Citation: *R. v. Ward,* 2025 YKTC 1

Date: 20250117
Docket: 23-00642
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

BOBBY RUSSELL WARD

Appearances:
Kathryn Laurie — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Bobby Ward is before the Court on a nine-count Information alleging offences under the *Criminal Code* contrary to ss. 88, 90, 91(1), 95(a), 129(a), 270(1)(a), 108(2), and two counts contrary to s. 733.1(1). All offences arise out of an interaction with the RCMP on December 7, 2023.

[2] On December 7, 2023, Whitehorse RCMP received a 911 call from a female indicating that she was parked in the driveway of her Whitehorse residence but could not exit her vehicle because she was frightened by a nearby intoxicated male. RCMP member, Cst. Pickell, responded to the complaint but the male was no longer at the

caller's residence. As Cst. Pickell was driving away from the residence, there was a second 911 call regarding an intoxicated male of similar description walking nearby on the Alaska Highway and causing vehicles to swerve to avoid hitting him. Cst. Pickell located Mr. Ward walking on the side of the Alaska Highway and matching the description of the individual in the 911 calls. He proceeded to arrest Mr. Ward for causing a disturbance under s. 175 of the *Criminal Code*. Mr. Ward ran from Cst. Pickell and there was a sequence of events involving a protracted physical interaction between them, including the use of a taser, ultimately resulting in Mr. Ward successfully evading arrest.

[3] At trial, Mr. Ward asserted that the RCMP breached his ss. 7 and 9 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* ("*Charter*") rights. The trial commenced in a *voir dire* to address the *Charter* breach application. Crown presented two RCMP witnesses on the *voir dire*. Mr. Ward did not present evidence on the *voir dire*.

Evidence of Cst. Isaac Pickell

[4] At the time of trial, Cst. Pickell had been an RCMP officer for just under eight years and had been stationed in the Yukon for over five years. He was on duty on December 7, 2023, and responded to a 911 call at approximately 4:36 p.m. The information relayed to Cst. Pickell was that a female was in the driveway to her residence in the Kopper King Trailer Park, Whitehorse, Yukon, and was afraid to get out of her vehicle because of an intoxicated male outside her home. She described the

individual as a “younger First Nations male”, approximately 18 years old, wearing dark clothing, holding a bottle and appeared heavily intoxicated.

[5] Cst. Pickell proceeded to drive his police vehicle to the residence and discovered, upon arrival, that the male was no longer there. The 911 caller advised that the male was last seen walking towards the Alaska Highway at the entrance of the trailer park. He conducted a brief patrol of the neighbourhood then headed towards the Alaska Highway as the incident had resolved itself. As he reached the highway, a second call came over the radio from dispatch describing what was believed to be a 911 call involving the same male on the Alaska Highway not far from his location. This call came at approximately 5:04 p.m. and referenced an intoxicated male holding a bottle that had tried to wave down the caller. The male was reported to be causing traffic to slow and give him a wide berth due to his intoxication.

[6] Cst. Pickell was driving an RCMP vehicle equipped with Watchguard audio and video recording. One of the two video cameras captures the image from the dashboard of the vehicle facing forward. The Watchguard recording was activated as Cst. Pickell proceeded to respond to the second 911 complaint.

[7] Cst. Pickell located Mr. Ward staggering as he walked along the highway. He was familiar with Mr. Ward having had extensive interactions with him, and knew him to be dangerous, often located using alcohol and drugs, and prone to evading police. Mr. Ward fit the general description of the individual described in the first 911 call, being a “First Nations male”, wearing dark clothing, and holding an orange Fanta bottle. Of note, Mr. Ward was not a teenager, having a birthdate in 1983.

[8] Cst. Pickell described Mr. Ward as staggering as he walked and indicated concern for his safety as there was heavy traffic on the highway. He stopped his vehicle near Mr. Ward and spoke to him in front of his vehicle, noting that he appeared to be intoxicated by alcohol or drug with erratic speech and movement, an odour of alcohol, and bloodshot eyes. During the initial interaction he advised Mr. Ward of the 911 calls and concern over his level of intoxication, which Mr. Ward disputed. This interaction, including Mr. Ward walking along the highway up to the vehicle, was captured by the Watchguard video.

[9] Cst. Pickell took the bottle from Mr. Ward and then advised him he was under arrest for causing a disturbance under the *Criminal Code*. He believed that he also had the authority to proceed at the time with an arrest under the *Liquor Act*, RSY 2002, c. 140, but also believed people were being disturbed as set out in s. 175 of the *Criminal Code* by his presence based on the 911 calls received, including drivers being disturbed by him staggering on the highway and causing them to move over to avoid him.

[10] Immediately upon being advised that he was under arrest, Mr. Ward ran from Cst. Pickell and Cst. Pickell chased after him, yelling for him to stop and that he was under arrest. He was able to catch up to Mr. Ward and tackle him to the ground on the side of the highway. Cst. Pickell told him to stop resisting, but Mr. Ward continued to resist. Cst. Pickell was unable to overpower Mr. Ward, noting that Mr. Ward was larger than him in physical stature. As they struggled, Cst. Pickell was concerned about the traffic and one of them being struck by a vehicle or causing an accident. He could not see Mr. Ward’s hands and was concerned about weapons and his own vulnerable

situation and proceeded to strike Mr. Ward two times in the ribs with his fist to subdue him. The strikes did not have an impact on Mr. Ward and Cst. Pickell radioed for help, noting that he was feeling overpowered.

[11] Cst. Pickel next drew his taser and deployed it on Mr. Ward, briefly subduing him. He continued to give verbal direction to Mr. Ward to show his hands and to stop resisting. He announced over the radio that he was deploying his taser to the responding officers. The taser cycle lasts five seconds, after which Mr. Ward, still unresponsive to verbal communication began to get up. The taser was triggered a second time, with less impact, and Mr. Ward was able to get up and run away again. The events to this point are captured by the Watchguard video, although at a distance which impacts the quality of the image. The video is clear enough to corroborate the evidence of Cst. Pickell as to the sequence of events.

[12] Cst. Pickell holstered the taser and gave chase, again catching Mr. Ward. and this time tackling him into the deep snow in the highway ditch. Mr. Ward began pushing Cst. Pickel and grabbed him around the legs in an attempt to take him down. Cst. Pickell responded by holding Mr. Ward's head and trying to deploy his taser again. He testified that at this point they were not in direct view of traffic, and he was scarred and feared for his life. He deployed the taser again on Mr. Ward's arm with no visible reaction, then tried again with no visible reaction. Mr. Ward began running further into the ditch away from Cst. Pickell and Cst. Pickell chose to return to the highway and wait for assistance. The events in the highway ditch were not captured by the Watchguard video.

[13] Cst. Pickell retraced the events with his colleagues and located the orange bottle, Mr. Ward's hat, a key chain, a cell phone and a loaded 9mm semi-automatic handgun.

Evidence of Cst. McRorie

[14] On December 7, 2023, Whitehorse RCMP officer, Cst. Patrick McRorie, was on duty and responded to the request for assistance by Cst. Pickell. On route he received updates from the scene, including that an officer had deployed a taser, the suspect had ran into the woods, and the RCMP dog had been engaged to track him.

[15] Based on the information provided over the radio, Cst. McRorie drove to an area near the university where he believed the individual may end up based on the estimated trajectory of his travel. He learned that the individual in the woods was Mr. Ward, who he knew to be violent, to carry weapons, and that he was larger in stature than Cst. McRorie. It was considered to be a high-risk situation.

[16] Cst. McRorie located Mr. Ward exiting the wooded area and from approximately 60 to 100 feet from Mr. Ward, he pulled out his service pistol. He proceeded to point the pistol at Mr. Ward and verbally direct him to stop, show his hands, put his hands up, and drop down on his knees. Once Mr. Ward complied with the demand to drop to his knees, the pistol was put in the "low ready" position, meaning it was pointed to the ground. As Cst. McRorie was giving direction to Mr. Ward, two officers arrived at the scene, approached Mr. Ward, and successfully took him into custody.

[17] Mr. Ward was escorted to the nearby Arrest Processing Unit where he was assessed by Emergency Medical Services ("EMS"). He was administered Narcan by EMS and escorted to the hospital.

Were Mr. Ward's s. 9 *Charter* Rights Infringed?

[18] Section 9 of the *Charter* states:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[19] Mr. Ward asserts that his s. 9 *Charter* rights were breached by Cst. Pickell when he was detained and subsequently arrested without Cst. Pickell having the lawful authority to do so.

[20] The Crown has conceded that Cst. Pickell did not have the requisite authority to arrest Mr. Ward in their written submission, noting at paras. 15 and 16:

> Cst. Pickell was not authorized to arrest the Applicant for causing a disturbance under section 175 of the *Criminal Code*...Section 175 C.C. is a purely summary infraction that requires the arresting officer to find the person committing the offence to arrest them without a warrant, pursuant to section 495(1)(b) C.C.
>
> It is undisputed that the *Criminal Code* did not authorize the Applicant's arrest in the case at bar, as the behavior observed on Watchguard video does not meet the threshold for the criminal infraction of causing a disturbance.

[21] The burden is on the Crown to prove the *Criminal Code* allegations against Mr. Ward beyond a reasonable doubt. I will not look behind a concession by the Crown on an evidentiary matter when clearly stated on the record, as was done here. Accordingly, I will not conduct an analysis of the grounds for arrest.

[22] I do find that there was no evidence of bad faith on the part of Cst. Pickell in forming his subjective belief that he held the requisite grounds for arrest. He testified to having dealt with Mr. Ward in his policing capacity on many occasions, that he observed signs of intoxication, and that Mr. Ward was staggering along the highway. He believed that Mr. Ward was causing a disturbance as evidenced by the 911 calls, including the most recent one from a driver concerned for Mr. Ward's safety indicating the need for drivers to slow down and give a wide berth to Mr. Ward.

[23] The Crown argued that there was not a s. 9 *Charter* breach, despite the concession, because Cst. Pickell could have arrested Mr. Ward under the *Liquor Act*.

[24] The *Liquor Act* defines intoxication in s. 1:

> "intoxicated" and "intoxicated condition" each mean the condition a person is in when their capabilities are so impaired by liquor that they are likely to cause injury to themselves or be a danger, nuisance, or disturbance to others;

[25] It is an offence to be intoxicated in a public place pursuant to s. 91 of the *Liquor Act*:

> 91 Intoxicated persons in public places
>
> ...
>
> (2) No person shall be in an intoxicated condition in a public place.

[26] The Crown argues that Cst. Pickell held the requisite grounds to arrest Mr. Ward under the *Liquor Act*, and that caselaw regarding s. 8 of the *Charter*, finding "a search or seizure may still be lawful if an officer is subjectively unaware of, or mistaken about,

his authority to conduct it", applies similarly to a s. 9 *Charter* analysis. These cases include *R. v. Miller*, (1987) 62 O.R. (2d) 97 (O.N.C.A.); *R. v. Makhmudov*, 2007 ABCA 248; *R. v. R.M.J.T.*, 2014 MBCA 36; and *R. v. Williams*, 2023 ONSC 4577.

[27] The Crown advanced the argument that "the s. 9 arbitrary detention assessment mirrors the s. 8 unreasonable search and seizure analytical framework", relying on *R. v. Grant*, 2009 SCC 32, at para. 56:

> This approach mirrors the framework developed for assessing unreasonable searches and seizures under s. 8 of the *Charter*. Under *R. v. Collins*, [1987] 1 S.C.R. 265, and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. ...

[28] The Crown contends that, based on this statement by the Supreme Court of Canada, the line of cases that stand for the proposition that "a search or seizure may still be lawful if an officer is subjectively unaware of, or mistaken about, his authority to conduct it" apply similarly to the s. 9 *Charter* analysis. Accordingly, the Crown asserts that "the s. 9 *Charter* right is protected where the detention is authorized by law, the authorizing law is not arbitrary, and the detention is carried out in a reasonable manner".

[29] With respect, I find that the Crown has taken the statement in *Grant* beyond the Court's intention. That is, the framework is similar, but the impact on the individual differs. A mistaken belief in authority for conducting a search is significantly different

than an arbitrary detention. The Court in *Grant* recognized the significance of a s. 9 *Charter* breach in para. 54:

> The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law" (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 88). Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9. [emphasis added]

[30] Crown relies on *R. v. Edwards* (1994), 19 O.R. (3d) 239 (C.A.), in support of its argument. However, I note that the case is distinguishable in one very important aspect, being that Mr. Edwards was properly arrested under provincial motor vehicle legislation. The fact that he was also arrestable for drug offences was analysed in relation to a s. 9 *Charter* argument that he was arbitrarily detained by virtue of the real reason for detention being to investigate drug offences. The Court of Appeal addresses the issue in paras. 7 and 9:

> 7 Counsel for the appellant concedes that the police were acting within their authority in taking the appellant into custody following his arrest on a charge of driving while his licence was under suspension, even though the usual procedure in such circumstances is to charge the individual arrested and then release him. However, he argues that since the acknowledged purpose of the detention was to facilitate the ongoing drug investigation, it constituted an arbitrary detention in breach of the appellant's rights under s. 9 of the Canadian Charter of Rights and Freedoms.
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> ...
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> 9 Whether or not the appellant was actually charged with possession for the purpose of trafficking when he was first arrested, there is no doubt that he was properly arrested and detained on the driving charge. The trial

> judge found that at the time of his arrest the police had reasonable and probable grounds to arrest him on a charge of possession for the purpose of trafficking. ...
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> ...
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> I can find no fault with that finding of the trial judge. In my view, at the time of his arrest the police had "articulable cause" to detain within the meaning of *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (C.A.), and also reasonable and probable grounds to believe that the appellant had committed a drug offence. Consequently, there was no breach of the appellant's s. 9 *Charter* rights.

[31] Mr. Ward was not, according to the Crown concession, properly detained and arrested under s. 175 of the *Criminal Code*, nor was it Cst. Pickel's intention to arrest Mr. Ward under the *Liquor Act*. The circumstances of arrest and the specific s. 9 *Charter* argument advanced in *Edwards* do not exist in the case before this Court, and *Edwards* does not help advance the Crown's argument.

[32] An arrest of an individual under the *Criminal Code* is very different than an arrest under the *Liquor Act*, including by way of potential penalty and the impact of a potential criminal record flowing from the arrest. The authority to arrest is also different between the two. The Crown's argument does not address s. 10(a) of the *Charter* which states:

> 10. Everyone has the right on arrest or detention
>
> a. to be informed promptly of the reasons therefor;

[33] To accept the Crown's argument, I would be accepting that s. 10(a) of the *Charter* is also satisfied where the officer "is subjectively unaware of, or mistaken about, his authority to arrest", as long as there was a lawful authority at the time. This

argument was not advanced by the Crown, and I am unaware of any legal authority to support the position.

[34] Mr. Ward had the right to be advised of the reasons for his arrest, including what he was being arrested for. Cst. Pickell complied with this requirement when he placed Mr. Ward under arrest for the offence contrary to s. 175 of the *Criminal Code*.

[35] The fact that Mr. Ward could have been arrested under the *Liquor Act* by Cst. Pickell does not change the fact that the grounds for the actual arrest of Mr. Ward under the *Criminal Code* did not exist. The Crown concedes this point, and the resulting detention of Mr. Ward was a violation of his s. 9 *Charter* rights.

Were Mr. Ward's s. 7 *Charter* Rights Infringed?

[36] Mr. Ward has advanced an argument that the actions of Cst. Pickell and Cst. McRorie violated his s. 7 *Charter* rights. Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[37] The Supreme Court of Canada decision of *R. v. Nasogaluak*, 2010 SCC 6, involved an intoxicated accused resisting arrest and being punched several times in the head before being subdued, after which time he was punched twice in the back, breaking his ribs, and puncturing his lung. The Court summarized the events that followed at paras. 12 and 13:

> 12 Eventually, Mr. Nasogaluak was taken to the police detachment. Mr. Nasogaluak provided two breath samples that placed him well over the legal blood alcohol limit. No record was made of the force used during

> the arrest, of Cst. Dlin's drawing of a weapon, or of Mr. Nasogaluak's injuries. The officers provided their colleagues and superiors at the station with little to no information about the incident, and no attempts were made to ensure that Mr. Nasogaluak received medical attention. Although Mr. Nasogaluak had no obvious signs of injury and did not expressly request medical assistance, he did tell Cst. Olthof on two occasions that he was hurt and was observed by Cst. Dlin crying and saying: "I can't breathe." Corporal Deweerd, the supervisor on duty, testified that he noticed Mr. Nasogaluak leaning over and moaning as if in pain. However, Mr. Nasogaluak had replied in the negative to the question of whether he was injured. ...
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> 13 Mr. Nasogaluak was released the following morning and checked himself into the hospital, on his parents' insistence. He was found to have suffered broken ribs and a collapsed lung that required emergency surgery. ...

[38] The Court in *Nasogaluak* reviewed the application of s. 25 of the *Criminal Code* to police officer use of force and confirmed the s. 7 *Charter* breach at para. 38:

> ...It is enough to say, for the purposes of the present appeal, that I accept the Court of Appeal's determination that the trial judge had made no palpable and overriding error in his findings that the police had used excessive force at the time of Mr. Nasogaluak's arrest. Further, I believe that a breach is easily made out on the facts of this case. The substantial interference with Mr. Nasogaluak's physical and psychological integrity that occurred upon his arrest and subsequent detention clearly brings this case under the ambit of s. 7 (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519). The excessive use of force by the police officers, compounded by the failure of those same officers to alert their superiors to the extent of the injuries they inflicted on Mr. Nasogaluak and their failure to ensure that he received medical attention, posed a very real threat to Mr. Nasogaluak's security of the person that was not in accordance with any principle of fundamental justice. On that evidence and record, we may assume that there was a breach of s. 7 and that there was no limit prescribed by law justifying such a breach. The conclusion that s. 25 was breached, in that excessive, unnecessary force was used by the police officers at the time of the arrest, confirms it.

[39] *Nasogaluak* provides helpful guidance on the use of force by a police officer in accordance with s. 25 of the *Criminal Code*, concluding at para. 34:

> Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. ...

[40] Cst. Pickell was not, at first instance, effecting a lawful arrest. Section 25 of the *Criminal Code* does not apply. The Court in *Nasogaluak* warned against judging police officers against a standard of perfection in para. 35:

> Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):
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> > In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.

[41] I find that the force used by Cst. Pickell to have been no more than necessary in the circumstances. There was a quick escalation of the risk posed to Cst. Pickell in his interactions with Mr. Ward, and he used reasonable force in the circumstances he found himself, noting that he feared for his own life during the exchange. As the struggle reached the ditch of the highway, Cst. Pickell was clearly on the defensive as Mr. Ward attempted to take him down to the ground.

[42] Unlike in *Nasogaluak*, Mr. Ward was afforded medical treatment in a timely manner and the circumstances of the force used were disclosed in real time over the radio as the situation unfolded. There is no evidence of attempts to conceal on the part of Cst. Pickell.

[43] However, the arrest itself was not lawful, and the resulting use of force by Cst. Pickell, although reasonable in application, result in a breach of Mr. Ward's s. 7 *Charter* rights.

[44] Mr. Ward argues that the actions of Cst. McRorie pointing a firearm at him also constitute a breach of his s. 7 *Charter* rights. I disagree. Cst. McRorie had significant knowledge of the events between Cst. Pikell and Mr. Ward leading up to that point, as well as independent knowledge that Mr. Ward was known to be violent and to carry weapons. Cst. McRorie had the requisite grounds to arrest Mr. Ward at the time, and the use of force was reasonable in the circumstances.

Section 24(2) *Charter* Analysis

[45] Having found a breach of Mr. Ward's ss. 7 and 9 *Charter* rights, I will conduct a s. 24(2) *Charter* analysis and consider the exclusion of evidence. The focus of the argument before the Court is in relation to the 9mm semi-automatic pistol and ammunition located at the scene. Mr. Ward relies on the majority decision of the Court of Appeal in *R. v. Sabiston*, 2023 SKCA 105, in support of the argument that another means available to Cst. Pickell to discover the handgun, being an arrest under the *Liquor Act*, diminishing the impact of the *Charter* breach on Mr. Ward, must fail.

[46] The recent Supreme Court of Canada pronouncement in *R. v. Sabiston*, 2024 SCC 33, allowed the appeal "substantially for the reasons of Tholl J.A. of the Court of Appeal for Saskatchewan". Tholl J.A. wrote the dissent, stating at para. 119:

> The question progresses to whether it was appropriate for the trial judge to have taken into account the fact that Mr. Sabiston would have been

> detained and ultimately arrested even if the *Charter* breaches had not occurred and to have used that factor to lower the significance of the impact on him. I find that she was entitled to do so. While potential, alternative courses of action do not change the fact that a *Charter* breach *occurred*, it is permissible for a trial judge to look at what would have happened in the absence of the *Charter* violation when considering the remedy. ...

[47] In Mr. Ward's case, the Crown argued that Mr. Ward was arrestable under the *Liquor Act* at the time of his detention. If arrestable under the *Liquor Act*, and the firearm was otherwise discoverable, the seriousness of the *Charter* breach would be diminished and would have an impact on the s. 24(2) *Charter* analysis.

[48] The Supreme Court of Yukon reviewed the authority to arrest under the *Liquor Act* in *R. v. E.B.K.*, 2003 YKSC 63, a case involving a youth under the influence of alcohol and coming into contact with the RCMP on three separate occasions over the course of an evening. The Court in *E.B.K* reviewed the circumstances of causing a disturbance under the *Liquor Act*, stating at paras. 61 and 62:

> 61 On the third incident, one can appreciate the dilemma that Cpl. Cashen was in. He had warned her that she would be arrested if she did not go home. E.B.K. had now clearly left her home at 4:40 a.m., and he observed her running across a highway. Although he did not see S.R. until after the arrest, he concluded that there was a threat of additional disturbances. She was a youth, engaged in underage drinking, out at 4:30 in the morning, and moderately intoxicated. She had been cautioned twice before as a result of calls to the police about a disturbance. It was reasonable for Cpl. Cashen to conclude that the disturbance would likely occur again.
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> 62 There is no requirement under the objective test that E.B.K. was actually a disturbance to others at the time of her detention. There is a requirement that Cpl. Cashen have reasonable and probable grounds to believe that she would be likely to be a disturbance. Based upon the totality of the evidence that evening, he had reasonable and probable grounds to detain her under s. 87 of the Liquor Act. It was not a mere nuisance or emotional disturbance on the first two occasions. Disturbance

> calls were made to the police by members of the public and Cpl. Cashen observed the seriousness of the disturbance on the second occasion. The incidents could reasonably be perceived as escalating.

[49] Cst. Pickell was dealing with Mr. Ward after two separate 911 calls that had been made in relation to a male fitting his description. The first call was from a female who called 911 out of fear for her own safety due to the actions of the intoxicated male, and the second call was due to fear for the safety of Mr. Ward given his level of intoxication and staggering on the side of a busy highway. These calls are coupled with Cst. Pickell's observations of intoxication, including staggering, of Mr. Ward.

[50] Unlike the requirements under s. 175 of the *Criminal Code*, the *E.B.K.* decision only requires Cst. Pickel to have reasonable grounds to believe Mr. Ward was "likely to be a disturbance". Cst. Pickell testified that given his observations of Mr. Ward and the multiple 911 calls, he believed that Mr. Ward would cause a disturbance to drivers on the highway and that there would be more calls in relation to Mr. Ward if he was not arrested at that time.

[51] I find that Cst. Pickell did have the requisite grounds to arrest Mr. Ward under the *Liquor Act*.

[52] The test to be applied when considering the admissibility of evidence under s. 24(2) of the *Charter* was set out by the Supreme Court of Canada in *Grant* and is summarized at para. 71:

> ...When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message

> the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. ...

[53] I will consider each of the three lines of inquiry individually as I assess and balance the effect of admitting the evidence on society's confidence in the justice system.

The Seriousness of the Charter-Infringing State Conduct

[54] The Supreme Court of Canada in *R. v. McColman*, 2023 SCC 8, reviewed the *Grant* analysis and set out the approach to the first *Grant* factor at paras. 57 and 58:

> 57 The first line of inquiry focuses on the extent to which the state conduct at issue deviates from the rule of law. As this Court stated in *Grant*, at para. 72, this line of inquiry "requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct". Or as this Court phrased it in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22: "Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?"
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> 58 In evaluating the gravity of the state conduct at issue, a court must "situate that conduct on a scale of culpability": *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 43. As Justice Doherty observed in *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, "the graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct": para. 23. To properly situate state conduct on the "scale of culpability", courts must also ask whether the presence of surrounding circumstances attenuates or exacerbates the seriousness of the state conduct: *Grant*, at para. 75. Were the police compelled to act quickly in

> order to prevent the disappearance of evidence? Did the police act in good faith? Could the police have obtained the evidence without a *Charter* violation? Only by adopting a holistic analysis can a court properly situate state conduct on the scale of culpability.

[55] I have found in this case that Cst. Pickell was not acting in bad faith and that he held the requisite subjective belief to arrest Mr. Ward pursuant to s. 175 of the *Criminal Code*. He further acknowledged that he could have arrested Mr. Ward under the *Liquor Act*, but he proceeded under the *Criminal Code* based on his understanding of the application of s. 175.

[56] When considering the question of whether Cst. Pickell's conduct involved "misconduct from which the court should be concerned to dissociate itself", I conclude that this is not such a case with regard to the s. 9 *Charter* breach. The additional use of force by Cst. Pickell giving rise to the s. 7 *Charter* breach, while reasonable in the circumstances were the arrest lawful, compounds the misconduct and, in this case, moderately favours the exclusion of the evidence.

The Impact of the Breach on the Charter-Protected Interests of the Accused

[57] The Court in *McColman* addressed the second line of inquiry at para. 66:

> The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para. 76.

[58] In *Sabiston,* while addressing this factor of the *Grant* analysis, continued at para. 119:

> ...While potential, alternative courses of action do not change the fact that a *Charter* breach occurred, it is permissible for a trial judge to look at what would have happened in the absence of the *Charter* violation when considering the remedy. This fits well with the concept that discoverability is properly examined at the second stage of the *Grant* framework, despite the fact that this course of analysis necessarily involves an inquiry as to what would have occurred in the absence of the breach: *Grant* at para 122. This point was reiterated by Kalmakoff J.A. in *Chapman*, where he stated as follows: "In the second stage of the *Grant* inquiry, the fact that the evidence would have been discovered through lawful means, had the police chosen to avail themselves of those means, may attenuate the seriousness of the impact of the breach on the *Charter*-protected rights of the accused: ...

[59] In these circumstances, as there was lawful authority on the part of Cst. Pickell to arrest Mr. Ward under the *Liquor Act*, the impact of the s. 9 *Charter* breach before the Court is at the low end. Had Cst. Pickell arrested Mr. Ward under the *Liquor Act* then the firearm would have been discovered in the process. Cst. Pickell believed he was acting lawfully in arresting Mr. Ward under the *Criminal Code*, and the use of force was reasonable had that been the case. The impact of the s. 7 *Charter* breach before the Court is also at the low end.

[60] This second line of inquiry favours the inclusion of the evidence.

Society's interest in the Adjudication of the Case on its Merits

[61] The Court in *McColman* addressed the third line of inquiry at paras. 69 and 70:

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

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

[62] The Court in *McColman* addressed the seriousness of impaired driving and the impact of such offending on society, concluding at para. 73:

> In light of the reliability and importance of the evidence as well as the seriousness of the alleged offence, the third line of inquiry pulls strongly in favour of inclusion. Admission of the evidence in this case would better serve the truth-seeking function of the criminal trial process and would not damage the long-term repute of the justice system.

[63] I find the comments regarding the serious nature of impaired driving analogous to possessing loaded restricted firearms. Having the firearm in his possession is a very serious and dangerous offence. The firearm itself is reliable evidence and critical to the prosecution of the offence. I find that the third line of inquiry favours the inclusion of the evidence.

Balancing the Grant Factors

[64] The Court in *McColman* provides guidance on balancing the three *Grant* factors at para. 74:

> When balancing the *Grant* factors, the cumulative weight of the first two lines of inquiry must be balanced against the third line of inquiry: *Lafrance*, at para. 90; *R. v. Beaver*, 2022 SCC 54, at para. 134. Here, the first line of

> inquiry slightly favours exclusion of the evidence and the second line of inquiry does so moderately. However, the third line of inquiry pulls strongly in favour of inclusion and, in our view, outweighs the cumulative weight of the first two lines of inquiry because of the crucial and reliable nature of the evidence as well as the important public policy concerns about the scourge of impaired driving. On the whole, considering all of the circumstances, the evidence should not be excluded under s. 24(2).

[65] In the case of Mr. Ward, the first line of inquiry moderately favours the exclusion of the evidence. The second and third lines of inquiry favour the inclusion of the evidence. Considered as a whole, the three *Grant* factors favour the inclusion of the evidence.

[66] I find that the evidence discovered by the RCMP after the *Charter* breaches, including the 9mm semi-automatic handgun and ammunition, should not be excluded and is admissible at trial.

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PHELPS T.C.J.