

Citation: *R. v. Jules*, 2024 YKTC 9

Date: 20240307
Docket: 22-00527
Registry: Whitehorse

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

REX

v.

MIROSLAV MELICHAR JULES

Appearances:
Mark Friedman
Amy Steele

Counsel for the Crown
Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] COZENS C.J.T.C. (Oral): Miroslav Jules has been charged with having committed an offence contrary to ss. 320.14(b) of the *Criminal Code*.

[2] Counsel for Mr. Jules has filed a *Charter* application alleging breaches of Mr. Jules' ss. 8, and 9 *Charter* rights, and seeking that the breath samples that were obtained be excluded from evidence at trial. Counsel abandoned a s. 7 *Charter* application for a judicial stay.

[3] Cst. Hamidi was the sole witness called at the *voir dire*.

[4] Cst. Hamidi testified that on November 18, 2022, he was on call in the community of Teslin. He stated that he and Cst. England received a notification from RCMP dispatch to attend a call. The call was unrelated to Mr. Jules' matter.

[5] Cst. Hamidi testified that he and Cst. England "...went to the Detachment, got our uniforms on and got a police vehicle".

[6] They then proceeded to attend this call.

[7] While en route to this call, they passed Mr. Jules' residence. Cst. Hamidi observed a vehicle running in the driveway. He testified that he knew that this vehicle belonged to Mr. Jules. After dealing with the other matter, he drove back to Mr. Jules' residence, approximately 10 minutes later, at approximately 5:50 p.m. He observed the reverse lights on the same vehicle as it was moving backwards. The vehicle stopped before entering the roadway, and Cst. Hamidi pulled the police cruiser behind the vehicle, blocking it from moving further. Cst. Hamidi did not activate the police cruiser's emergency lights, therefore there was no video or audio-recording made of the interaction between himself and Mr. Jules.

[8] Cst. Hamidi stated that he pulled behind the vehicle for preventative purposes, in order to ensure that there were no concerns prior to the vehicle entering the roadway.

[9] Cst. Hamidi approached the driver's side window and spoke with Mr. Jules. He requested his driver's licence and vehicle documentation. He stated that Mr. Jules had slurred speech.

[10] Cst. Hamidi read Mr. Jules the mandatory breath demand from the card he carried with him. Cst. Hamidi had an approved screening device (“ASD”) in the police cruiser. Mr. Jules initially indicated a refusal to comply with the breath demand, however, he agreed to comply shortly afterwards. A “Fail” result was recorded on the ASD, and Mr. Jules was arrested for an impaired driving offence. He subsequently provided two breath samples of 250 mg%.

Issues

[11] There is no real dispute on the facts. The question before me is a narrow one: did Cst. Hamidi have the jurisdiction to conduct this random stop and make the mandatory breath demand to Mr. Jules in the circumstances, in particular as the vehicle was at all times in the driveway of a private residence?

Legal Authority

[12] Crown counsel submits the legal authority for Cst. Hamidi to have stopped Mr. Jules while he was operating his vehicle is found in the Yukon *Motor Vehicles Act*, RSY 2002, c. 153 (the “Act”).

[13] Section 106 reads:

106 Stopping for peace officer

Every driver shall, on being signalled or requested to stop by a peace officer in uniform, immediately:

- (a) bring their vehicle to a stop;
- (b) furnish any information respecting the driver or the vehicle that the peace officer requires; and

- (c) remain stopped until they are permitted by the peace officer to leave.

[14] This section has been determined in *R. v. Rowat*, 2018 YKSC 50 and *R. v. Benoit–Richardson*, 2023 YKTC 29 as allowing police officers to make random vehicle stops for the purposes of investigating impaired driving, and to make the mandatory breath demand after a random stop.

[15] The authority to make the mandatory breath demand, following a lawful stop of a motorist, is found in s. 320.27(2) of the *Code*, which reads:

Mandatory alcohol screening

(2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer’s opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

[16] Section 320.11 of the *Code* defines what it means to “operate” a motor vehicle:

“**operate**” means

- (a) in respect of a motor vehicle, to drive it or to have care or control of it;

...

[17] Crown counsel’s position is that Mr. Jules was operating a motor vehicle, despite still being in a private driveway, and that Cst. Hamidi therefore had the authority to detain him for the purpose of making a mandatory breath demand.

[18] Crown counsel submits that, unlike in Ontario for example, in order for a person to be a “driver” in the Yukon, they do not need to be operating or having care and control of a vehicle on a highway.

[19] It would appear, at first blush, that the authority of Cst. Hamidi to conduct this random stop should be answered in the negative, in accordance with the decision of the Court in *R. v. McColman*, 2023 SCC 8.

[20] In *McColman*, the police followed an all-terrain vehicle (“ATV”) that was first observed parked outside of a convenience store and then operating on a highway, before entering onto the private driveway of Mr. McColman’s parents. This private driveway also provided access to a commercial establishment.

[21] The police conducted the random stop to check for driver sobriety after the ATV had pulled into the driveway. They did not attempt to conduct the stop while the ATV was being operated on the highway before pulling into the driveway, although they had formulated an intention to do so while the ATV was being driven on the highway.

[22] It was conceded that there were no reasonable and probable grounds to make the traffic stop, and that this was purely a random stop.

[23] The Court held that s. 48(1) of the Ontario *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 1 (“HTA”) did not provide the police with authority to conduct the random stop on the private driveway.

[24] Section 48(1) reads:

A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 320.27 or 320.28 of the *Criminal Code* (Canada).

[25] In **McColman**, the Court noted in para. 8:

8 Section 1(1) of the *HTA* defines a "driver" as "a person who drives a vehicle on a highway". It further defines a "highway" as including:

... a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

[26] The Court relied on the definition of "driver" in the *HTA*, stating at paras. 40 and 41 that:

40 ...Under a harmonious reading of the two definitions of "driver", for the purpose of s. 48(1), "driver" refers to a person who is driving, or has care or control of, a motor vehicle on a highway. A person who has care or control of a motor vehicle but who is no longer on a highway would not be a "driver" under the *HTA*.

41 In the present case, Mr. McColman was not a "driver" for the purpose of s. 48(1) when he was stopped by the police. Even if it can be said that he had care or control of the ATV, he was not on a highway when the police effected the stop. Therefore, the police stop was unauthorized by s. 48(1) of the *HTA*.

[27] In para. 62, the Court noted jurisprudence that stated a highway under the *HTA* does not include a private driveway:

62 However, not all of the applicable case law supported Cst. Lobsinger's decision to conduct a random sobriety stop. In *R. v. George*, 2004 ONCJ 316, the trial judge held that the police officer did not have the authority

under s. 48(1) of the *HTA* to conduct a random sobriety stop of a person who had pulled off the highway onto his private driveway: paras. 15-16 (CanLII). Similarly, in *R. v. Nield*, 2015 ONSC 5730, 88 M.V.R. (6th) 274, the Ontario Superior Court of Justice held that s. 48(1) of the *HTA* did not apply to a person who was driving a vehicle, but who was not situated on a highway: paras. 26 and 29. See also *R. v. Hajivasilis*, 2013 ONCA 27, 114 O.R. (3d) 337, at para. 13; *R. v. Larocque*, 2014 ONCJ 601, at para. 11 (CanLII); and *Vander Griendt*, at paras. 19-21.

[28] In *R. v. Hajivasilis*, 2013 ONCA 27, Doherty J. A. stated at para. 10 that:

The phrase "intended for or used by the general public for the passage of vehicles" limits the meaning of "highway". If a vehicle is being driven on property to which the general public does not have access or if that access is for a limited purpose other than passage (such as parking), the property will not fall within the meaning of "highway". Most privately owned parking lots are not "highways" as defined in the *HTA*. It is accepted that the parking lot where the respondent allegedly struck the parked vehicle does not fall within the meaning of "highway" in the *HTA*.

(See also *R. v. Comrie*, 2023 ONCJ 513 at paras. 1 to 4 and 10 to 18).

[29] However, the *Yukon Act* differs in a significant way from the Ontario *HTA*.

Whereas the *HTA* defines a "driver" as being someone who operates or has care and control of a vehicle on a highway, the *Yukon Act* has a more expansive definition of "driver".

[30] Section 1(1) of the *Act* reads as follows:

"driver" or **"operator"** means a person who drives a vehicle or who has care and control of a vehicle.

[31] There is no requirement that the person be driving or having care and control of a vehicle on a highway.

[32] Crown counsel submits therefore, that Mr. Jules was a “driver” under the *Act*, and the fact that he was on a private driveway is not relevant for the purposes of him being required to comply with a mandatory breath demand. This distinguishes this case from ***McColman***.

[33] I agree. The limitation that existed in ***McColman***, that the motor vehicle had to be operated on a highway, does not apply in the Yukon, due to the definition of “driver” being substantially different. Strictly speaking, it is enough that a person be operating a motor vehicle, regardless of whether the person is on public or private property.

[34] The fact that Cst. Hamidi observed the vehicle moving is not relevant to a determination that the mandatory breath demand was lawful. Even had it been observed simply stationary, under the definition of “operate” in the *Code*, the mandatory breath demand still could have been made.

[35] I agree that this expanded definition of who is a “driver” can lead to people being required to submit to mandatory breath demands in situations that, frankly, would be somewhat absurd. According to the *Code* definition of “operate”, a person in the Yukon could be washing their vehicle in their driveway, doing mechanical work, with no intention to drive it, and still be subject to a mandatory breath demand. They could also simply be leaning against their vehicle talking to a neighbour. They could be putting air in their tires.

[36] However, the expanded definition of “driver” also serves to protect people from impaired individuals who may choose to drive an all-terrain vehicle or other motorized vehicles on private property where there may be a gathering of invited individuals.

[37] For the authority granted to Cst. Hamidi under s. 106(b) of the *Act* to make the mandatory breath demand there is a stipulation; he must be an “officer in uniform”. This requirement is akin to what is stated in s. 48(1) of the *HTA* that the officer be “readily identifiable as such”.

[38] If Cst. Hamidi was not “a peace officer in uniform” at the time of the traffic stop and breath demand, there was no obligation on Mr. Jules to comply with the mandatory breath demand, as there was no lawful authority for the demand to have been made.

[39] The rationale behind the requirement that a person furnish information to a “peace officer in uniform”, is that the person be aware that it is a peace officer requesting that the information be provided.

[40] Upon my further review of Cst. Hamidi’s testimony, although he was not specifically asked this question, he did state that he and Cst. England put on their uniforms and left the detachment in a police cruiser.

[41] As such, I find that there was lawful authority under s. 106 of the *Act* for the random stop and mandatory breath demand, and that there was no breach of Mr. Jules’ ss. 8 and 9 *Charter* rights.

[42] Although not necessary for the purposes of my decision, it may well be that, unlike in Ontario, a private driveway is a “highway” under the *Act*.

[43] “Highway” is defined in s. 1(1) of the *Act* as:

“highway” means any cul-de-sac, boulevard, thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge,

causeway, ice-road, trestle way or other place, whether publicly or privately owned, any part of which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles, and includes

(a) a sidewalk, including a boulevard portion thereof...

[44] The definition of “highway” in the Ontario and in the British Columbia motor vehicle legislation, for example, use the term “general public” instead of simply “public”, as is used in the *Yukon Act*.

[45] In *R. v. Halliday*, 2022 BCPC 171, the Court held that a gravel roadway providing access to several residences was not a “highway” under the British Columbia *Motor Vehicle Act*, RSBC 1996 Chapter 318 (“MVA”). It was, however, a “highway” for the purposes of the *Criminal Code*.

[46] Mr. Sullivan, who was subject to a *Criminal Code* driving prohibition, was driving his vehicle on a gravel road that provided access to several residences.

[47] The Court noted the definition of “highway” in para. 8:

8 The definition” of highway under the *Motor Vehicle Act* states that:

"highway" includes

...

(b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, ...

[48] The Court considered the use of the phrase “general public” in the *MVA*, as compared to the use of the word “public” in the *Criminal Code*, when considering whether the area in question was a highway, concluding that the private driveway in this

instance was not a highway for the purpose of the *MVA*, but that it was a highway for the purpose of the *Criminal Code*, based upon the different references to “general public” as distinguished from “public”.

[49] The definition of “highway” in the *Code* is set out in s. 2:

“**highway**” means a road to which the public has the right of access...;

[50] The Court considered the distinction between the two phrases in paras. 52 to 59, stating in para. 54 as follows:

The case authorities differentiate between "general public" referred to in s. 1(b) of the *Motor Vehicle Act* and "public" in s. 1(c). The term "highway" in s. 1 states that highway "includes" the listed definitions. The *Criminal Code* refers to a highway as a road to which the public has the right of access.

[51] This comparison to the *Criminal Code* definition of “highway”, and the reference to simply the “public”, would perhaps allow for an access road or driveway in the Yukon, even if marked private, to be considered a “highway”.

[52] In *R. v. McMeekin*, [1982] B.C.J. No. 727 (Co. Ct.), the Court said at para. 12 that in British Columbia:

..."general public access" is shown when members of the public enter land for a purpose of their own rather than for a purpose incidental to the ownership of the property.

[53] The Court went on to state in para. 15 that a working definition of "general public access" could be:

...

“the unrestricted entry to all members of the population within implied limits for a purpose unrelated directly to the ownership of the land”.

In the Motor Vehicle Act, this is further restricted to the general public using land for the passage of vehicles. In contrast, combining the Harrison discussion of the absence of the word "general", a definition of "public access" could be:

“entry to all members of the public who enter by legal right, or by implied or express permission of the owner, and as a matter of fact the public enters the property unmolested by the owner”.

[54] The Court stated in para. 17 that:

In summary therefore I conclude that:

- (1) "General public access" means unrestricted entry to all members of the population within implied limits for a purpose unrelated directly to the property's ownership.
- (2) "Public access" to private property means entry to all members of the public who enter by legal right, or by implied or express permission of the owner, and as a matter of fact, the public enters the property unmolested by the owner.
- (3) The Motor Vehicle Act restricts the "public access to private property" group to those who enter for the purpose of parking, service of vehicle, or by invitation to the public....

[55] As a private driveway in the Yukon can be used for delivery vehicles to park in order to deliver goods to the residence attached to the driveway, in other words for a purpose connected to the individual who owns the driveway, it would appear that a

private driveway may fall within the definition of a road that the public, albeit not the general public, has access to, and thus constitute a “highway”.

COZENS C.J.T.C.