Citation: *R. v. Tom,* 2024 YKTC 23

Date: 20240801
Docket: 23-00482
Registry: Whitehorse
Heard: Carmacks

**IN THE TERRITORIAL COURT OF YUKON**
Before His Honour Judge Phelps

REX

v.

DAVID ALEX TOM

Appearances:
William McDiarmid — Counsel for the Crown
Amy Steele — Counsel for the Defence

**RULING ON *CHARTER* APPLICATION AND REASONS FOR JUDGMENT**

[1] David Alex Tom is before the Court on a three-count Information alleging that on or about September 27, 2023, he committed offences contrary to ss. 320.14(1)(a), 320.14(1)(b) and 320.18(1)(a) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Mr. Tom alleging the violation of his rights contrary to ss. 8 and 9 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* (the "*Charter*"). The parties agreed to proceed with a blended *voir dire*.

[3] Crown presented two witnesses, one civilian and one RCMP member, on the *voir dire*. Defence did not present evidence. The parties agreed that the decision on the *voir dire* would be determinative of the offence contrary to s. 320.14(1)(b) of the *Criminal Code.*

[4] The investigation of Mr. Tom began with a call on September 27, 2023, at approximately 8:30 a.m., to the Village of Carmacks RCMP from Helena Belanger. Ms. Belanger reported that Mr. Tom was intoxicated and sleeping in his car which was parked in her driveway. While on route to Ms. Belanger's residence, the RCMP located Mr. Tom driving his vehicle and he was arrested for the impaired operation of a motor vehicle contrary to s. 320.14(1)(a) of the *Criminal Code*.

[5] Mr. Tom asserts that the investigating officer did not have the requisite reasonable grounds to arrest him and in doing so breached his s. 9 *Charter* rights. There was a delay in making the s. 320.28(1)(a)(i) *Criminal Code* demand to Mr. Tom for samples of his breath, which, along with the absence of reasonable grounds to make the demand, Mr. Tom argues invalidates the lawfulness of the resulting search and constitutes a breach of his s. 8 *Charter* rights.

**Evidence of Helena Belanger**

[6] Ms. Belanger has been a resident of Carmacks for 30 years where she resides with her husband and her son. She has known Mr. Tom for over 25 years as he is a friend of her husband and has visited her home on occasion.

[7] On September 27, 2023, at approximately 3:00 a.m., Mr. Tom attended at Ms. Belanger's home and the door was answered by her son. Mr. Tom was asking for her husband, and Mr. Tom was advised by her son that her husband would not come to the door as he had gone to bed. Mr. Tom returned at 4:00 a.m. again asking for her husband and was again advised by her son that he could not speak to her husband. He was advised that if he came back again, the RCMP would be called.

[8] Ms. Belanger stated that Mr. Tom had done this previously, showing up in the middle of the night in an intoxicated state and looking for a ride home. She did not interact with him on this occasion but could hear the conversation due to the proximity of her bedroom to the front door, and believed he was intoxicated. When she got up to go to work in the morning, Mr. Tom was sleeping in his vehicle in their driveway. She called the RCMP to report him when she arrived at work at approximately 8:30 a.m.

**Evidence of Cpl. David MacNeil**

[9] Cpl. David MacNeil has been an RCMP officer for over nine years and stationed in Carmacks for 18 months. He had a couple of dealings with Mr. Tom in Carmacks prior to this incident, when Mr. Tom was intoxicated, for mental health related calls. He has also talked to him since the incident when Mr. Tom has been sober. In his experience as an RCMP member, Cpl. MacNeil has been directly involved in an estimated 80 to 100 impaired driving files, and others in which he was indirectly involved to assist other members.

[10] On Sept 27, 2023, at approximately 8:30 a.m., Cpl. MacNeil was informed, through dispatch, of Ms. Belanger's complaint regarding Mr. Tom, who she believed to

be intoxicated and currently in his vehicle at her residence. Cpl. MacNeil knows Ms. Belanger to be a respected member of the community. He quickly changed into his uniform and headed towards Ms. Belanger's residence to locate Mr. Tom, treating the call as urgent given the time of day and the likelihood of children being on the roads going to school.

[11] As Cpl. MacNeil drove towards Ms. Belanger's residence, he turned on his emergency lights to pass a vehicle, and as he drove past the vehicle and turned off his lights, he noticed a car he believed to be driven by Mr. Tom turn off the road and into a driveway. He was familiar with the vehicle from previous interactions with Mr. Tom. Mr. Tom's vehicle was driving towards him on the roadway when he saw it. He followed the car into the driveway and confirmed it was the correct vehicle, locating Mr. Tom in the driver's seat.

[12] Mr. Tom began to exit the vehicle when Cpl. MacNeil directed him to stay in the vehicle, which he ignored, and then to get back into the vehicle, which Mr. Tom also ignored. He approached Mr. Tom outside the vehicle and advised him that he was investigating a complaint from Ms. Belanger.

[13] Cpl. MacNeil noted that Mr. Tom's eyes were "all glossy and red" to which Mr. Tom replied "I know". He asked Mr. Tom when he had his last drink, and Mr. Tom responded it was "about four hours ago".

[14] Cpl. MacNeil then looked inside the vehicle and noticed both opened and unopened beer cans within reach of the driver's seat. He advised Mr. Tom that "you smell like a brewery right now" to which Mr. Tom replied, "I know".

[15] Mr. Tom explained he was at Ms. Belanger's house at 4:00 a.m. trying to give them some dried meat when their boy told him that his dad was sleeping, so he decided to sleep in his car. Cpl. MacNeil advised Mr. Tom that he was under arrest for impaired operation of a motor vehicle. This was followed by advising him of his right to speak to a lawyer and the police warning.

[16] As Cpl. MacNeil was searching Mr. Tom after the arrest, who he decided not to handcuff, the homeowner, Joseph, exited the house and asked them to move the vehicles so he could get out with his own vehicle. There was time spent sorting out the moving and parking of Mr. Tom's vehicle, which the homeowner ultimately did. Mr. Tom was non-responsive to the directions of Cpl. MacNeil and proceeded with actions that included hugging Joseph, changing his coat by taking it off and putting it in the vehicle, followed by retrieving his raincoat from the vehicle.

[17] Cpl. MacNeil asked Mr. Tom if there was anything of value in the car he would like Joseph to take before it is towed, and Mr. Tom requested his wallet. Cpl. MacNeil searched for the wallet as requested by Mr. Tom, ultimately not locating it in the vehicle. He then checked in with dispatch regarding his status and drove to the detachment with Mr. Tom. While driving, Cpl. MacNeil explained the breath demand to Mr. Tom in plain language from memory, including what was going to happen and that he would formally read the demand to him at the detachment.

**Detailed Timeline of Events**

[18] The police vehicle Watchguard audio and video recording, which captured audio of the investigation with a portable microphone attached to Cpl. MacNeil, was entered as an exhibit. The recording depicts the following timeline of events on a 24-hour clock:

> 8:41:23 – Cpl. MacNeil stopped the police vehicle behind Mr. Tom's vehicle which had come to a stop with Mr. Tom seated in the driver's seat. Mr. Tom opened the door of his vehicle as the police vehicle came to a stop.
>
> 8:41:25 – Cpl. MacNeil loudly told Mr. Tom to remain in the vehicle, as Mr. Tom continued to exit the vehicle and stand. Cpl. MacNeil then directed him to get back into the vehicle, which Mr. Tom did not comply with.
>
> 8:41:30 – Cpl. MacNeil approached and was face to face with Mr. Tom and advised him of the purpose for the stop and the call received that he was sleeping in his car and bothering Ms. Belanger all night.
>
> 8:42:35 – Cpl. MacNeil placed Mr. Tom under arrest for impaired operation of a motor vehicle.
>
> 8:43:20 - Cpl. MacNeil finished advising Mr. Tom of his right to counsel and read him the police warning.

8:43:30 - Cpl. MacNeil advised Mr. Tom he was not going to handcuff him and started a search of his person by having Mr. Tom disclose items in his pockets that might be dangerous.

8:43:50 - Cpl. MacNeil was finishing the search when the homeowner, Joseph, exited the house and approached. Joseph suggested a location to park Mr. Tom's vehicle on the property so that he could get his own vehicle out.

8:44:35 - Cpl. MacNeil was trying to get Mr. Tom to comply with direction while also speaking to Joseph about moving Mr. Tom's vehicle. Mr. Tom proceeded to hug Joseph and speak with him, then started to follow Cpl. MacNeil to the police vehicle. About halfway there, Mr. Tom took off his jacket and returned to his car to leave it there. Cpl. MacNeil wanted him to have a jacket in case it was cold in the police station, so Mr. Tom entered the vehicle to get a different jacket.

8:45:19 - Cpl. MacNeil confirmed with Mr. Tom that he could take items from the car if he wanted to bring them with him.

8:46:25 - Cpl. MacNeil placed Mr. Tom in the police vehicle and then attended to get the car key from Joseph, who had parked the car out of the way, and advised him that the vehicle would get picked up by police later in the day.

8:47:10 - Cpl. MacNeil asked Mr. Tom if there was anything of value in the vehicle that he wanted removed and left with Joeseph before they departed for the detachment. Mr. Tom advised that his wallet was in the glove box and asked for it to be left with Joseph.

8:48:25 - Cpl. MacNeil confirmed that there was no wallet in the car but that he had found some ammunition which he gave to Joseph to hold onto.

8:48:45 – Mr. Tom told Joseph that he is going to get locked up when Cpl. MacNeil advised him that he will be able to go home when they are done. There is an ensuing conversation between Joseph and Mr. Tom about the car, his wife's need for the car, and what was going to happen. This is followed by Mr. Tom pleading with Cpl. MacNeil not to arrest him.

8:50:00 - Cpl. MacNeil radioed a report on the investigation status to dispatch and advised that he was returning to the detachment. He also requested a breath technician meet him at the detachment.

8:51:05 - Cpl. MacNeil began driving to the detachment. Mr. Tom asked Cpl. MacNeil two consecutive times if Cpl. MacNeil had his cigarettes and rain jacket, and Cpl. MacNeil confirmed that he did.

8:52:10 - Cpl. MacNeil advised Mr. Tom of the breath demand in plain language, stating that he would read it to him at the detachment when

> they were out of the vehicle and did not have the barrier between them.
>
> Mr. Tom indicated an understanding of the demand.
>
> 8:53:40 - Cpl. MacNeil parked the police vehicle in the detachment garage and then radioed dispatch to provide an update on their location.

[19] At the detachment, Cpl. MacNeil did a query on Mr. Tom and discovered that he was prohibited from driving. This was followed by rechartering Mr. Tom and giving him another opportunity to contact counsel, which was declined. Cpl. MacNeil also formally read the breath demand with the prepared RCMP language to Mr. Tom at 8:59 a.m.

[20] Mr. Tom proceeded to provide three samples of his breath, was served a Certificate of Qualified Technician document, and ultimately driven to his residence at 11:05 a.m.

**Did Cpl. MacNeil have the requisite reasonable grounds to arrest Mr. Tom?**

[21] The Ontario Court of Appeal addressed the test when assessing if a police officer held the requisite reasonable grounds to arrest in an impaired driving case in *R. v. Bush*, 2010 ONCA 554, at paras. 47 and 48:

> [47] There is no necessity that the defendant be in a state of extreme intoxication before the officer has reasonable and probable grounds to arrest: R. v. Deighan, [1999] O.J. No. 2413, 45 M.V.R. (3d) 90 (C.A.), at para. 1. Impairment may be established where the prosecution proves any degree of impairment from slight to great: R. v. Stellato (1993), 12 O.R. (3d) 90, [1993] O.J. No. 18 (C.A.), affd (1994), 18 O.R. (3d) 800, [1994] 2 S.C.R. 478, [1994] S.C.J. No. 51. Slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function, whether impacting on perception or field of vision,reaction or response time, judgment and regard for the rules of the road: Censoni, at para. 47.

> [48] The test is whether, objectively, there were reasonable and probable grounds to believe the suspect's ability to drive was even slightly impaired by the consumption of alcohol: see R. v. Stellato, supra; Moreno-Baches and Wang, at para. 17...

[22] The Court in *Bush* addressed the question of whether or not a trial judge should consider each of the police officer's individual grounds for arrest in isolation when assessing objective reasonableness at paras. 55 and 56:

> [55] In assessing whether reasonable and probable grounds existed, trial judges are often improperly asked to engage in a dissection of the officer's grounds looking at each in isolation, opinions that were developed at the scene "without the luxury of judicial reflection": Censoni, at para. 43; also Jacques, at para. 23. However, it is neither necessary nor desirable to conduct an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable: R. v. McClelland, [1995] A.J. No. 539, 165 A.R. 332 (C.A.).
>
> [56] An assessment of whether the officer objectively had reasonable and probable grounds does not involve the equivalent of an impaired driver scorecard with the list of all the usual indicia of impairment and counsel noting which ones are present and which are absent as the essential test. There is no mathematical formula with a certain number of indicia being required before reasonable and probable grounds objectively existed: Censoni, at para. 46. The absence of some indicia that are often found in impaired drivers does not necessarily undermine a finding of reasonable and probable grounds based on the observed indicia and available information: R. v. Costello, [2002] O.J. No. 93, 22 M.V.R. (4th) 165 (C.A.), at para. 2; Wang, at para. 21.

[23] Accordingly, I will refrain from addressing each factor in isolation, looking at possible alternative explanations for the observation, and instead look at the totality of the observations of Cpl. MacNeil. It is necessary, however, to determine which of the observations relied on are purely subjective and which are capable of contributing to objective reasonableness.

[24] This Court addressed the test for objective reasonableness, which includes the requirement to look at the totality of the circumstances, in *R v. Golebeski*, 2019 YKTC 50, providing a helpful summary of factors to consider at para. 26:

> In terms of the objective branch of the test, as I noted in *R. v. Wabisca*, 2018 YKTC 7, the assessment of objective reasonableness requires consideration of the following factors (at para. 4):
>
> - The test is whether there are reasonable grounds to believe the accused's ability to drive was impaired by alcohol to even a slight degree;
> - Objective reasonableness is assessed from the perspective of a reasonable person placed in the position of the officer, with the officer's training, knowledge and experience;
> - The assessment must be based on the totality of the circumstances;
> - The question is whether the officer's belief was reasonable at the time the belief is formed, not whether it was subsequently proven to be accurate;
> - The reasonableness standard is defined as being more than a mere suspicion, but less than either proof beyond a reasonable doubt or the civil standard of proof on a balance of probabilities.
>
> (See *R. v. Bush*, 2010 ONCA 554; *R. v. Nguyen*, 2017 BCPC 131; *R. v. Lavallee*, 2016 YKTC 57)

[25] Cpl. MacNeil articulated the observations that led to his finding that Mr. Tom's ability to operate his vehicle was impaired by alcohol and that gave him the reasonable grounds to arrest as follows:

- The call to the RCMP from a long-standing member of the community saying Mr. Tom was intoxicated;

- Mr. Tom turning into a driveway immediately upon seeing the police vehicle emergency lights;

- Mr. Tom ignoring the directions from Cpl. MacNeil not to get out of the vehicle, and then ignoring the direction to get back into his vehicle;

- The odour of liquor that he could smell on Mr. Tom's breath, which increased as he spoke with him. He did not consider it to be stale, rather moderately fresh. The stale odor of alcohol, in his experience, is very distinct;

- The liquor that was observed inside the vehicle, opened and unopened, within reach of the driver;

- Mr. Tom's speech was garbled and hard to understand. He had to ask Mr. Tom to repeat himself during the interaction and had to focus on what Mr. Tom was saying in order to understand him. His speech was similar to other interactions Cpl. MacNeil had with Mr. Tom on occasions when Mr. Tom was intoxicated;

- The physical issues of his eyes. In his experience, Cpl. MacNeil typically looks at eyes with impaired drivers as one of the biggest tells of impairment. Mr. Tom's eyes depicted veiny redness, which, in his experience, is quite distinct with impairment; and

- The look of Mr. Tom, in general, exhibited signs of impairment.

[26] The defence casebook includes *Golebeski*, in which the Court reviewed the reasonable grounds on an impaired driving investigation. I note that the case is distinguishable on two main points. First, when addressing slurred speech, the following is stated at para. 13:

> In considering the Officer's evidence with respect to his stated grounds, I conclude that there are issues with his evidence regarding slurred speech. Firstly, when giving his evidence, he makes no mention of slurred speech when describing the two brief conversations he had with Ms. Golebeski in her vehicle and in the ambulance. Instead, he mentions it almost as an afterthought when asked to enumerate his grounds. Similarly, the Officer made no mentioned of slurred speech in his notes or in his Supplementary Occurrence Report. It is not until some, unspecified, time later when the Officer wrote the Crown Brief that he first makes note of slurred speech. When one considers that both smell of liquor and blood shot eyes are indicative of consumption, while slurred speech is indicative of impairment, it is curious that the Officer would not have highlighted slurred speech in both his evidence and notes.

[27] Cpl. MacNeil testified before this Court, at length, as to his observations of Mr. Tom's speech being garbled and hard to understand. It was far from an afterthought, as was the case in *Golebeski*, and the findings in *Golebeski* are of little assistance to this case when assessing Mr. Tom's speech as a factor.

[28] In addition to his elaboration on what he meant in relation to the speech being garbled and hard to understand, Cpl. MacNeil had previous dealings with Mr. Tom when Mr. Tom was intoxicated to compare the speech to. Cpl. MacNeil was clear and fair in his testimony, which included highlighting the requirement on his part to concentrate on Mr. Tom's speech in order to understand him. I am satisfied that Cpl. MacNeil clearly articulated his concern with Mr. Tom's speech, noted as "garbled" as opposed to "slurred", and linked his observations to intoxication.

[29] The defence casebook also includes the decision of this Court in *R. v. Lavallee*, 2016 YKTC 57, wherein the Court concluded it had significant concerns with the exaggerated evidence of the investigating officer, describing the accused as "grossly" intoxicated, as stated at para. 37:

> Notwithstanding my otherwise positive assessment of Cst. Jury's testimony, I find that the symptoms of intoxication, as testified to, fall far short of what I almost invariably have placed before me when an individual is stated to be grossly intoxicated. Cst. Jury was never asked to explain what she meant when she used these words to describe Mr. Lavallee. I would generally expect to see more than the driving pattern described here, the odour of liquor from Mr. Lavallee, which was not described as being either strong, moderate or weak, the leaning against the boat trailer and the dishevelled appearance.

[30] The concern with the lack of evidence to satisfy the purported observations of the officer led to the Court finding that the evidence did not meet the threshold of objective reasonableness. The Court in *Lavallee* was aware of the test to be applied in the circumstances, noting at para. 38:

> Of course, the test for impairment is far below a requirement of gross intoxication; any degree of impairment from slight to great is sufficient in the context of impaired driving offences (*Bush*, para. 47, citing *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.)).

[31] Unlike in *Lavallee*, Cpl. MacNeil did testify, at length, to his reasonable grounds for arrest in both direct and cross-examination, without wavering, and in a manner that was consistent and fair throughout. He did not, at any point, exaggerate his observations as was the case in *Lavallee*.

[32] I find that Cpl. MacNeil, based on the articulated grounds, subjectively held reasonable grounds at the time of arrest.

[33] When assessing whether or not the grounds for arrest were objectively reasonable, I will not consider the reference that "the look of him in general exhibited signs of impairment." Without explanation, which was not provided to the Court, I find there is insufficient evidence regarding this factor.

[34] I was urged to further disregard that Mr. Tom turned into a driveway immediately upon seeing the police vehicle emergency lights. It is argued that he knew the homeowner and it is possible that he was driving to the location intentionally. I note that Joseph was not expecting company based on his need to move Mr. Tom's vehicle in order to get his vehicle out of the driveway. Cpl. MacNeil also elaborated on the timing of the turn, and that it would be an incredible coincidence that Mr. Tom reached his intended destination at the exact time that the emergency lights were turned on. I find that Mr. Tom should be given the benefit of the doubt and I will exclude this factor from consideration of the objective reasonableness of the grounds.

[35] Cpl. MacNeil is a seasoned police officer with considerable experience investigating impaired driving. He had previous interaction with Mr. Tom when Mr. Tom was intoxicated which he relied on in his assessment of the reasonable grounds to arrest. His ability to articulate the remaining grounds and link them to his belief of impairment, viewed together, meet the threshold test set out in *Bush* and were objectively reasonable.

[36] I find that Cpl. MacNeil's reasonable grounds for the arrest of Mr. Tom were subjectively and objectively reasonable and there was not a breach of Mr. Tom's s. 9 *Charter* rights.

**Was the 320.28 *Criminal Code* demand made to Mr. Tom as soon as practicable?**

[37] A plain language s. 320.28 *Criminal Code* demand was made by Cpl. MacNeil to Mr. Tom during the drive to the detachment. This was made at 8:52 a.m. and the subsequent demand reading language from a prepared card was made at 8:59 a.m., a difference of seven minutes.

[38] The Ontario Superior Court of Justice addressed the wording necessary to make a valid breath demand in *R. v. Grant*, 2014 ONSC 1479, at para. 29:

> I agree with the respondent that the fact the officer did not say the "magic words" of her "ability to operate a motor vehicle being impaired by the consumption of alcohol" was not fatal to his belief grounds. It is implicit in the officer's evidence in examination-in-chief that he had the requisite reasonable and probable grounds to make the *Intoxilyzer* breath demand and arrest the appellant. It is neither necessary for the officer to quote verbatim from the *Criminal Code* section nor to use any 'magic words' nor any mandatory incantation.

[39] The Saskatchewan Court of Queen's Bench addressed this issue in *R. v. Kachmarski*, 2014 SKQB 39, at para. 35:

> There is no statutorily prescribed text for a s. 254(3) breathalyser demand. It is sufficient if the person to whom the demand is made was given an unambiguous message of what is required. See *R. v. Tornsey*, 2007 ONCA 67, 217 C.C.C. (3d) 571 at paras. 6-7; *R. v. Humphrey* (1977), 38 C.C.C. (2d) 148, [1977] O.J. No. 1148 (QL) (Ont. C.A.); and *R. v. Ghebretatiyos* (2000), 8 M.V.R. (4th) 132, [2000] O.J. No. 4982 (QL) (Ont. Sup. Ct.).

[40] This Court addressed the wording used by a peace officer when making a breath demand in *R. v. Gaven*, 2019 YKTC 46, at para. 26:

> The law is clear that the precise words of a breath demand do not have to be proved as long as the person receiving the demand understands what is being requested. In *Torsney*, the Court stated at para. 6:
>
> > We agree with the summary conviction appeal judge that the missing word "forthwith" did not render the demand invalid. The demand need not be in any particular form, provided it is made clear to the driver that he or she is required to give a sample of his or her breath forthwith. This can be accomplished through words or conduct, including the "tenor [of the officer's] discussion with the accused". See *R. v. Horvath*, [1992] B.C.J. No. 1107 (B.C.S.C.) (A.D.). What is crucial is that the words used be sufficient to convey to the detainee the nature of the demand. See *R. v. Ackerman* (1972), 6 C.C.C. (2d) 425 at 427 (Sask. C.A.) and *R. v. Flegel* (1972), 7 C.C.C. (2d) 55 at 57 (Sask. C.A.).

[41] I agree with these authorities for the proposition that the wording used by a peace officer when making a breath demand does not have to follow a script. While the Court in *Gaven* was dealing with a s. 320.27 *Criminal Code* demand, I find that the principle applies equally to a s. 320.28 *Criminal Code* demand. It was made clear to Mr. Tom that he was required to provide two samples of his breath for the purpose of analysis at the detachment, which he ultimately did. Mr. Tom acknowledged his understanding of what he was being told by Cpl. MacNeil.

[42] I find that Cpl. MacNeil made a valid s. 320.28 *Criminal Code* demand at 8:52, approximately nine and one-half minutes after placing Mr. Tom under arrest.

[43] A demand made 12 to 14 minutes after the officer formed the reasonable grounds was determined to be made as soon as practicable in the British Columbia Supreme Court decision *R. v. Naidu*, 2010 BCSC 851, upheld by the British Columbia Court of Appeal in *R. v. Naidu*, 2012 BCCA 150. The facts before the Court are addressed at paras. 6 and 7:

> 6 The evidence of Constable Hodgins is that he read the breath demand at 3:07 a.m. During the 12 minutes that passed, Constable Hodgins did the following:
>
> > *He arrested the appellant, placed him in handcuffs and sat him in the back seat of the police cruiser.
> >
> > *He had a discussion with the appellant regarding wrist pain experienced by the appellant.
> >
> > *He went on his in-vehicle computer and checked the appellant's driver's licence with ICBC and did a records check on CPIC (Canadian Police Information Centre) and PRIME (Police Records Information Management).
> >
> > *He read the appellant his Charter rights using the official warning.
>
> 7 Constable Hodgins' evidence is that the computer search was to determine whether the appellant had any outstanding arrest warrants; whether there was any history of violence with the police; whether he had any contagious diseases; and whether he had any driving prohibitions.

[44] In finding that the demand met the “as soon as practicable” requirement, the Court in *Naidu* stated at para. 48:

> To accept the appellant's submission is to virtually read "forthwith" back into s. 254(3). The computer queries were related to the investigation of the appellant and took a reasonable amount of time. I am unable to say that there was any unreasonable delay. One of the decisions which the court in *Sullivan* referred to is *R. v. Vanderbruggen*, 29 M.V.R. (5th) 260, 206 C.C.C. (3d) 489, (Ont. C.A.). The court in that case said this at para. 16:
>
> > [16] To conclude, these provisions, which are designed to expedite trials and aid in proof of the suspect's blood alcohol level, should not be interpreted so as to require an exact accounting of every moment in the chronology. We are now far removed from the days when the breathalyzer was first introduced in Canada and there may have been some suspicion and scepticism about its accuracy and value and about the science underlying the presumption of identity. These provisions must be interpreted reasonably in a manner that is consistent with parliament's purpose in facilitating the use of this reliable evidence.

[45] The Ontario Superior Court of Justice addressed an 11-minute delay in *R. v. Duong*, 2015 ONSC 5676, stating the following with respect to the “as soon as practicable” requirement at para. 15:

> It is well established that the phrase "as soon as practicable" in this particular statutory context does not require that the demand for breath samples be made "as soon as possible," but only that the demand for breath samples be made "within a reasonably prompt time under the circumstances." The recognized touchstone for determining whether or not the demand was made as soon as practicable in the circumstances is whether the police acted reasonably having regard to the entire chain of events. See *R. v. Vanderbruggen*, at para. 12; *R. v. Mudry* (1979), 19 A.R. 379, 50 C.C.C. (2d) 518 (C.A.); *R. v. Ashby* (1980), 57 C.C.C. (2d) 348, 9 M.V.R. 158 (Ont.C.A.), leave denied, (1981) 37 N.R. 393 (S.C.C.); *R. v. Seed* (1998), 114 O.A.C. 326, 38 M.V.R. (3d) 44 (C.A.), at paras. 6-8; *R. v. Letford* (2000), 51 O.R. (3d) 737, 150 C.C.C. (3d) 225 (C.A.), at paras. 14-20; *R. v. Lemieux*, [2002] O.J. No. 979 (C.A.); *R. v. Schouten*, [2002] O.J. No. 4777, [2002] O.T.C. 1041 (S.C.J.); *R. v. Furlong*, 2011 ONSC 6707, 24 M.V.R. (6th) 149, at paras. 12-13.

[46] Cpl. MacNeil decided not to handcuff Mr. Tom when he placed him under arrest as Mr. Tom was not being combative and had been cooperative with Cpl. MacNeil during their previous encounters. This decision ended up adding to the delay as Mr. Tom was repeatedly non-compliant with oral directions given by Cpl. MacNeil, particularly once Joseph exited the house and joined them. Despite this, Cpl. MacNeil continued to deal with Mr. Tom in a fair manner by using oral direction.

[47] As can be seen in the timeline, Cpl. MacNeil continuously moved the investigation forward as he navigated the needs of Joseph to have Mr. Tom’s car moved out of the way, and the needs of Mr. Tom to get the jacket he was seeking as well as his valuables out of the vehicle. I am unable to find that any actions on the part

of Cpl. MacNeil were unreasonable given the circumstances or that they contributed to unreasonable delay in making the s. 320.28 *Criminal Code* demand to Mr. Tom.

[48] I find that the s. 320.28 *Criminal Code* demand made by Cpl. MacNeil to Mr. Tom was made in compliance with the requirement it be made "as soon as practicable".

[49] In the alternative, having reviewed the events set out in the timeline and the actions of Cpl. MacNeil up to 8:59 a.m., an additional almost seven minutes, I would have come to the same conclusion. This is particularly so given that some of the time was spent doing a background check on Mr. Tom and discovering that he was prohibited from driving, followed by confirming that Mr. Tom understood his jeopardy and his right to access counsel.

[50] I find that the demand made to Mr. Tom was compliant with the requirements of s. 320.28 of the *Criminal Code* and that the following breath samples taken from him did not violate his s. 8 *Charter* rights.

**Conclusion**

[51] A Driving Prohibition subjecting Mr. Tom to a driving prohibition of five years commencing October 27, 2021, was filed by the Crown. On the evidence that Mr. Tom was located by Cpl. MacNeil driving a motor vehicle on September 27, 2023, I find Mr. Tom guilty of Count 3 on the Information for the offence contrary to s. 320.18(1)(a) of the *Criminal Code*.

[52] A Certificate of Qualified Technician recording that Mr. Tom provided two samples of his breath into an approved instrument on September 27, 2023, resulting in

readings of 130 milligrams of alcohol in 100 millilitres of blood, was filed by the Crown. Accordingly, I find Mr. Tom guilty of Count 2 on the Information for the offence contrary to s. 320.14(1)(b) of the *Criminal Code*.

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PHELPS T.C.J.