Citation: *R. v. Bus*, 2024 YKTC 56

Date: 20241205
Docket: 23-00603
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before Her Honour Judge McLeod

REX

v.

CYPRIAN JULIAN BUS

Appearances:
Andreas Kuntz — Counsel for the Crown
Jonathan Squires — Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

REASONS FOR JUDGMENT

[1] McLEOD T.C.J. (Oral): Mr. Bus faces charges of impaired driving and refuse breath sample. He has pleaded not guilty.

[2] Before I turn to the substantive issues in this case, there is an issue that became clear to me only after I had heard submissions on those substantive issues and had reserved judgment. That issue is this: Count 2 of the Information charging Mr. Bus specified that Mr. Bus had committed an offence of refuse breath demand made under s. 320.27 of the *Criminal Code* (the "*Code*") and, therefore, committed an offence under s. 320.15 of the *Criminal Code*.

[3] Section 320.27 of the *Code* specifically refers to demands made for an Approved Screening Device ("ASD"). The only evidence of the refusal of a peace officer's demand heard at trial was with respect to a demand made under s. 320.28 of the *Code*, that is, namely, to provide breath samples into a breathalyzer.

[4] Neither counsel raised this issue during the trial. The trial took place over two days, one in June and one in September. In September, evidence was heard on the *Charter* issues and then submissions were made. I was present at the trial in June, but was unfortunately, in September, only able to attend remotely because of having contracted COVID. When appearing remotely, I did not have a copy of the Information and thus, when only reviewing my notes in detail from the June hearing, did I become aware of the problems with the particularization of the Information. Thus, a further hearing was held.

[5] Mr. Kuntz, for the Crown, argues that the powers of amendment of the Information under s. 601 of the *Code* are broad. Furthermore, Mr. Kuntz argues that part of my determination as to whether to amend an Information must include a consideration of where "the accused has been misled or prejudiced in his defence by the error" and, further, "whether having regard to the merits of the case, the proposed amendment can be made without injustice being done" (see ss. 601(4)(c) and (d), of the *Code*).

[6] In a case such as this, where there was never any argument by the defendant of the error in the Information, it could not be said that the defendant had been misled or that an amendment at this stage of the proceedings would lead to an injustice.

Mr. Squires, however, for Mr. Bus argued that it would be unfair to amend the Information at this stage of the proceedings and it would affect any perception of the fairness of the trial.

[7] There is no doubt that s. 601 of the *Code* permits an amendment to be made "at any time, at any stage of the proceedings" (see s. 601(3)) and given that judgment had not been rendered, it could not be argued that the proceedings had concluded.

[8] Having reviewed again the evidence of the demanding officer given in examination and cross-examination, I am satisfied that at no time was the wording of the demand touched upon even for the purpose of clarifying what demand was made. Furthermore, in both the original *Charter* application filed by the defence and a subsequent amended *Charter* application, the defendant clearly anticipated responding to a charge under s. 320.28 of the *Code*, the refuse breathalyzer section. The charge of refuse ASD was never even mentioned.

[9] Given all of these circumstances, I am unable to find that an amendment to the Information, even at this stage of the proceedings, would cause an injustice. Rather, it would clearly ratify what both counsel appear to have understood, the charge on which the Crown was proceeding. Accordingly, I find that Count 2 of the Information should be amended to read that Mr. Bus "refused to comply with a demand made under s. 320.28 of the *Code* and thereby committed an offence under s. 320.15" of the *Code*.

[10] I will now turn to the other issues in this case. They are:

(1) whether the Crown has proven beyond a reasonable doubt that Mr. Bus had driven while impaired by alcohol;

(2) whether Mr. Bus refused to provide breath samples and accompanied the arresting officer to allow the breath samples to be taken; and

(3) whether Mr. Bus was the subject of an arbitrary detention by being held for over 10 hours in a cell before being released. The Crown concedes this aspect of the *Charter* application.

[11] If the answer to #3 is yes, the question is then what is the appropriate remedy.

[12] The defendant argues that the charges should be stayed pursuant to s. 24(1) of the *Charter of Rights and Freedoms* (the "*Charter*") or, failing that, for an exclusion of the state-gathered evidence, which would include the utterance of the alleged refusal.

[13] I will now turn to the facts.

[14] On November 10, 2023, at approximately 3:00 in the morning, Mr. Ryan, who was doing snow removal as a second job, was on his way back to his work yard. He recalled the temperature to be between minus 17 to minus 20 Celsius. He had to go back to the yard to deliver the truck in which he was driving to perform the snow removal.

[15] Mr. Ryan explained that he was on the Alaska Highway driving from Porter Creek to the yard. He saw a man on the same side of the road walking the same direction that

he was travelling with his thumb out. He also saw a set of tail lights deep in a ditch about 20 to 30 yards away from the man.

[16] Mr. Ryan pulled over. The man walked towards him. He was described as stumbling, staggering, and not walking straight. Mr. Ryan said his first thought was that the person was concussed "until he got closer". He could then smell alcohol from both this person's body and his breath. He also discerned that the person had slurred speech and was not very coherent. It was Mr. Bus.

[17] Mr. Bus told Mr. Ryan that it was his car that was in the ditch, and that he had been driving. Mr. Ryan saw that Mr. Bus' ankles were wet. Mr. Bus also confirmed to Mr. Ryan that he had been drinking, although he declined to say how much.

[18] Mr. Ryan said he did not call a tow truck to assist Mr. Bus despite Mr. Bus' request, as he concluded that Mr. Bus was drunk. He drew that conclusion because Mr. Bus had admitted drinking and Mr. Ryan could smell the alcohol. He testified that he estimated that the elapsed time from the first time he saw Mr. Bus to the time he called 911 was about 20 minutes.

[19] Mr. Bus apparently also asked Mr. Ryan if Mr. Ryan could help him get his car out of the ditch. Mr. Ryan explained that he could not, as the vehicle he was driving was a work vehicle.

[20] Cst. Hutton-Brown was the first officer on the scene. After receiving information from Mr. Ryan, the officer found Mr. Bus in the passenger seat of Mr. Ryan's service truck. Mr. Bus was described by the officer as being slightly hunched over and almost

semi-awake, which the officer further described as being not fully aware when somebody was speaking to him. He also said that Mr. Bus had trouble focusing on the officer.

[21] Cst. Hutton-Brown invited Mr. Bus, who he noticed was smelling of alcohol from his breath, to take a seat in the patrol vehicle to keep warm. The officer described how, in the walk to his patrol car, he had to hold on to Mr. Bus to stop him from swaying or losing his balance. The interaction between the officer and Mr. Bus is captured on the WatchGuard video, which was admitted into evidence.

[22] Mr. Bus was told by the officer that he was being detained for an investigation into an impaired driving charge. Mr. Bus, while being informed of his detention and, subsequently, his right to counsel, continuously interrupts the officer, indicating that he disagrees. Mr. Bus had an accent, but he is also clearly slurring his words.

[23] Mr. Bus indicated that he did not want to call a lawyer. Subsequently, Mr. Bus was arrested for impaired driving and a breath demand was made. The demand was as follows, “I demand that you provide, as soon as practicable, samples of your breath that are suitable for analysis and that you accompany for this purpose. Do you understand?” Mr. Bus’ first response was, “I disagree.”

[24] Cst. Hutton-Brown said, “What I’m trying to tell you is that I’m demanding samples of your breath that are suitable for analysis. Are you going to accompany me for this purpose?” Mr. Bus responded initially, “Yes, of course.” Then there was a pause and he said, “or not.”

[25] After querying the officer for advice as to whether he should cooperate, Mr. Bus is told that if he fails to comply with the breath sample, the consequences could be equal to or worse than an impaired driving conviction. Mr. Bus indicated he does not want to comply.

[26] He is then asked by Cst. Hutton-Brown, “Are you refusing?”. His response was, “Yes.”

[27] Mr. Bus is then arrested for the refuse and responds that he does not agree to be arrested. He also says he wants to contact his wellness worker. It is explained to him that he can only contact a lawyer. Mr. Bus asks for a note to be made that he does not want to contact his lawyer but to call his counsellor.

[28] Cst. Hutton-Brown then, on two occasions, makes inquiries as to where Mr. Bus could be taken. Mr. Bus asked to be taken to his home, which he describes as a 25-kilometre drive. The officer explains that Mr. Bus can only be released to a sober adult. Mr. Bus apparently lives on his own. Thus, ultimately, Mr. Bus is taken to the Adult Processing Unit (“APU”) for lodging, as it was the officer’s view that Mr. Bus could not be left on his own until he was sober, nor could he, due to his intoxication at that time, understand the import of any release documents.

[29] Mr. Bus was arrested at 3:36 a.m. He was driven to the APU, arriving at 4:10 in the morning. He was not released until 1:30 the following afternoon.

[30] Mr. Ryan's testimony of his conversation with Mr. Bus allows for a conclusion that Mr. Bus had driven the car into the ditch. He admitted being the driver and his feet were wet and he asked for Mr. Ryan for assistance in moving his car.

[31] At this juncture, I want to deal with the issue of whether the evidence before Mr. Bus was detained by the officer rises to the level of proving beyond a reasonable doubt that Mr. Bus was impaired by alcohol and had been operating a motor vehicle.

[32] The rationale for this bifurcation of the evidence is that I am told by the Crown that he is conceding the s. 9 *Charter* breach application. Thus, a remedy hearing will have to take place, and it is important to note that, under s. 24(2) of the *Charter*, it is only state conduct that can be excluded. The evidence of Mr. Ryan obviously does not fall into that category. Clearly, the evidence of the refuse is different, as that is capable of exclusion, so I will deal with that under a discussion on remedies for the *Charter* issue.

[33] The evidence of Mr. Ryan about his conversation with Mr. Bus, both while they were smoking a cigarette and in Mr. Ryan's work vehicle, was essentially unchallenged. Within that conversation, Mr. Bus admitted that he had driven the car into the ditch, as I have said, and that he had been drinking alcohol.

[34] Additionally, Mr. Ryan, as did the officer upon coming onto the scene, smelled alcohol on Mr. Bus' breath. Mr. Ryan also testified that in his conversation with Mr. Bus, he noted slurred speech and described it as not being coherent.

[35] In terms of the road conditions, Mr. Ryan testified that there had been more than five centimetres of snow that day, but that the roads were clear and that there was snow on the shoulder of the road. Mr. Ryan conceded that the shoulder may have been slippery. Mr. Ryan had described Mr. Bus as staggering as the two men approached each other and, further, when they were standing talking to each other while smoking, that Mr. Bus was swaying.

[36] Mr. Squires, counsel for the defence, rightly cautions that there may be some evidence of alcohol consumption and of unsteadiness on Mr. Bus' feet, but says it does not rise to the standard of proof beyond a reasonable doubt that Mr. Bus' ability to operate a car was impaired. It is at this stage I need to clarify the law.

[37] I agree that reasonable doubt is the standard to which all criminal trials must adhere, but there is no magic stage in impaired driving trials above which the standard of reasonable doubt is passed. The law is much clearer. Impairment may be established when the prosecution proves any degree of impairment, from slight to great, beyond a reasonable doubt (see *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), which was affirmed by the Supreme Court of Canada in 1994.

[38] 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 on time, judgment and regard for the rules of the road (see *R. v. Censoni*, 2001 CarswellOnt 4590 (Ont. Sup. Ct.), at para. 47).

[39] I accept that there is no evidence of the manner in which Mr. Bus drove his car. What there is are the numerous indicia of impairment described by Mr. Ryan, who even

considered whether the explanation of Mr. Bus' clear inabilities that he listed were due to a concussion as a result of the car ending up in a ditch of the highway. Mr. Ryan testified that he has had numerous concussions and the indicia, in his view, was not what he had experienced as a concussion victim and, once he smelled the alcohol, he knew Mr. Bus was drunk.

[40] Another factor: the issue of an unexplained accident can be taken into account. For example, in *R. v. Lyaruu*, 2011 ONCA 547, the Court of Appeal in Ontario upheld a conviction for impaired driving where the appellant refused to provide a breath sample, concluding that there was "ample evidence of impairment, including the smell of alcohol on the accused's breath, his bloodshot eyes, [and] the unexplained accident" (emphasis added) and the *Code* inference, to which I will refer later (see *R. v. Grant*, 2014 ONSC 1479).

[41] As Mr. Squires correctly pointed out, it is Mr. Bus' right to choose not to testify, but there are not any inferences that I can draw from his silence, but that is a far cry from being allowed to draw inferences that are speculative on no evidence. For example, I do have evidence that Mr. Bus had been drinking. He told us. Mr. Ryan told us.

[42] Could he have been suffering from a concussion? The answer is, I do not know, as there is no evidence as to what happened when the car went into the ditch. In fact, Mr. Bus told Mr. Ryan that he was not injured by the accident.

[43] With respect to Mr. Bus driving off the road into the ditch, there is an assertion by Mr. Ryan that the road conditions were dry and not slippery, well maintained, and there

was no snow on the road. With respect to Mr. Bus walking on the side of the road, there was a vague concurrence by Mr. Ryan that Mr. Bus was walking on the shoulder, which was gravel, and could have been icy, but that does not explain the evidence of Mr. Ryan as to why Mr. Bus was standing still when they were smoking and was not coherent.

[44] Furthermore, when the officer arrived on the scene, he "invited" Mr. Bus to join him in the police car to keep warm. Mr. Bus went and was described as having a tough time keeping his balance, so much so that the officer held onto him to stop him from swaying and falling over.

[45] Finally, in considering other evidence, the officer made a demand under section 320.28 of the *Code*. Mr. Bus unequivocally refused.

[46] The defence has not asserted that the demand made by the officer was not in accordance with the *Code* prerequisites. The *Charter* notice only refers to the overholding issue. Thus, s. 320.31(1) of the *Code* permits me, because of the refusal, to draw an inference from that evidence which goes to the issue of impairment.

[47] For these reasons, on the evidence to which I have referred, which does not include the WatchGuard video or anything after Mr. Bus was formally detained, I find that the Crown is able to prove the requisite elements of the offence of impaired driving beyond a reasonable doubt.

[48] Furthermore, with respect to the refusal, there is evidence of an unequivocal refusal of Mr. Bus even after being told the consequences to take a breathalyzer test.

That constitutes an offence as charged and as amended in Count 2, and I find that Mr. Bus has not raised a reasonable doubt on that issue, either.

[49] This, of course, does not end the matter, as I now turn to the s. 9 *Charter* breach allegation. Firstly, I will turn to the circumstances of the detention.

[50] When Cst. Hutton-Brown and Cst. Belleisle arrived at Mr. Ryan's truck, they were responding to Mr. Ryan's call which they understood was for a person "potentially impaired by alcohol". Cst. Hutton-Brown arrived at 3:28 a.m. and, after confirming that he was in the right place, he manoeuvred his car to come in behind Mr. Ryan's truck. He spoke to Mr. Ryan for a couple of minutes and then went to the passenger door, where he found Mr. Bus. His conversation with Mr. Bus included hearing about Mr. Bus' recent breakup with his wife and that he was having a rough day.

[51] Since Mr. Ryan wanted to continue his journey, Cst. Hutton-Brown invited Mr. Bus into his car, and it was at this point that the WatchGuard video picks up Mr. Bus before he gets into the car, staggering towards the car and falling onto snow. He is then seen getting into the back of the police vehicle. Mr. Bus clearly had trouble finding his wallet to hand over his driver's licence as he looks into all his pockets. At some point, Mr. Bus is "detained", and the officer handcuffs Mr. Bus to the front. Mr. Bus is then given his rights to counsel, which, as I said, he disagrees with, and waives his right to contact a lawyer.

[52] Cst. Hutton-Brown then leaves the vehicle for a short period and then comes back and formally arrests Mr. Bus for impaired driving, once again, gives him his rights to counsel and cautions him. The demand for a breath test is also made and Mr. Bus

refuses, after being warned of the consequences of refusing being equal or worse than an impaired driving conviction. Mr. Bus clearly says he does not want to cooperate. He is charged with the refuse breath sample at 3:40 a.m.

[53] Mr. Bus says he does not want to contact a lawyer. Rather, he would now like to contact his wellness worker or his “shrink”. He is told he can only speak to a lawyer, and then there is a discussion about where Mr. Bus is going to be taken.

[54] The officer then gets out of his car because he had called the paramedics. They arrive at 3:42 a.m. Mr. Bus tells the paramedics that he takes anti-depressants. He is told that his blood sugar level has to be checked. It is checked and the paramedic tells him that his sugar level is low and asks him some questions.

[55] During this process, Mr. Bus seems to breathe deeply. The paramedics then shut the door of the car and Mr. Bus starts to cry, putting his head on the side of the door. He begins to hyperventilate, with obviously accelerated breathing, continuing to cry. The paramedics return to tell him that they are going to put him in the ambulance and take him to the hospital. Mr. Bus is obviously upset, gets out of the car, and is escorted out of the range of the camera.

[56] Cst. Hutton-Brown testified that the paramedics spent eight minutes with Mr. Bus and took him to the ambulance, warmed him up, and tested his blood sugar level again, which indicated it was normal, so they placed Mr. Bus back into the police car. He is asked again by Cst. Hutton-Brown whether there is anywhere he can go. He says his girlfriend is in Nova Scotia.

[57] Mr. Bus is told to wait in the car and the door closed. Again, he then starts again to hyperventilate. His jacket is half off and he starts to raise his head up, pushing it against the roof of the car. He puts his feet on the seat of the car and grasps his head in both hands and continues to hyperventilate. This behaviour goes on for two minutes before he starts banging on the window and the screen between the front and rear seats. He is dribbling. He is gritting his teeth.

[58] He asks the officer, “May I have some medical support, please? May I go with them?” Cst. Hutton-Brown tells Mr. Bus that he has already been cleared by the medical team and starts to drive away and appears to be driving at some speed. Mr. Bus tells the officer it is going to get worse, and he says, “I think you should leave me with the medical team”. There are many reasons why he should, he says, be left with the medical team.

[59] Cst. Hutton-Brown just asks, “Why is that?”. Mr. Bus’ response is that he might bite his veins despite the fact that he is handcuffed to the front. He says, “Please leave me with the medical team”. Mr. Bus then falls against the screen, asking through gritted teeth, “Please leave me with the medical team. If you think I was cleared, I was not truly”. He is holding his head and hyperventilating, again trying to open the car door and trying to get his handcuffs off.

[60] Mr. Bus says there is lots he is dealing with in the moment. The officer says, “I understand that, man”. I noted that Mr. Bus does not even have a seatbelt on.

[61] What is clear on the video and no doubt to the officer, is that this man is very distressed. His movements are jerky, he is grinding his mouth and, throughout, has an

almost strangled voice. When asked about the behaviour of Mr. Bus at trial, Cst. Hutton-Brown explained the behaviour as indicative of "frustration". To everybody watching the video as I described it in court, it apparently appeared as a panic attack, and that is not a medical diagnosis – it is for want of a better description of Mr. Bus' behaviour.

[62] His facial expressions, his drooling, his strangled voice are all extremely distressing to watch. Frustration, frankly, this was not. He was right, Mr. Bus, when he said he felt he needed medical help. Frankly, Cst. Hutton-Brown's testimony that he watched this video and concluded that Mr. Bus was just "frustrated" is either remarkable ignorance as to what was happening or simply an *ex post facto* explanation playing down what is visible on the video.

[63] Furthermore, Mr. Bus had been making statements about harming himself and to just lodge him at the APU without any heads up to the correctional officers was unfair to those correctional officers and could have been extremely dangerous given the threat of self-harm.

[64] Once at the APU, Mr. Bus was taken inside a cell. His outer clothes were removed and he was left alone at 4:10 a.m. In terms of his rationale for lodging Mr. Bus at the APU, Cst. Hutton-Brown said he needed to make sure that Mr. Bus was safe "due to his high levels of intoxication". It should be noted that there were no breath tests to indicate what Mr. Bus' level of intoxication was.

[65] Cst. Hutton-Brown also said that Mr. Bus needed to be sober to understand the release documents and the fact that he had no one sober to take him in, he had to be lodged at the APU. He clearly could not be left at the scene.

[66] With respect to any instructions that he gave to the officers at the APU, the officer explains his shift ended at 5:00 a.m. and his role was just to alert the watch commander by email the reason for the arrest, the documents upon which he was recommending Mr. Bus be released. Cst. Hutton-Brown's recommendation was that Mr. Bus should be released when sober on an appearance notice.

[67] In terms of the role of an RCMP officer who assumes responsibility for a person at the APU, which is referred to as a pass-on, Cst. Hutton-Brown said he would, if he was the pass-on officer, call over to the APU when he came on duty to speak to the correctional officers about a prisoner's state of sobriety. Cst. Bélanger was the officer who was tasked to release Mr. Bus. She came on duty at 6:00 a.m. She was unable to recall when she received this task. She could not remember who tasked her, but she assumes it was the supervisor. She could not recall when asked directly if it was a watch commander.

[68] In terms of the process of receiving information as a pass-on, Cst. Bélanger testified she had received the information either verbally over the radio, in person, or by email. If received by way of email, she would have to assess when that release should be executed. However, she also testified that when there was another emergency, that emergency would be the priority and the release would be delayed.

[69] Cst. Bélanger was unable to say when Mr. Bus was taken into custody. To her knowledge, she could not say if she received the time in the email, nor was she able to say, in fact, whether there had been an emergency pre-empting her role as a pass-on officer to release Ms. Bus.

[70] Cst. Bélanger did not go to the APU until 1:39 in the afternoon to release Mr. Bus, some seven hours and 39 minutes after she arrived on shift.

[71] Ross Faulkiner is a correctional officer ("CO Faulkiner") at the Whitehorse Correctional Centre ("WCC"). The APU is within the WCC building, but only deals with prisoners as opposed to inmates. Correctional officers in the APU work 12-hour shifts and during the 7:00 p.m. to 7:00 a.m. shift, there are two correctional officers within the APU. When the correctional officers in the APU report on duty, they have a briefing as to who is being held in the cells, when they were admitted, and what their status is. All prisoners are delivered to the APU by members of the RCMP. That officer fills out what is called a C-13 Prisoner Report and then hands over the form to the correctional officer assuming responsibility for the detained individual. They then take over the daily logbook whereby there are checks on the prisoners approximately every 15 minutes and the results recorded in the logbooks.

[72] Other duties of the correctional officers were described. If someone is in distress or asks for help, the correctional officers call the medical personnel to provide immediate medical assistance. If detainees arrive intoxicated, the correctional officers wait until they have assumed a "more normal deportment" and the correctional officers may offer juice to equalize the sugar content in a detainee's body.

[73] The correctional officer was asked about other provisions given to prisoners. The response was, “Prison is not a comfort place.” After a few hours, if somebody asks, they may be provided with a sandwich.

[74] In terms of the form filled in for Mr. Bus, while CO Faulkiner had no independent recollection of the details of Mr. Bus’ stay, he did explain the prisoner log that pertained to Mr. Bus. Of note is that the log showed the initials “HFI”, which CO Faulkiner described as standing for “hold for further investigation”. He described that as signifying to the correctional officer that they have no additional obligations, as it would be the RCMP who would come to release the prisoner or who would notify the correctional officers that his status as a prisoner being held HFI had changed. That notification would be from the RCMP watch commander or a member of the RCMP directly going to the correctional officers.

[75] The log shows that the correctional officers did their checks and, while it appears that at 4:30 in the morning Mr. Bus was banging on the door, there was no note as to whether anybody asked Mr. Bus what the issue was.

[76] CO Faulkiner did testify as to the following: it was not his or his colleagues’ responsibility to phone the RCMP to change the status of their prisoner, as it is “the RCMP’s investigation”. There is no information provided to a prisoner at the time of lodging that they could ask for a sandwich or juice. Thus, in Mr. Bus’ case, the arresting officer would know that when the paramedics asked Mr. Bus if he had eaten anything lately when there was an issue with his blood sugar, the answer was, “A little”.

[77] The investigation with respect to Mr. Bus started at 3:00 a.m. or shortly thereafter. Eleven hours later, Mr. Bus was still in custody with no provision of food or a drink of anything more than water.

[78] There is no information provided in the prisoner's log that Mr. Bus had, before being brought to the APU, medical issues with his blood sugar at the scene of his apprehension, nor is there any evidence that Cst. Hutton-Brown alerted the correctional officers to any issue with respect to Mr. Bus' mental state. Given Cst. Hutton-Brown's view that Mr. Bus was just frustrated, it seems unlikely that any issues of a mental problem were passed on to the correctional officers.

[79] With that in mind, I turn to the Crown's concession that Mr. Bus was arbitrarily detained. It is in my view that that is a correct conclusion by the Crown.

[80] The obligation under s. 498(1) of the *Code* is a power of detention only if it fulfils one of the circumstances, which include that the officer believes, on reasonable grounds (a) that it is necessary in the public interest that the person be detained in custody. Cst. Hutton-Brown explained to Mr. Bus that he was obligated that Mr. Bus only be released to a sober adult. It is evident that, had Mr. Bus had someone at his home to receive him, the officer would have driven him the 25 kilometres to his residence. However, the power of continued detention only remains lawful so long as the circumstances leading to the detention remain.

[81] While Cst. Hutton-Brown was concerned that Mr. Bus was not sober, and that was reasonable, that was not the only problem. What I find to be troubling is that Mr. Bus had threatened to kill himself. He had begged for medical attention.

Cst. Hutton-Brown knew he was on anti-depressants and was suffering from significant personal issues. None of that information was passed on to the correctional officers, nor, indeed, did the officer even reconsider calling back the paramedics when he saw Mr. Bus' distress in his car and heard his threat to bite his veins. Thus, the fact of the initial detention is understandable and may fall within the exceptions in the *Code*, but the type of detention given Mr. Bus' considerable troubling mental health is arbitrary.

[82] Furthermore, Cst. Hutton-Brown instructed the correctional officers that Mr. Bus should be held for further investigation. There was no need for further investigation. Mr. Bus had been charged with impaired and refuse. Any such investigation had been completed. This amounts to a complete lack of care and regard for the seriousness of the concept of detention.

[83] Liberty is a right. Removal of that right is only permitted in very restricted circumstances.

[84] Additionally, there were no efforts by any member of the RCMP to continue to assess Mr. Bus' state of sobriety at any time until he was released. Equally troubling is that the pass-on officer did not pick up the mantle when she came on duty at 6:00 a.m. and immediately check on his sobriety. As mentioned, it was not until after 1:00 p.m. that she decided to go down to the APU.

[85] I will now turn to the remedy stage because of that breach.

[86] Mr. Squires seeks one of two remedies: a stay of proceedings pursuant to s. 24(1) of the *Charter* or, if that fails, an exclusion of all state-gathered evidence pursuant to s. 24(2) of the *Charter*.

[87] Section 24(1) of the *Charter* states:

> Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[88] A stay of proceedings in circumstances such as that of Mr. Bus has not been held to be warranted in similar cases in the Yukon. A stay is a remedy of last resort, reserved only for the clearest of cases and for situations where other, more measured alternatives, are inadequate.

[89] Overholding does not involve state conduct that compromises state fairness. Thus, any potential for a stay of proceedings in circumstances such as in Mr. Bus' case falls under the "residual" category for a stay of proceedings which requires a different assessment. Question 1 of that assessment is whether the state has engaged in a conduct offensive to societal notions of fair play and decency and whether proceeding with the trial would be harmful to the integrity of the justice system.

[90] In Mr. Bus' case, the trial proceeded and, thus, I cannot conclude that its proceeding would be harmful to the integrity of the trial process.

[91] The parameters of whether a stay of proceedings is appropriate when the breach falls into the residual category were set out in *Canada (The Minister of Citizenship and*

Immigration) v. Tobiass, [1997] 3 S.C.R. 391 from the Supreme Court of Canada. At para. 91, the Supreme Court said this:

> ...For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

[92] Going further, in 2010, the Ontario Court of Appeal in *R. v. Zarinchang*, 2010 ONCA 286, provided further guidance at paras. 58 to 60. The Court said:

> [58] Where the residual category is engaged, a court will generally find it necessary to perform the balancing exercise referred to in the third criterion. When a stay is sought for a case on the basis of the residual category, there will not be a concern about continuing prejudice to the applicant by proceeding with the prosecution. Rather, the concern is for the integrity of the justice system.
>
> [59] When the problem giving rise to the stay application is systemic in nature, the reason a stay is ordered is to address the prejudice to the justice system from allowing the prosecution to proceed at the same time as the systemic problem, to which the accused was subjected, continues. In effect, a stay of the charge against an accused in the residual category of cases is the price the system pays to
>
> [60] However, the 'residual category' is not an open-ended means for courts to address ongoing systemic problems. In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the

> interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. It seems to us that a court will be required to look at the particulars of the case, the circumstances of the accused, the nature of the charges he or she faces, the interest of the victim and the broader interest of the community in having the particular charges disposed of on the merits.

[93] While I appreciate that a stay on the charges without which Mr. Bus would inevitably be convicted of at least one charge, any assessment of this issue must include a contextual discussion of the particular circumstances of this breach. I want to put the *Charter* breach into context of the place where it occurred.

[94] It had occurred in Whitehorse where there have been three cases in the last five years whereby the exact same breach occurred for the exact same reason. In *R. v. Davidson*, 2019 YKTC 16, Mr. Davidson was charged with impaired driving and refuse. He was investigated shortly after 6:00 a.m. He was taken to the APU and was booked at 8:05 a.m. He was released at 5:12 in the afternoon.

[95] Judge Ruddy, in coming to a conclusion, stated this at paras. 41 to 43:

> 41 However, the problem in this case does not lay with the initial decision to detain. Rather it lays with what appears to be a broader systemic problem in the relation to the loose policies that govern the detention and release of detainees at the APU.
>
> 42 It is clear on the evidence of both Cst. Caron and Mr. O'Neill that when a person is lodged at the APU on PTA status [that means a promise to appear], COs do check on them regularly, but it is only the RCMP who can release. There does not seem to be any system of regular communication between the COs at the APU and the RCMP in relation to the status of a detainee which would ensure

> consistent monitoring of a detainee's condition to ensure that they are not held in custody any longer than necessary.
>
> 43 Even more troubling, both Cst. Caron and Mr. O'Neill referenced rough guidelines of holding individuals detained due to their state of intoxication for up to 12 hours. Indeed, Cst. Caron noted that the only apparent communication between the APU and the RCMP in relation to a PTA hold is if detention is getting close to 12 hours, at which point the CO will contact the Watch Commander to advise. This suggests a belief that any person detained as a result of their state of intoxication can be held up to 12 hours as of right regardless of the individual's state of intoxication at any given time.

[96] While finding the defendant guilty of both the charges because Judge Ruddy considered that a remedy under s. 24(2) of the *Charter* was not available to her at that time given the state of the law, she invited counsel to make submissions as to a remedy at the sentencing phase.

[97] Also, in 2019 in Whitehorse came the decision of *R. v. Golebeski*, 2019 YKTC 50, in which Ms. Golebeski was, again, facing charges with impaired driving and driving over 80 milligrams in 100 millilitres of blood. Ms. Golebeski was lodged in cells at APU at 23:59. She was not released until 9:24 a.m. the following day. Judge Ruddy made the following finding at para. 44:

> ...There is no evidence that anyone from the RCMP checked on her state of sobriety over the course of the almost nine hours she spent in APU custody before Cpl. Stelter's arrival. From the time of arrest to the time of release, Ms. Golebeski spent approximately 12 hours in custody.

[98] As a result, Judge Ruddy excluded all of the police-gathered evidence which, in effect, led to a dismissal of both charges.

[99] In 2021, again in Whitehorse, in *R. v. Hendrie*, 2021 YKTC 11, Judge Cozens, who as at that time was the Chief Judge, issued a lengthy judgment. Mr. Hendrie was charged with impaired and driving with 80 milligrams or more in 100 millilitres of blood. As a result of the 180 milligrams breathalyzer test and the behaviour of Mr. Hendrie, the arresting officer determined that Mr. Hendrie should be detained at the APU.

[100] He was admitted at 7:08 p.m. When he was admitted, Mr. Hendrie was to be released on a promise to appear, which necessitated a member of the RCMP reattending to release him. An officer attended at 3:41 a.m. and left instructions that he should be released when sober. Mr. Hendrie was released at 3:54 a.m.

[101] The releasing officer testified that he believed he was to go to the APU at midnight but that he was detained on reasons for which he had no recollection and did not go there until approximately 3:30 a.m.

[102] Judge Cozens found it a breach of s. 9 of the *Charter* and, in his discussion of the appropriate remedy, he made the following finding at paras. 95 to 98:

> 95 The circumstances of this case do not warrant a judicial stay of proceedings. The breach was not in any way causally connected to the impaired driving investigation, and occurred several hours after the investigation was completed.
>
> 96 There was nothing particularly egregious about the conduct of the RCMP in committing the breach. It was more a question of carelessness or negligence than any deliberate attempt to override Mr. Hendrie's s. 9 *Charter* right. There were no other breaches of Mr. Hendrie's *Charter* rights.
>
> 97 I have found that the initial detention of Mr. Hendrie by Cpl. Hutton was within the lawful exercise of his duties as a

> police officer, as was the detention following the completion of the breath sampling process.
>
> 98 This is not the clearest of cases where a judicial stay is warranted.

[103] As a result, Judge Cozens excluded the evidence under s. 24(2) of the *Charter* and stated at paras. 147 to 154:

> 147 Were this to be a one-off overholding, the case for exclusion of the evidence of the breath samples would not serve the long-term interests of justice. Rather it would be more in the line of 'punishing' the RCMP for this one particular incident, with no backdrop of trying to correct a systemic issue that was, or should have been, brought to the attention of the RCMP so that future such breaches do not occur.
>
> 148 However, here there was an unaddressed systemic issue of overholding as a result of inadequate RCMP policies and procedures with respect to ensuring the timely release of individuals detained at the APU, who must remain in custody pending further RCMP action.
>
> 149 This situation was noted in *Davidson*, and in my opinion, steps should have been taken to correct the situation.
>
> 150 In assessing the impact of exclusion of the evidence of the breath samples on the administration of justice and the public perception, I also consider the concept of there likely being no other practical remedy for a breach of a *Charter* right.
>
> 151 Were I to have the ability to reduce Mr. Hendrie's below a mandatory minimum sentence, it could not be said that there was the lack of a meaningful remedy for the s. 9 *Charter* breach. However, without of course deciding whether such a remedy exists, the weight of jurisprudence would seem to indicate that I cannot do so, except in particularly egregious circumstances, which is not the case here.

> 152 I would think that the public perception of the administration of justice would be negatively impacted by the lack of a meaningful remedy for the s. 9 *Charter* breach in this case.
>
> 153 I think this negative impact would be enhanced because of the prior judicial admonition in the Yukon about the systemic problems that have contributed to such overholdings of individuals in RCMP custody in the past, and what appears to be the failure of the RCMP to heed these admonitions and take any action to rectify them.
>
> 154 In my opinion [says Chief Judge Cozens], in a balancing of the three *Grant* factors, the systematic flaws that contributed to the s. 9 *Charter* breach in Mr. Hendrie's case are sufficiently significant that the impact upon the administration of justice requires that the evidence of the breath samples be excluded. Therefore, the Certificate of a Qualified Technician and Subject Test Samples are excluded from admissibility at trial.

[104] As a result, the defendant was acquitted.

[105] This, then, is the context over three decisions in the Yukon with the same governmental parties involved, and the negligence continues. No message appears to have been sent to change the processes whereby officers, either from the RCMP or, indeed, the correctional facility, are mandated to consider the issue of detention and whether it is in accordance with the law.

[106] The judicially led *imprimatur* has been received with deaf ears. Thus, when considering the question of whether a remedy which is reserved for the clearest of cases applies, I must consider whether other measured alternatives are adequate or inadequate. Other measured alternatives have not sent the appropriate message. Nothing has changed.

[107] In response to the question, while the trial has taken place, the egregiousness of this repeated systemic ignoring of the paramount right under s. 9 of the *Charter* and with three decisions criticizing exactly the same issue, the ignoring of judicial commentary of this with a form of impunity would no doubt undermine the integrity of the judicial system.

[108] The question also requires an assessment or whether any remedy short of a stay could be appropriate. The purpose of this section is to send a message of disassociation of the justice system from the state conduct. This is a particular act of the state which has been repeated despite the judicial messages that have been sent. Is there any message short of a stay?

[109] Frankly, there is the issue of exclusion of evidence. Were I to exclude the state-gathered evidence, the charge of impaired driving would still be made out. While this focus is not to provide redress to the applicant, a strong message of complete disassociation of the state action must be sent. As I have said, nothing else has worked.

[110] In addition, the only other possible remedy is a reduction in sentence. That is not possible given the mandatory nature of the sentencing regime for impaired driving (see *R. v. Donnelly*, 2016 ONCA 988, para. 167).

[111] With respect to question #3, I must ask myself and I must answer: which option better protects the integrity of the system. Is it staying the proceedings or having a trial on the merits and coming to a conclusion on the merits, which is, frankly, very concerning, having done the trial given the graphic video of the behaviour of Mr. Bus.

There was a trial on the merits as in the other cases in the Yukon referred to above. Dismissal of the charges as a result of the exclusion of evidence led to an acquittal in the last two cases.

[112] Despite the strong words of the Chief Judge of the Territorial Court of Yukon, what is striking is the complete nonchalance and, frankly, callous behaviour of two officers in the RCMP. There was a man sitting in custody in a cell without any note of his distress and attempted threat to harm himself and he was just left there.

[113] There was not a system put in place, despite the judgments to which I have referred, whereby there could be a consideration of the right of the person to be out of detention in a timely fashion. It demonstrates, frankly, a lack of reverence or even consideration of the hardship of custody, especially when someone is clearly suffering from what looks like to be mental health issues.

[114] While this is implicitly a criticism of the apparent nonchalance of Cst. Bélanger, in her view, I perceive, it was that she can get to the issue of the defendant's custody when she can and, frankly, almost when she feels like it. She was totally unable to explain why she did not go to the APU until well after she came on shift. That reflects an utter disregard of one of the most important rights in the *Charter*, the right to be protected against arbitrary detention.

[115] In addition, despite the dicta of the previous cases to which I have referred, nothing has been put in place to ensure that an officer coming on duty to assume the custody responsibility of a defendant should prioritize release of this person. In this case, the ignorance of the officer, the true disregard of the true importance, the

deprivation of liberty when there have been judgments on exactly the same issue, and in a case such as this where there was such extreme circumstances given Mr. Bus' obviously fragile state, leaves me with only one option, and that is to assume that this is a systemic issue and, secondly, that learned judgments from my colleagues have fallen on deaf ears.

[116] The presumption of innocence with charged persons is paramount. The release provisions in the *Code* are the law of the land. A demonstrated lack of respect and adherence of that law in these exact circumstances from written decisions can only lead to one decision by me. There is no other remedy that could possibly send the message.

[117] This is the clearest of cases. There will be judicial stays imposed. Mr. Bus, you are free to go.

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McLEOD T.C.J.