

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Brooks

REX

v.

ALEN THOMAS

Appearances:
Elmer B. Brillantes
Luke Faught

Counsel for the Crown
Counsel for the Defence

RULING ON *VOIR DIRE*

[1] BROOKS T.C.J. (Oral): Mr. Alen Thomas stands charged that on or about May 10, 2025, at or near the City of Whitehorse, he did, within two hours of ceasing to operate a conveyance, have a blood alcohol concentration that was equal to or exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 320.14(1)(b) of the *Criminal Code*.

[2] I have just held a *voir dire* with regard to the admissibility of certain evidence. The defence seeks to exclude evidence as set out in their application, including observations, statements, and the breath samples themselves. They do so on the basis of alleged breaches of section 10(b) of the *Charter of Rights and Freedoms* (“*Charter*”).

[3] I feel able to give my reasons now, just after the conclusion of the submissions that I have received. I do so because of the quality of the information I received by way of application and response, and because of the quality of the submissions which I received from both counsel. At the same time, this is a case which, because most of it was caught on the camera of the investigating officer, it is one in which there are not many twists and turns to the evidence, if I can refer to it that way. It is simply an analysis of what can be seen and what inferences are to be drawn from it. In those circumstances, as I say, I am able to give the reasons here today. I do so without repeating back to counsel what they have said to me and repeating back the quotations that they have given me from various cases. I have taken all of it into account but in the circumstances, do not feel the need to repeat it back to counsel.

[4] The issues raised in this *voir dire*, as I say, are based on section 10(b) of the *Charter*. The central issue really is the reasonable opportunity to contact counsel, which is placed in question by the defence in their submissions and in their cross-examination of the police officer. There were other subsidiary issues raised as well, which are also significant. Namely, the extent to which the police officer did not fulfil his obligation about assisting with the contact of a lawyer through an intermediary. The defence also raises the inadequate resources which were made available to the accused for the purpose of contacting counsel and getting the legal advice that he needed.

[5] I have just had the submissions of counsel, which were very helpful to me. The submissions of the defence were focused on various frailties that they said existed in what occurred, such that the breaches were established, and the Crown, on the other

hand, took a broader approach by looking at the chronology of events. I certainly am of the view that the totality of the circumstances are critically important if one is to understand the issues raised and their analysis and resolution. In that regard, therefore, I am going to, although it requires a lengthy review of the evidence which I have heard and seen on the WatchCam, a review of the entirety of the chronology as it was set out before me, particularly through the evidence of Constable Hutton-Brown. I will begin the summary of it right at the beginning and I do so because these events, even right at the beginning, do shape what happened thereafter and do shape the point of view of the police officer and do shed, in my view, significant light on the issue of the reasonable opportunity afforded to the accused and whether that was indeed reasonable or not.

[6] Constable Hutton-Brown stopped Mr. Thomas at approximately 3:03 a.m. on May 10, 2025. He issued an Approved Screening Device (“ASD”) demand, and Mr. Thomas provided that sample. That sample resulted in a failure. As a result, Mr. Thomas was arrested for impaired driving. He was handcuffed and walked from his car back to the police vehicle. The police officer, from memory as they were walking, advised him of his right to contact a lawyer. That was done from memory.

[7] They got to the back of the patrol car and it was there, at approximately 3:10 a.m., that the constable read from a card, the right-to-counsel warning with which we are all familiar, which has a component of contacting Legal Aid, that the accused has a right to Legal Aid or a lawyer of his choice, and an opportunity to have a private phone call. Mr. Thomas was then asked about whether he wanted to call a lawyer.

He was also asked who he might want to call and whether that person's number was on his phone. The police officer then went into the breath demand, asked if that was understood, and that they were going to have to go to the detachment for that purpose. Then, before leaving, the police officer asks him whether he is going to provide samples, and that he will let him talk to his lawyer thereafter. The police caution was then also read.

[8] Before leaving the scene, the constable asked about Mr. Thomas' cell phone and made a point of going to grab it. According to my note of what he said, he asked whether the phone was in a case — it was in a green case — and that he would get it "so that you can talk to your lawyer as soon as possible". He testified that the number for the lawyer of Mr. Thomas was on his cell phone.

[9] They left for the detachment and arrived at roughly 3:27 a.m. At that time the constable says to Mr. Thomas, "Let's find that number and you call it. You find the number and we will call that number." Now, this is the beginning of the issue raised by the defence about an intermediary for Mr. Thomas to make contact with his counsel. I raised, during the course of defence counsel's argument, the extent to which an intermediary was really raised on these facts, and I will return to that after going through further evidence that we received.

[10] At this point I simply note that the police officer, in his interaction with Mr. Thomas, was operating on the basis that there was a phone number on the phone and that they were going to get that number and then call that number for Mr. Thomas

to speak with his lawyer. That is to say, the issue of an intermediary certainly did not arise at the outset.

[11] In any event, they continued on and a number was provided by Mr. Thomas, to the police officer, and a phone call was made. A message was left for the lawyer. The constable testified that he could not understand the exact name of that lawyer, as that lawyer had a very heavy French accent. He left the number for that lawyer to call back to the lawyer's room. In the meantime, Mr. Thomas had been on his first of three washroom visits, this one for approximately three or four minutes in length. With Mr. Thomas now back at roughly 3:32 a.m., the police constable advised Mr. Thomas that the message had been left and asked him if he wanted to wait for a call back from that lawyer or wanted to call for another lawyer. Mr. Thomas asked for his phone and he is given his phone.

[12] Much is made of the contact that Mr. Thomas has available to him with lawyers as a result of having access to his phone. The defence takes the position, that will arise with regard to the issue of resources, that insufficient access was given for Mr. Thomas to get in touch with a lawyer.

[13] I mention that at this stage because this is the first of, at least two and perhaps three, occasions in which Mr. Thomas has free access to his phone for the purpose of him utilizing it in any way he wishes in order to get access to a lawyer. I do not have evidence before me that Mr. Thomas had access to the internet on his telephone, although one would certainly expect that he would, and I was told by the constable that there is internet access at every police station. It is important to note the free access he

is given to his phone. On his phone, Mr. Thomas makes a call and he begins to speak in a language that is not French or English. I am afraid I do not know what language it is. The police officer asks him if that is his lawyer and then says to him, "You can't talk to him like this." The reason that the police officer says that, I infer and indeed I find as a fact, is that the police officer wished to give privacy to Mr. Thomas, and there he was sitting in the open. As far as the police officer knows, he is speaking to his lawyer. So, he says to him that he cannot talk to him like this and that he must instead hang up the call and they will operate on the basis that the phone number is provided to the police officer and he will get a private room. There is mention of a name Alvin. The police officer then asks Mr. Thomas, "He is a lawyer, though?" To which the accused says, "Yeah." This turns out to be untrue and that is very, very important.

[14] Submissions were made with regard to *R. v. Mumtaz*, 2017 ONSC 2253, in paragraphs 35 to 39 about the obligations on police officers, and what is expected will be the kinds of scenarios when they are to provide further information and to assist with intermediaries. Certainly in this case, what happened here was the police officer operated on the understandable inference that this was a lawyer and indeed was told that it was a lawyer. He testified that that is, in fact, what his thinking was at the time.

[15] The police officer got the phone number and made a call to Alvin. He then asked if Alvin, in fact, was a lawyer, and was told that he was not a lawyer. As a result of that, the police officer hung up and went back to speak with the accused.

[16] The defence raises the issue that Alvin had indicated that he was going to help Mr. Thomas. What form that help was taking was left completely ambiguous. It

certainly was not necessarily help in contacting a lawyer, and certainly raised the prospect that this contact, and this helping, was going to take Mr. Thomas away from what he needed, which was legal advice. Whereas the police officer is faulted at this point for not recognizing that Alvin said he was helping and, therefore, embarking on a series of questions to see the extent to which he should be using Alvin as an intermediary, is a submission which I do not accept. I return back to what is said at the outset, namely, the number for the lawyer of Mr. Thomas was on his phone. That is critically important.

[17] The police officer went back to Mr. Thomas and said, "Alvin is not a lawyer, so we have to find you a lawyer. It has to be a lawyer that you speak to." I reject the criticism suggested of this approach by the police officer. It is one to focus the mind of Mr. Thomas on what he needs to do in order to be able to exercise the rights that he is given. The police officer then asks him if he wants to try the lawyer again. As a result of the conversation, a decision is made to wait another five minutes or so to see if the lawyer calls back.

[18] There is then another call placed and a message left, and there is a request to wait a bit. The police officer says, "We will give it about 20 minutes." We are at roughly 3:44 a.m. now. That too is significant for what happens in the future and to understand the idea of reasonableness in this context because 3:44 plus the 20 minutes would take us to just after four o'clock, but of course much more time than that is given to Mr. Thomas. It is not restricted to 20 minutes. It is something that the police officer viewed as a reasonable amount of time but does not hold to that in any way. It simply

was a general timeline that, in his experience had worked and so, nothing happened for a period of time.

[19] It comes to approximately 3:56 a.m. and a list of lawyers is then accessed by the police officer. I will skip ahead to those two lists that were marked as Exhibits A and B, as there was significant submissions made with respect to them.

[20] With regard to Exhibit A, it is important that it says, not least because this is going to be placed in front of the accused at a later time and so he has this information in front of him and he was given ample time to read it and digest it: it is this, if I may quote from Exhibit A:

The Access to Justice Committee of the Law Society of Yukon has surveyed the membership and present the following names of contact information for criminal lawyers for after regular business hours.

Those lawyers practicing criminal law listed alphabetically in the table have volunteered to have their contact information available for people arrested by the RCMP to assist them in contacting their counsel of choice.

Please contact the Law Society at 668-4231 if you have any questions. Our website at lawsocietyyukon.com provides a search tool for the public to find lawyer contact information under "Find a Lawyer".

Further down, after the names are provided, it says:

Legal Aid after hours 4:30 p.m. to 8:30 a.m. - Angel
Answering Service - 867-668-5482 for duty counsel only.

[21] That was significant. It was at about this time that Mr. Thomas goes back to the washroom, coming out at about 4:14 a.m. He comes out after the investigating officer

shouts through the door at him, "You have been in there almost 15 minutes, so we need you to come out so we can carry on with this." There is then a flush and he comes out. This is his second visit to the washroom.

[22] He now comes out and is asked what he wants to do, and indicates that he wants to speak with a lawyer. He is asked if he wants to call another lawyer, and the police officer says to him, "You find me the number and I will call them."

[23] The police officer testified he was concerned about the loss of evidence insofar as the alcohol was dissipating from the accused's system the longer things were taking, and that it had been his training that the taking of samples should be done as soon as practicable. He testified that, in his experience, 30 to 45 minutes was the usual waiting period that happened for how long one had to wait for a lawyer to be in contact. We were, by this point, at the outside edge of what he had ever had to wait before.

[24] Another phone number is provided by the accused, according to my note, from his phone and as a result of that, a call is made to what we have referred to from the evidence as lawyer number two. A message is left, and at that time the police officer says, "We're going to wait 15 minutes and then we're going to go ahead with the breath testing." Now, I mention that for a number of reasons.

[25] First of all, the urgency of the situation is communicated to Mr. Thomas. Things have to start happening or they are going to just go ahead; that is the way it is going to be. He is told that. That suggestion was one that also came up in the case of *R. v. Vaillancourt*, 2024 YKSC 2, and it was suggested that such a reminder to an accused was positive and important.

[26] The second aspect that is also important is that the police officer did not wait just 15 minutes, he in fact waited more than 35 minutes for a choice of lawyer to be made before proceeding any farther. That too is very significant.

[27] Lawyer number two is then called. There is no answer and there is a voice message left. It was a law office, so that much was done. We then we have a situation where nothing happens from 4:18 a.m. until sometime thereafter.

[28] About 4:36 a.m. Mr. Thomas goes into the washroom again. He is there for approximately 17 minutes. He is asked again if he would just come out. The police officer got hand sanitizer for him, perhaps there was some problem with him washing his hands, it is not clear on the evidence.

[29] In any event, that is his third trip. In this situation, where time is of significance, and is of significance to the knowledge of Mr. Thomas, we have him spending in excess of 35 minutes in the washroom. That may be nothing at all, but it certainly would focus one's mind, when one came out of the washroom, that there was a task at hand and one had to get to it. He is told that his lawyer has not called back and there is a conversation that ensues between Mr. Thomas and the constable. The result of that conversation is the police officer says, "We're going to make a call and start the observation period. Which lawyer do you want to call now?" It is at this point that Mr. Thomas is given the sheets of paper.

[30] I have referred to Exhibit A. Exhibit B is a document that is in excess of 20 pages long and prints off lawyers qualified to be members of the Yukon Law Society. The focus is not on criminal lawyers and indeed there is just a listing of lawyers from

many jurisdictions across the country. It is one that is a flood of information, not much of it very helpful. I come at the criticism of it from the other end of defence counsel. Defence counsel says it needed to be up to date, it needed to be better, but that is not really the problem. The problem is this one does not have any focus to it and one is left somewhat at sea. For reasons that are not clear, Mr. Thomas does not look at the one that is focused on criminal lawyers, as I have referred to in Exhibit A, but refers to this larger one, and he spends roughly seven minutes flipping through the pages. There is, to my eye, no discernible difference between one page and the other, but perhaps to Mr. Thomas there was, so he continues flipping through the pages. Eventually he is told by the investigating officer, "You need to pick a lawyer." The police officer is concerned that they are about one and a half hours at the detachment and things need to move forward.

[31] About a minute after the police officer suggested Mr. Thomas has to find a lawyer from the list, Mr. Thomas points one out, lawyer number three, and they place a call to that lawyer and a message left with the number is left again. What happens at this point thereafter is that the observation period has started.

[32] At the start of the observation period, the police officer tells Mr. Thomas that, "When they call back, we will put that person through. You can have your call then and we will stop the process to deal with that," but in the meantime the observation period starts. Defence counsel objects to that and suggests that that is completely inappropriate and a clear breach of the rights of Mr. Thomas because, in effect, by having an observation period, they are commencing to elicit evidence, or at least be in a position to do so and he has not had his call with a lawyer yet. Though, again, this is

why I have gone through this process of going through the chronology. It is essential to understand the entire chronology, to understand how everyone got to where they were at 4:55:25 a.m. when that call ended. The situation is one in which repeated opportunities have been given to Mr. Thomas. It is extremely difficult to say that Mr. Thomas has been diligent. It is a situation in which clearly the urgency of it is one which he knew and which he did very little. The police officer, in proceeding the way they did, in my view, had already provided a reasonable opportunity by the time of the end of that call and, in my view, there is not a complaint to be made about that opportunity as it was given.

[33] I have already referred to the intermediary issue, which I do not consider to be an issue in this case, and I have already referred to, in my view, the resources given. I am of the view that the resources given were not inadequate. Exhibit A to my mind is something that is very useful, very good, and provides recognizable specialists in criminal law, admittedly not all of them, who would be available on an after-hours basis to answer a call. This was right in front of Mr. Thomas and he did not avail himself of that. The situation is one where, in my view, he was provided with a reasonable opportunity.

[34] If I am wrong in my analysis and in finding no breach which occurred, I should make it clear that, in my view, the conduct here was not in any way egregious and I disagree with defence counsel's characterization of this as an example of ignorance of the police and that it must be conduct from which the Court distances itself. The police officer in cross-examination made statements that indicated that his knowledge of the law was not complete or perhaps nuanced, but what is necessary is not his

understanding of the *ratio decidendi* of particular cases, but his conduct in how he deals with accused people. Here in this case, he was professional, and indeed I would go so far as to say indulgent with this accused for the entirety of the time that he dealt with him. It is in those circumstances that any conduct of his found to be a breach of the *Charter* cannot, in my view, be characterized as serious. The impact on the accused, in my view, was not dramatic. When I come to the third branch of the section 24(2) analysis, we are, of course, dealing with reliable evidence in the breath tests and we are dealing with a serious offence, about which much has been remarked in the past.

[35] In the entirety of the circumstances, I find there is no breach and, in any event, I would not have excluded the breath test results anyway.

BROOKS T.C.J.