicle which was inoperable given the location in the ditch and the snow on the ground. While she initially did not fully understand why the EMS attendants were escorting her from her vehicle, it would have become clear to her as she was being escorted to the roadway the circumstances that she found herself in. The presence of the RCMP, combined with the words used by Cst. Pickell and the circumstances of the motor vehicle accident together would have provided Ms. Anderson an understanding of her jeopardy.

[51] It is also clear from the evidence that no further substantive steps were taken by the RCMP to investigate the impaired driving offence before Ms. Anderson was reminded that she was detained for that purpose. She was placed under arrest with clear language by Cst. Dowling prior to being advised of her s. 10(b) *Charter* rights and there is no evidence before this Court that she did not fully understand her jeopardy at that time. She chose to speak to legal counsel indicating further that she understood her jeopardy.

[52] Cst. Pickell testified that Ms. Anderson's initial response was that of understanding what was being said to her. It was only on his follow up that she indicated otherwise. There is no evidence before the Court from Ms. Anderson on her level of understanding with respect to what Cst. Pickell told her when she was still seated in her vehicle.

[53] Defense filed the Ontario Court of Justice decision of *R. v. Steele*, 2014 ONCJ 583, wherein the Court confirmed that there is a subjective focus when considering s. 10(a) *Charter* compliance at paras. 17 and 18:

17 At first blush this passage appears to adopt a purely objective test -- the accused is adequately informed of his right "if he can reasonably be supposed to have understood." In fact, the inquiry is not into what the subject should have known; when an officer fails to provide a clear, simple and direct explanation for the detention the question remains whether in spite of this the officer managed to inform the detainee of the reason. This is effectively an inquiry into what the subject ultimately understood, given all of the circumstances. Objective facts can, of course, inform this inquiry, but it is an inquiry into whether the subject was left informed by the officer in spite of the failure to provide direct and simple information.

18 This subjective focus is supported by the purpose of section 10(a). Both objectives of equipping the detainee with the information needed to

determine whether to submit, and to empower the detainee to contact counsel, assume actual successful communication to the subject.

[54] The onus is on Ms. Anderson to prove the s. 10(a) *Charter* breach on a balance of probabilities. On the evidence before me, I am unable to conclude that it is more probable than not that Ms. Anderson did not understand the purpose of her detention. I find that there was not a breach of Ms. Anderson's section 10(a) *Charter* rights.

Sections 9 and 10(b) *Charter* Arguments

[55] Ms. Anderson's argument under ss. 9 and 10(b) of the *Charter* is that once the officers formed the reasonable suspicion to make the ASD demand pursuant to s. 320.27(1)(b) of the *Criminal Code*, they were obliged to do so immediately. Absent making the demand, the suspension of providing Ms. Anderson with her s. 10(b) *Charter* rights ends and the officers were required to inform her of those rights.

[56] She argues that this occurred at approximately 11:59 p.m., the time that Cst. Pickell informed her that she was being investigated for impaired driving and was subject to a motor vehicle stop. Cst. Pickell testified that in his opinion based on his observations to that point, it was "likely that Ms. Anderson was intoxicated by alcohol".

[57] The suspension of an individual's s. 10(b) *Charter* rights during an impaired driving investigation were considered at length in *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37. Reasonable police screening measures to assess impairment at the roadside during the suspension to providing the s. 10(b) *Charter* rights were addressed in *Orbanski* at para. 48:

...It was argued that asking questions about alcohol consumption falls outside the scope of reasonable police screening measures because it introduces an added element of self-incrimination...the 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 (*Smith*, at p. 74)...

[58] The Court in *Orbanski* continued to address the questioning by peace officers in the cases before the Court and the use of “reasonable and necessary measures” at paras. 49 and 50:

49 To return to the case-specific inquiry relevant to this appeal, in *Orbanski*, the officer asked the driver if he had been drinking, to which Orbanski answered that he had had one beer at two o'clock. Similarly, in *Elias*, the driver was asked whether he had been drinking, and he replied that he had. In both cases, the driver's answer was part of the information used by the officer to form the reasonable suspicion necessary to request a roadside breath sample in the case of *Elias*, and the reasonable and probable grounds necessary to request a breathalyzer test in the case of *Orbanski*. The questions were relevant, involved minimal intrusion and did not go beyond what was necessary for the officer to carry out his duty to control traffic on the public roads in order to protect life and property. In my view, the police officers were authorized in each case to make such inquiries.

50 The police officer was also authorized to ask Orbanski to perform a physical sobriety test at the roadside. As I have indicated, the inquiry is always case specific. In this case, the request made to Orbanski fell within the scope of reasonable and necessary measures. ...

[59] Regarding an individual's section 10(b) *Charter* rights, the Court in *Orbanski* stated at para. 52:

...In my view, it logically follows from *Thomsen* that a limit on the right to counsel is also prescribed during the roadside screening techniques

utilized in these cases. If a limit on the right to counsel is prescribed *during* compliance with a s. 254(2) demand for a sample for analysis in the roadside screening device, then the limit must necessarily be prescribed during the screening measures *preceding* the demand, conducted with the very objective of determining whether there is a reasonable suspicion justifying the demand. ...

[60] It follows that Cst. Pickell and Cst. Dowling were permitted to take reasonable and necessary measures to determine the level of sobriety of Ms. Anderson to give them the requisite grounds to make a demand pursuant to s. 320.27(1)(b) of the *Criminal Code*. The suspension of the right to counsel is limited to inquiries necessary to form the grounds.

[61] The legal requirements to make an ASD demand are set out in s. 320.27(1)(b) of the *Criminal Code*:

320.27 (1) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person...

(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;

[62] In *R. v. Breault*, 2023 SCC 9, the Court commented on the requirement to make the demand "forthwith", being the wording of the provision replaced by s. 320.27 in the *Criminal Code*, and applies to the current application of "immediately", at para. 7:

Exceptionally, unusual circumstances may justify giving the word "forthwith" a more flexible interpretation than its usual or ordinary meaning demands (*Woods*, at para. 43, citing *R. v. Bernshaw*, [1995] 1 S.C.R. 254). However, those circumstances must be just that: unusual. They

cannot arise from utilitarian considerations or considerations of administrative convenience. Moreover, the determination of what constitutes unusual circumstances must be grounded primarily in the text of s. 254(2)(b) *Cr. C.*

[63] The Court commented further on what might warrant a delay in making the s. 320.27(1)(b) demand at paras. 57 and 58:

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.

[64] Cst. Pickell briefly interrupted Ms. Anderson's interaction with EMS as she was being assisted from the vehicle to advise her that she was detained for the purpose of an impaired driving investigation. The two EMS attendants, with the assistance of two fire department personnel, then assisted Ms. Anderson out of the ditch and to the ambulance. The EMS attendants proceeded to assess Ms. Anderson's medical condition.

[65] Cst. Pickell, and subsequently Cst. Dowling, both testified that they did not possess the subjective grounds to make the s. 320.27(1)(b) demand to Ms. Anderson. If they had formed the subjective grounds, I find that the circumstances in this case fit within the "unusual circumstances" referred to in *Breault*. That is, RCMP deferring to the EMS attendants to take the necessary steps to medically clear Ms. Anderson, having

found her shortly after a motor vehicle accident, is a paramount consideration in the circumstances.

[66] Cst. Dowling's belief that he could not form reasonable grounds to make the s. 320.27(1)(b) demand without the specified evidence of alcohol consumption gave rise to the lack of the requisite subjective grounds. Regardless of this being a misunderstanding of the legal requirement for the demand, the delay to await medical clearance was justified and did not result in a s. 10(b) *Charter* violation.

Sections 8 and 9 *Charter* Argument

[67] Ms. Anderson's argument that there was a s. 8 breach of her *Charter* rights arises from the assertion that Cst. Dowling did not have the reasonable grounds to arrest her. Without the reasonable grounds for arrest, the demand pursuant to s. 320.28(1)(a) of the *Criminal Code* for a breath sample, and the sample that followed, constitute a s. 8 *Charter* breach. In addition to the s. 8 *Charter* breach, the lack of reasonable grounds to arrest resulted in an arbitrary detention and a breach of her s. 9 *Charter* rights.

[68] The Ontario Court of Appeal considered the elements of the reasonable and probable grounds test required for a breath demand in *R. v. Bush*, 2010 ONCA 554, at paras. 46 to 48:

46 In the context of a breath demand, the reasonable and probable grounds standard is not an onerous test: see *R. v. Wang*, 2010 ONCA 435 at para. 17. It must not be inflated to the context of testing trial evidence. Neither must it be so diluted as to threaten individual freedom: *Censoni* at para. 43.

47 There is no necessity that the defendant be in a state of extreme intoxication before the officer has reasonable and probable grounds to arrest: *R. v. Deighan*, [1999] O.J. No. 2413 (C.A.) at para. 1. Impairment may be established where the prosecution proves any degree of impairment from slight to great: *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478. Slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, and regard for the rules of the road: *Censoni* at para. 47.

48 The test is whether, objectively, there were reasonable and probable grounds to believe the suspect's ability to drive was even slightly impaired by the consumption of alcohol: see *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.), aff'd [1994] 2 S.C.R. 478; *Moneno-Baches and Wang*, at para. 17. ...

[69] Cst. Dowling testified to his reasonable grounds and his subjective belief that he had the requisite grounds for arrest in the circumstances. My conclusion on an assessment of his evidence and his articulation of his grounds is that he held the requisite subjective belief.

[70] When considering whether the grounds were objectively reasonable, a review of not only the grounds articulated by Cst. Dowling, but on the totality of the circumstances known to the police is required, as addressed by the Ontario Court of Appeal in *R. v. Fyfe*, 2023 ONCA 715, at para. 62:

Finally, the appellant's contention that the objective component of reasonable and probable grounds must focus only on an officer's articulated grounds is inconsistent with the exhortations in the authorities to consider "the totality of the circumstances" (*Shepherd*, at para. 21); "the cumulative effect of the totality of the circumstances, bearing in mind any exigent circumstances" (*R. v. Desilva*, 2022 ONCA 879, 421 C.C.C. (3d) 177, at para. 58); "[t]he totality of the circumstances known to police" (*R. v. Orr*, 2021 BCCA 42, 399 C.C.C. (3d) 441, at para. 78); and "the facts as a whole, seen through the eyes of a reasonable person who has the same knowledge, training and experience as the arresting officer" (*Canary*, at para. 30). ...

[71] In Ms. Anderson's case, the facts include an unexplained single vehicle accident. The Court considered the factor of a motor vehicle accident on whether or not there were reasonable and probable grounds to arrest in *R. v. Rhyason*, 2007 SCC 39, at paras. 18 and 19:

18 Of additional relevance are the two paragraphs immediately following the two impugned sentences. The trial judge found the accident to be significant, noting that "[i]f Constable Stevens had merely detected signs of alcohol consumption in the absence of an accident, there may have been a valid argument to the effect that evidence of alcohol consumption does not itself constitute evidence of impairment" (para. 25 M.V.R.). As the trial judge observed, there is abundant jurisprudence confirming that the circumstances of an accident can be taken into account, along with other evidence, in determining whether an officer had reasonable and probable grounds to arrest an individual for impaired driving. (See, for example, *R. v. Eliuk* (2002), 299 A.R. 364, 2002 ABCA 85, at para. 12; *R. v. Pedersen* (2004), 193 B.C.A.C. 206, 2004 BCCA 64, at para. 30; *R. v. Turner* (2004), 1 M.V.R. (5th) 191 (Ont. C.J.), at para. 8; and *R. v. Gairdner* (1999), 40 M.V.R. (3d) 133 (B.C.S.C.), at para. 15.)

19 This is not to suggest that consumption plus an unexplained accident always generates reasonable and probable grounds or, conversely, that it never does. What is important is that determining whether there are reasonable and probable grounds is a fact-based exercise dependent upon the circumstances of the case. In this case, the presence of an unexplained accident was one factor that the trial judge appropriately took into consideration when determining that those grounds existed.

[72] The photographs of the scene taken by Cst. Pickell show the trajectory of Ms. Anderson's vehicle from the roadway to the final destination in the ditch. The pictures depict that her vehicle gradually left the roadway at a slight angle into the ditch, continuing for a considerable distance to the final resting spot of the vehicle.

[73] With the evidence of the accident, the observations of Cst. Pickell along with the observations made by Cst. Dowling include:

- The initial report to RCMP from the complainant advising that the driver was possibly intoxicated;
- The unexplained single vehicle accident;
- Ms. Anderson's glossy eyes;
- Ms. Anderson's flushed face;
- Ms. Anderson's heavily slurred speech;
- Ms. Anderson was unsteady on her feet;
- The smell of alcohol coming from Ms. Anderson; and
- Ms. Anderson appeared confused by the EMS attendant's questions.

[74] I find that the combination of these factors, viewed objectively, support the conclusion that there were reasonable grounds to arrest Ms. Anderson at 12:12:00. That is, there were objectively reasonable grounds to conclude that Ms. Anderson's ability to drive was at least slightly impaired by the consumption of alcohol.

[75] I find that there was not at breach of Ms. Anderson 's ss. 8 and 9 *Charter* rights resulting from her arrest by Cst. Dowling.

Conclusion

[76] I find that there were no infringements of Ms. Anderson's *Charter* rights in relation to the arguments she put forward.

PHELPS T.C.J.