PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Tyler MacIntosh*, 2023 NSPC 60

Date: 20231218
Docket: 8557392 & 8557393
Registry: Kentville

Between:

His Majesty the King

v.

Tyler MacIntosh

DECISION

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	October 25, November 30 and December 18, 2023, Windsor, Nova Scotia
Decision	December 18, 2023, in Windsor, Nova Scotia
Charges:	Sections 320.15(1) and 320.14(1)(a) of the *Criminal Code of Canada*
Counsel:	William Ferguson, for the Provincial Crown Phillip Star, KC, for the Defence

By the Court:

Introduction

[1] Mr. MacIntosh was speeding while operating a motor vehicle and stopped by police. The roadside interaction led the officer to make an approved screening device [ASD] demand for a sample of Mr. MacIntosh's breath. Date, jurisdiction, and identity were admitted, and the Crown called the arresting officer as the sole witness. There was no defence evidence.

[2] Cst. Waters testified that he had an approved screening device (ASD) in his police car when he stopped Mr. MacIntosh for speeding. In addition to having the machine at the ready, the roadside interaction led the officer to reach a reasonable suspicion Mr. MacIntosh had consumed alcohol.

[3] The officer told Mr. MacIntosh, "I demand that you immediately provide a sample of your breath suitable for analysis to be made by means of an approved screening device and that you accompany me for that purpose".

[4] After nine failed attempts to provide a sample into the ASD, Mr. MacIntosh was arrested for failure to comply with the ASD demand. He was charged with two offences, impaired operation of a motor vehicle contrary to s. 320.14(1)(a) *Cr. C.*, and the following:

> Without reasonable excuse, fail to comply with a demand made to him by a Peace Officer to provide samples of his breath suitable to enable a proper analysis to be

> made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 320.15(1) of the *Criminal Code*.

The Issues

1) Did failure to specify in the count the particular device by section number render the count invalid?

2) Is proof Mr. MacIntosh received the ASD demand and the fact of non-compliance sufficient to establish *mens rea*, or is the Crown required to establish an intentional failure to comply?

The Law

[5] Two *Criminal Code* demand sections are relevant to the issues. Section 320.27(2) refers to ASD demands, and s. 320.28 to breathalyzer demands. They read as follows:

> Section 320.27(2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers …, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose. [Emphasis added]

[6] Mr. MacIntosh argues he was not charged with failing to comply with the ASD demand but was instead charged with failing to comply with a breathalyzer demand. The breathalyzer demand section reads as follows:

> Section 320.28(1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol … , the peace officer may, by demand made as soon as practicable,
>
> (a) require the person to provide, as soon as practicable,

> (i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, or
>
> (b) require the person to accompany the peace officer for the purpose of taking samples of that person's breath…

[7] There was no evidence the officer had reasonable grounds in accordance with s. 320.28 *Cr. C.*, he did not mention a qualified technician in either the demand or the charge wording, and he did not ask Mr. MacIntosh to provide samples for a breathalyzer machine. All testing occurred at the roadside with an ASD.

[8] The charging section for both breathalyzer and ASD offences is the same, s. 320.15(1) *Cr. C.* which reads as follows:

> Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28.

Issue One: Valid charge

[9] The relevant count, pursuant to s. 320.15 *Cr. C.*, does not include reference to the specific demand in issue. It references neither s. 320.27 (ASD) nor s. 320.28 (breathalyzer).

[10] Mr. MacIntosh argues he was charged with failing to comply with a breathalyzer demand, and not an ASD demand. A few cases were submitted to further explain and support that position.

[11] *R. v. Strong* (1990), 102 NSR (2d) 365 (NS County Court): This case involved precursor sections of the *Code*. The appellate court upheld a lower court decision

not to allow a Crown application to amend to substitute a charge of breathalyzer refusal per s. 254(5) *Cr. C.* on an Information charging s. 254(2) Cr. C., an ALERT refusal. The court found the failure to specify the correct charging section resulted in prejudice to Mr. Strong who had closed his case and elected not to call evidence.

[12] *R. v. Lombard*, 2013 NSPC 133: This is a trial court decision of my brother Judge Landry that also proceeded under precursor sections of the *Code*. The Crown led evidence at trial of an ASD demand, and the Information charged the general charging section 254(5) *Cr. C.* The charge read failure to provide "samples of his breath that in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in his blood" (emphasis by trial judge).

[13] The court found the charge language accorded with the relevant breathalyzer offence section, and not the ASD, and found Mr. Lombard not guilty because the Crown had failed to call evidence of a breathalyzer demand.

[14] With respect those decisions do not compel this Court to accept Mr. MacIntosh's argument. Mr. MacIntosh was not charged under an incorrect charging section. Section 320.15 *Cr. C.* is the relevant charging section for both a breathalyzer offence and an ASD offence. The relevant Information simply failed to

specify which particular demand was in issue. Unlike *Strong*, this was not a case of charging one demand when the evidence supported another.

[15] In *obiter* the appellate court in *Strong* mused "A reference to 254(5) in the absence of the particulars of the allegation, would, even so, in all likelihood, be defective as duplicitous, or, at least ambiguous, since several offences are created by that subsection (emphasis added)". However, the case was not decided on that point, instead it focused on the trial judge's proper exercise of discretion in refusing to amend.

[16] Mr. MacIntosh, it must be noted, while also charged with a charging section that could reference other offences, was in receipt of Crown disclosure and heard the trial evidence that focused exclusively on the ASD demand given to him and his efforts to blow into that machine. Those efforts were also captured at roadside on the officer's body camera. It must be apparent that breathalyzer testing is not done at roadside but at the detachment, and as a result, unlike *Strong*, in all the circumstances prejudice cannot be said to arise from the failure to specify the proper demand in the charge wording when the proper charging section was used.

[17] *Lombard* is also distinguishable from Mr. MacIntosh's circumstances because while both were charged with a general charging section, Mr. Lombard's Information used the language of a breathalyzer charge and not that typical to ASD

charges. While the evidence at trial all related to the ASD, the trial judge concluded Mr. Lombard was charged with a breathalyzer offence and a breathalyzer demand had not been given him. In reaching this conclusion, the trial judge referenced and appears to have taken up the *obiter* comment in *Strong.*

[18] Mr. MacIntosh's charge wording does not accord with a breathalyzer charge, for example it does not aver to a qualified technician's opinion- as seen in the breathalyzer demand. And it also worth considering that sections 320.27 and 320.28 seek "necessary samples of breath" but neither section includes the words "*in order to determine the concentration, if any, of alcohol in his blood".*

[19] On that point Cst. Waters testified the ASD "gives a numerical amount which I would refer to as a pass, warn or fail". That evidence was not fully explored, and to be honest I have never seen an ASD and do not have a full appreciation of all that those machines can do. Perhaps it does provide some information related to concentration of alcohol in blood. Perhaps a fail result does, by extension, signal an indication of such a concentration, at least with regard to exceeding the legal limit.

[20] In any event, I would not accede to defence counsel's argument that the wording of the charge supported a breathalyser offence and NOT an ASD offence. Instead, I find it supports both. Given the trial proceeded with disclosure to the defence and clear evidence of the ASD being the singular focus of the officer and

being mentioned specifically in the demand to Mr. MacIntosh, this case is not similar to *Lombard*. In *R. v. Gieni*, 2014 SKPC 104, the trial judge considered *Lombard*, but chose not to follow it, instead he amended the incorrect charge section to accord with the evidence at trial and found no prejudice arose for essentially the same reasons I addressed above.

[21] That said, I will grant the Crown's request to amend the count by adding the words "pursuant to s. 320.27 of the *Code*", if for no other reason than to make clear for record keeping purposes that the refusal charge related to the ASD and not the breathalyzer.

Issue Two: Proof of mens rea for refusal

[22] What constitutes proof of *mens rea* for refusal offences is still the subject of debate in the country. In my 2021 decision *R. v. Burgess*, 2021 NSPC 34, convicting Mr. Burgess of refusal, I adopted the approach set out in *R. v. Lewko,* 2002 SKCA 121 - *mens rea* requires proof of an intention not to provide a sample. Subsequent to my decision, the Saskatchewan Court of Queens Bench, sitting as a summary conviction appeal court, determined it was not bound to follow the *Lewko* approach. In *R. v. Sweet*, 2022 SKQB 126 beginning at paragraph 78, the court referenced a similar conclusion reached in *R. v. Bradley*, 2022 NBQB 31 and explained the

rationale for concluding only proof of demand and the fact of non-compliance are necessary to establish *mens rea*.

> [78] Context will be important to any evaluation of whether Parliament intended an amendment to result in substantive change. Here the context is the longstanding divide between *Lewko* and jurisdictions that followed it, and decisions from certain other jurisdictions that, for some time, considered that knowledge of the demand and the fact of non-compliance was sufficient to satisfy the mental element. A detailed analysis of that divide, and of the intended effect of the amendment, is provided by Gregory J. in *Bradley* at paras 120 to 184. I commend the entire discussion but will reproduce only a few excerpts. I have omitted the footnotes.
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> > [137] The purpose of the provision in s. 320.15 is to deter drivers from escaping detection for impaired driving by refusing or otherwise failing to comply with police demands, lawfully made. It removes any incentive not to comply with a demand because the punishment is the same as a conviction for impaired driving.
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> > …
> >
> > [138] The offence in question now reads as follows:
> >
> > > 320.15 (1) Everyone commits an offence who, **knowing** that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28. [emphasis added]
> >
> > [139] The wording of the former section omits the word "knowing" …
> >
> > [140] When examining the text of a provision it is important to consider what words are used and what words are not used. While the word "knowing" suggests a subjective *mens rea*, I note that this word only applies to

the demand. An accused must "know" that a demand has in fact been made before compliance is triggered.

[141] What is absent, however, is the word "wilfully", as in "wilfully failed to comply". This would have suggested a higher level of *mens rea* and a subjective one at that.

[142] It has been said that the insertion of the phrase "knowing that a demand has been made" constitutes clarification of the *mens rea* for the offence. This is noted in the Legislative Backgrounder as follows:

> There are a number of key changes to the elements of these offences. The simpliciter offence has been amended to clarify the necessary fault element for proof of the offence. Previously, the offence of failure or refusal to comply with a demand did not state the necessary mental fault element required for conviction. The provision now provides that knowledge that the demand had been made is sufficient to prove the mental element.

[143] Paccioco J in *R. v. Soucy* [2014 ONCJ 497] concluded the *mens rea* is subjective. The debate that ensued from the 2012 *R. v. Porter* [2012 ONSC 3504] and 2014 *Soucy* cases (discussed below) could not have escaped Parliament's attention. It seems abundantly clear now that Parliament intended an objective *mens rea* with the addition of the word "knowing" applying specifically to the demand and not to any other aspect of the offence.

…

[148] There are five categories of offences to which objective *mens rea* applies. For my purposes, I highlight the fifth category referred to as "duty-based" offences. These are offences where there is a duty of care between accused and victim, such as parent and child. Failing to provide the necessities of life to a child is an example of

an objective fault offence (though not all offences arising in the parent/child context are subject to an objective fault *mens rea*).

[149] Also consider the duty of care owed by gun owners. Those who own guns have a duty of care to others relating to their ownership, use and storage. This is considered by the Supreme Court of Canada in *R. v. Finlay* [1993 CanLII 63 (SCC), [1993] 3 SCR 103]. While the Court refers to the general concept in criminal law that punishment should not be meted out to the morally innocent, "Those who have the capacity to live up to a standard of care and fail to do so, in circumstances involving inherently dangerous activities, however, cannot be said to have done nothing wrong."

[150] The Court cites and relies on a report of the Law Reform Commission of Canada that makes the point that certain kinds of activities "…involve the control of technology (cars, explosives, firearms) with the inherent potential to do such serious damage to life and limb that the law is justified in paying special attention to the individuals in control. Failing to act in a way which indicates respect for the inherent potential for harm of those technologies, after having voluntarily assumed control of them (no one *has* to drive, use explosives, or keep guns) is legitimately regarded as criminal. [Emphasis in original.]"

[151] Consider also the responsibility of a driver to whom a demand for a sample of breath is made. They are required to make it known to the officer if they do not understand what is being said or asked by the officer, or if they do not or cannot understand instructions (this does not mean that an officer is required to explain the purpose of a valid approved screening device demand or the consequences of a failure to comply). The officer then has an opportunity to consider the issues raised by the driver.

> If the driver says nothing, there is no chance for the officer to assess the issue the driver is having …
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> …
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> [183] I realize that this is uncomfortably close to putting an onus on an accused, normally not permissible in the criminal law, but this accords with the intent of Parliament and the finding by the Supreme Court of Canada that some impaired driving laws are close to absolute liability laws. They survive constitutional challenge however because they allow for an accused to escape liability by way of proof of a reasonable excuse. It is not for this Court to defeat that intention considering the universally known carnage Parliament continues to work toward preventing.
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> 184] It is not for this Court to challenge that intention in the absence of any challenge to the constitutionality of the laws by Ms. Bradley.

[23] Considering the forgoing, I conclude the reasoning in both *Sweet* and *Bradley* are persuasive. Parliament intended the Crown's burden of proof of *mens rea* to be knowledge of a demand and non-compliance with it. As such, I adopt that conclusion and reject the *Lewko* approach as inconsistent with Parliament's intent in adopting the 2018 amendments.

[24] Having reached this conclusion, I also decline to follow *R. v. Bain*, [1985] NSJ 215 wherein the appellate court upheld an acquittal where the trial judge found *mens rea* was not proven. The m*ens rea* analysis was conducted in accord with the precursor section of the *Code*, and so the decision does not bind this Court.

The evidence of mens rea

[25] Following delivery of the ASD demand, Cst. Waters testified that he told Mr. MacIntosh, "Should you refuse to do so, you will be charged with refusal under the *Criminal Code*. Do you understand?" Mr. MacIntosh asked what it meant to refuse, so the officer explained that "a refusal would or could result in him being charged under the *Criminal Code* with refusal", and the officer took time to explain that the law had changed since 2018 and anyone operating a motor vehicle could now be subject to a mandatory requirement to provide a breath sample. He did so "to clear the concern that if he refused, he would be charged". Mr. MacIntosh said he understood, agreed to provide a sample, and "we began the first test".

[26] Cst. Waters testified that the machine was operational, and the Court is not prepared to speculate that the machine was not properly working. The process of providing a sample was initially explained to Mr. MacIntosh as follows: "he was told how the sample is to be obtained, what is required on his end, and advised he needed to take a deep breath in, and he needed to seal his mouth around the mouthpiece and blow continuously until I told him to stop".

[27] The officer brought the ASD calibration records to the witness stand, and defence conceded the machine was properly calibrated and an approved screening device within the meaning of the *Criminal Code*.

[28] Defence counsel asks the Court to focus on the following words spoken by Mr. MacIntosh during various attempts to provide a sample: “the machine is pulled from my mouth” and “I am trying as hard as I can”.

[29] The Court rewatched the video footage of Mr. MacIntosh’s efforts four through nine. The attempts were made while Mr. MacIntosh was seated in his truck, the machine was at the window of his truck and the officer appeared to be holding the straw. While it is somewhat interesting that the officer held the straw, at all times he takes it away from Mr. MacIntosh in response to a signal from the machine that the attempt was unsuccessful. I simply cannot say that I saw the officer pull the straw away from Mr. MacIntosh while he was still engaged in proper blowing technique thus undermining the effort. I am also not prepared to speculate that the machine was not properly working. Following review of the video camera footage, it appears Mr. MacIntosh stopped blowing and that accords with the testimony of the officer. The officer testified that Mr. MacIntosh was not providing breath enough breath into the machine, his evidence supported a conclusion Mr. MacIntosh stopped blowing,

[30] The *mens rea* of the offence was established and it now turns to Mr. MacIntosh to prove, on the balance of probabilities, a reasonable excuse for failing to provide a valid sample into the device. Other than his comments to the officer, the Court has no evidence of a reasonable excuse for his failure to provide a

sample. The officer reached the conclusion Mr. MacIntosh was failing to blow for the full length of time and provide a sample.

[31] The Crown has proven all the elements of the offence under s. 320.15 *Cr. C.* to the criminal standard of proof beyond a reasonable doubt. The sole witness' testimony was both credible and reliable and caused the court no concern, it was accepted in its entirety.

[32] There is no real dispute between the parties, the s.320.14 *Cr. C.* offence involving speeding does not support a conviction.

[33] Judgment accordingly.

van der Hoek PCJ.