Citation: *R. v. Wabisca*, 2019 YKTC 39

Date: 20190905
Docket: 18-00086
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

DYLAN MICHAEL WABISCA

Appearances:
Leo Lane — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Dylan Wabisca has been charged with having committed offences contrary to ss. 253(1)(a) and 254(5) of the *Criminal Code*.

[2] Counsel for Mr. Wabisca has filed a Notice of *Charter* Application alleging breaches of Mr. Wabisca's ss. 8 and 9 *Charter* rights. She is seeking exclusion of all evidence obtained after the demand for a sample of Mr. Wabisca's breath into a roadside device, including the "Fail" reading that resulted.

[3] The trial commenced in a *voir dire*. The only witness was Cst. Miller. He stated that he had nine years' experience as a general duty RCMP officer with associated training in impaired driving investigations. He estimated that he had been the lead

investigator in approximately 60 impaired driving investigations and assisted in at least 60 others.

[4] He testified that at 4:03 a.m. in the morning of April 22, 2018, he was on patrol in the downtown area of Whitehorse when he observed a pickup truck (the "truck") being driven by an individual subsequently identified as Mr. Wabisca. Cst. Miller was driving northbound on 2nd Avenue and Mr. Wabisca was driving southbound. The road was clear with good visibility and little traffic. Cst. Miller stated that while it was dark out, there were street and vehicle lights that enhanced visibility. There was also lots of ambient light.

[5] Cst. Miller saw the truck as it passed through the Main Street intersection. He estimated the speed of the truck to be in excess of 50 km/h.

[6] He also noted a pedestrian pushing a bike in a southbound direction on the shoulder of the road (actually on the left side of the bus lane pullout to the right of the curb driving lane). He stated that he was concerned for the safety of the pedestrian, as he felt that he might get run over.

[7] Cst. Miller testified that the pedestrian was wearing a high visibility vest, clearly visible from behind, and he felt that it would be uncommon for a driver not to notice the pedestrian as a result.

[8] Cst. Miller noted the truck to swerve in order to, in his opinion, avoid striking the pedestrian and then to continue in a southbound direction. Due to the speed of the

vehicle and the swerving that he observed, Cst. Miller conducted a U-turn and began to follow the truck.

[9] As he drove quickly in order to catch up to the truck, Cst. Miller estimated it to be travelling at approximately 70 km/h. He observed the truck driving in the center of the two lanes. While the lane marking was not consistently clear, the grooves worn in the lanes from regular driving were visible. Cst. Miller then observed the truck swerving to the right in order to exit onto Robert Service Way. The right hand turn signal of the truck had been activated.

[10] Cst. Miller then observed the truck swerve slightly towards the center line of the two lane roadway and then possibly again, just prior to it moving to the right and entering into the traffic circle. The right hand turn signal remained on from the time the truck began its entry onto Robert Service Way until just before it entered the traffic circle.

[11] Once in the traffic circle, the truck did not remain in the driving lane while it proceeded past the first exit and continued straight onto Robert Service Way. Rather, it proceeded with at least two wheels on the yellow-painted and raised curb/median that separated the driving lane from the central median area.

[12] Cst. Miller activated his emergency lights and Mr. Wabisca pulled the truck over uneventfully. He ran the plates and noted that they were registered to a different vehicle than the truck.

[13] After approximately two minutes, Cst. Miller approached the truck in order to speak to Mr. Wabisca. He noted that the windows were heavily tinted and that the driver's window was rolled up. He considered that to be unusual, as generally drivers are waiting for him with their window rolled down. He said that generally in his experience, drivers are looking in the mirror in order to see when he is approaching the vehicle.

[14] Cst. Miller stated that he had to wait one to two seconds at the window and then knocked on the window to get Mr. Wabisca's attention. Once the window was rolled down, Cst. Miller recognized Mr. Wabisca, who presented him with the driving and vehicle documentation that he was holding in his hand.

[15] I have reviewed the video recording that captured the entirety of the driving that was observed by Cst. Miller, as well as his initial interactions with Mr. Wabisca.

[16] Cst. Miller and Mr. Wabisca had the following exchange, as best discerned from the testimony of Cst. Miller and the video recording:

Cst.:	Hows it going tonight
Wabisca:	just came in from Sima
Cst.:	came in from Sima
Wabisca:	yeh
Cst:	okay. You were driving at a pretty high speed and you were swerving.
Wabisca:	Johnny Cash will do that to you
Cst.:	What's that
Wabisca:	Johnny Cash will do that

Cst.: Johnny Cash will do that eh

Wabisca: yeh

Cst.: Okay and where are you heading tonight

Wabisca: I just came in …. (indiscernible) for coffee and doughnuts

Cst.: What's going on out at Sima

Wabisca: uh the hill climb…out there all night

Cst.: okay have you had anything to drink today

Wabisca: earlier today yes

Cst.: earlier today. What time

Wabisca: like noonish

Cst.: noonish

Cst.: Well Mr. Wabisca, you and I know each other

Wabisca: yeh

Cst.: so right now what I am going to do is considering the driving evidence that I saw and the fact that you told me that you consumed alcohol earlier today I'm going to issue what is called a breath demand…

[17] Cst. Miller testified that the basis upon which he suspected that Mr. Wabisca had alcohol in his body and therefore read him the approved screening device demand was as follows:

- the driving evidence which included:
    - a last second swerve around the pedestrian, and the additional swerving;
    - the right-turn signal light left on;
    - the truck did not slow down as Cst. Miller approached from behind;

- the speeding over 50 km/h;
- the driving over the median at the traffic circle;
- the truck travelling down the center of two lanes;
- the hour of the day in that there not usually many vehicles on the road at that time;
- the delay in opening the truck window to speak to him;
- the non-responsive answers which Cst. Miller thought may result from confusion; and
- the admission to earlier consumption of alcohol as, in his experience, impaired drivers usually underreport their consumption. Cst. Miller testified that he did not believe that Mr. Wabisca's last drink was as long ago as Mr. Wabisca stated.

[18] Cst. Miller agreed that he did not notice a smell of alcohol coming from Mr. Wabisca or the inside of the truck. He also agreed that it was not particularly windy at the time. He stated that he was not comfortable getting too close to Mr. Wabisca in the truck, as he was uncertain as to whether anyone was in the back seat.

[19] Cst. Miller also agreed that he did not notice any other indicia consistent with the consumption of alcohol.

Analysis

[20] The question for me is whether the admission by Mr. Wabisca as to having consumed alcohol some 16 hours earlier, coupled with the driving pattern that was observed, was sufficient to have provided Cst. Miller with the requisite reasonable suspicion to demand that Mr. Wabisca provide a sample of his breath into an approved screening device.

[21] The legal requirement to make such a demand was recently reviewed by Chisholm J. in ***R.*** v. ***Sidney***, 2018 YKTC 37 as follows:

> 18 Section 254(2)(b) of the *Criminal Code* provides that a peace officer who has reasonable grounds to suspect that a person has alcohol in their body and has operated a motor vehicle in the preceding three hours, may require the person to comply with an approved screening device demand.
>
> 19 The decision in *R. v. Loewen*, 2009 YKTC 116, considered the requirements for making a demand:
>
> > 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.
>
> 20 As stated in *R. v. Chehil*, 2013 SCC 49:
>
> > 26 Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:
> >
> > > The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
>
> 21 In *Schroeder v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 2366, the Court stated:
>
> > 14 It is the consumption of alcohol alone that provides grounds for the demand, not its amount or behavioural consequence...All that the officer requires is a reasonable suspicion that the person operating the vehicle had alcohol in their body. The officer does not have to believe that the accused has committed any offence. ...

> 22 In fact, the Ontario Court of Appeal has found that it is not a precondition to a valid screening device demand that the driver have the odour of an alcoholic beverage on his or her breath (see, for example, *R. v. Zoravkocic* (1988), 112 O.A.C. 119 (ONCA), and *R. v. Hryniewicz*, [2000] O.J. No. 436 (ONCA)).

[22] The initial swerve of Mr. Wabisca's truck to avoid striking or coming to close to the bike-pushing pedestrian is noticeable. Mr. Wabisca's truck was coming from directly under the street light into a darker area where the bus pull-out lane was situated. The pedestrian was walking in the bus pull-out near, but not within, the curb driving lane. The only visible vehicles on the road were Cst. Miller's police cruiser and Mr. Wabisca's truck.

[23] While the swerving of the truck is somewhat sudden, it is not dramatic. It would appear to be consistent with a late observation of the pedestrian by Mr. Wabisca. I appreciate that the pedestrian is wearing a reflective vest that was clearly illuminated by Cst. Miller's headlights after he performed a U-turn. I am unable to state with any certainty as to how visible the pedestrian would have been to Mr. Wabisca as he proceeded under the street light, at the same time as he likely would have been observing Cst. Miller's vehicle proceeding towards him. I note from the video-recording that there were several other reflective items visible in the same direction the pedestrian was travelling that made the pedestrian less singularly visible.

[24] This said, I expect that a highly attentive driver would likely have been able to pass by the pedestrian with a less noticeable swerve. I can appreciate, however, that at this time of the morning, any driver would likely not be expecting to encounter a bike-pushing pedestrian walking along the 2nd Avenue roadway.

[25] The other observations of swerving along 2nd Avenue and Robert Service Way are minor and fairly insignificant, although with careful attention, I find are somewhat observable on the video recording. I appreciate that in real time the observations would have been somewhat different than what I am seeing.

[26] The travel down the centre of 2nd Avenue is also noticeable, as is the speed of the truck. I consider that there is no other observable traffic and, at that time of day, not likely to be much in the way of traffic. While not lawful, in that the truck was required to be operated within a driving lane, and not straddling two lanes, there was no danger or hazard that resulted, or was likely to result, given the circumstances.

[27] The lanes were not clearly marked by visible line markings, only really apparent by usage indicators.

[28] The right turn signal light that continued long after the turn was completed was certainly noticeable. It would appear that the automatic disengagement mechanism failed to operate immediately. This said, I expect that at some point, many drivers may have on occasion experienced the same occurrence.

[29] The manner in which Mr. Wabisca executed his entry into and exit out of the traffic circle was certainly not what one would expect to see if Mr. Wabisca had been aware that Cst. Miller was following him in his police cruiser. Mr. Wabisca basically executed a shortcut through the traffic circle driving over the curb/median with the driver side wheels, with the passenger side wheels barely on the roadway proper.

[30] There is no evidence that driving over the raised median as he did constituted an offence under the Yukon *Motor Vehicle Act*, R.S.Y. 2002, c. 153.[1]

[31] While Cst. Miller felt that Mr. Wabisca's answers to the questions asked of him were somewhat non-responsive and perhaps an indication of confusion related to alcohol consumption on Mr. Wabisca's part, I see nothing in Mr. Wabisca's answers that in any meaningful way supports the conclusion drawn by Cst. Miller.

[32] I also am not troubled by the brief delay in noticing Cst. Miller at the driver door. There was a long delay in Cst. Miller approaching the truck and it is obvious that during this delay Mr. Wabisca was locating his documentation in order to provide it to Cst. Miller promptly.

[33] Cst. Miller certainly had grounds to activate his emergency lights and detain Mr. Wabisca at roadside in order to commence an investigation. The apparent excessive speed at which the truck was being operated, and the driving down the centre of the four-lane 2nd Avenue clearly provided grounds for the stop.

[34] Coupled with the other observations made by Cst. Miller, there was certainly a basis for him to commence an impaired driving investigation. I accept that Cst. Miller had a subjective suspicion that Mr. Wabisca may have alcohol in his body.

[1] What Mr. Wabisca drove over is referred to in the Yukon as a "truck apron" which is designed: "…to help large vehicles get through the roundabout". (***Yukon Driver's Basic Handbook*** *Cars and Light Trucks*, Chapter 4).

[35] I find, however, that, viewed objectively, the subjective suspicion of Cst. Miller did not amount to a reasonable suspicion such as would justify the demand that he provide sample of his breath into a roadside screening device.

[36] Despite speaking to Mr. Wabisca from a fairly close proximity, Cst. Miller did not make any observations consistent with the consumption of alcohol. In addition to the absence of any odour of liquor, there was no notation of slurred speech, flushed face, bloodshot eyes, fumbling with documents, or any other indicia with respect to Mr. Wabisca's person consistent with the consumption of alcohol. To some extent, the absence of these and other indicia of alcohol consumption are contra-indicators to the issue of the presence of alcohol in Mr. Wabisca's body.

[37] In saying this, I am cognizant that none of these indicia, including the presence of an odour of liquor, are required or necessary in order for a reasonable suspicion to exist so that the roadside screening device demand can be provided. Everything that a police officer observes must be taken into account. Factors, which on their own, are unremarkable and possibly consistent with innocent explanations, need to be considered in the constellation of all the other factors and can, as a result, amount to a basis for a reasonable suspicion to be formed.

[38] Mr. Wabisca's admission that he had consumed alcohol approximately 16 hours earlier did not include any information as to how much alcohol he had consumed or the nature of the alcohol. It was not reasonable to suspect that an unspecified amount of alcohol consumed approximately 16 hours earlier would still be in Mr. Wabisca's body.

[39] I appreciate that Cst. Miller's experience is that impaired drivers are often not truthful when stating their alcohol consumption to a police officer. Mr. Wabisca may not have been truthful. Cst. Miller was not entitled, however, to simply use his experience to disbelieve Mr. Wabisca and reasonably suspect that he presently had alcohol in his body. This includes his personal experience with Mr. Wabisca. I am not questioning Cst. Miller's assertion that his prior knowledge of Mr. Wabisca, had any impact on his decision to make the roadside screening device demand to Mr. Wabisca.

[40] In my opinion, the other observations of Cst. Miller do not, when considered with this admission, make Cst. Miller's subjective suspicion objectively reasonable.

[41] On the information that he had, Cst. Miller was entitled to continue his impaired driving investigation, and further detain Mr. Wabisca for the purpose of doing so. If he had done so, he may have been able to observe other indicia of alcohol consumption that would therefore, have raised his subjective suspicion to an objectively reasonable suspicion.

[42] He was not, however entitled to detain Mr. Wabisca for the purpose of requiring him to provide a sample of his breath into a roadside screening device, because he did not have a reasonable suspicion and, as such, Mr. Wabisca was arbitrarily detained.

[43] The unlawful detention commenced from the time that Mr. Wabisca was advised that he was required to provide a breath sample into a roadside screening device at least until a "Fail" reading was recorded on the approved screening device.

Section 24(2)

[44] With respect to this *voir dire*, the evidence counsel for Mr. Wabisca has requested be excluded is the "Fail" result that was registered on the approved screening device.

[45] Considering the factors set out in ***R.*** v. ***Grant***, 2009 SCC 32, relevant to determining whether the evidence of the "Fail" result should be excluded, I conclude that this evidence should be excluded from admission at trial.

[46] In ***R.*** v. ***Edzerza-MacNeil***, 2019 YKTC 3, I stated the following in reference to the s. 24(2) analysis:

> 70 Section 24 of the *Charter* reads:
>
> > (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
> >
> > (2) 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.
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> …
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> 72 As I stated in ***Roberts*** [2019 YKTC 2] in paras. 57 - 60:
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> > 57 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 into disrepute.

58 In para. 86 of ***Sakaraveych*** [2017 ONCJ 669], (referring to ***R***. v. ***Pino***, 2016 ONCA 389 at para. 72), the Court stated that:

> In determining whether or not the evidence was "obtained in a manner that infringed or denied any rights or freedoms" of the applicant, the court should be guided by the following considerations:
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> > (1) the approach should be generous, consistent with the purpose of s.24(2);
> >
> > (2) the court should consider the entire "chain of events" between the accused and the police;
> >
> > (3) the requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of
> >
> > (4) the connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections;
> >
> > (5) but the connection cannot be either too tenuous or too remote.

59 The Court in ***Sakaraveych*** , referring to the decision in ***R***. v. ***Grant***, 2009 SCC 32, stated in para. 88 that:

> ... a Charter breach in and of itself brings the administration of justice into disrepute. However, in their view, subsection 24(2) was concerned with the future impact of the admission/exclusion of the evidence on the repute of the administration of justice. In other words, the court was concerned with whether admission/exclusion would do further damage to the repute of the justice system. In doing so, the court noted that the analysis required a long-term view, one aimed at preserving the integrity of the justice system and our democracy.

> 60 The three-part test established in ***Grant*** for assessing the impact of the admission of the evidence on society's confidence in the justice system requires a consideration of:
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> (a) the seriousness of the *Charter*-infringing state conduct;
>
> (b) the impact of the breach on the *Charte*r-protected interests of the accused; and
>
> (c) society's interest in the adjudication on the merits.

[47] In this case, Cst. Miller was polite, and there is no evidence that he was acting in any way in a manner that could be considered as demonstrating “bad faith”. The absence of “bad faith “and even the presence of “good faith”, does not, however, mean that the conduct of the state, as seen through the actions of Cst. Miller were not serious.

[48] The right to be free from unlawful detention at the hands of the State is an important principle and right that individuals in Canada can expect to live under.

[49] The ability to demand a roadside sample from a detainee into a roadside screening device is an infringement of the detainee’s right to counsel, saved only by the operation of s. 1 of the *Charter*. The reasonable suspicion standard is intended to allow for the investigative detention of an individual when there is a sufficient evidentiary basis to do so. The suspension of the *Charter*-protected right to counsel is intended to allow for this investigative detention due to the underlying societal interest in dealing with the issue of impaired driving. The underlying issue of the harm caused by impaired driving is of a serious nature; so also, however, is the right of individuals to be protected from state interference into personal autonomy. The detention of Mr. Wabisca without a

sufficient basis to do so is serious conduct by the state and militates in favour of exclusion.

[50] The impact of this breach on Mr. Wabisca's right to be free from unlawful detention also favours exclusion of the evidence. He was required to accompany Cst. Miller in order to provide a sample of his breath. He was detained for a further period of time in order to do so. He was unable to continue on his way free from state interference.

[51] I understand from the evidence and submissions of counsel that it took a significant amount of time to obtain the "Fail" result on the approved screening device. This increased the period of this detention. As no reason has been provided to explain this delay, in the absence of further evidence on this point, I certainly do not attribute it to either Mr. Wabisca or Cst. Miller. I am aware that this delay occurred and extended the period of detention. It is a factor for consideration.

[52] Mr. Wabisca was required to participate in the investigation by providing a sample of his breath. I appreciate that this is not a highly intrusive procedure, but it is a procedure nonetheless that constitutes a significant interference in the liberty of Mr. Wabisca.

[53] With respect to society's interest in having this matter adjudicated on the merits, the impact of exclusion of the evidence, I repeat what I stated in Roberts:

> 76 Generally speaking, this branch of the ***Grant*** analysis favours the admission of the evidence obtained following a *Charter* breach to be allowed into trial.

> 77 However, as stated in ***R***. v. ***McGuffie***, 2016 ONCA 365, (cited in para. 69 of ***Fountain***), where the first two steps of the ***Grant*** analysis make a strong case for exclusion, the third step will rarely if ever tip the balance in favour of inclusion. (see also ***Sivalingham***, at para. 33)
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> 78 It must also be remembered that the benefits of admission of the evidence in a particular case must be balanced against the impact upon the reputation of the administration of justice in the long term. (***Sakarevych***, para. 110)
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> 79 The negative impacts of impaired driving and the devastating impacts on individuals, families, and communities cannot be understated. Impaired driving is a serious offence with all-too-often tragic consequences. It is important to ensure that individuals who are committing the offence of impaired driving are brought before the courts and dealt with according to law.
>
> 80 It is also important, however, that individuals who are accused of committing serious criminal offences are able to be arrested, prosecuted and held accountable for their actions. It is important that they do not escape being held accountable because their rights under the Charter have been infringed, and evidence necessary to the prosecution, such as in this case, is not excluded from trial.
>
> 81 Therefore it is important that police officers understand, when executing their duties, the importance of complying with the *Charter*-protected interests of individuals in Canadian society, which also means they must understand them.

[54] In my opinion, the importance of having Mr. Wabisca's case adjudicated on the merits, must be considered in light of society's interest in having all impaired driving cases adjudicated on the merits, something that requires police officers to make every effort to ensure they are acting within the jurisdiction and in compliance with the law.

[55] Excluding the evidence in one case may result in other investigations and cases doing so as a result of actions that may subsequently be taken by investigative authorities.

[56] I find that a balancing of the ***Grant*** factors requires that the evidence be excluded in order to avoid bringing the administration of justice into disrepute. In my opinion, at least in the Yukon, it will be the rare case where such evidence would not be excluded in similar circumstances.

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COZENS T.C.J.