

Citation: *R. v. Fotheringham*, 2016 YKTC 70

Date: 20160630  
Docket: 12-00448A  
Registry: Whitehorse

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

REGINA

v.

DANIEL ADAM FOTHERINGHAM

Appearances:  
Leo Lane  
Jennifer Cunningham

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] Daniel Fotheringham has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

[2] On July 12, 2012, at approximately 2:45 a.m. according to Cst. Brindamour-Carignan's report, RCMP officers were responding to a call in the Riverdale area of Whitehorse related to a possible intruder into a residence.

[3] Cst. Rouleau and Cst. Brindamour-Carignan were in one police vehicle. Cst. Brindamour-Carignan was an RCMP recruit on field training and Cst. Rouleau was her trainer at that time. Cst. Horbachewsky was in a separate vehicle following close behind.

[4] While en route to and in the vicinity of the call, Cst. Rouleau and Cst. Brindamour-Carignan observed a truck parked parallel to the curb on a residential street. The truck had its headlights and brake lights on and music blaring. They pulled their police cruiser up to the front of the vehicle and exited. Cst. Horbachewsky arrived as they were doing this and executed a U-turn to pull up behind Mr. Fotheringham's truck.

[5] Cst. Brindamour-Carignan stated that, after she exited the police vehicle, she noted Mr. Fotheringham's truck to be running. All three RCMP officers testified that they thought, given the location of the truck in proximity to the call they were responding to, that there might be a connection.

[6] At this point the focus of the RCMP officers was on investigating the truck and its occupant.

[7] As Cst. Rouleau approached the truck, at approximately 2:36:55 according to the Video Incident Capture System ("VICS") recording taken from Cst. Horbachewsky's police cruiser, he noticed that the windows of the truck were rolled up and an individual, later identified as Mr. Fotheringham, was slumped over the middle console. He noted that the vehicle was in "drive" and the door locks were down. Cst. Brindamour-Carignan remained several feet behind Cst. Rouleau.

[8] Cst. Rouleau and the other officers testified that they were concerned about Mr. Fotheringham's well-being due to the situation that they found him in and thought that he might be in distress.

[9] Cst. Rouleau knocked on the driver's window with his flashlight and shone it into the vehicle on strobe setting. The strobe light is known to have a positive impact on waking up individuals. It is extremely bright and flashes quickly.

[10] After not noting any response from Mr. Fotheringham, Cst. Rouleau broke the driver's window with the end of his baton. From the VICS recording, this occurred at 2:37:21. Cst. Rouleau was also speaking loudly at Mr. Fotheringham while he was at the vehicle window. Cst. Rouleau testified that he reached inside and rubbed the baton on the middle of Mr. Fotheringham's chest in what Cst. Rouleau described as the "stern rub" technique which he said was being forceful enough to be uncomfortable. I note, from the VICS recording, that Cst. Rouleau made several jabbing motions with the baton all within less than one second at 2:37:23 in what would be the sternum rub testified to. He did not lean into or reach his arm into the vehicle to do so, although the baton appears to have been extended for the purposes of doing so. Given the angle in which the baton was applied to Mr. Fotheringham, his chest would have had to have been accessible in a manner that meant "slumped over the console" would have been a sideways position and not facing down and away from the window.

[11] By 2:37:27, Mr. Fotheringham appears to be "awake". Cst. Rouleau told him to put the vehicle into park. The truck lurched forward at 2:37:29. This coincided with the time Cst. Horbachewsky arrived at the side of the truck on foot after exiting his vehicle. Cst. Horbachewsky's first words after arriving at the truck window were "what's going on here"? It appears that Mr. Fotheringham was able to put the vehicle into park as directed. Cst. Horbachewsky noted that the truck door was locked and Mr.

Fotheringham had his seatbelt on. Mr. Fotheringham did not attempt to drive the vehicle away.

[12] When the flashlight was shone in Mr. Fotheringham's face at 2:37:41, he raised his arm to block the strobe light. It appears from the VICS recording that Cst. Horbachewsky's flashlight was shining into Mr. Fotheringham's face before that, although Cst. Horbachewsky testified that he didn't recall using one. Nothing in particular turns on this.

[13] First Cst. Horbachewsky and then Cst. Rouleau yelled at Mr. Fotheringham that he was under arrest and told him to get out of the vehicle. This arrest occurred at 2:38:03. Cst. Rouleau advised Mr. Fotheringham that he was under arrest seconds after Cst. Horbachewsky did. Cst. Rouleau testified that in his mind the arrest was for impaired driving.

[14] Cst. Horbachewsky testified that he formed the opinion that Mr. Fotheringham was impaired and arrested him. Prior to forming his opinion he did not receive any information from Cst. Rouleau or Cst. Brindamour-Carignan in regard to their observations of Mr. Fotheringham. From the evidence, I infer that Cst. Horbachewsky formed his opinion prior to the arrest at 2:38:03 but only informed Mr. Fotheringham of the reason for the arrest, impaired driving, at 2:38:50 once Mr. Fotheringham was out of his truck.

[15] Cst. Horbachewsky provided Mr. Fotheringham a shortened version of his *Charter* rights from memory immediately after informing him of the reasons for the arrest.

[16] Cst. Rouleau testified that, notwithstanding that both he and Cst. Horbachewsky arrested Mr. Fotheringham at approximately the same time, it was Cst. Horbachewsky who formed the grounds for the arrest.

[17] Cst. Horbachewsky stated that Mr. Fotheringham did not initially respond to the requests to get out of the vehicle or other commands. He stated that Mr. Fotheringham had no reaction and was staring off into the distance. He felt that Mr. Fotheringham was “slow”. He could smell liquor emanating from the vehicle. He testified that Mr. Fotheringham was “laughing”, which he thought was not a normal reaction to the circumstances. Cst. Rouleau did not testify as to noting any laughing.

[18] In cross-examination, Cst. Horbachewsky stated that he could smell liquor both at the time Mr. Fotheringham was in the truck and talking through the broken window, and when Mr. Fotheringham was outside of the vehicle after his arrest. He acknowledged that his notes made at the time referred only to an odour of liquor when Mr. Fotheringham was outside of the vehicle. He testified, however, that the smell was coming from the inside of the vehicle when Mr. Fotheringham was inside it and it was only when he was outside the vehicle that it was noted as coming from his mouth.

[19] I note that Cst. Rouleau testified that he did not smell liquor until after Mr. Fotheringham had been arrested. Cst. Rouleau noted Mr. Fotheringham, while being confused, to have clear speech, and to be cooperative following his arrest.

[20] Cst. Brindamour-Carignan testified that there was an odour of liquor emanating from the vehicle and that Mr. Fotheringham appeared to be dazed and disoriented when

he got out of the vehicle. Cst. Brindamour-Carignan also testified that the strobe light could have a disorienting effect.

[21] She testified that while there was a strong odour of liquor emanating from Mr. Fotheringham while he was walking down the hallway at the RCMP detachment, she did not notice any signs of impairment.

[22] Cst. Horbachewsky testified that he had been involved in approximately 50 impaired driving investigations in the Yukon as of the date he resigned from the RCMP in April 2013. He had conducted approximately 13 of these as a qualified breath technician by that date. He stated that as an RCMP member he had the opportunity on a number of occasions to have contact with impaired and/or intoxicated individuals.

[23] Cst. Horbachewsky testified that he did not have a roadside screening device with him that day, and that he did not usually carry one. He stated that he would not have used a roadside screening device, had he had one, in any event.

[24] Cst. Horbachewsky was not aware that there was open liquor in the console of the vehicle until he had been advised of this, post-arrest, and after the truck had been searched by Cst. Rouleau. This occurred after Cst. Horbachewsky had placed Mr. Fotheringham into his police cruiser. The time he was informed of the open liquor in the vehicle was 2:40:58.

[25] While Cst. Horbachewsky was questioning Mr. Fotheringham outside of his truck after arresting him, Cst. Rouleau entered Mr. Fotheringham's truck and brought out an open bottle of beer obtained from the console and three bottles of beer with the caps on

that were located in the back seat area. He and Cst. Brindamour-Carignan poured these out on the road. Cst. Rouleau testified that he had observed the open liquor in the console and the beer in the back seat. It is not entirely clear on the evidence whether Cst. Rouleau noticed the bottles of beer when he was standing outside of the vehicle or after he had entered the vehicle to open the glove compartment to try to locate the registration for the vehicle.

[26] Cst. Horbachewsky testified that the only time he noted any slurring of Mr. Fotheringham's words was when Mr. Fotheringham first stated his name. His speech seemed normal to him after that.

[27] He stated that, subsequent to the arrest, he noted Mr. Fotheringham to have red eyes and other indicia of impairment. Cst. Horbachewsky stated later, however, that he noted the red eyes both while Mr. Fotheringham was in the truck and afterwards. Also, subsequent to the arrest he noted that Mr. Fotheringham had an odour of liquor on his breath and he appeared to be unsteady on his feet.

[28] Cst. Horbachewsky stated that it was Cst. Rouleau who told Cst. Brindamour-Carignan to read Mr. Fotheringham the breath demand and his *Charter* rights. This is also heard to some extent in the VICS recording. It appears from the recording that Csts. Horbachewsky and Rouleau agreed on this in order to allow Cst. Horbachewsky to act as the qualified breath technician for Mr. Fotheringham. As it turned out, Cst. Horbachewsky's designation was invalid on that date as per *R. v. Kroeker*, 2014 YKTC 31. The Crown therefore called an expert at the trial to remedy the loss of the

presumption in s. 258(1)(c). Defence did not present any significant challenge to the expert evidence.

[29] Cst. Horbachewsky testified that he would have told Cst. Brindamour-Carignan what he observed prior to and during the arrest of Mr. Fotheringham in order to provide her with the grounds to make the breath demand. Cst. Horbachewsky testified that he may have done this in the police cruiser before Cst. Brindamour-Carignan read the breath demand to Mr. Fotheringham. He agreed that while what he told Cst. Brindamour-Carignan in this regard ideally should have been recorded, it was not in this case. I note that this exchange was not captured by any VICS recording, although the VICS system was running somewhat sporadically in Cst. Horbachewsky's vehicle. Cst. Horbachewsky did not take any notes in regard to what he advised Cst. Brindamour-Carignan of in regard to his grounds.

[30] Mr. Fotheringham was placed in Cst. Horbachewsky's police cruiser at 2:40:12. Cst. Horbachewsky returned to the police vehicle at 2:43:20. He then began to question Mr. Fotheringham about the events that had occurred that night.

[31] Cst. Brindamour-Carignan returned to Cst. Horbachewsky's vehicle at approximately 2:46:05. She was standing in front of Cst. Horbachewsky's vehicle with Cst. Rouleau at time. At this point the VICS stops recording.

[32] On a separate VICS clip from Cst. Horbachewsky's vehicle once Cst. Brindamour-Carignan is inside, she is then heard reading Mr. Fotheringham his *Charter* rights at 2:47:58. I note that when the audio starts Cst. Brindamour-Carignan is already partway through what is being read to Mr. Fotheringham. The audio starts with the

words "...driving and care and control of a vehicle" and then it records Cst. Brindamour-Carignan going into Mr. Fotheringham's rights to counsel before the recording ends at 2:48:42 with the audio stopping at 2:48:37 which appears to be part-way through what Cst. Brindamour-Carignan was recording.

[33] Cst. Brindamour-Carignan testified that she read the breath demand verbatim to Mr. Fotheringham from the *Charter* card supplied. This is also not captured by any audio recording. Cst. Brindamour-Carignan testified that when she read the breath demand to Mr. Fotheringham she was relying on the grounds that Cst. Horbachewsky had. She did not testify that she was relying on any other grounds than those supplied by Cst. Horbachewsky. She mentioned, however, her observation that Mr. Fotheringham was slumped over the console, noted when she drove by in the police cruiser before stopping, and that he appeared to be confused and groggy when he awoke and was out of the truck. She also testified that, prior to reading Mr. Fotheringham his rights, he told her he had been working 60 hours straight and had only had a few drinks.

[34] Subsequent to Mr. Fotheringham's arrest, but prior to him being provided an opportunity to contact counsel, Cst. Horbachewsky asked Mr. Fotheringham a number of investigatory questions for purposes related to the impaired driving investigation.

[35] Mr. Fotheringham provided two breath samples that registered 100 mg%. Cst. Horbachewsky testified that his designation as a qualified intoxilyzer specialist was subsequently determined not to be valid on July 12, 2012, something that he did not become aware of until later.

[36] In watching and listening to the VICS recording of the arrest of Mr. Fotheringham, I note that he appears to show no noticeable signs of unsteadiness on his feet, other than perhaps immediately after stepping down from his truck. His balance while walking to the police cruiser afterwards appeared to be fairly normal. His speech was clear and responsive.

### **Positions of Counsel**

[37] Counsel for Mr. Fotheringham submits that Mr. Fotheringham's s. 9 *Charter* right was breached as there were insufficient grounds to arrest him at the time that Cst. Horbachewsky did.

[38] Counsel states that as there were no grounds for the arrest then any observations made pre-demand are inadmissible as evidence. (I am assuming that counsel means between arrest and demand as it is clear that there was a basis upon which to investigate the situation that would have allowed for any observations made during the investigative stage pre-arrest to be admissible.)

[39] Counsel further argues that there were not reasonable grounds to make the breath demand to Mr. Fotheringham. She submits that Cst. Horbachewsky failed to conduct a proper investigation, arresting Mr. Fotheringham while he was still in his truck. I note that the arrest occurred approximately 34 seconds after Cst. Horbachewsky arrived on the scene.

[40] Counsel further submits that Mr. Fotheringham's s. 10(b) *Charter* rights were violated, both at the scene and subsequently when Mr. Fotheringham was at the RCMP Detachment.

[41] On the other hand, Crown counsel submits that it is clear that Mr. Fotheringham was impaired and in care and control of a motor vehicle.

[42] Counsel submits that Cst. Horbachewsky's experience investigating impaired driving cases provided him with the necessary experience to quickly form the opinion that there were reasonable grounds to believe Mr. Fotheringham was impaired. Counsel notes that Cst. Horbachewsky smelled alcohol in the vehicle, that Mr. Fotheringham was disoriented and confused, and that it was hard to wake him up. Counsel submits that although the laughing described by Cst. Horbachewsky did not form part of his grounds, it was observed and was completely inappropriate.

[43] Counsel further submits that Cst. Brindamour-Carignan could supplement the grounds that Cst. Horbachewsky provided with her own observations. Counsel points to her observations of the lurching truck, hearing the loud music before the window was smashed, the open beer in the truck, Mr. Fotheringham's groggy and confused state and the odour of liquor emanating from him. Counsel did not mention, but I am aware, that Cst. Brindamour-Carignan also observed Mr. Fotheringham slumped over the console as she and Cst. Rouleau drove to the scene.

## **Analysis**

[44] I find that the police officers were acting within their lawful authority when they approached Mr. Fotheringham's vehicle to investigate what could be reasonably assessed as being a somewhat unusual circumstance. I also find that Cst. Rouleau was justified in using his baton to break the window to further his investigation and equally justified in using his baton and flashlight as he did in an attempt to rouse Mr. Fotheringham. Counsel for Mr. Fotheringham takes no issue with the circumstances of the police officers' actions up to this point in time.

[45] I do not have any concerns in regard to the initial thoughts that Cst. Rouleau and Cst. Horbachewsky had about the truck possibly being related to the initial call about a possible break and enter.

[46] It is clear, however, that the investigation quickly switched to an impaired driving investigation. I find that there were no improper actions or purposes of any of the police officers in this regard that arose at the outset from any combining of the two investigations.

[47] The initial issue is whether there were reasonable grounds to arrest Mr. Fotheringham and further, whether there were reasonable grounds to make the breath demand to him.

[48] I agree with defense counsel that there is no requirement in s. 254 that a police officer arrest an individual in order to require the individual to accompany the police officer for the purpose of providing a breath sample. This said, it would seem that if

there were reasonable grounds to believe an offence had been committed for the purpose of making a breath demand then there are likely also reasonable grounds to make an arrest. Also, the arrest was for impaired driving and such a charge could be pursued irrespective of whether there would also be a breath demand being made under s. 254(3).

[49] The arrest triggered an obligation on the part of Cst. Horbachewsky to advise Mr. Fotheringham of his right to counsel, known as the informational component. Cst. Horbachewsky then was required to allow Mr. Fotheringham the opportunity to speak with counsel, known as the implementational component. There is no evidence that Mr. Fotheringham ever waived his right to speak with counsel.

[50] The questioning of Mr. Fotheringham by Cst. Horbachewsky after Mr. Fotheringham had been arrested constituted a clear breach of Mr. Fotheringham's s. 10(b) *Charter* right to counsel. Once Mr. Fotheringham was arrested he was entitled not only to be informed of his right to counsel but also the opportunity to exercise that right. Until he was provided the opportunity to contact and speak with counsel, Cst. Horbachewsky was required to hold off from asking any questions in regard to the impaired driving investigation. He did not do so. Therefore, any observations made by Cst. Horbachewsky arising from Mr. Fotheringham's responses to these questions were made in breach of his *Charter* rights and, I find, in accordance with established jurisprudence, not admissible under s. 24(2) of the *Charter*. Crown counsel did not suggest otherwise.

[51] Mr. Fotheringham was arrested because Cst. Horbachewsky believed, on at least a subjective basis, that he had reasonable grounds to believe that Mr. Fotheringham was impaired while in care and control of a motor vehicle. The arrest served no other purpose, besides perhaps, allowing for a search of Mr. Fotheringham's truck incident to arrest.

[52] The lawfulness of the arrest is linked to the reasonableness of the grounds to make the breath demand of Mr. Fotheringham. I note that the breath demand appears to have been made more than nine and one-half minutes after Mr. Fotheringham was arrested. In the interim, the RCMP officers were speaking between themselves outside the vehicles and, for a time, with the complainant from the original call in regard to a possible intruder. Cst. Horbachewsky also questioned Mr. Fotheringham in the police vehicle without making the breath demand. While it wasn't argued, this passage of time raises questions in regard to compliance with the requirement to make the demand as soon as is practicable. I find that it did not require the attention of all three police officers to deal with any matters such that it justifies this delay in reading the breath demand to Mr. Fotheringham. The decision to have Cst. Brindamour-Carignan make the breath demand instead of Cst. Horbachewsky was made towards the end of this nine and one-half minutes.

[53] I also have concerns about the objective reasonableness of Cst. Horbachewsky's grounds to believe Mr. Fotheringham was impaired. There was little in the way of investigation prior to the arrest being made. There is no evidence that Cst. Rouleau or Cst. Brindamour-Carignan briefed Cst. Horbachewsky in any way as to what they observed and no evidence that Cst. Horbachewsky heard any radio transmissions that

would have supplemented what he directly observed. By asking “what was going on here” it is apparent that Cst. Horbachewsky knew little at the time. There is no evidence that Cst. Horbachewsky observed Mr. Fotheringham slumped over the console. By the time Cst. Horbachewsky arrived at the truck window, Mr. Fotheringham appears to no longer have been “asleep” or slumped over the console.

[54] Clearly, Mr. Fotheringham did not respond immediately to police direction and seemed somewhat disoriented or confused, at least briefly, as he did not seem to be so shortly after exiting the vehicle. I am satisfied that Cst. Horbachewsky smelled an odour of liquor emanating from the vehicle. It was not described, however, as coming from Mr. Fotheringham or as being particularly strong.

[55] I am less persuaded by the observations of red eyes. Cst. Horbachewsky’s notes were not very detailed or helpful. He testified at one point to observing the red eyes only after Mr. Fotheringham was out of the vehicle and at another point also while he was in the vehicle. For much of this time a flashlight was shining into Mr. Fotheringham’s eyes.

[56] Mr. Fotheringham’s speech was not slurred, other than perhaps somewhat in his initial response when giving his name.

[57] His balance was not of any particular concern from my observation of the recording, which I accept is not necessarily the same as Cst. Horbachewsky’s who was at the scene live, so to speak.

[58] Mr. Fotheringham's somewhat disoriented and non-responsive state at the outset is consistent with being impaired. It is also consistent with other explanations not caused by impairment, including fatigue and the strobe light shining in his face.

[59] Certainly the location of the truck with its lights on, the loud music and it not being in park raises concerns about possible impairment, particularly when taking into account the odour of liquor emanating from the inside of the vehicle. I can appreciate Cst. Horbachewsky having concerns about the possibility of Mr. Fotheringham being impaired.

[60] Certainly there were grounds to conduct an impaired driving investigation.

[61] However, Cst. Horbachewsky concluded that he already had sufficient grounds to arrest Mr. Fotheringham for being impaired while in care and control of a vehicle.

[62] I disagree. I find that Cst. Horbachewsky's grounds were not sufficient for an objectively reasonable belief that Mr. Fotheringham was impaired. I believe that at best Cst. Horbachewsky could have had a suspicion, albeit even a strong one, that Mr. Fotheringham was impaired by alcohol. A suspicion, however, does not amount to reasonable grounds to either make an arrest or a breath demand. In my opinion, Cst. Horbachewsky should have taken further investigative steps to elevate what I believe would be, objectively viewed, as a suspicion at best.

[63] I recognize that it was Cst. Brindamour-Carignan who made the breath demand. In *R. v. Rezansoff*, 2014 SKCA 80, the Court stated the following:

25 A plain reading of s. 254(3) suggests the precise point at which a peace officer must have reasonable grounds to believe a person is committing or, at any time within the preceding hours, has committed an offence under s. 253 as a result of the consumption of alcohol does not matter as long as the peace officer has the reasonable grounds to believe at the time of making the demand. This question was left open by this Court in *R. v. Vandal*, 2009 SKCA 79, 331 Sask. R. 171 (Sask. C.A.) at para. 13 as not needing to be decided in that case.

...

27 It is the role of this Court in such an appeal to examine the decision of the summary conviction appeal court for reviewable error on a standard of correctness (see *R. v. Gunn*, 2012 SKCA 80, [2013] 1 W.W.R. 495). It is open to this Court to substitute its own opinion where the judge has come to the wrong legal conclusion (see *R. v. Shinkewski*, 2012 SKCA 63, [2012] 9 W.W.R. 674 at para. 12). Given "the standard of 'reasonable grounds to believe' is one of lesser probability which simply requires the reviewing court to determine whether the factors articulated by the officer who made the breath-demand were reliable and were capable of supporting the officer's belief that the individual had driven while impaired or 'over .08' within the preceding three hours" (*Gunn* para. 7). It is clear that all of the observations both prior to and after the arrest made by the arresting officer would fully support a demand for a breath sample. We are satisfied the post-arrest conduct of the accused and the observations of the arresting officer and the admission by the accused passenger they had both been drinking are sufficient to ground the arresting officer's subjective belief with an objective base. We therefore see no *Charter* breach and it is not necessary to deal with the other grounds raised by the Crown.

[64] To the extent that Cst. Brindamour-Carignan may have been allowed to supplement the grounds provided to her by Cst. Horbachewsky with her own observations, I find that the evidence does not support a finding that she did so. She testified that she relied on the grounds provided to her by Cst. Horbachewsky. She gave no evidence to support a finding that she ever turned her attention to her own observations and used these to supplement the grounds provided to her by Cst. Horbachewsky in order to have sufficient grounds to make the breath demand. I find that, as a recruit, she simply read the *Charter* rights and breath demand as she had

been instructed to do and did not embark on a analysis of the situation to form grounds that went beyond Cst. Horbachewsky's.

[65] In the event that I am wrong about this, I nonetheless find that even with a consideration of the bottle of open liquor, the beer located in the back seat and the somewhat sparse evidence of an odour of alcohol emanating from Mr. Fotheringham, the constellation of facts is still insufficient to reach an objectively reasonable belief that he was impaired. Again, in my view, it does not rise above a reasonable suspicion, which, while sufficient for a roadside demand is insufficient for s. 254(3) demand.

[66] As such I find that there has also been a breach of Mr. Fotheringham's s. 8 and 9 *Charter* rights.

[67] I am further satisfied that the evidence of Mr. Fotheringham's breath samples should be excluded from evidence under s. 24(2), for the reasons that follow.

[68] The three prongs of the *Grant* s. 24(2) analysis (*R. v. Grant*, 2009 SCC 32) are: (i) the seriousness of the breach; (ii) the impact of the breach on the *Charter*-protected interests; and (iii) society's interest in adjudication on the merits. In these circumstances, there are three breaches to be considered, as, in addition to the s. 8 and 9 breaches just discussed, Crown counsel did not disagree and I find, that Mr. Fotheringham's s. 10(b) right to counsel was also infringed by Cst. Horbachewsky's questioning of him both outside and inside the police vehicle.

[69] In terms of the first *Grant* factor, I find that the s. 9 and 10(b) breaches are relatively serious, in that each of them was more than inadvertent or minor. Indeed, Cst.

Horbachewsky's questioning of Mr. Fotheringham prior to his exercising his right to speak with counsel was deliberate and verged on a wilful or reckless disregard of his obligations under s. 10(b). I also find that the precipitous arrest of Mr. Fotheringham within 34 seconds of Cst. Horbachewsky's arrival on the scene was more than minor. At the point that the arrest took place, Cst. Horbachewsky, in my view, would have had very little information that pointed towards Mr. Fotheringham's impairment by alcohol or drugs as opposed to some other medical situation. The cumulative effect of these two breaches with the further s. 8 breach, which in my view was less serious, shows a pattern of disregard for Mr. Fotheringham's *Charter* rights and supports exclusion (see **R. v. Gaber**, 2015 YKSC 38 at para. 57).

[70] In terms of the extent to which the *Charter* breaches impacted on and undermined Mr. Fotheringham's *Charter*-protected interest, with the exception of the s. 10(b) breach and the questioning done by Cst. Horbachewsky, the impact of the s. 8 and 9 breaches, while serious and more than fleeting and technical were not especially intrusive. This is not the same as a strip search for example. Here I take into account the fact that Mr. Fotheringham could have been detained, in any event, for a roadside screening demand. I also find that the search of his vehicle incident to arrest was not particularly intrusive.

[71] Society's interest in an adjudication of the issue on the merits considers whether the truth-seeking function of the trial process will be better served by admitting versus excluding the evidence. It is not disputed that there is a high social interest in the prosecution of impaired driving cases. As well, the evidence from the breath tests, as

supplemented by the testimony of the expert witness, is reliable and crucial to the Crown's case, which would tend in favour of admission.

[72] In terms of balancing the three *Grant* factors, I find that the overall pattern of *Charter* breaches in this case, coupled with the relative seriousness of the s. 9 and 10 breaches in particular, tips the scales towards exclusion of the breathalyser evidence. Police officers that find themselves in the situation that Csts. Horbachewsky, Rouleau and Brindamour-Carignan did, have the option of detaining a suspect and making a less intrusive roadside demand. The rejection of this course of action in favour of making an arrest after less than 34 seconds of observation, in the absence of clear and compelling evidence, is not police conduct that should be encouraged.

[73] In my view, the administration of justice would be more negatively impacted by the admission of this evidence than by its exclusion.

[74] Therefore, besides the exclusion of the breath tickets, upon which the expert evidence was based, I also exclude all statements made by Mr. Fotheringham after his arrest. I also exclude any observations made after Mr. Fotheringham was taken from the scene to the RCMP Detachment. The observations made at the scene that would have been made in any event in the course of an impaired driving investigation based on suspicion are not excluded.

[75] There were several issues litigated in this matter, including the issue of the VICS recording, both in respect to disclosure and whether the proper steps had been taken to ensure an accurate recording of proceedings was made and whether there were proper steps taken to preserve these recordings. Certainly, as seen by the assistance the

recording from Cst. Horbachewsky's vehicle and person provided, it will almost invariably be of assistance to have comprehensive and clear audio and video recordings made of police officer investigations of such a nature preserved and disclosed in a timely fashion.

[76] Certainly that was not the case here in regard to audio and video recordings. However, I am satisfied that any such failures were unintended and not as a result of any malfeasance on the part of any of the officers involved. As with this issue and certain others, given the findings I have made, I do not propose to give further consideration to or make any findings on these other issues.

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COZENS T.C.J.