Citation: *R. v. Bunbury*, 2005 YKTC 50 Date: 20050624
Docket: 04-00447
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

R e g i n a

v.

Glen Douglas Bunbury

Appearances:
Tony Brown Counsel for Crown
Malcolm Campbell Counsel for Defence

REASONS FOR JUDGMENT

[1] On the 13th of October 2004, a vehicle driven by the defendant, Glen Bunbury, collided with the rear end of a vehicle driven by Hassan El-Khatib. The RCMP attended at the scene, and, following an investigation into the accident, charged Mr. Bunbury with driving while his ability to do so was impaired by alcohol contrary to s. 253(a) of the *Criminal Code* and driving while his blood alcohol content exceeded 80 milligrams percent contrary to s. 253(b).

Facts:

[2] On the evidence, the cause of the accident is somewhat unclear. Mr. El-Khatib testified that, at approximately 10:00 p.m., he was driving on 4th Avenue in downtown Whitehorse, southbound in the outer lane, when he heard squealing brakes. He looked in the rear view mirror and noted a car approaching him from behind at a high rate of speed. Mr. El-Khatib had his signal on to turn into the Yukon Inn parking lot, but upon hearing the squealing brakes decided to continue

driving straight, rather than slowing to turn, to avoid a big collision. His vehicle was subsequently struck from behind on the left side.

[3] On cross-examination, Mr. El-Khatib maintained that he had not changed lanes prior to the accident; however, Cst. Warner testified that Mr. El-Khatib had advised him that he was changing lanes, and before doing so, noted a vehicle some distance back. He changed lanes and was struck from behind by Mr. Bunbury.

[4] Mr. El-Khatib testified that he smelled alcohol on Mr. Bunbury's breath, and that Mr. Bunbury was staggering and could not walk straight. In terms of Mr. Bunbury's state of sobriety, Mr. El-Khatib indicated, "probably he was drinking".

[5] Cst. Warner was on routine patrol in his police vehicle when he came upon the accident. Contemporaneous with his arrival, he received a radio transmission from telecoms advising him of the accident. The time of the transmission was 10:12 p.m. Cst. Gaetz also heard the radio transmission and attended at the scene at 10:30 p.m. to provide assistance.

[6] Upon arriving, Cst. Warner noted Mr. El-Khatib to be seated in his vehicle; Mr. Bunbury was standing at the front of his own vehicle. Cst. Warner spoke briefly to each to determine if either had suffered injuries. Mr. El-Khatib complained of back and neck pain and was noted to be shaky. Cst. Warner called for an ambulance and remained with Mr. El-Khatib to keep him calm. While waiting, Mr. El-Khatib advised Cst. Warner of his belief that Mr. Bunbury had been drinking.

[7] Upon arrival of the ambulance, Cst. Warner went to speak to Mr. Bunbury. At this time, he noted a strong odour of liquor on Mr. Bunbury's breath. This, in conjunction with what Mr. El-Khatib had told him, caused Cst. Warner to form the

suspicion that Mr. Bunbury had consumed alcohol and had been operating a motor vehicle. He made an Approved Screening Device demand at 10:30 p.m.

[8] Mr. Bunbury was placed in the back of a police vehicle with the door open. Cst. Warner provided him with three opportunities to blow in the Approved Screening Device. On the first attempt, Mr. Bunbury did not provide a sufficient sample for testing. On the second attempt, Mr. Bunbury sucked back. On the third, he again provided an insufficient sample. Mr. Bunbury became agitated and somewhat uncooperative. Cst. Warner became frustrated and asked Cst. Gaetz to take over the impaired investigation.

[9] Cst. Gaetz indicated that Cst. Warner advised him that Mr. Bunbury was the driver, and Cst. Warner believed that he had been drinking. Cst. Gaetz initiated a standard impaired investigation. His approach was one he described as “old school”, meaning he did not intend to rely on the Approved Screening Device.

[10] In his *viva voce* evidence, Cst. Gaetz testified that he could smell an odour of liquor coming from Mr. Bunbury’s person from three feet away. He noted Mr. Bunbury to be fairly steady on his feet, but his eyes were glassy and his speech was somewhat slurred. In his notes, Cst. Gaetz recorded his observations to be only a slight smell of liquor and glassy eyes.

[11] Cst. Gaetz had Mr. Bunbury perform the horizontal astigmus test, a roadside sobriety test. He indicated that Mr. Bunbury was able to follow the pen, but not smoothly.

[12] Between 10:20 p.m. and 10:33 p.m., Cst. Gaetz formed the opinion that Mr. Bunbury’s ability to drive was impaired by alcohol. At 10:33 p.m., he advised Mr. Bunbury that he was being detained; he read him his *Charter* rights and the breath demand.

[13] Cst. Gaetz took Mr. Bunbury to the RCMP detachment. He was unable to specifically account for some 13 minutes between making the demand and leaving for the detachment. They arrived at the detachment at 10:48 p.m.

[14] Cst. Warner contacted Legal Aid on behalf of Mr. Bunbury at 10:52 p.m. Legal Aid counsel called back at 10:58 p.m. Mr. Bunbury was placed in the phone room and given privacy. He could be seen through the window but not heard. Cst. Warner believes he was outside of the phone room, but is not sure, though he was certain that he was not stationed at the door observing Mr. Bunbury. At this time, Cst. Gaetz was in the breathalyser room preparing the BAC Datamaster C machine and was not observing Mr. Bunbury.

[15] At 11:03 p.m., Cst. Gaetz brought Mr. Bunbury into the breathalyser room. At 11:11 p.m., Mr. Bunbury provided the first sample into the BAC Datamaster C which registered a reading of 170. He provided a second sample at 11:29 p.m., which registered as an invalid sample. Cst. Gaetz was of the view that the sample was invalid as Mr. Bunbury was not blowing strongly enough. Mr. Bunbury provided a third sample at 11:34 p.m., which registered a reading of 160. Cst. Gaetz observed Mr. Bunbury burp just before providing the third sample.

Issues:

[16] The defence has raised five issues which I must address:

1. Whether the Approved Screening Device demand and the request that Mr. Bunbury perform the horizontal astigmas test were made forthwith;
2. Whether Cst. Gaetz had reasonable and probable grounds to make the breath demand;
3. Whether the BAC Datamaster C test results are reliable;
4. Whether Mr. Bunbury was arbitrarily detained after completion of the BAC Datamaster C test; and

5. Whether the Crown has established beyond a reasonable doubt that Mr. Bunbury's ability to operate a motor vehicle was impaired by alcohol.

I will deal with each issue in turn.

Issue 1: Whether the Approved Screening Device demand and the request that Mr. Bunbury perform the horizontal astigmas test were made forthwith:

[17] Dealing first with the Approved Screening Device or ASD demand, while the defence has framed the issue as whether the demand was made forthwith, the written argument suggests that the actual issue the defence is putting forward is whether Cst. Warner was entitled to make the demand in this instance.

[18] The argument is premised on the wording of section 254(2). The section indicates that an ASD demand can be made "where a peace officer reasonably suspects that a person who **is** operating a motor vehicle … or has the care or control of a motor vehicle". In this instance, defence argues that when Cst. Warner arrived Mr. Bunbury was standing at the front of his vehicle and was no longer operating or in care and control of the vehicle. Defence has filed cases to support the proposition that an ASD demand cannot be made after the driver has left the vehicle.

[19] However, I would note that we are not dealing with a case in which the accused is charged with a *de facto* refusal to comply with an ASD demand by failing to provide suitable samples. Nor are we dealing with a case in which the results of an ASD test have been used to found the grounds to make the breath demand. In either of these cases, the authority of the peace officer to make the demand would be a central issue.

[20] In the case at bar, Mr. Bunbury made three attempts to blow into the ASD, but none of the samples were suitable for a completed test. Instead of charging Mr. Bunbury with a refusal, Cst. Warner chose to have Cst. Gaetz take over the

impaired investigation. Cst. Gaetz was clear that he did not rely in any way on the unsuccessful ASD attempts to found his grounds for the breath demand.

[21] In such circumstances, I agree with the Crown's submission that the authority or lack thereof of Cst. Warner to make the ASD demand is really irrelevant at this point given the fact that no evidence was obtained as a result of the demand and the unsuccessful attempts.

[22] Turning to the horizontal astigmas test, the defence appears to have three separate arguments regarding the use of this test. Firstly, defence argues that Cst. Gaetz did not have the authority to request that Mr. Bunbury participate in the test for the same reasons set out in the preceding argument regarding the ASD, namely that Mr. Bunbury was no longer operating or in care and control of the vehicle. Secondly, defence argues that the test was not administered forthwith as required. Lastly, in the absence of expert evidence to interpret the test results, the defence questions the validity of Cst. Gaetz's opinion that Mr. Bunbury failed the test and that the failure of the test amounts to evidence of impairment.

[23] I will deal with the first two arguments together. Defence suggests that the decision of His Honour Judge Lilles in *R. v. Scurvey*, 2002 YKTC 87, stands for the proposition that the right to require someone to participate in roadside sobriety tests is equivalent to the authority for making the ASD demand.

[24] On this point, Lilles C.J. stated the following:

> For the purpose of this case, I shall assume (without deciding) that the right to require a driver to participate in roadside physical co-ordination tests is the same as for a screening demand pursuant to s. 254(2) of the Code. That is to say, it constitutes a detention and triggers a right to counsel pursuant to s. 10(b) of the Charter but is capable to being saved by s. 1, as a "reasonable limit prescribed by law". But, as

> in the case of the screening demand, there must be some evidence indicating that the driver had recently consumed alcohol or had alcohol in his body…. (paragraph 8)

[25] In equating roadside sobriety testing to ASD demands, Lilles C.J. was clearly concerned, on the facts of that case, about the specific issues of detention and evidence of alcohol consumption. His decision does not address in any way whether an individual need be operating or in care and control of a vehicle when asked to perform sobriety tests or whether the tests need to be performed forthwith. Absent more compelling argument, I am not prepared to make the finding that either or both are requirements for roadside sobriety testing.

[26] In terms of the third argument regarding the horizontal astigmas test, the issue of the validity of the test results is more properly an argument related to the defendant's next issue of whether or not the officer had reasonable and probable grounds to make the breath demand. As such, I will address the argument along with the arguments relating to that issue.

Issue 2: Whether Cst. Gaetz had reasonable and probable grounds to make the breath demand:

[27] As the Crown points out in its reply, the defence has provided a number of cases regarding the issue of reasonable and probable grounds, but has not really argued the issue. I must infer that the defence is suggesting that the BAC Datamaster C results should be excluded on the basis the officer did not have reasonable and probable grounds to make the demand.

[28] I am of the view that Cst. Gaetz did not, in fact, have reasonable and probable grounds to make the demand.

[29] At trial, Cst. Gaetz indicated that his grounds for making the breath demand were based on the following:

1. The fact that Cst. Warner advised him that Mr. Bunbury was the driver of the rear vehicle involved in the collision and that he, Cst. Warner, believed that Mr. Bunbury had been drinking;
2. His own observations that he could smell alcohol on Mr. Bunbury from three feet away, and that Mr. Bunbury's eyes were glassy and his speech was slightly slurred; and lastly,
3. Mr. Bunbury was able to follow the pen but not smoothly during the horizontal astigmas test.

[30] I would note that Cst. Gaetz made no notation as to observing slurred speech. When challenged on this issue, he indicated that he recalls observing such a notation on the booking sheet later in the evening, but that he did not himself complete the booking sheet. He conceded that he had no independent memory of slurred speech. In such circumstances, I must find as a fact that he did not observe Mr. Bunbury slurring his speech.

[31] I would also note that I have serious concerns about the performance of the horizontal astigmas test. Cst. Gaetz indicated that while he had no certificate relating specifically to administering the horizontal astigmas test, he had received training as a recruit in 1981 and had passed a standard sobriety testing course in the late 1990's or early in 2000. When asked how the test is to be performed, he described the performance of the test as "waving a pen in front of somebody's eyes".

[32] In the *Scurvey* case, Lilles C.J. dealt extensively with the issue of the performance of the horizontal astigmas test. He noted the test to be "highly technical" and quoted the following description from the decision of the B.C. provincial court in *R. v. Sandu*, [2002] B.C.J. No. 696 at paragraph 8:

> …The officer was satisfied with relying on the Horizontal Astigmas Test. He acknowledged that he did not have any scientific degree nor was he an ophthalmologist. Constable Chew was aware that there were in excess of five types of astigmatism but he would not say what they were. He took a four day

> course under the U.S. National Highway Training program. Constable Chew said that the object of the test was to observe the pupil of the eyes for any jerking motion as the pupil followed the course of an object passed in front of the eye. The distance of the object from the eye and the angle are important aspects of the test. The required angle to observe any jerking of the pupil is 45 degrees. In other words, the object is moved from the center to the right or left to a point of 45 degrees. The officer's evidence was that the pupil should follow the object in a smooth motion to the point of 45 degrees and hold the gaze without a jerking motion of the pupil. The Constable conceded that any deviation in procedure could negate the results of the test. … He wasn't sure if there were cars with their headlights on going by at the same time which might affect the eye movement. The other area of concern in this case is the distance the officer held the object from the eye. The officer said that he was aware that there was controversy with the use of the test and that he was not an expert but he was giving his opinion based on his experience.

[33] In the *Scurvey* case, Lilles C.J. went on to conclude "In the absence of "expert evidence" based on accepted scientific principles, I am unable to accept Constable McPhee's conclusions based on his reported observations of Mr. Scurvey during the horizontal astigmas test" (paragraph 14).

[34] In the case at bar, Cst. Gaetz's description of how the test is performed falls well short of demonstrating that he has any real appreciation of the highly technical nature of the test. In addition, no expert evidence was lead to suggest that the manner in which the test was performed was appropriate and the conclusions drawn were accurate. As a result, I find that the evidence of the horizontal astigmas test is not admissible to support Cst. Gaetz's conclusion that Mr. Bunbury was impaired.

[35] Cst. Gaetz noted no balance or fine motor coordination problems. On the evidence I do accept, his reasonable and probable grounds rely solely on the

accident, the smell of alcohol, and glassy eyes. I note that Cst. Gaetz did not undertake any investigation into the cause of the accident, nor did he testify that Cst. Warner provided him with any information in this regard. Further, I note that the smell of alcohol and glassy eyes are indicative only of consumption not necessarily of impairment. I find that Cst. Gaetz did not have the requisite reasonable and probable grounds to make the breath demand.

[36] However, I must note that the certificate was tendered as an exhibit at trial. The defence took no opposition and the certificate was admitted into evidence. In addition, while there appears to be a *prima facie* case to support an argument of a *Charter* breach and an order for exclusion, the defence made no such application at trial. An application to raise a *Charter* argument post trial was denied. Accordingly, assuming I can even make an order for exclusion at this point, it would have to be based on the common law.

[37] The Supreme Court of Canada, in the pre-*Charter* case of *Rilling v. the Queen,* [1976] 2 S.C.R. 183, stated the following:

> It is my opinion that this Court should accept and adopt the views expressed in the Orchard, Showell and Flegel cases, supra, and hold that while absence of reasonable and probable grounds for belief of impairment may afford a defence to a charge of refusal to submit to a breathalyser test laid under s. 235(2) of the Criminal Code, it does not render inadmissible certificate evidence in the case of a charge under s. 236 of the Criminal Code. The motive which actuates a peace officer in making a demand under s. 235(1) is not a relevant consideration when the demand has been acceded to. (p. 12)

[38] In *R. v. Bernshaw*, [1995] 1 S.C.R. 254, Cory J. discussed the post-*Charter* applicability of *Rilling*:

> …Certainly the Charter is relevant. An accused may be able to establish on the balance of probabilities that the taking of breath samples infringed his Charter

> rights. For example, it might be contended that the requisite reasonable and probable grounds for making the breathalyser demand were absent, and that, in the circumstances, the admission of those breathalyser results would bring the administration of justice into disrepute. In those circumstances, the breathalyser evidence might well not be accepted. Yet, where an accused complies with the breathalyser demand, the Crown need not prove as part of its case that it had reasonable and probable grounds to make that demand. Rather, I think, the onus rests upon the accused to establish on the balance of probabilities that there has been a Charter breach and that, under s. 24(2), the evidence should be excluded. There should not be an automatic exclusion of the breathalyser test results (paragraph 41).

[39] While Cory J. was not writing on behalf of the majority, I would note that most jurisdictions in Canada have adopted his position on the current applicability of *Rilling*. In my view, this is entirely appropriate.

[40] As a result, in the absence of a *Charter* application, the lack of reasonable and probable grounds does not affect the admissibility of the certificate of analysis.

Issue 3: Whether the BAC Datamaster C results are reliable:

[41] The defence argues that the BAC Datamaster C results are not reliable as the police officers did not maintain the required observation period before the first sample was taken; the second attempt resulted in an invalid sample; and Mr. Bunbury was observed to burp before the third attempt.

[42] In support of this argument, the defence called Carolyn Kirkwood who was qualified as an expert in the use and operation of the BAC Datamaster C. Ms. Kirkwood testified that a continuous observation of the subject for at least 15 minutes is required before each test to ensure that the subject does not burp,

belch or regurgitate, which could produce a falsely high reading if mouth alcohol were brought up from the stomach.

[43] The evidence is clear that both Cst. Warner and Cst. Gaetz believed that the other was conducting the necessary observation up until Mr. Bunbury was brought into the breathalyser room at 11:03 p.m. The first test was taken at 11:11 p.m. As a result, I find that Mr. Bunbury was observed for only eight of the required 15 minutes before the taking of the first sample.

[44] As to the invalid sample, Ms. Kirkwood testified that the invalid sample reading could be a result of four possible scenarios:

1. An inconsistent breath sample due to the presence of mouth alcohol;
2. An inconsistent breath sample due to the subject sucking back;
3. A subject with a very high blood alcohol level who blows very hard thereby blowing droplets of saliva into the machine; or
4. Dirt in the sample chamber.

[45] Ms. Kirkwood indicated that the fourth scenario, dirt in the sample chamber, can be discounted as the machine would not have been capable of taking the third sample successfully as it would need servicing to clean out the dirt. She further indicated that the third scenario, the combination of a high blood alcohol level and a hard blow, would be highly unlikely as Cst. Gaetz testified that Mr. Bunbury was not blowing hard, hence his erroneous conclusion that the invalid sample reading was a result of an insufficient sample.

[46] Accordingly, it was Ms. Kirkwood’s opinion that the invalid sample was a result of an inconsistent breath sample due either to mouth alcohol or sucking back. She also indicated that the presence of mouth alcohol could result in falsely high readings.

[47] With respect to the third issue of the observed burp before the third sample, Ms. Kirkwood testified that when technicians observe a burp, belch or

regurgitation they are instructed to wait a further 15 minutes before testing the subject. Cst. Gaetz did not wait the required 15 minutes because he was of the view that the burp was a dry burp, as he did not see Mr. Bunbury swallow anything. Ms. Kirkwood confirmed that a dry burp would not affect the readings, as it would not result in mouth alcohol being brought up from the stomach. She indicated that it was not very likely that there was mouth alcohol following the burp in this instance, but that it was a possibility.

[48] It should also be noted that Ms. Kirkwood agreed on cross-examination that, as there was a good correlation between the two valid samples obtained, that was most likely what Mr. Bunbury's blood alcohol level was at the time. She also testified that, from her review, the instrument was functioning properly at the time.

[49] The defence argues that the combination of procedural irregularities in this case should leave me with a reasonable doubt as to the validity of the test results.

[50] There are two cases out of the Yukon territorial court which have dealt with similar arguments. *R. v. Taylor,* [1995] Y.J. No. 4, involved a situation where the police officer failed to appropriately conduct the observation before the first sample, but did conduct the observation before the second sample. In making his decision, Stuart J. provides a summary of the case law addressing the impact of procedural defects on the presumption and concludes:

> Based on these cases, there are two statutory presumptions arising from Certificate evidence:
> i) the foundation presumption – that test results are accurate; and
> ii) the ultimate presumption – that the blood alcohol levels at the time of the offence are the same as at the time of the test.
>
> …

> Whether such evidence, in challenging the credibility of test results, can rebut the ultimate presumption is a matter of weight, not admissibility – a matter to be determined in conjunction with other evidence. (paragraphs 46 and 48)

[51] In assessing the facts in the *Taylor* case, Stuart J. concluded:

> In this case, the deficiencies in the testing process, individually or collectively, create possibilities for inaccuracy, but fail to sustain a reasonable doubt about the reliability of test results. More than a possible adverse impact is required to raise a reasonable doubt. The defence must press the impact of a deficiency beyond speculation or conjecture about its effect on test results. (paragraph 78)

[52] The more recent decision of Lilles J. in *R. v. Sheppard,* [1999] Y.J. No. 25 (Y.T.C.), involved a strikingly similar set of facts summarized as follows:

> The procedures followed by Corporal Jarvis in operating the Datamaster C breath instrument deviated significantly from the procedures recommended for its operation. He did not keep the defendant under proper observation for 15 minutes prior to administering the first test. He did not wait a full 5 minutes before starting the instrument for the second sample. He pushed the wrong button on the instrument for the third sample, so that the printout improperly recorded “refused”. He observed burps during the taking of the third sample, but did not wait the recommended 15 minutes, or even 5 minutes, before starting to take the fourth sample. … In my view, these deviations are so significant as to raise real concerns as to the training received by Corporal Jarvis and perhaps other Datamaster C technicians in the Yukon. (paragraph 31)

[53] Notwithstanding his concern regarding the procedural deviations, Lilles J. found that they were insufficient to rebut the ultimate presumption:

> Even in the absence of expert evidence supporting the defence position, the significant deficiencies in the test procedures in this case create possibilities for inaccuracy. The deficiencies themselves, however, fail to sustain a reasonable doubt about the reliability of the test results. I would add that deficiencies in testing procedures, to secure an acquittal, must do more than raise a reasonable doubt about the accuracy of test results. The deficiencies must raise a reasonable doubt that the range of reliable results at the time of testing dips below illegal levels. (paragraph 37)

[54] In the case at bar, the procedural irregularities similarly create possibilities for inaccuracy; however, there was no evidence led before me to suggest that the range of reliable results at the time of testing would fall below the illegal levels. Adopting the reasoning of Lilles J., I find that I am not left with a reasonable doubt as a result of the procedural irregularities.

Issue 4: Whether Mr. Bunbury was arbitrarily detained after the BAC Datamaster test:

[55] The defence argues that Mr. Bunbury's detention after the BAC Datamaster C test was arbitrary, warranting a judicial stay of proceedings. The defence refers to s. 498 of the *Code* which speaks to the release of an individual by an officer in charge. The section indicates that an individual is to be released on conditions unless the officer in charge has reasonable grounds to believe that it is necessary in the public interest to detain them in order to establish identity, to secure or preserve evidence, or to prevent the continuation or repetition of the offence or the commission of another offence.

[56] In support of the arbitrary detention argument, the defence has filed a number of cases out of the B.C. provincial court in which judicial stays were granted following findings of arbitrary detention.

[57] The defence has also filed the case of *R. v. Tugnum,* 2002 BCSC 1572, out of the B.C. Supreme Court which sets out a procedure to be followed in such cases:

> …I am of the view that the trial judge was obligated to first consider whether there existed reasonable grounds to detain the accused in the public interest under s. 498. If not, the detention was unlawful.
>
> The trial judge was then required to consider whether the unlawful detention was arbitrary, applying the tests set out above. That is, was the detention the result of the officer's mere opinion without any grounds or even worse, the random, capricious or unjustifiable exercise of his authority? According to Duguay, this analysis should have included a consideration of the following factors:
>
> 1. the particular facts of the case;
> 2. the extent of the departure from reasonable and probable grounds; and
> 3. the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the arresting officer…. (paragraphs 12 - 13)

[58] In attempting to apply this test to the case at bar, I find myself in something of a quandary. I must assume from the reference to arbitrary detention in the written argument that the defence is alleging a breach of s. 9 of the *Charter*, although s. 9 is not specifically mentioned, and defence has provided no notice of a *Charter* application. Setting aside, for the moment, the question of whether the defence can now even make a *Charter* argument having failed to give the required notice, I would note that the defence bears the onus of establishing a *Charter* breach. I am not satisfied that a proper foundation has been laid to assess whether a breach has occurred.

[59] The only evidence relating to Mr. Bunbury's detention was that Cst. Warner indicated, in his direct evidence, that Mr. Bunbury was lodged in cells

until he was sober. Cst. Warner completed the necessary documentation for Mr. Bunbury, but left it to be served on him when he was sober, to ensure that he understood. Cst. Warner conceded on cross-examination that there was no real indication over the course of the evening that Mr. Bunbury did not understand what was going on. Further, Cst. Warner made no efforts to arrange for a ride for Mr. Bunbury, nor did he offer to drive him home. Mr. Bunbury was released at 9:41 the following morning by someone other than Cst. Warner.

[60] The cases filed by the Crown suggest that there are instances where an individual's state of intoxication can found the basis for the reasonable and probable grounds to detain.

[61] In this case, however, the grounds for detaining Mr. Bunbury are simply not explored in any meaningful way which would allow me to assess the reasonableness of the grounds asserted, the departure from reasonableness if any, or the honesty of the belief in the existence of reasonable grounds. As a result, I am not satisfied that defence has met the onus of establishing the breach.

[62] Even if I am wrong in this finding and the detention was arbitrary, I would note the defence bears the onus of establishing not just the breach, but also of persuading me what remedy if any should be granted. The *Tugnum* case adopts the reasoning of the Supreme Court of Canada in *R. v. O'Connor,* [1995] 4 S.C.R. 411, in determining whether a judicial stay should be granted. L'Heureux-Dube J., writing for a plurality of the Supreme Court of Canada, at para. 75, held that a judicial stay is only appropriate where the following criteria are met:

> 1. the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome; and
> 2. no other remedy is reasonably capable of removing the prejudice.

…

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. (paragraph 82)

[63] There is no argument before me on the issue of what prejudice, if any, exists and how that prejudice will be manifested, perpetuated or aggravated by the conduct of this trial, such that I am unable to determine whether such a drastic remedy would be the only remedy capable of removing that prejudice.

Issue 5: Whether the Crown has proven beyond a reasonable doubt that Mr. Bunbury's ability to operate a motor vehicle was impaired by alcohol:

[64] The evidence as it relates to impairment can be found in the evidence of Mr. El-Khatib, Cst. Warner, and Cst. Gaetz. In my view, there are concerns with respect to the reliability of the evidence of each of these witnesses on this point.

[65] Mr. El-Khatib testified that he smelled alcohol on Mr. Bunbury's breath; Mr. Bunbury was staggering and could not walk straight. Mr. El-Khatib concluded, "probably he was drinking". Of concern is Mr. El-Khatib's evidence as to Mr. Bunbury's balance problems. Firstly, Mr. El-Khatib indicated that he was having difficulty standing himself as a result of the accident, which would provide an alternate explanation for any balance problems he observed in Mr. Bunbury. More importantly, however, Mr. El-Khatib's evidence as to Mr. Bunbury's balance problems is directly contradictory to the evidence of both police officers, neither of which noted any problems with Mr. Bunbury's balance.

[66] In addition, Mr. El-Khatib's overall credibility is suspect. He testified at trial that he was driving in the curb lane when struck from behind. He adamantly

denied, on cross-examination, that he had changed lanes prior to the collision. This is contradicted by the evidence of Cst. Warner who indicated that Mr. El-Khatib advised him that he had changed lanes, noting a vehicle some distance back. As he merged, he noted the high rate of speed of the other vehicle. He tried to speed up, but was not fast enough to avoid the collision. This prior inconsistent statement calls into question Mr. El-Khatib's credibility, and also calls into question the actual cause of the accident. I would note that an independent third party apparently viewed the accident and was interviewed by Cst. Warner, but was not produced at trial.

[67] Cst. Warner testified that when he first spoke to Mr. Bunbury he did not note a smell of alcohol. Mr. El-Khatib then told him that Mr. Bunbury was very drunk. When he approached Mr. Bunbury again, Cst. Warner noted an odour of alcohol emanating from Mr. Bunbury, and when dealing with the ASD, he noted that Mr. Bunbury's speech was slow and slightly slurred.

[68] However, Cst. Warner demonstrated some problems with recollection during his testimony. For instance, when questioned about what Mr. El-Khatib had told him regarding the accident, Cst. Warner testified that Mr. El-Khatib had told him he had first come out of somewhere else and turned left onto 4th Avenue, before he changed lanes. It became clear on re-direct that Cst. Warner had not included any reference to a left-hand turn when he recorded the description Mr. El-Khatib provided him of the accident. Furthermore, Cst. Warner made absolutely no notes as to indicia of impairment observed, and he agreed that his memory might have suffered with the passage of time. As a result, I do not accept his evidence as to the slurred speech as being reliable. His evidence as to smell of alcohol, however, is confirmed by the other witnesses.

[69] Cst. Gaetz' s evidence as to impairment is limited to the smell of alcohol and glassy eyes for the reasons noted above in the discussion with respect to reasonable and probable grounds.

[70] In the result, smell of alcohol, glassy eyes, and the motor vehicle accident are the only potential indicia of impairment established on the facts. Smell of alcohol and glassy eyes, again, are only proof of consumption, not necessarily of impairment. As to the motor vehicle accident, the conflicting versions provided by Mr. El-Khatib are such that I am unable to determine beyond a reasonable doubt how the collision even occurred.

[71] I find that the Crown has not proven beyond a reasonable doubt that Mr. Bunbury's ability to drive was impaired by alcohol.

Conclusion:

[72] In conclusion, as the Crown has not proven beyond a reasonable doubt that Mr. Bunbury's ability to drive was impaired by alcohol, he is acquitted of the offence contrary to s. 253(a). However, as the certificate of analysis has been admitted into evidence, and the defence has been unsuccessful in establishing evidence to the contrary, I have no option but to convict Mr. Bunbury of the offence contrary to s. 253(b).

Ruddy T.C.J.