Citation: *R. v. Whiticar,* 2025 YKTC 34

Date: 20250619
Docket: 24-11018
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REX

v.

TOMMIE WHITICAR

Appearances:
Karlena Koot — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Tommie Whiticar has entered pleas of not guilty with respect to a two-count Information alleging the offences of impaired operation of a conveyance contrary to s. 320.14(1)(a) of the *Criminal Code* (the "*Code*") and operating a conveyance with a blood alcohol concentration equal to or exceeding the legal limit contrary to s. 320.14(1)(b) of the *Code*. The offences are alleged to have occurred on July 6, 2024, in Dawson City, Yukon.

[2] Ms. Whiticar has filed a Notice of Application asserting a violation of her rights under ss. 8 and 9 of the *Charter* and seeking exclusion of evidence, including the

WatchGuard video and the Certificate of Qualified Technician, pursuant to s. 24(2) of the *Charter*.

[3] Trial commenced in Dawson, on February 18, 2025, by way of a blended *voir dire*. At the outset, Crown indicated they would not be proceeding on count 1 of the Information with respect to impaired operation. Accordingly, count 1 is hereby dismissed for want of evidence.

Overview of Facts

[4] Cst. Jeffery was the sole witness on the *voir dire*. In brief, he indicated that, on July 6, 2024, he received a report of a female sleeping at the wheel in the lineup for the George Black Ferry on the Top of the World Highway side of the Yukon River. A description of the vehicle colour, make, model, and licence plate were provided. Cst. Jeffery drove his marked police vehicle to the ferry landing on the Dawson side of the River. While en route, he contacted the complainant by telephone. Upon arrival, he observed a vehicle matching the description pull into the lineup for the ferry on the other side of the river. The complainant, whom he understood to be on the other side of the river, confirmed by telephone that the vehicle he observed was indeed the subject of the complaint. The vehicle drove on to the ferry and was transported across to the Dawson side ferry landing where it disembarked. When the vehicle drove past Cst. Jeffery, he confirmed that the licence plate matched that provided and initiated a traffic stop.

[5] Cst. Jeffery approached the vehicle and found Ms. Whiticar in the driver's seat; a female passenger and a small child were in the back seat. Cst. Jeffery informed Ms. Whiticar of the reasons for the stop, indicating that he had received a report that

she was on the other side of the ferry landing sleeping in the car and not responding to knocking on the window.

[6] Cst. Jeffery testified he observed that Ms. Whiticar had red eyes and a flushed face. He asked Ms. Whiticar if she had had any alcohol or drugs that day to which she replied, no, but she had the day before.

[7] Cst. Jeffery formed the suspicion that Ms. Whiticar had alcohol in her system and made an Approved Screening Device ("ASD") demand pursuant to s. 320.27(1)(b) of the *Code*. Ms. Whiticar provided a suitable sample which registered a fail reading, and Cst. Jeffery, consequently, arrested Ms. Whiticar for impaired operation, handcuffed her, and placed her in the rear of his police vehicle.

[8] Cst. Jeffery then had a conversation with the female passenger with respect to making suitable arrangements for care of the young child and retrieving necessary items from the vehicle, before allowing the passenger to take the child to a nearby residence.

[9] Cst. Jeffery contacted dispatch to make arrangements for a Qualified Breath Technician. He then conducted a search of Ms. Whiticar's vehicle and locked it, before returning to his police vehicle where he advised Ms. Whiticar again of the reasons for arrest, and read her the right to counsel, police warning, and breath demand.
Cst. Jeffery transported Ms. Whiticar to the RCMP where she provided two samples of her breath resulting in readings of 140 and 130 milligrams percent, respectively.

Issues

[10] There are three issues for determination on the *voir dire*:

1. Whether the officer had reasonable grounds to suspect that Ms. Whiticar had alcohol in her system as is required to make the ASD demand pursuant to s. 320.27(1)(b) of the *Code*;

2. If not, is the resulting *Charter* breach negated by the availability of the mandatory screening demand pursuant to s. 320.27(2) of the *Code*; and

3. If a *Charter* breach is substantiated, should evidence be excluded from the trial proper pursuant to s. 24(2) of the *Charter*?

Issue 1: Reasonable Suspicion

[11] As the Crown has conceded that the evidence falls short of establishing the requisite reasonable suspicion for a demand under s. 320.27(1)(b), it is, strictly speaking, not necessary to address the first issue. However, I will do so in a summary fashion, as the analysis and findings would have some relevance to the assessment of the seriousness of any breach that may be found to have occurred.

[12] Section 320.27(1)(b) of the *Code* sets out the authority of a peace officer to make a demand for a breath sample into an approved screening device, "if [the] peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance". (For ease of reference, I will refer to this as the reasonable suspicion demand.)

[13] For a reasonable suspicion demand to be lawful, the officer's grounds must be both subjectively held and objectively reasonable. In *R. v. Kang-Brown*, 2008 SCC 18, the Supreme Court of Canada defined reasonable suspicion as "something more than a mere suspicion and something less than a belief based on reasonable and probable grounds" (para. 75). In *R. v. Loewen*, 2009 YKTC 116, Lilles J. of this Court noted:

> 6 The test, obviously is not a demanding or high level one. There must only be a reasonable suspicion that there is alcohol in the accused's body. A mere suspicion without a reasonable evidentiary basis or a hunch that the driver has had something to drink is insufficient to justify a demand to provide a screening sample.

[14] In the case at bar, Cst. Jeffery did not observe many of the classic signs of alcohol consumption: no slurred speech, fine or gross motor coordination issues, or, most importantly, the smell of alcohol emanating either from Ms. Whiticar or even from the vehicle. While none of these indicia, including the smell of alcohol, are required to support a reasonable suspicion, the lack thereof makes establishing the evidentiary basis to support a reasonable suspicion that much more difficult.

[15] Here, Cst. Jeffery's grounds to suspect that Ms. Whiticar had alcohol in her body are limited to the admission of drinking the day before, the observed red eyes and flushed face, and the civilian complaint.

[16] With respect to the admission of drinking the day before, given that these events occurred in the early evening, in my view, it is not objectively reasonable to conclude that an admission of drinking the day before would support a reasonable suspicion that Ms. Whiticar had alcohol in her body at the time of the traffic stop. Absent other indicia, it is simply too remote.

[17] With respect to the facial observations, Cst. Jeffery made no mention of red eyes or a flushed face in either his notes or his reports. Given the importance of potential indicia of consumption in assessing reasonable suspicion, failure to document such critical evidence raises very real concerns about the reliability of Cst. Jeffery's trial recollection on this point.

[18] That, in essence, leaves the civilian complaint as the sole ground supporting Cst. Jeffery's suspicion. Apparently, the complainant indicated someone was seen asleep behind the wheel of a vehicle, later determined to be Ms. Whiticar's, in the ferry lineup and did not respond to knocking on the window. At the end of his cross-examination, Cst. Jeffery then added that the original complaint also indicated that the vehicle left the ferry lineup at some point and drove at a high rate of speed up to the Top of the World and back down. It was not clear to me why this information was not provided in direct, nor was Cst. Jeffery asked any clarifying questions to explain exactly how or when this might have occurred in relation to finding the driver unresponsive behind the wheel. Though, to be fair, there were also no questions posed to the officer to suggest that this late testimonial addition came as a surprise to anyone but me. Nonetheless, on the whole, I was left somewhat confused as to the entirety and sequence of events relayed by the complainant that Cst. Jeffrey was relying on in forming his suspicion.

[19] However, even including speeding up and down the hill, I am hard pressed to conclude that the complaint gives rise to a reasonable suspicion that Ms. Whiticar had alcohol in her body. There are reasons beyond alcohol consumption as to why someone might fall asleep behind the wheel while waiting for the ferry; most obviously,

fatigue at the end of a summer day. The failure to respond to knocking on the window may relate to the nature and duration of the knocking - there is a difference been tapping and pounding; between one knock and repeated knocking, but there is simply no evidence before me on this point. Similarly, the driving described, in and of itself, does not necessarily give rise to a suspicion that the driver has consumed alcohol. Speeding is not uncommon.

[20] Even when looking at the totality of the complaint, rather than its component parts, in my view, the most that can be said is that the behaviour described was, as stated by Cst. Jeffery, unusual; one might even say it was suspicious, in a general sense. However, generally suspicious behaviour simply does not give rise to a reasonable suspicion that Ms. Whiticar had alcohol in her body as required by s. 320.27(1)(b).

[21] Accordingly, I find that the ASD demand pursuant to s. 320.27(1)(b) was not lawful. In the normal course, this determination would result in a finding that Ms. Whiticar was arbitrarily detained contrary to s. 9 of the *Charter*, and that the taking of the breath sample at the roadside was in breach of Ms. Whiticar's s. 8 *Charter* right to be secure against unreasonable search and seizure. However, before this finding can be made, I must address the second issue, the real crux of this case: namely, whether the availability of the mandatory demand under s. 320.27(2) of the *Code*, though not invoked by the officer, can be relied upon at trial to render the demand lawful, thus negating any consequent *Charter* breaches.

Issue 2: The Mandatory Demand

[22] Since it's inception in 2018, s. 320.27(2) of the *Code* has provided the authority for a peace officer to demand a sample of someone's breath for analysis by an approved screening device without the need for any evidence-based reasonable suspicion. Invoking the mandatory demand requires only that three preconditions be met:

1. the officer must have an approved screening device in their possession;

2. the demand must be in the course of the lawful exercise of common law or statutory powers; and

3. the subject of the demand must be operating a motor vehicle at the time, rather than within the preceding three hours.

[23] Defence concedes that all three pre-conditions have been met on the evidence of this case, such that Cst. Jeffery could have made the mandatory demand under s. 320.27(2) rather than the reasonable suspicion demand under s. 320.27(1)(b). Counsel disagree on whether the availability of the mandatory demand can now be relied upon, at trial, as lawful authority for the breath demand made by Cst. Jeffery on July 6, 2024.

[24] There is a growing body of law, primarily in provincial and territorial courts, that has grappled with this particular question, but the law is far from settled.

[25] The treatment of this issue in the Yukon is divided, with three decided cases, each differing in approach.

[26] In *R. v. Schmidt*, 2023 YKTC 32, the Court was similarly asked to consider whether the defendant's *Charter* rights had been infringed with respect to an ASD demand based on reasonable suspicion. The Crown advanced the argument that the officer had the lawful authority to make the mandatory demand regardless of whether he had the requisite reasonable suspicion. While acknowledging that the preconditions for a mandatory demand existed, Cozens C.J. noted:

> 67 However, this was not the basis put forward by Cst. Fox for the ASD demand that he made. He founded the basis for his demand on s. 320.27(1) -- i.e., "reasonable suspicion". I am not aware of any jurisprudence that holds that if a police officer fails on the reasonable suspicion basis, they can then successfully default to the mandatory s. 320.27(2) demand, nor am I prepared to make such a determination myself. If the police officer decided to proceed on the reasonable suspicion basis to obtain an ASD breath sample, then the Court should assess whether this standard has been met and not default to a finding based upon thinking along the lines of, "[w]ell, the officer could have used s. 320.27(2) regardless, so it doesn't matter".

[27] Based on these comments, it would appear that while the argument was advanced in *Schmidt*, it was not supported by case law.

[28] In *R. v. Davy*, 2024 YKTC 26, Phelps J. did not address this particular argument with respect to his ruling on the lawfulness of a demand based on reasonable suspicion; however, the availability of the mandatory demand was a factor considered on the s. 24(2) *Charter* analysis.

[29] In *R. v. Toor*, 2024 YKTC 42, the defendant was charged with refusal to provide a sample pursuant to a demand which appeared to be based on reasonable suspicion. The lawfulness of the demand "was not strenuously challenged by the defence", but Cairns J. noted concerns about the objective reasonableness of the officer's evidence on consumption; however, she determined that she did not need to decide the point as she was satisfied the officer had the lawful authority to make the mandatory demand under s. 320.27(1). In so concluding, she relied in part on the reasoning in *R. v. Devore*, [2022] O.J. 5833 (ONCJ).

[30] In *Devore*, a decision out of the Ontario Court of Justice, the presiding judge was satisfied on the evidence that the officer did, in fact, have the grounds to support a reasonable suspicion demand. However, the judge, nonetheless, went on to consider whether the demand would also have been lawful on the basis of the mandatory demand:

> 39 …That being said, I am not aware of the content of a demand made pursuant to section 320.27(2) being any different than that required of the demand pursuant to section 320.27(1). With respect to a demand pursuant to section 320.27(2) there is no requirement that the officer have a subjective belief, suspicion or grounds. The grounds for a demand pursuant to section 320.27(2) only require compliance with the statutory three conditions before an officer can make a demand which is that the officer must be acting in the lawful exercise of his powers at the time of the demand, the subject must be operating a motor vehicle, and the officer must have an approved screening device in his possession at the time of the demand. In my view it is not necessarily what grounds, beliefs or suspicions the officer had at the time of the demand, or what section of the Code the officer believed he was making the demand pursuant to, but rather whether the officer was acting lawfully in making the demand and entitled to make the demand given the statutory requirements.

[31] The presiding judge concludes that if wrong on the determination that the officer had grounds to make the reasonable suspicion demand, they would have been satisfied that the demand was lawful pursuant to the mandatory demand provision.

[32] In *R. v. Rahmanian*, 2024 ONCJ 411, another decision out of the Ontario Court of Justice, the Court similarly determined that the officer had grounds to make the reasonable suspicion demand. The Court went on to consider whether reliance on the mandatory demand requires an officer to declaratively invoke the authority, making the following comments:

> 29 The earlier referenced law supporting that the police are not required to testify using any "magic words" to establish the "reasonable suspicion" for a screening demand applies more powerfully where the same step is also authorized without any grounds. To draw from the dated terminology for the "reasonable suspicion" standard - Where the police do not need "articulable cause" to use an investigatory tool, they cannot then be *Charter*- bound to "articulate" their reliance on it, especially given no "cause" is required. The *Charter* demands substance over form.

[33] However, the presiding judge in *Rahmanian* does not address the question of whether the mandatory demand provision, though not invoked, can negate a breach where the basis for a reasonable suspicion demand is not supported on the evidence.

[34] In *R. v. Dirksen*, 2020 ABQB 363, a summary conviction appeal in the Alberta Court of Queen’s Bench, the officer made a mandatory demand, but when the defendant failed to provide a suitable sample, the officer then made the reasonable suspicion demand based on an erroneous belief that they could not charge the defendant with a refusal pursuant to a mandatory demand. The Court, in upholding the

conviction, made the following comments about the interrelationship between the two demands:

> 30 The argument of the appellant respecting the juxtaposition of these two *Criminal Code* provisions appears to be predicated on the assumption that an investigating police officer could rely upon either MAS section 327.20(2) or ASD section 320.27(1), but not both.
>
> 31 These two *Criminal Code* provisions are not mutually exclusive.
>
> 32 There is nothing in the wording of these provisions preventing an investigating police officer, in the appropriate circumstances, from making use of both a MAS demand and ASD demand, provided of course that the procedural requirements of each section are satisfied.
>
> 33 If the procedural requirements of both provisions are satisfied, the result will be the same, that is, a sample of breath will be produced. If the sample registers a "fail", the legal basis for a qualified breath technician to obtain breath samples using an approved device is established.

[35] I would note that the *Dirksen* case is factually distinct from the case at bar. It stands for the proposition that an officer can choose to make both demands, not that the mandatory demand can be relied on at trial to establish lawfulness even though a reasonable suspicion demand was made at the scene.

[36] More on point is the decision of *R. v. Handley*, 2024 NSPC 39, out of the Nova Scotia Provincial Court. The officer testified that the demand was based on reasonable suspicion, but it appears this was not communicated to the defendant. Crown conceded that the grounds were insufficient for a reasonable suspicion demand, and it was agreed that the preconditions for a mandatory demand were present. Thus, the decision focussed on whether the mandatory demand could be relied upon by the Crown to support a finding the demand was lawful, when it was not the authority relied upon by the officer in making the demand. The Court concluded as follows:

> 44 I fail to see how the officer's mistaken, but unvocalized, reliance on 320.27(1)(b) invalidates what is otherwise plainly lawful under s. 320.27(2). Accordingly, I am not persuaded that Mr. Handley's rights and protected interests under s. 8 of the *Charter* are engaged on these facts. I do note that *if* he was advised the demand was being made under s. 320.27(1)(b), or the charge was particularized as such, that may change the analysis (see *e.g., R. v. Haqyar*, 2019 ABPC 195 at para. 22).

[37] Both *Devore* and *Handley* appear to suggest that, provided the mandatory demand preconditions have been met, a demand will always be lawful even if the officer has opted to make a demand based on reasonable suspicion but has insufficient grounds. However, both cases come from jurisdictions where it appears the wording of the two demands is identical. The presiding judge in *Handley* does question whether an accused person's knowledge about the basis for the demand at the time the demand is made would change the analysis.

[38] This is an important distinction to the case at bar as the demand made by Cst. Jeffrey began with the words "I have reasonable grounds to suspect that you have over the past three hours operated a motor vehicle with alcohol or drugs in your body". Thus, it was made clear to Ms. Whiticar that the demand was based on reasonable suspicion.

[39] Crown suggests this is a distinction without a difference, I disagree. There is a qualitative difference in trial fairness that flows from the information provided to a defendant, in advance, which sets out the case that she must meet at trial.

[40] In *R. v. Haqyar*, 2019 ABPC 195, the Alberta Provincial Court addressed this question and concluded:

> 22 The remaining issue is whether the breath demand made of Mr. Haqyar was a lawful demand under section 320.27(1)(b). I note that Constable McCartney had in his possession an approved screening device, and therefore could have relied upon section 320.27(2). However, the Information specifically states that the demand was made pursuant to section 320.27(1)(b), and I am of the view that the accused would be prejudiced if the Crown was not now required to prove that particular set forth in the Information: *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2

[41] Ultimately, I need not decide whether the availability of the mandatory demand will operate in order to negate a breach arising from insufficient grounds to make a reasonable suspicion demand, in all cases. I need only decide whether this is so, where the basis for the reasonable suspicion demand is expressly made clear to the accused at the time the demand is made.

[42] Given the lack of a definitive statement of law on this particular issue, it is necessary to consider the number of cases counsel have provided involving analogous situations in which the Crown or the Court rely on a different authority to justify police action than was invoked by the officer.

[43] Crown relies on the decision of the Manitoba Court of Appeal in *R. v. R.M.J.T.*, 2014 MBCA 36, a case involving offences of sexual interference and possession of child pornography. The police seized a computer on the basis of consent from the mother of the complainant. The mother's authority to provide consent was challenged. The Court found that not only did the mother have the authority to consent to the seizure, but the police had the authority to seize the computer pursuant to s. 489(2) of the *Code*:

> 64 With respect to his argument that the officers could not have had subjective belief for a seizure pursuant to s. 489(2) of the *Code* on the

ground that neither officer attempted to rely on that section as justification for the seizure, I would simply note that such a failure is not fatal to the application of the section. Jurisprudence has demonstrated that a seizure made under mistaken authority is not necessarily fatal where authority otherwise exits. For example, in *R. v. Miller* (1987), 62 O.R. (2d) 97 (C.A.), the police seized a bandage from an accused pursuant to a search warrant. However, there was no power to grant such a warrant at the time. Nevertheless, the court held that the seizure was authorized as incident to arrest and therefore not in violation of s. 8 of the *Charter*. In reaching this conclusion, Goodman J.A. stated (at p. 103):

> In my view, the fact that the investigating officer misconceived his right to seize the bandage as incident to the lawful arrest and purported to seize under an invalid warrant is not a conclusive factor in determining the validity of the search or seizure. If the right to seize the bandage is valid independent of the warrant, the warrant may be regarded as surplusage.

65 More recently, the case of *R. v. Makhmudov (R.) et al.*, 2007 ABCA 248, 417 A.R. 228, involved circumstances where an officer detected the smell of marijuana on the zippers of two identical bags during the accused's journey from Vancouver to Toronto. The bags were temporarily seized pending identification of ownership. After identifying themselves as owners, the accused were arrested and charged, and the bags were searched. Restricted guns, ammunition and drugs were found in the bags. The trial judge found that the arrest was lawful, and the interim seizure of the bags without a warrant was carried out by a police officer in the execution of his duty and for the purpose of preserving evidence. On appeal, the accused argued that the initial temporary seizure of the bags was not authorized under s. 489(2) of the *Code*.

66 The court dealt with the argument pertaining to s. 489(2) of the *Code,* stating (at para. 18):

> The initial, temporary seizure of the bags was not unlawful. After smelling marijuana, the police officer had reasonable grounds to believe the bags contained marijuana. The officer testified that the seizure was to preserve that evidence. The police officer's lack of knowledge of, and failure to cite the particular provision of the **Criminal Code**, was not fatal. Section 489(2) permits a police officer in the execution of his duty to seize things that he believes, on reasonable grounds, have been used in the commission of an offence or will afford evidence in respect of an offence. Here, the section was satisfied and the seizure was lawful. [emphasis added]

[44] A somewhat contrary line of authorities begins with the Supreme Court of Canada decision in *R. v. Caslake*, [1998] 1 S.C.R. 51. In terms of facts, several hours after arresting the accused for possession of narcotics, the officer conducted an inventory search of the accused's vehicle pursuant to RCMP policy. The Court concluded that the officer could have validly searched the vehicle under the authority to search incident to arrest, but concluded that compliance with RCMP policy is not one of the legitimate purposes of that authority, noting:

> 27 Naturally, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched. ...

[45] Counsel for Ms. Whiticar has provided three additional cases with similar findings.

[46] In *R. v. Dhillon*, 2012 BCCA 254, the police were called to a parking lot regarding a reported fight. Upon arriving, the officer recognized the accused and saw scissors and rolling papers in the accused's vehicle, items the officer associated with marijuana. This raised a concern about potential weapons. While the accused denied the presence of any weapons, the officer asked if he would consent to a search of his vehicle and the accused agreed. Firearms were located in the trunk. The trial judge seems to have found the search reasonable on the basis of an investigative detention. On appeal, the Crown conceded there was no valid consent, but argued that the search was a justifiable use of police power to preserve the peace, prevent crime, and protect life and property. The British Columbia Court of Appeal disagreed finding:

> 40 … As this Court made clear in *R. v. Whitaker*, 2008 BCCA 174, it is not sufficient that the police may have had a legal basis to exercise certain powers if they did not in fact exercise those powers. It is not enough, for example, for the Crown to assert that the police had reasonable grounds to obtain a warrant if they did not in fact obtain a warrant. The question for the court is the lawfulness of the actual police conduct, not the potential basis for the exercise of police power. As Mr. Justice Frankel observed in *Whitaker*, albeit in the context of an unlawful arrest:
>
> > [65] The Crown argued, in brief, that even if the police did not have reasonable grounds to arrest Mr. Whitaker, his detention was not arbitrary because he could have been detained under the common law power of investigative detention recognized in *R. v. Mann* [citation omitted]. The difficulty with this argument is that the police did not invoke the common law power of investigative detention; they invoked the statutory power of arrest, with its more extensive power of incidental search of the person. When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis. In deciding whether the police infringed *Charter* rights they are to be judged on what they did, not what they could have done: *R. v. Charley,* (1993), 22 C.R. (4th) 297 (Ont. C.A.) at para. 5. [Emphasis added.]

[47] A similar result was reached by the Ontario Superior Court of Justice in *Ontario v. Brown*, 2024 ONSC 7252, in which the police followed a vehicle and decided to conduct a random sobriety check under the *Highway Traffic Act*, RSO 1990, c. H8 (as amended) (the "*HTA*"). By the time the stop was initiated, the vehicle was parked on a private driveway. The Crown conceded that there was no authority under the *HTA* to follow the vehicle onto the driveway to conduct the sobriety check, but argued the police had the common law power to detain to investigate whether the accused was driving while impaired. The Court found:

> 67 I cannot accept the Crown's submission.

> 68 An inquiry into the actions of police properly focusses on the actual choice made by them and not on an alternate choice that was theoretically available: *R. v. Charley*, (1992) 22 CR (4th) 297 (Ont. C.A.), 1993 CanLII 17040 (ON CA), *R. v Whitaker*, 2008 BCCA 174, 170 CRR (2d) 309, leave to appeal to SCC refused; *R. v Sabiston*, 2023 SKCA 105 (CanLII) at para. 4. The officers were consistent in their evidence that they were exercising statutory powers under the HTA to conduct a sobriety check. Neither testified to detaining Mr. Brown to investigate the crime of impaired driving.

[48] In *R. v. Sabiston*, 2023 SKCA 105, the Supreme Court of Canada overturned the majority decision of the Saskatchewan Court of Appeal and adopted the reasons of the dissenting judge. The accused was arrested for possession of stolen property. A knife was located on a pat down search, whereupon the accused advised there was a sawed-off shotgun in his backpack. The Crown conceded the arrest was unlawful but argued that the search was justified because the officers could have detained the accused for investigation. The dissenting judge's reasons considered the relevant case law, noting that this argument has been rejected by both the Ontario and British Columbia Courts of Appeal, and similarly rejected the argument:

> 93 I find that this argument has no merit. When a court is deciding whether a *Charter* breach *occurred*, it must assess what the police did, not what they could have done. The facts of the actual situation must be evaluated to determine whether there was a breach. It is the actual police power exercised that matters when examining whether there was a *Charter* breach, not some other power that could have potentially been used but was not. The officers did not purport to detain Mr. Sabiston for the purposes of an investigation; they arrested him.

[49] In considering these two lines of cases, I note that *R.M.J.T.*, *R. v. Miller* (1987), 62 O.R. (2d) 97 (C.A.), and *R. v. Makhmudov*, 2007 ABCA 248, all conclude that an officer's mistaken belief, lack of knowledge or failure to cite a particular provision as authority are not necessarily fatal with respect to the lawfulness of the officer's conduct

pursuant to that provision. In my view, that is a slightly different issue than the one before me. Even if I am wrong in that distinction, I would nonetheless prefer the reasoning in the converse line of cases, particularly in *Dhillon*, *Brown*, and *Sabiston*, all of which squarely address the specific issue I must decide: whether police conduct can be justified at trial pursuant to an authority that would have been available to them, if that was not the authority that they were operating under.

[50] It should be noted that the presiding judge in *Handley* also considered some of these cases, but distinguished their rationale and its application to the mandatory demand on the following basis:

> 41 The distinction between police powers related to arrest, detention or search incident to arrest, on the one hand, and s. 320.27(2) on the other, is that s. 320.27(2) does not import a subjective element.

[51] I am not sure I entirely understand the rationale for this distinction. In my view, it is not the court's role to find some other available, but not invoked, authority to ex post facto justify the conduct of the police. It seems to me there is little difference between trying to do so based on a non-invoked authority requiring a subjective element and one that does not. If there is a qualitative difference between the two, it is more appropriately addressed when assessing the seriousness of the police conduct in the s. 24(2) *Charter* analysis.

[52] The fact is, in this case, Cst. Jeffery made it clear to Ms. Whiticar that the breath demand was based on reasonable suspicion pursuant to s. 320.27(1)(b). He did not make a mandatory demand pursuant to s. 320.27(2), although it was available to him. The lawfulness of the demand in this case should be based on what he did do; not what

he could have done. I agree with the comments of the dissenting judge in *Sabiston*, and adopted by the Supreme Court of Canada, that:

> 100 … A member of the public who is interacting with a police officer should be assured that a court will assess the actions of that officer against *Charter* standards as opposed to searching for alternative, hypothetical scenarios to justify the conduct.

[53] In the result, I find that the availability of the mandatory demand does not render the demand lawful in this case. Accordingly, I find that Ms. Whiticar was arbitrarily detained contrary to s. 9 of the *Charter*, and the taking of the breath sample constituted a breach of her s. 8 *Charter* right to be secure against unreasonable search and seizure.

Issue 3: Section 24(2) of the *Charter*

[54] Section 24(2) of the *Charter* mandates that evidence obtained in a manner infringing *Charter* rights shall be excluded if it would bring the administration of justice into disrepute. Ms. Whiticar seeks exclusion of the WatchGuard video and the Certificate of Qualified Technician.

[55] The test for exclusion set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, requires consideration of three factors:

1. The seriousness of the *Charter*-infringing conduct;
2. The impact on the *Charter*-protected interests of the accused; and
3. Society's interest in adjudication on the merits.

[56] The three factors must be weighed in determining whether, on balance, admission of the evidence would bring the administration of justice into disrepute.

Seriousness of the Charter-infringing conduct

[57] The Supreme Court of Canada recently considered the *Grant* test in the context of impaired driving offences in *R. v. McColman*, 2023 SCC 8. They summarized the first line of inquiry in *Grant* as follows:

> 57 The first line of inquiry focuses on the extent to which the state conduct at issue deviates from the rule of law. As this Court stated in *Grant*, at para. 72, this line of inquiry "requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct". Or as this Court phrased it in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22: "Did [the police conduct] involve misconduct from which the court should be concerned to dissociate itself?"
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> 58 In evaluating the gravity of the state conduct at issue, a court must "situate that conduct on a scale of culpability": *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 43. As Justice Doherty observed in *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, "the graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct": para. 23. To properly situate state conduct on the "scale of culpability", courts must also ask whether the presence of surrounding circumstances attenuates or exacerbates the seriousness of the state conduct: *Grant*, at para. 75. Were the police compelled to act quickly in order to prevent the disappearance of evidence? Did the police act in good faith? Could the police have obtained the evidence without a *Charter* violation? Only by adopting a holistic analysis can a court properly situate state conduct on the scale of culpability.

[58] Breaches of *Charter* rights that are more than mere technicalities are always very concerning, particularly so when they are indicative of an officer's failure to comply with

Charter norms in the face of well-settled law. For this reason, the first line of inquiry often favours exclusion. However, my concerns about Cst. Jeffery's conduct in this case, are somewhat diminished for two reasons: his relative inexperience and the availability of the mandatory demand.

[59] Cst. Jeffery was new to policing with only one and one-half years in uniform as of the trial date; less than one year on the offence date. Notwithstanding this, he demonstrated a clear understanding of his authorities in relation to breath demands and was able to articulate what he did and why. He was respectful and professional in his dealings with Ms. Whiticar, her passenger, and the child. He was responding to a report of clearly suspicious behaviour. His error flowed from a deficit in his understanding that reasonable suspicion in the context of a demand under s. 320.27(1)(b), requires more than mere suspicion. While it is concerning that this was not made sufficiently clear to him in his training, his actions are not, in my view, indicative of a flagrant disregard of *Charter* norms. With respect to the mandatory demand, Parliament's establishment of this constitutionally-vetted authority to make a breath demand, with no grounds whatsoever relating to the consumption of alcohol or indicia of impairment, has fundamentally changed the impaired driving landscape. In circumstances, as in this case, where the authority to make a mandatory demand is available to the officer, I would agree with the comments of the Ontario Court of Justice in *R. v. Campbell,* 2022 ONCJ 571*, that* it "attenuates the seriousness of the *Charter* breach". Cst. Jeffery's decision to rely on the reasonable suspicion demand, in circumstances falling short of the legal requirements for such a demand, rather than on the mandatory demand, could be termed an error in judgment. However, the fact that Cst. Jeffery need have done

nothing more than speak the words to invoke the mandatory demand necessarily renders his error in judgement and the consequent *Charter* breach less serious than it might have been viewed in the past.

[60] In these circumstances, I am satisfied the seriousness of the breach is sufficiently attenuated so as to render this a neutral factor with respect to the question of exclusion.

Impact on the Accused

[61] *McColman* summarizes the second branch of the test as follows:

> 66 The second line of inquiry is aimed at the concern that admitting evidence obtained in violation of the *Charter* may send a message to the public that *Charter* rights are of little actual avail to the citizen. Courts must evaluate the extent to which the breach "actually undermined the interests protected by the right infringed": *Grant*, at para. 76. Like the first line of inquiry, the second line envisions a sliding scale of conduct, with "fleeting and technical" breaches at one end of the scale and "profoundly intrusive" breaches at the other: para. 76.

[62] In deciding where the impact of the breach falls on this spectrum, I note Ms. Whiticar was stopped in a public place and compelled to provide a sample of her breath to be used as evidence against her. While the ASD procedure has been held to be minimally intrusive, she was nonetheless required to provide the sample in the presence of her small child and in full view of passersby.

[63] It should be noted that the availability of the mandatory demand, although not invoked, has recently been considered to be a factor that attenuates the impact of the *Charter* breach on an accused (see *Davy*, para. 48).

[64] There is clear logic to this position. If the mandatory demand had been invoked, for all practical purposes, things would have unfolded in exactly the same manner in terms of their impact on Ms. Whiticar. However, the fundamental difference is that impact would have flowed from a lawful demand. There is no recompense for impacts on accused persons that flow from lawful police conduct. While the outcome might be the same, the impetus is entirely different. Cst. Jeffery could have made the mandatory demand, but the fact is he did not. While, as already stated, I am satisfied that the availability of the mandatory demand attenuates the seriousness of Cst. Jeffery's conduct giving rise to the breach, I am of the view that the impact on Ms. Whiticar must nonetheless be assessed with the recognition that that impact flowed from an unlawful demand.

[65] I am satisfied that the impact on Ms. Whiticar falls in the mid-range of the spectrum and would favour exclusion.

Society's Interest in Adjudication on Merits

[66] The third branch of the *Grant* test is summarized in *McColman*:

> 69 The third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry requires courts to consider both the negative impact of admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence: *Grant*, at para. 79. In each case, "it is the long-term repute of the administration of justice that must be assessed": *Harrison*, at para. 36.
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> 70 Under this third line of inquiry, courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence, although this Court has recognized that the final factor can cut both ways: *Grant*, at paras. 81 and 83-84. While the public has a heightened interest in a

> determination on the merits where the offence is serious, it also has a vital interest in maintaining a justice system that is above reproach: para. 84.

[67] There is little doubt that the evidence Ms. Whiticar seeks to have excluded is both highly reliable and critical to the Crown's case. Nor is there any doubt that the offence of impaired driving is a serious offence. In *McColman*, the Supreme Court of Canada summarized the seriousness in quoting from their earlier decision in *R. v. Bernshaw,* [1995] 1 S.C.R. 254:

> 72 ...
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> > Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country. (paragraph 72)

[68] The third branch of the *Grant* test clearly favours inclusion.

Balancing the Three Branches

[69] In the result, the first branch is neutral, the second favours exclusion, and the third favours inclusion. In weighing these three factors, however, it must be noted that in *McColman*, the Supreme Court of Canada has sent a clear message about the weight to be afforded to the third branch of the *Grant* test in impaired driving cases:

> 74 ...However, the third line of inquiry pulls strongly in favour of inclusion and, in our view, outweighs the cumulative weight of the first two lines of inquiry because of the crucial and reliable nature of the evidence as well as the important public policy concerns about the scourge of impaired driving. ...

[70] A balancing of the three *Grant* factors, in all of the circumstances, favours inclusion. Accordingly, I am satisfied that the evidence should not be excluded pursuant to s. 24(2) of the *Charter*.

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RUDDY T.C.J.