Citation: *R. v. Charlie*, 2021 YKTC 74

Date: 20210519
Docket: 19-00209
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Chief Judge Cozens

REGINA

v.

CHERYL JOYCE CHARLIE

Appearances:

Lauren Whyte and	Counsel for the Crown
Paul Battin (by telephone)	
Jennifer Budgell (by telephone)	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.

RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): Cheryl Charlie has been charged with having committed offences contrary to s. 320.14(1)(a) and (b) of the *Criminal Code*. The trial took place November 24, 2020, and February 9, 2021. The trial took place in the context of a *voir dire*. Submissions were made on February 9, 2021, and the ruling was reserved until today's date. This is my ruling.

[2] Cpl. Russell had 13 years of experience as an RCMP officer as of June 6, 2019. He testified on that day that at approximately 8:45 p.m. he was at home in the community of Old Crow when he received a call from dispatch regarding multiple

complaints of several drivers on quad or all-terrain vehicles ("ATV") vehicles who were driving recklessly in the community. He was unsure whether dispatch had received one or multiple complaints. Cpl. Russell felt that, in light of the concerns previously expressed by the community leadership, that he should go out on patrol and show an RCMP presence.

[3] In June 2019, Cpl. Russell was made aware that the express view of chief and council was a concern about traffic safety in the community and particularly focusing on impaired driving. Cpl. Russell was aware that certain provisions of the *Motor Vehicle Act,* RSY 2002, c. 153 (the *"Act")* with respect to the operation of ATVs did not apply in Old Crow. There was, however, a concern about impaired driving in relation to the use of ATVs. Impaired driving was a particular focus for the RCMP in Old Crow and the RCMP had taken a zero tolerance stance on impaired driving because of the community concern about such driving.

[4] Cpl. Russell felt that this was not an emergency situation that required an immediate response. It was not his understanding that the situation was necessarily occurring at the time he received the call from dispatch. He also did not understand that the complaint or complaints necessarily were in respect of impaired drivers. Nevertheless, as a result of the call from dispatch, Cpl. Russell decided to conduct patrols in the community in his marked police cruiser.

[5] Cpl. Russell started his patrols at approximately 9:48 p.m. He had not taken an Approved Screening Device ("ASD") with him.

[6] Almost immediately upon starting his patrol and as he was driving towards the Vuntut Gwitchin First Nation offices, he stopped to speak with an individual who was pumping air into his ATV tires. Cpl. Russell stopped to check for the driver's sobriety. As he was speaking with this individual, Cpl. Russell looked down the road towards an intersection approximately 25 to 30 metres away. He observed an ATV turn the corner at a high enough rate of speed that the driver briefly lost control of the ATV. The ATV skidded sideways off the road in what he termed as being "like a power slide", and the right-hand wheels came off the ground before the driver regained control of the ATV and the wheels came down.

[7] Cpl. Russell described the driver as being ragdolled during the incident. He considered this to not be normal driving and said that he only had seen this type of driving on one previous occasion approximately two years earlier.

[8] The ATV then proceeded towards Cpl. Russell. As the ATV approached him, Cpl. Russell was able to identify the driver as Cheryl Charlie. He stated that he knew Ms. Charlie from regular meetings they had both attended in the six to seven months he had been in the community by then. Ms. Charlie was the Deputy Chief in the community at the time.

[9] Cpl. Russell stated he would have met with Ms. Charlie biweekly and monthly in various community gatherings. He stated that his relationship with Ms. Charlie was strictly professional. He said that even in this capacity he had known Ms. Charlie to be very professional, calm, even-keeled, and stoic.

[10] Cpl. Russell activated his police cruiser's emergency lights, and the ATV stopped approximately 10 metres in front of Cpl. Russell's police cruiser. He stated that he activated his police cruiser's emergency lights as he wanted to speak to Ms. Charlie about taking the corner at such a high rate of speed.

[11] I will say, in watching the video from the front of the police cruiser, I did not notice any flashing lights, but I appreciate that Cpl. Russell testified that he did activate his lights.

[12] Cpl. Russell stated that the possibility of Ms. Charlie having committed *Criminal Code* offences such as dangerous or impaired driving were also on his mind at the time and that he wanted to check for her level of sobriety. He said that this was out of character for Ms. Charlie, and he wanted to speak to her face to face to follow up on his suspicion that alcohol was involved.

[13] Ms. Charlie stopped the ATV just short of Cpl. Russell's cruiser. He drove up beside her as she sat on the ATV and spoke to her out of his open window. Cpl. Russell asked her what she was doing "ripping around the corner" and Ms. Charlie said that she was going too fast. Cpl. Russell told Ms. Charlie to take it slow. The conversation was friendly at that point.

[14] Ms. Charlie then asked Cpl. Russell how he was doing. This struck Cpl. Russell as odd given the nature of his previous interactions with Ms. Charlie. He stated that she had never asked him this before. He perceived there to be a change in her demeanour at this time. He asked Ms. Charlie if she was okay based upon his assessment of her behaviour at the time. She responded that she was "good".

[15] Cpl. Russell's perception of Ms. Charlie as being different and acting in attitude somewhat out of character. It was based upon how he had observed her in his previous interactions with her. He noted Ms. Charlie to be smiling, dishevelled, "a bit off," with what appeared to be a flushed face, which he described as being droopy. He could tell from her eyes that she was tired. He said that her eyes had bags under them. Cpl. Russell agreed that his notes did not have a reference to Ms. Charlie being tired. He testified that, referring to Ms. Charlie having a flushed face, he meant she looked tired.

[16] When questioned further about Ms. Charlie's flushed face, Cpl. Russell agreed that her facial colour was fine. He also agreed that his handwritten notes did not mention Ms. Charlie going from happy to depressed in her demeanour.

[17] Cpl. Russell felt that Ms. Charlie's behaviour was odd as they had never had this kind of interaction in the past other than one particular incident in September 2018 when he was in Old Crow for a managerial review prior to his being posted to the community. On that occasion, he considered her to be intoxicated and also jovial and happy.

[18] Cpl. Russell stated that he felt that something was not adding up on this June 6, 2019 date.

[19] Cpl. Russell stated that he suspected Ms. Charlie's behaviour was indicative of her having consumed alcohol. Due to this suspicion, he got out of his police vehicle to have a closer interaction with Ms. Charlie to determine whether there was an alcohol-related issue. At that time, he felt that his suspicion that Ms. Charlie was under the influence of alcohol turned from being hypothetical to plausible. Cpl. Russell said that

he could smell a strong odour of liquor coming from Ms. Charlie. This was while she was still sitting on the ATV. He then asked her to step off the ATV. He noted that she lost her balance when she did so, and as a result, she had to take a balancing step.

[20] Cpl. Russell asked Ms. Charlie to follow him to the front of his police vehicle where the video in-car system was able to record their interaction. He walked backwards in order to be able to observe how she was walking, in part in order to see whether the stumble off the quad was a one-off. He stated that he had been trained in Standard Field Sobriety Testing ("SFST").

[21] Cpl. Russell noted Ms. Charlie to take a step backwards in order to regain her balance after six or seven steps. At that point, Cpl. Russell testified that, based upon the totality of circumstances, he believed that he had reasonable and probable grounds to believe that Ms. Charlie was impaired by alcohol.

[22] The following exchange then took place in front of the police cruiser.

> Cheryl, how much you been drinking?
>
> (Inaudible response)
>
> Cpl. Russell: What does that mean?
>
> Ms. Charlie: Are you going to power trip on me?
>
> Cpl. Russell: "I'm not power tripping on you, but you're slurring your words. You're drunk.
>
> Ms. Charlie: I'm not. How do you know I'm drunk? How come you think I'm slurring my words?.
>
> Cpl. Russell: Because you are.

> Ms. Charlie: I'm not.
>
> Cpl. Russell: Well, I can smell liquor on you, and you just came ripping around the corner there. You almost lost control of your quad right in front of me.
>
> Ms. Charlie: Well, I'm — yeah, you're right.
>
> Cpl. Russell: So, Cheryl, you're detained for impaired driving.

[23] Cpl. Russell testified that his initial suspicion that Ms. Charlie may be operating the ATV while impaired by alcohol or drug arose as his observation of the loss of control as the ATV made the turn and proceeded towards him. He suspected that Ms. Charlie was under the influence almost immediately based on her flushed or tired face, odd behaviour, and the prior loss of control. He considered that these factors alone were enough for further investigation, and he found that the basis for his suspicion that Ms. Charlie was impaired by alcohol once Cpl. Russell further observed Ms. Charlie's balance problems, being the balance step after getting off of the ATV and then the step back as she walked to the front of the police cruiser, coupled with the smell of alcohol. His suspicion turned into having reasonable and probable grounds to believe that Ms. Charlie was operating a vehicle while her ability to do so was impaired by alcohol.

[24] Cpl. Russell testified it does not take a lot to determine that a person is impaired.

[25] He agreed that he asked Ms. Charlie to get off the ATV and walk to the front of the police cruiser in order to make observations that would assist him in determining whether she was impaired. He agreed that the SFST procedure could be used instead

of making an ASD demand. The SFST involved a number of coordination tests, such as the walking-in-a-straight-line test, the standing-on-one-foot-test, and the vertical and horizontal gaze nystagmus test.

[26] Cpl. Russell did not, however, read the SFST demand to Ms. Charlie because he was not requiring Ms. Charlie to do any of these tests. He agreed, however, that he was attempting to assess Ms. Charlie's level of impairment by getting her to step down off the ATV and then walk to the front of his police cruiser.

[27] Cpl. Russell agreed that Ms. Charlie's conversation with him was intelligible, that she was able to follow the conversation between them, that she was coherent, that she had no trouble understanding him or vice versa, and that she was cooperative.

[28] After Cpl. Russell informed Ms. Charlie that she was being detained for an impaired driving investigation, Ms. Charlie asked Cpl. Russell if he was serious and whether he could just take her home. Cpl. Russell stated that he felt like he was in a catch-22 situation. In all of 2018, prior to his arrival, there had been no impaired driving charges laid. He assumed that the RCMP had been receiving impaired driving complaints during this period, but no charges had been laid because of how the RCMP had decided to deal with these complaints. He felt, due to the circumstances, including being watched by the individual he had just spoken with, whom he had previously apprehended and charged with impaired driving, as well as Ms. Charlie's position of leadership in the community, that he had to detain Ms. Charlie for further investigation. He said that he felt that his credibility as a police officer was now on the line.

[29] Cpl. Russell stated that while he could have given Ms. Charlie an ASD demand, once he had determined that alcohol was involved based upon the smell of liquor on Ms. Charlie's breath — and if he had an ASD with him — he felt, however, that the ASD would only have confirmed what he already believed. He testified that it did not cross his mind to call for an ASD to be brought to him. He said that if he believed he required one, he could have arranged to have it brought to him or he could have gone back to the detachment where the ASD was located.

[30] Cpl. Russell testified that he was initially unsure whether his observations of Ms. Charlie that caused him concern were the result of alcohol or drugs having been consumed by her. This was one reason why he did not initially consider using the ASD. He also stated that it was not his practice to just jump into a roadside screening device demand when he suspects an individual may be operating a motor vehicle while impaired. He said that his practice was to continue to investigate instead. If further investigation did not result in him having more than a reasonable suspicion, then he would utilize the ASD.

[31] In this case, once Cpl. Russell could detect the smell of liquor coming from Ms. Charlie's breath, coupled with her odd behaviour and balance problems, he felt that he had reasonable and probable grounds to make the breath demand for the approved instrument. The ASD was no longer a tool that he felt was necessary to utilize.

[32] Cpl. Russell agreed that it did not take much for him to conclude that Ms. Charlie was impaired by alcohol.

[33] Cpl. Russell detained Ms. Charlie for impaired driving at 9:51 p.m. and placed her in the rear seat of the police vehicle. He did not arrest Ms. Charlie as he was satisfied that it was not necessary to arrest her in order to require her to accompany him to the detachment in order to obtain the breath samples from the approved instrument. He felt that the state of detention Ms. Charlie was presently in was sufficient to continue. He stated that had Ms. Charlie not been cooperative, he may have chosen to arrest her. He stated that he had the requisite grounds to arrest Ms. Charlie had he wished to do so. However, had Ms. Charlie been arrested, she would have been in handcuffs and her liberty further restricted. Cpl. Russell denied that his decision not to arrest Ms. Charlie was because he was not confident in his grounds that Ms. Charlie was impaired.

[34] Cpl. Russell advised Ms. Charlie of her right to counsel, and Ms. Charlie responded that she had her own lawyer. Cpl. Russell asked her who this lawyer was. He said he asked her this so that he could put her in touch with her lawyer. He said that Ms. Charlie could call whatever lawyer she wanted to call. He said that while in the police cruiser, Ms. Charlie was vague about who she wanted to call. He advised her of her option to contact a legal aid lawyer.

[35] Cpl. Russell read Ms. Charlie the breath demand, at which point in time another member of the community approached the police vehicle and began to speak to Cpl. Russell. This individual had a phone in his hand, and Cpl. Russell felt that he may have been intending to video-record the interaction. Cpl. Russell rolled up the window of the police vehicle to afford Ms. Charlie some privacy. He then reread her the breath

demand from memory, incorrectly referring to the ASD instead of the approved instrument.

[36] Cpl. Russell felt that it would be better if he were to take Ms. Charlie back to the RCMP detachment to finish the process in order to afford her more privacy rather than her being dealt with publicly in the community.

[37] While on route to the RCMP detachment, Cpl. Russell provided Ms. Charlie the police warning. He estimated that he had had Ms. Charlie in custody for approximately four minutes, if that, by the time they arrived at the detachment. His first interaction with Ms. Charlie had been approximately six or so minutes prior to the time they arrived at the detachment. He said that he initially contacted Ms. Charlie approximately 30 seconds after he started his patrol in the community.

[38] Approximately 40 seconds after arriving at the detachment, Ms. Charlie was placed into an interview room. Ms. Charlie was speaking to someone on her phone. He believed that she was speaking with the individual who had approached them in the vehicle. Cpl. Russell turned on his audio recorder immediately and advised Ms. Charlie it was on. He then reread Ms. Charlie her *Charter* right to counsel because he wanted to make sure that she understood her rights. He also wanted to correct his earlier mistake in referring to the ASD rather than the approved instrument and to ensure that Ms. Charlie was advised of all that was necessary given that he had been partially distracted by the third party at roadside. He wanted to ensure that Ms. Charlie was fully informed of what her rights were and what she was facing.

[39] Cpl. Russell stated that he reread Ms. Charlie the breath demand from a card and explained the testing procedure to her as well as the legal consequences for refusing to provide a breath sample.

[40] Cpl. Russell stated that he was concerned that Ms. Charlie was using her cellphone to speak to someone who was not a lawyer. He was concerned she would contact other non-lawyers on her cellphone. He told her that he wanted to call the lawyer she wished to speak with to ensure that it was, in fact, a lawyer. Ms. Charlie stated that she wanted to speak to her lawyer, Dave Joe, who Cpl. Russell understood to be a lawyer that specialized in land claims. Cpl. Russell stated that he told Ms. Charlie that criminal law was different. He was concerned that a land claims lawyer would have too narrow a focus for criminal matters. He said that he conducted a Google search to see whether Mr. Joe was an actual person and whether, if so, he was a lawyer who could provide Ms. Charlie with criminal legal advice. He wanted to make sure that Ms. Charlie would be getting the right advice for the situation she was in.

[41] Cpl. Russell stated that he wanted to explain Ms. Charlie's situation to Mr. Joe. He wished to do so in order to allow for her to receive the best advice possible. Cpl. Russell used the phone number for Mr. Joe that he had obtained from the Google search to call Mr. Joe. However, he only received a voice message. Cpl. Russell left a call-back number for Mr. Joe, as well as information about Ms. Charlie's detention.

[42] Cpl. Russell stated that he told Ms. Charlie that she could contact another lawyer or call Mr. Joe again. He said that he told Ms. Charlie that this was her opportunity to speak with a lawyer. He stated that he explained to Ms. Charlie the difference between

obtaining legal advice now and obtaining legal advice afterwards. He stated that he offered Ms. Charlie the opportunity to call other lawyers. He said that he offered Ms. Charlie the ability to use her phone to try to reach a lawyer, but he also said that he first wanted to confirm that it was a lawyer she was speaking with. He said that he only tried the 604 area code number for Mr. Joe as he assumed it was the only number for Mr. Joe and was the number Ms. Charlie had in her cellphone contacts.

[43] Cpl. Russell said that he felt that the avenues for contacting Mr. Joe were exhausted. He said that he stated to Ms. Charlie, "I'd like to get moving here" as the impaired investigation was time sensitive. However, Cpl. Russell stated that at the time he said that he was still focused on trying to put Ms. Charlie in touch with a lawyer. He said that he offered her a list of lawyers she could call. Cpl. Russell said that Ms. Charlie stated she would speak to another lawyer. Cpl. Russell said that Ms. Charlie was looking through her cellphone, and he assumed she was looking for contact information for another lawyer. He was waiting for her to provide him some direction while also waiting for Mr. Joe to call back.

[44] Cpl. Russell said that he believed Ms. Charlie called lawyer Daryn Leas, or something to that effect, and left him a message. Ms. Charlie ultimately ended up speaking with lawyer Bruce Warnsby after Cpl. Russell spoke with him and provided him information about the detention of Ms. Charlie. This conversation between Ms. Charlie and Mr. Warnsby took place in a private room and lasted approximately 19 minutes.

[45] Cpl. Russell stated that, during the investigation, he had been a bit thrown off by the intervention of the third party and the adrenaline rush from the entire situation.

[46] Ultimately, two breath samples of 160 and 150 milligrams per cent were obtained from Ms. Charlie.

Submissions of Counsel

[47] Counsel for Ms. Charlie submits that Ms. Charlie's ss. 8, 9, 10(a) and 10(b) *Charter* rights were violated and the results of the breath tests and observations of impairment should be excluded from evidence at trial pursuant to s. 24(2) of the *Charter*. By virtue of s. 217.02 of the *Act* does not generally apply to the operation of ATVs on maintained highways within the community of Old Crow. Exceptions, I note, are in s. 217.06 and s. 217.08(a) of the *Act*, which require all drivers and/or passengers under the age of 16 to wear helmets when riding an ATV without reference to being on a maintained highway. Therefore, Cpl. Russell had no grounds under the *Act* to stop Ms. Charlie.

[48] Counsel submits if, however, the *Criminal Code* reasons that Cpl. Russell testified to as being his grounds for stopping Ms. Charlie were sufficient to allow him to do so, Ms. Charlie was detained from the time that Ms. Charlie's ATV was effectively stopped, or at the latest, at the moment that she was asked to step off of the ATV. The totality of the circumstances, being the flushed, tired face, odd emotions, driving pattern, stumble/balance issues, and smell of alcohol were insufficient in the brief approximately two minutes that Cpl. Russell was in contact with Ms. Charlie to provide him reasonable and probable grounds to arrest her. Another indicia consistent with impairment by

alcohol, including watery, bloodshot eyes, were not noted, amongst others. The reliance on the odd emotions of Ms. Charlie was overemphasized by Cpl. Russell given the limited nature of his previous interactions with Ms. Charlie and was not an objectively reasonable basis for Cpl. Russell's conclusion that this was a contributing factor to his assessment that Ms. Charlie was impaired.

[49] Cpl. Russell discounted other explanations that account for Ms. Charlie's appearance and demeanour. Ms. Charlie was not showing other indicia commonly associated with impairment, such as the watery, bloodshot eyes, swaying, slurring of words, confusion, et cetera. The balance issues were momentary and not demonstrated throughout Ms. Charlie's interactions with Cpl. Russell. At most, the observations of Cpl. Russell, viewed objectively, could give rise to a suspicion that Ms. Charlie may have had alcohol in her body.

[50] Counsel submits that Cpl. Russell decided he had reasonable and probable grounds as a matter of convenience given that he did not have an ASD with him. He went into the community to investigate only *Criminal Code* offences. Therefore, he should have taken steps such as picking up an ASD that would allow him to do so effectively.

[51] Counsel further submits that Ms. Charlie should have been given her right to counsel from the moment that she was detained given that Cpl. Russell decided not to give the ASD demand or conduct the SFST particularly once he smelled alcohol on Ms. Charlie's breath. He decided to further investigate a suspicion of Ms. Charlie's impairment without resort to these tools, and by asking her to step down and walk to the

front of the police cruiser, he is asking Ms. Charlie to effectively engage in field sobriety testing without following the procedures established for doing so. He is seeking to obtain incriminatory evidence from Ms. Charlie.

[52] The detention was arbitrary at this point as Ms. Charlie should have been provided the reasons for her further detention when he asked her to step down, given what he suspected at the time; and with respect to the s. 10 *Charter* breaches, counsel questions Cpl. Russell's undermining of Ms. Charlie's confidence in the counsel that she was requesting to speak to. Cpl. Russell was putting pressure on Ms. Charlie to use a lawyer that practised criminal law rather than a land claims lawyer. This interfered with Ms. Charlie's right to counsel of choice.

[53] With respect to s. 24(2) of the *Charter*, counsel submits that these breaches are serious. Cpl. Russell should have had the ASD with him. He could only investigate *Criminal Code* offences. He only formed his stated reasonable and probable grounds as a matter of convenience. The impact on Ms. Charlie is significant, noting the extended period of detention that resulted at the detachment. Despite the fact that this evidence is crucial to the Crown in this case, it needs to be excluded.

[54] Crown counsel submits that what Cpl. Russell did was reasonable given the community he was operating in. Perfection is not required. He had the grounds to require Ms. Charlie to stop in order for him to investigate further what he observed when the ATV had a momentary loss of control. While s. 106 of the *Act* did not authorize a traffic stop, Cpl. Russell had at least a common law power to investigate what could be a *Criminal Code* offence based on the complaint or complaints that were received in

light of the concerns about ATV operation in the community. As this had not been previously brought to his attention, the standard for doing so was not particularly high.

[55] Cpl. Russell could rely on Ms. Charlie stating “You’re right” when he spoke to her about what he was observing. Cpl. Russell was distracted by the intervention of the third party, but he corrected his mistake regarding the ASD and provided Ms. Charlie the *Charter* right to counsel. Counsel agrees that while it was questionable of Cpl. Russell to stress the importance of speaking to a lawyer with criminal law experience, Ms. Charlie was still able to speak to counsel and was not directed as to which counsel she should speak to or limited in her ability to do so. There was no interference in Ms. Charlie’s actual ability to speak to counsel of choice. Counsel notes the limited restraints on Ms. Charlie, such as no handcuffs and the ability she had to maintain possession and use of her cellphone. Cpl. Russell had good motives throughout, there was therefore no breach of Ms. Charlie’s *Charter* rights and that even if a breach is found to have occurred, the evidence should nonetheless not be excluded under s. 24(2) of the *Charter*.

[56] A comprehensive analysis of the law regarding reasonable grounds to make a breath demand was provided by Rybchuk J. in *R. v. Kelln*, 2021 SKPC 29 at paras. 71 to 74:

> 71 The leading case law on the “reasonable grounds to believe” standard required for lawful arrest and breath demand is *Bernshaw*, *Bush* and *Gunn*. While these cases were decided under the former section 254(3) of the *Criminal Code*, the law remains the same under the new section 320.28 of the *Criminal Code*. A police officer must hold an honest belief that the driver is impaired by alcohol, and there must exist reasonable grounds for the belief. (See *R v*

Straiton-Garty, 2020 NSPC 7; *R v Ross*, 2020 ABPC 84; and *R v Shepherd*, 2009 SCC 35, [2009] 2 SCR 527).

72 In *Gunn*, Caldwell, J.A. thoroughly discussed reasonable and probable grounds (now referred to as reasonable grounds to believe) when an officer makes a breath demand at paras. 7-9.

> [7] A police officer may not demand a breath sample of an individual unless the officer has reasonable grounds to believe the individual has, within the preceding three hours, driven while impaired or while over the prescribed limit. This means the officer must subjectively (or honestly) believe the individual has driven while impaired or "over .08" within the preceding three hours and that belief must be rationally sustainable on an objective basis ... This does not mean that the Crown has to demonstrate a *prima facie* case for conviction..., let alone prove its case beyond a reasonable doubt … rather, the standard of "reasonable grounds to believe" is one of lesser probability which simply requires the reviewing court to determine whether the factors articulated by the officer who made the breath-demand were reliable and were capable of supporting the officer's belief that the individual had driven while impaired or "over .08" within the preceding three hours.
>
> [8] Where an individual challenges the validity of a breath-demand on the basis that the police officer's belief was not reasonable, the question for the trial judge is whether, on the whole of the evidence adduced, a reasonable person standing in the shoes of the officer would have believed the individual's ability to operate a motor vehicle was impaired … This is a question of law and a trial judge's answer to it is measured on appeal against the yardstick of correctness... .
>
> [9] When determining whether the standard of "reasonable grounds to believe" has been met, it is important to keep in mind that a police officer need only believe that an individual's ability to drive is *slightly* impaired. This follows on the ratio in *R. v. Stellato*, (1993) 78 C.C.C. (3d) 380 (ON CA) … where the Ontario Court of Appeal held that, for the purposes of section 253(1)(a), of the *Criminal Code*,

> an impaired ability to operate a vehicle may be established where the Crown proves any degree of impairment from slight to great. As such, the precondition to an officer's authority to make a breath-demand may be satisfied where, objectively speaking, an officer has reasonable grounds to believe an individual's ability to drive is even slightly impaired by the consumption of alcohol.

I note that there were a number of cases cited within that quote that I did not refer to in this oral decision.

> 73 *Gunn* is unequivocal that there are two components to the reasonable grounds to believe standard: the officer must subjectively believe that the driver was impaired by alcohol and that belief must be objectively reasonable.
>
> 74 Much of the jurisprudence on the subject focuses on the objective aspect of the reasonable grounds test. It is not difficult to see why. Generally, officers will subjectively believe they have the grounds to arrest before doing so. However, there are times when that subjective belief is simply not present.

[57] I have no difficulty with the initial stop of Ms. Charlie by Cpl. Russell. It would likely have been considered to be an abrogation of responsibilities in the community as an RCMP officer had he not inquired further into the potential reasons for the momentary loss of control over the ATV in light of the community concerns and complaint or complaints made in this regard.

[58] Cpl. Russell's further investigation into a possible impaired driving offence, such as by having Ms. Charlie step off the ATV and walk to the front of the police cruiser, are acceptable investigative techniques. However, as with the ASD, such observations made of an accused when the accused is acting under the direction of a police officer

for such a purpose are only admissible for the purpose of assessing the suspicion or reasonable grounds for a breath demand to be made and not as evidence of impairment per se.

[59] The first question is whether the observations of Cpl. Russell provided him with reasonable grounds to make the s. 320.28(1) breath demand or whether they are sufficient only to allow for the s. 320.27(1)(b) Approved Screening Device breath demand. Cpl. Russell stated that he relied on the following observations: power slide of the ATV, unusual behaviour of Ms. Charlie being more talkative and friendly, the flushed (meaning tired) face, the smell of alcohol, and balance steps when getting off the ATV and when arriving at the front of the police cruiser. He did not, in his testimony, state that he relied on the conversation between himself and Ms. Charlie that took place in front of the police cruiser informing his reasonable grounds.

[60] Regardless, in this conversation, Ms. Charlie denied that she was drunk or that she was slurring her words. Her admission that Cpl. Russell was right, while part of a larger conversation, was immediately following Cpl. Russell's statement that she almost lost control of her ATV in front of him. I am not prepared to find that Ms. Charlie was admitting to anything more than that; in particular, admitting that she was drunk.

[61] Cpl. Russell stated that he possessed the subjective belief that he had the reasonable grounds for the s. 320.28(1) demand. Was the subjective belief objectively reasonable, however? I find that it was not. Cpl. Russell formed his opinion very quickly, which of course is not in and of itself problematic. It does not necessarily take long for an experienced police officer to form the opinion that an individual is impaired

by alcohol. However, Cpl. Russell formed his grounds in circumstances in which he felt some pressure to act, in part due to the presence of the third-party individual he had initially been speaking with. Cpl. Russell did not have an ASD with him. This, for practical purposes, meant that this option for investigation of Cpl. Russell's suspicion was not immediately available.

[62] I am aware that Cpl. Russell testified that he did not believe that he should have taken one with him or obtained one after initially dealing with Ms. Charlie, as he felt that it would not have added anything to what he already believed. There was a number of indicia normally associated with impairment that were not present. I am aware that the absence of such commonly associated indicia of impairment does not necessarily undermine the ability of a police officer to rely on what observations he or she has otherwise made. The absence of certain factors simply needs to be assessed as part of the entirety of observations made. The power slide on the ATV was a single moment that could be the result of something as simple as excessive speed taking the corner. It was different from an ongoing pattern of drifting in and out of a driving lane, for example.

[63] Cpl. Russell did not have the reasonable grounds to make the approved instrument breath demand at the time that he asked Ms. Charlie to step off the ATV and walk to the front of the police cruiser. He testified that he asked Ms. Charlie to step off the ATV and walk to the front of the police cruiser to further his impaired driving investigation and to seek whether there was further incriminating evidence that would allow him to form the reasonable grounds to make the approved breath demand.

[64] He gathered further evidence in the form of two balance steps that she took when she followed his instructions. Cpl. Russell had testified he was not conducting the SFST in order to form his reasonable grounds. He was, however, making observations consistent with some of what requiring an individual to participate in a SFST would allow for. I accept his evidence. Certainly, if a police officer is to rely on SFST as set out in s. 320.27(1)(a) of the *Criminal Code* in order to form grounds under the s. 320.28(1) breath demand, then compliance with the requirements of the SFST manual would be expected. Cpl. Russell was simply adding these balanced observations to the suspicion that was already in his mind. I find, however, that these two moments of brief possible loss of balance are insufficient to elevate the suspicion Cpl. Russell already had to his now having reasonable grounds to believe that Ms. Charlie was impaired in light of the totality of the information available to him at the time in his view from an objective viewpoint.

[65] I am satisfied that, at best, when viewed objectively, Cpl. Russell only had a reasonable suspicion. While he had grounds to make a s. 320.27(1)(b) breath demand or require Ms. Charlie to engage in the SFST under s. 320.27(1)(a), he lacked the reasonable grounds to require Ms. Charlie to comply with a breath demand under s. 320.2(a)(i). As such, I find that Ms. Charlie was unreasonably detained for the purpose of providing a breath sample and the obtaining of the breach was an unlawful search. Both Ms. Charlie's s. 8 and s. 9 *Charter* rights were breached.

[66] With respect to Ms. Charlie's s. 10(a) *Charter* right to be promptly informed of the reasons for her detention, Cpl. Russell did not initially tell Ms. Charlie why she was being detained. It was clear from Cpl. Russell's evidence that he suspected a possible

impaired driver from the moment he observed the ATV momentarily lose control and enter into a power slide, although he was unsure whether that could possibly be by alcohol or drug.

[67] Cpl. Russell activated his police cruiser lights in order to have Ms. Charlie stop and interact with him. Ms. Charlie was effectively detained from the moment Cpl. Russell turned his police lights on. She was, for all practical purposes, not free to leave. It is unlikely that anyone in such a situation would drive away.

[68] This initial detention was furthered when Cpl. Russell directed Ms. Charlie to step off the ATV and accompany him to the front of the police cruiser. Ms. Charlie was again, for all practical purposes, required to comply with this direction. At no time in this initial and further period of investigative detention was Ms. Charlie advised by Cpl. Russell that he was detaining her for an impaired driving investigation.

[69] It was not until after Cpl. Russell formed his reasonable grounds to believe that Ms. Charlie was impaired by alcohol that Ms. Charlie was informed that she was under investigation for impaired driving and that she would have to accompany Cpl. Russell to the detachment to provide a breath sample. Not every interaction between the police and an individual is a detention that triggers the right to be informed of the reasons for detention or the right to contact legal counsel. The nature of detention and the triggering of the s. 10(b) *Charter* right was discussed in *R. v. Suberu*, 2009 SCC 33 in paras. 18 to 25, with the Court stating at para. 24:

> As explained in *Grant*, the meaning of “detention” can only be determined by adopting a purposive approach and neither overshoots nor impoverishes the protection intended

> by the *Charter* right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interests in robust *Charter* rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the *Charter*.

[70] Given Cpl. Russell's testimony, I am satisfied Ms. Charlie should have been informed of the reasons for her detention at a minimum once she had stopped her ATV and Cpl. Russell began his face-to-face interaction with her. He was not conducting a general investigation at this point in time; he was conducting an impaired driving investigation and Ms. Charlie was the subject. This constituted a breach of Ms. Charlie's s. 10(a) *Charter* right. I find, however, there was no breach of Ms. Charlie's s. 10(b) *Charter* right. There was no obligation on Cpl. Russell to provide Ms. Charlie an opportunity to speak to legal counsel while she was detained at roadside for the purposes of conducting an impaired driving investigation. He was entitled to conduct his impaired driving investigation and to suspend Ms. Charlie's s. 10(b) *Charter* right while doing so. In saying this, I appreciate the following comments of Ruddy, J. in *R. v. Simon*, 2021 YKTC 4 at para. 18:

> Section 10(b) of the *Charter* guarantees that "[e]veryone has the right on arrest or detention … (b) to retain and instruct counsel without delay and to be informed of that right". It is well established in the jurisprudence that implicit in s. 10(b) is the requirement that a detainee be advised of their right to counsel immediately upon detention. In *R v Suberu*, ... the Supreme Court of Canada outlined this requirement and applicable exceptions in para. 2 as follows:
>
> > The specific issue raised in this case is whether the police duty to inform an individual of his or her s.

> 10(b) *Charter* right to retain and instruct counsel is triggered at the outset of an investigative detention — a question left open in *R. v. Mann*… It is our view that this question must be answered in the affirmative. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, s, 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay." The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the *Charter*.

[71] However, I am satisfied in the context of impaired driving investigations, a police officer is not obliged to provide a detainee either the information or implementational components of the right to counsel while the officer is determining whether he has the reasonable grounds to make a s. 320.28(1) breath demand.

[72] Prior to the police officer determining whether such grounds exist, the officer is not seeking to obtain any incriminating evidence that will support a criminal charge. At best, any information the police officer is able to obtain is allowable only for the purpose of determining whether reasonable grounds exist to make a s. 320.28(1) breath demand. Certainly, the conscripted evidence that Cpl. Russell obtained from Ms. Charlie following her detention is not available as evidence at trial for proving that Ms. Charlie committed the s. 320.14(1)(a) offence with which she has been charged.

[73] While this approach does not comply with strict adherence to the black-and-white wording of *Suberu*, it is certainly more practical and pragmatic. The s. 10(b) *Charter* right to counsel is intended to allow a detainee to obtain legal advice before providing

information and participating in the investigative process in a manner that could directly result in incriminating evidence being obtained.

[74] In saying this, I appreciate that the s. 10(b) right can be triggered in other situations such as when there is delay at roadside, such as for the purpose of having an ASD brought to roadside. However, as a general approach, I am satisfied that a brief delay in providing both the informational and implementational aspects of the s. 10(b) *Charter* right is allowable for the limited purpose of providing a police officer in an impaired driving investigation a foundation to determine whether the police officer will be seeking to obtain from the accused incriminating evidence of an impaired driving offence. This assumes, however, that there is no improper purpose for the delay in providing the s. 10(b) *Charter* right.

[75] Cpl. Russell, after placing Ms. Charlie in the police cruiser, informed her of her right to contact legal counsel. At the same time, Cpl. Russell was dealing with the intervention of a third party. His decision to take Ms. Charlie to the nearby detachment in order to complete the informational and implementational aspects of her s. 10(b) *Charter* right was reasonable in the circumstances. There was no obligation to arrest Ms. Charlie at this point. Cpl. Russell's decision to simply detain her for the purpose of the s. 320.28(1) breath demand and the obtaining of breath samples was reasonable and within his discretion.

[76] Once at the detachment, while the comments of Cpl. Russell with respect to the appropriateness of Ms. Charlie's choice of counsel were questionable and should generally be avoided, he took reasonable steps to provide Ms. Charlie access to her

counsel of choice and he did not act in a way that prevented her from doing so or that resulted in her speaking to other counsel that Cpl. Russell directed her to. I am therefore satisfied that Ms. Charlie's s. 10(b) *Charter* right was complied with.

[77] Section 24(2) of the *Charter* reads:

> Where, in proceedings under subsection (1) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[78] Once a breach of a *Charter* protected right has been established, the sole question in deciding if the evidence obtained as a result of the breach should be excluded from trial is whether, in the circumstances, the admission of the evidence would bring the administration of justice in disrepute. The Court in *R. v. Van Driel*, 2017 ABPC 23, referring to the decision in *R. v. Grant*, 2009 SCC 32, stated at paras. 66 and 67 that:

> [66] ...
>
> > On the first branch of the *Grant* inquiry, I find that the *Charter*-infringing state conduct was serious. The Constable here should not have proceeded to a breath demand on the weak indicia available to him. Until the Constable smelled alcohol, he had no reason to believe the Appellant driving without headlights and with expired documents resulted from impairment, as opposed to simple inattentiveness. Further, the indicia regarding the amount of alcohol consumed suggested modest consumption. This should have indicated to the Constable that the level of alcohol consumption may not be such that it would impair the ability to drive. It is a serious matter to take breath samples in

> breach of the *Charter* when Parliament has provided an alternate course in the form of screening tools. The Constable knew the breath sample demand would have a significant impact on the Appellant, and should have taken the steps necessary to ensure he was not in breach of the Appellant's *Charter* rights. The Court should dissociate itself from such conduct.
>
> [67] Following this line of reasoning, I find that the first line of inquiry favours exclusion.

[79] I agree with the reasoning of Pharo, J. and Kenny, J. I find that this aspect of the *Grant* test favours exclusion of the evidence. The impact of the breach, while the taking of the breath samples in and of itself was a relatively minor intrusion upon Ms. Charlie's *Charter*-protected interests, there is a difference between administering of an ASD at roadside and the transport of Ms. Charlie to the RCMP detachment for a much lengthier administration of an approved instrument test.

[80] I appreciate that in this case Ms. Charlie was not arrested and handcuffed and that her ATV was not towed. Nonetheless, this still remains a significant intrusion into Ms. Charlie's liberty interests. When done in a manner that is lawful, including being *Charter* compliant, this intrusion is justified. When, however, it is done in a non-*Charter*-compliant manner, the intrusion is not justified and is significant. I find that this second line of inquiry favours exclusion of the evidence.

[81] The breathalyzer results are reliable evidence and are critical to the Crown's case. Impaired driving is a commonly committed crime with all-too-often devastating impacts upon individuals, families, and communities. The importance of being able to fully prosecute impaired driving cases on their merits cannot be overstated. I find that this line of inquiry supports the admission of the breathalyzer results as evidence in the

trial proper. The impact upon the public confidence in the administration of justice, the balancing of the *Grant* lines of inquiry require that there not only be a short-term approach taken in this analysis of the impact of admission or exclusion of the evidence and the public's confidence in the administration of justice but that the longer-term impacts in particular be considered. In *R. v. Thompson*, 2020 ONCA 264, the Court stated at para. 106 the following:

> The final step under the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence and the long-term repute of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision. ...

[82] As stated in *R. v. Ferose*, 2019 ONSC 1052 at paras. 35 and 37:

> 35 In applying *Grant*'s three factors, there is no requirement that all three factors or a majority of them be satisfied. Rather, it is a balancing exercise where the key question is whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter,* would conclude that the admission of the evidence would do harm to the long-term repute of the administration of justice: ...
>
> ...
>
> 37 Importantly, the objective of s. 24(2) is not to rectify police misconduct, but rather, to preserve public confidence in the law.

[83] This is not a circumstance where there is any systemic issue in the policing that therefore elevates the concerns above the breaches that occurred. However, the stopping of drivers by police for impaired driving investigations is a fairly common occurrence. Parliament has allowed for police officers to detain drivers for such

investigations and has provided mechanisms, such as the ASD, to limit the nature of the detention only to what is necessary for the investigation.

[84] Thus, there is, for the circumstances warranted, a graduated form of detention that is no more than is necessary. In order for a police officer to detain a driver for the purpose of providing a breath sample into an approved instrument at the detachment (thus resulting in a further intrusion into the driver's liberty interests) the police officer must ensure that a principled approach has been taken at each stage of the process where, as in this case, the police officer forms a subjectively held reasonable belief that the driver is impaired and therefore does not utilize the less intrusive ASD process. It is imperative that the subjective belief be objectively reasonable.

[85] In saying this, I am aware that once a police officer forms reasonable grounds to believe the driver is operating a motor vehicle while impaired, there no longer remains any statutory authority to take the additional step of making an ASD demand on the driver. However, nothing precludes a police officer from assessing a subjective belief to ensure that this belief is objectively reasonable, citing *R. v. Minielly*, 2009 YKTC 9 and *R. v. Binelli*, 2010 ONSC 539. Jumping too swiftly to a conclusion can result in mistakes being made. I recognize that there are certainly instances where a police officer can form his or her subjective reasonable grounds that are also objectively reasonable within a very short time frame and without resorting to the use of the ASD or SFST. I find, however, that this case is not one in which such circumstances exist.

[86] I find therefore on a balancing of the three *Grant* lines of inquiry that allowing the breath sample evidence to be admitted at trial would undermine public confidence in the

administration of justice and I therefore exclude them from being admitted as evidence at the trial proper.

[87] Also, I note in my decision that I have talked about the inadmissibility of the acts of Ms. Charlie while under police direction from being used as evidence of impairment.

[DISCUSSIONS]

[88] If the Crown is not calling any more evidence and does not wish to make any arguments or submissions on whether there should be a conviction, I would find that in the circumstances, obviously, excluding the breath samples eliminates Count 2 and that there is not sufficient evidence to show that Ms. Charlie was operating her vehicle while impaired by alcohol and I would dismiss that charge as well.

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COZENS C.J.T.C.