PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Curtis Leroy Handley*, 2024 NSPC 39

Date: 20240729
Docket: 8692396,
8693343,
8692394,
8692395
Registry: Shubenacadie

Between:

His Majesty the King

v.

Curtis Leroy Handley

DECISION ON TRIAL

Judge: The Honourable Judge Mark Heerema

Heard: April 15, 2024 & June 13, 2024, in Shubenacadie, Nova Scotia

Decision: July 29, 2024, in Shubenacadie, Nova Scotia

Charge: Section 320.14(1)(a) of the Criminal Code
Section 320.14(1)(b) of the Criminal Code
Section 320.18(1)(b) of the Criminal Code
Section 145(5.1) of the Criminal Code

Counsel: Brian Warcop for the Crown
Jennifer L. MacDonald for Mr. Handley

By the Court:

Introduction

[1] An officer believed she had reasonable suspicion to demand a breath sample of the accused, Mr. Curtis Leroy Handley, pursuant to s. 320.27(1)(b) of the *Criminal Code*. She based the demand she made on this subjective belief.

[2] The parties agree that she did not meet the reasonable suspicion standard in law.

[3] Despite this, the parties agree that the officer *could* have made a mandatory demand for a breath sample under s. 320.27(2) of the *Criminal Code.* The parties are divided as to whether the subjective motivation of the officer renders the demand she made lawful, or unlawful.

Overview of the Facts and Issues

[4] On May 19, 2023, a concerned citizen called police after spotting a white Mercedes SUV driving erratically, swerving in and out of traffic, with its front bumper hanging down. They saw the SUV pull into an A&W drive-thru in Enfield, Nova Scotia. Cst. McFarlane responded to RCMP dispatch and attended the A&W. She observed the vehicle in line. The vehicle, driven and solely occupied by Mr. Handley, exited the drive-thru. Cst. McFarlane activated her emergency equipment and Mr. Handley immediately pulled his vehicle over in the restaurant parking lot.

[5] After a short interaction outside of their vehicles, Mr. Handley was given a demand to provide a sample of his breath for analysis by means of an approved screening device (the "ASD demand"). The officer testified that she made the ASD demand because she had a reasonable suspicion that he had consumed alcohol.

[6] Mr. Handley agreed to provide a sample and registered a "fail." He was subsequently arrested for impaired operation of a motor vehicle and given a demand to provide a sample of his breath for analysis by means of an approved instrument. He said he would provide a sample and was transported back to the RCMP detachment in Enfield, NS.

[7] Upon arriving at the detachment, and after speaking with a lawyer, he provided two samples of his breath to a qualified technician. Both samples were found to contain 330 milligrams of alcohol in 100 millilitres of blood.

[8] Mr. Handley was subject to a driving prohibition at the time, as well as police-issued undertaking not to occupy the driver's seat of a motor vehicle.

[9] On April 15, 2024, a blended trial and *Charter voir dire* proceeded by consent. The sole witness was Cst. Violet McFarlane.

[10] There are three matters in dispute:

> First, was the ASD demand unlawful and violative of Mr. Handley's s. 8 rights under the *Canadian Charter of Rights and Freedoms* (the *'Charter'*)?
>
> Second, were Mr. Handley's s. 10(b) *Charter* rights violated?
>
> Third, has the Crown proven these offences beyond a reasonable doubt?

Issue #1 – Lawfulness of the ASD Demand

(a) Governing Principles

[11] Warrantless searches must be authorized by law. This includes breath samples into approved screening devices. Section 320.27 of the *Criminal Code* provides two separate pathways for an officer to make this type of demand.

[12] Pursuant to s. 320.27(1)(b), an officer who has "reasonable grounds to suspect" that a person has alcohol in their body and that person has within the preceding three hours operated a conveyance, may require the person to immediately provide samples of their breath.

[13] Pursuant to s. 320.27(2), if an officer has in their possession an approved screening device and they are engaged in the lawful exercise of their powers, they may require a person who they find operating a motor vehicle to immediately provide samples of their breath.

[14] Notably, s. 320.27(2) was enacted on December 18, 2018 as part of Bill C-46 which overhauled the impaired driving provisions of the *Criminal Code*. Prior to these amendments, approved screening device demands could only be made where an officer had reasonable suspicion, and as such, the introduction of s.

320.27(2) significantly widened the ability of peace officers to make an approved screening device demand. The constitutionality of s. 320.27(2) has been affirmed by various courts (see *e.g.*, *R. v. Mackenzie Wright*, 2023 SKKB 236 and *R. v. Brown*, 2021 NSPC 32).

(b) Relevant Facts

[15] Cst. McFarlane testified that after Mr. Handley pulled over in the A&W parking lot, she parked her police vehicle behind his. This was at approximately 5:20 p.m. She stayed in her vehicle and began querying the license plate to gain information about the registered owner.

[16] As she was waiting for information from dispatch, Mr. Handley exited his vehicle and proceeded towards her. She felt this was highly unusual, as in her experience most people wait in their vehicle until being approached by the officer.

[17] She was uniformed and driving a marked police vehicle. She exited her vehicle. Mr. Handley asked why he had been pulled over. She told him that his front bumper was hanging down. He appeared relieved hearing this, turned around and proceeded to the front of his vehicle to look at it. As he was walking back towards her, the officer noticed very slow and deliberate movements which led her to believe that he may have consumed alcohol.

[18] The officer did not notice any smell of alcohol coming from Mr. Handley, unsteadiness, redness of his eyes, slurred speech or other more common indicia of impairment, nor did she observe any alcohol bottles or cans. She noted his speech to be fast and rapid. He did appear upset and had a hard time providing his name. He did not have a license on him.

[19] The officer testified that, based on "the totality of my experience" she had a "suspicion" that he had alcohol in his system. On that basis, she read him the ASD demand at 5:29 p.m. The officer testified that she was aware that a mandatory demand under s. 320.27(2) was also available and that it required Mr. Handley to be found operating a vehicle, which she had witnessed.

[20] Cst. McFarlane read Mr. Handley the ASD demand.

[21] While it is clear from the officer's testimony that she was basing the demand she made under s. 320.27(1)(b), there is no evidence that she advised Mr. Handley

which provision of the *Criminal Code*, or upon what authority, she was relying. She testified that the pre-printed demand on a card that she reads from contains identical wording for either s. 320.27(1)(b) or s. 320.27(2). The officer read the demand she made to Mr. Handley into the record and I noted that it makes no reference, either by section number or content, to any specific provision of the *Criminal Code.*

[22] Upon hearing the ASD demand, Mr. Handley indicated that he would provide a sample.

[23] Cst. McFarlane had an ASD in her police vehicle. Mr. Handley sat, uncuffed in the rear of the police vehicle with the door open. He provided a breath sample and registered a "fail" at 5:32 p.m., and was subsequently placed under arrest for impaired driving.

(c) Position of the Parties

[24] The parties agree that Cst. McFarlane did not meet the grounds necessary in law to demand a breath sample, pursuant to s. 320.27(1)(b). Simply put, she did not have reasonable grounds to suspect that Mr. Handley had alcohol in his body. I agree with the parties. While I accept that the officer subjectively believed, based on her experience, that she had met this standard, I do not believe that the constellation of objectively discernible facts supported her belief. While the officer was entitled to draw upon her training or experience to make otherwise equivocal information probative, despite this I believe she fell just short (*R. v. Zakos*, 2022 ONCA 121 at para. 41).

[25] I agree with the parties that Cst. McFarlane *did* have grounds to make a demand pursuant to s. 320.27(2); that is, (i) she was lawfully engaged in a traffic stop of Mr. Handley, (ii) she had observed Mr. Handley operating the motor vehicle, and (iii) she had an approved screening device in her possession.

[26] The narrow issue which divides the parties is the impact of Cst. McFarlane subjectively relying upon s. 320.27(1)(b) as opposed to s. 320.27(2) in making the ASD demand of Mr. Handley.

[27] Mr. Handley argues that because the officer was wrong in her assessment of reasonable suspicion, her subjective decision to make a demand under that authority cannot be rectified. In effect, while she *could* have made a demand for

his breath under s. 320.27(2), she did not, and it is now unfair to allow the Crown to rely upon this provision.

[28] Mr. Handley notes that the few cases that address this issue generally speak of the officer needing to choose, *at the time of the ASD demand,* to rely upon one or both powers under s. 320.27. He argues that unless the officer relied upon both provisions at the roadside, the Crown cannot at trial. Mr. Handley relies upon *R. v. Caslake,* [1998] 1 S.C.R. 51 and other cases to advance his argument, which I will address in more detail below.

[29] The Crown disagrees with the position taken by Mr. Handley. They argue that Cst. McFarlane's error about the existence of reasonable grounds does not neutralize the applicability of s. 320.27(2) of the *Criminal Code*. That is, in these factual circumstances, s. 320.27(2) provides that a demand could be made of Mr. Handley's breath into an approved screening device without the need for reasonable grounds or any other subjective element being satisfied.

(d) Principles applied

[30] I agree with the parties that the elements necessary for a lawful demand under s. 320.27(2) existed. Cst. McFarlane was aware that the necessary elements of s. 320.27(2) were satisfied; however, believing she had also met the higher standard of reasonable suspicion, subjectively chose to rely upon it.

[31] Can the Crown thrust s. 320.27(2) to centre stage now, when Cst. McFarlane did not?

[32] This issue has received inconsistent treatment in the law.

[33] In *R. v. Schmidt*, 2023 YKTC 32, the Court found that an officer did not have reasonable grounds to suspect under s. 320.27(1)(b). The Court rejected the Crown's argument that despite this finding, lawful authority for an approved screening device demand could be found in s. 320.27(2):

> [67] However, this was not the basis put forward by Cst. Fox for the ASD demand that he made. He founded the basis for his demand on s. 320.27(1) — i.e., "reasonable suspicion". I am not aware of any jurisprudence that holds that if a police officer fails on the reasonable suspicion basis, they can then successfully default to the mandatory s. 320.27(2) demand, nor am I prepared to make such a determination myself. If the police officer decided to proceed on the reasonable suspicion basis to obtain an ASD breath

> sample, then the Court should assess whether this standard has been met and not default to a finding based upon thinking along the lines of, "[w]ell, the officer could have used s. 320.27(2) regardless, so it doesn't matter."

[34] The Court in *Schmidt* found breaches of s. 8, 10(a) and 10(b) and excluded the evidence of the samples pursuant to s. 24(2).

[35] A contrary approach was seemingly taken in a summary conviction appeal by Belzil J. in *R. v. Dirksen*, 2020 ABQB 363. In that case, an officer made an ASD demand under s. 320.27(2). After the demand was made, and the accused agreed to provide a sample, the officer believed the accused was not trying to provide a sample. Erroneously believing that there was no charge for refusing a sample under s. 320.27(2), the officer then demanded a sample pursuant to s. 320.27(1)(b). The conviction was maintained, and in so doing it was noted:

> [30] The argument of the appellant respecting the juxtaposition of these two *Criminal Code* provisions appears to be predicated on the assumption that an investigating police officer could rely upon either MAS section 327.20(2) [sic] or ASD section 320.27(1), but not both.
>
> [31] These two *Criminal Code* provisions are not mutually exclusive.
>
> [32] There is nothing in the wording of these provisions preventing an investigating police officer, in the appropriate circumstances, from making use of both a MAS demand and ASD demand, provided of course that the procedural requirements of each section are satisfied.
>
> [33] If the procedural requirements of both provisions are satisfied, the result will be the same, that is, a sample of breath will be produced. If the sample registers a "fail", the legal basis for a qualified breath technician to obtain breath samples using an approved device is established.

[36] Similar reasoning to *Dirksen* can be seen in *R. v. Morris-Rainford*, 2020 ONCJ 447 and *Hayley Bradley v. Her Majesty the Queen*, 2022 NBQB 31.

[37] In *R. v. Campbell*, [2022] O.J. No. 5480, the Court of Justice identified the issue, but chose not to address it:

> 11 Having considered the evidence and the submissions of counsel, I find that it is unnecessary for me to resolve the issue of whether an officer must subjectively turn his mind to the police power to make a mandatory ASD demand under s. 320.27(2) for the Crown to rely on that subsection to meet its onus of establishing a reasonable search on a s. 8 *Charter* application. Based on my assessment of the objectively discernible facts, I find

> that P.C. Raponi made a valid ASD demand pursuant to s. 320.27(1)(b). I have decided the case on that basis.

[38] This case requires me to address what *Campbell* left unanswered: does the officer need to be subjectively motivated by s. 320.27(2) to make a demand for a breath sample lawful under that authority? For the reasons which follow, I am not persuaded a subjective motivation is required and conclude that the demand made by Cst. McFarlane in this case was lawful.

[39] I begin by addressing the Supreme Court of Canada's decision in *R. v. Caslake,* 1998 1 S.C.R. 51. In *Caslake*, an accused had been lawfully arrested for possession of narcotics. Six hours after being arrested in his vehicle, the police conducted a detailed inventory search of the vehicle pursuant to RCMP policy. The Supreme Court of Canada found that while the officer *could* have relied upon the doctrine of search incident to arrest to justify this search, they did not, and therefore the search was invalid. The Court found that for search incident to arrest, the officer must be guided by some valid purpose connected to the arrest (para. 19). Accordingly, a search incident to arrest is tethered, assessed, and guided by the purpose for which it occurred:

> This Court cannot characterize a search as being incidental to an arrest when the officer is actually acting for purposes unrelated to the arrest. That is the reason for the subjective element of the test.
>
> (para. 21, see also para. 27)

[40] Courts have reached similar conclusions with respect to other doctrines that require an officer's actions be guided by specified, defined purposes at the time of the search (see *e.g.*, *R. v. Whitaker,* 2008 BCCA 174 at para. 65 in relation to arrest powers and investigative detention; and *R. v. Dhillon* 2012 BCCA 254 at paras. 37-40).

[41] The distinction between police powers related to arrest, detention or search incident to arrest, on the one hand, and s. 320.27(2) on the other, is that s. 320.27(2) does not import a subjective element.

[42] Parliament has expressly provided peace officers with the ability to make a mandatory ASD demand provided certain factual realities are met, namely: the officer has a screening device, the officer is in the lawful exercise of their powers, and the person is operating a motor vehicle.

[43] In this case, Mr. Handley was not told specifically that a breath sample was being demanded under the authority of s. 320.27(1)(b). He was found operating a motor vehicle by an officer engaged in a lawful traffic stop who had an approved screening device in her possession. After a short interaction with him, the officer made a demand for his breath without reference to either subsection.

[44] I fail to see how the officer's mistaken, but unvocalized, reliance on 320.27(1)(b) invalidates what is otherwise plainly lawful under s. 320.27(2). Accordingly, I am not persuaded that Mr. Handley's rights and protected interests under s. 8 of the *Charter* are engaged on these facts. I do note that *if* he was advised the demand was being made under s. 320.27(1)(b), or the charge was particularized as such, that may change the analysis (see *e.g*., *R. v. Haqyar,* 2019 ABPC 195 at para. 22).

[45] Accordingly, I find that the ASD demand in this case, and its results, were authorized by law. There is no contest that s. 320.27(2) is reasonable, and that the search was carried out in a reasonable manner. Accordingly, I find that Mr. Handley's s. 8 rights were not violated.

(e) Section 24(2)

[46] If I am wrong and the ASD demand in this case was unlawful, then a s. 8 breach occurred. In this alternative situation, a s. 24(2) analysis is required to determine whether the "fail" should be excluded from evidence.

[47] This analysis must start by noting the doctrine of consequential breaches as recently addressed by the Supreme Court of Canada in *R. v. Zacharias*, 2023 SCC 30. Here, had the approved screening device demand not occurred, Mr. Handley would not have been arrested for impaired driving, not taken to the station, not detained there and not given subsequent breath samples. The ensuing breaches of Mr. Handley's rights must be considered.

[48] The first factor under the *Grant* analysis requires an evaluation of the seriousness of the state conduct that led to the breach and the need for the Court to disassociate itself from it. In the case of consequential breaches, pursuant to *Zacharias*, these matters are unlikely to significantly impact the assessment of the state infringing conduct.

[49] While ultimately the parties and Court agree that Cst. McFarlane did not have reasonable suspicion, I do not find that her conduct was driven by bad faith or wilful disregard. I find that she subjectively believed she had met this standard. There was no evidence that she was attempting to act improperly or unfairly towards Mr. Handley. Moreover, I strongly echo the Court in *Campbell* that the existence of s. 320.27(2) has some relevance at this stage:

> 39 In this case, P.C. Raponi had an ASD in his possession. Pursuant to s. 320.27(2), he did not require a reasonable suspicion to make the ASD demand. Once he had conducted the lawful stop of the accused's vehicle, he could have made the mandatory alcohol screening demand. Instead, he conducted an initial screening process by speaking with the accused and his passenger and by making other observations which led him to make the ASD demand pursuant to s. 320.27(1)(b). This demand was made within the "forthwith window". As Jennis J. stated in *R. v. Skuse*, "[i]f the officer had fallen short of meeting the requisite standard, he did not fall short by very much and there was no bad faith on his part".
>
> 40 Furthermore, if I am in error in finding that the requisite reasonable suspicion existed for the ASD demand to be made pursuant to s. 320.27(1)(b), the existence of a statutory basis under s. 320.27(2) to make the demand without any grounds in these circumstances attenuates the seriousness of the *Charter* breach. The seriousness of the breach would be at the inadvertent or minor end of the spectrum.

[50] The first factor only weakly favours exclusion.

[51] Turning to the second factor, I must consider the impact of the breach on the interests of the accused. In this case, the accused was placed, uncuffed, in the back of the officer's police car with the door open. The officer made the demand, and within three minutes a "fail" was registered. The accused was subsequently transported, again uncuffed, to the police station and held there for some time.

[52] I will address the Crown's reliance on the 2018 decision of the Ontario Court of Appeal in *Jennings*. In *Jennings,* the Court of Appeal addressed the *obiter dicta* from the Supreme Court of Canada's judgment in *Grant,* which described breath demand samples as quintessentially "minimally intrusive" breaches. The Ontario Court of Appeal agreed, and stated that the Supreme Court made this finding, knowing that such demands would ultimately lead to consequential arrests, demands, *etc*. In effect, the Court is to sever what happens following the initial breath sample from its consideration.

[53] The reasoning employed in *Jennings* was expressly rejected by a majority of the Supreme Court of Canada in *Zacharias* (see para. 57). Accordingly, I must employ a broader lens than *Jennings* envisioned as being necessary.

[54] The facts of *Zacharias* are useful in conducting this analysis. That case also featured a roadside stop with a breach of the accused's *Charter* rights which led to a further search, arrest, and Mr. Zacharias being brought to a police station. In that case, the Supreme Court found that in light of the subsequent breaches, this factor under *Grant* moderately favoured exclusion of the evidence. I find that conclusion is also appropriate in this case.

[55] Turning finally to society's interest in an adjudication on the merits, impaired driving offences, and the scourge they represent, remain matters of serious societal concern. Mr. Handley's blood alcohol concentration levels were exceedingly high: 330 mg of alcohol in 100 ml of blood. This factor strongly favours admission.

[56] In balancing, I find that the pull of the first two factors are insufficient to outweigh the third and accordingly I would admit the evidence.

Issue #2 – Were Mr. Handley's s. 10(b) rights infringed?

(a) Relevant Facts

[57] Immediately after Mr. Handley registered a "fail" on the ASD at 5:32 p.m., the officer advised Mr. Handley that he was under arrest for impaired driving. She then made a demand for a breath sample to a qualified technician. Mr. Handley stated that he understood and agreed to be taken to the detachment for this purpose. He remained uncuffed in the rear of the police vehicle.

[58] The officer testified that she then briefly provided direction to another officer on scene regarding Mr. Handley's vehicle. After this, she and Mr. Handley departed for the police station.

[59] The officer described Mr. Handley as being very upset and talking excessively. He was generally not responsive to her words. The officer testified that she was motivated to leave the scene quickly to avoid the spectacle of it in the drive-thru area and to preserve the dignity of Mr. Handley. The officer indicated that she advised Mr. Handley that he had a right to a lawyer, not to talk to her, that

anything he said could be used against him, and that they would deal with everything at the detachment. This was informally addressed and not read from a "*Charter* card". The officer's explanation for not doing so immediately was based on Mr. Handley's heightened emotional state, as she felt that this possibility was not workable.

[60] The officer testified that they arrived at the detachment at 5:48 p.m. and that she formally read him his rights from the *Charter* card at 5:52 p.m. Two phone calls were subsequently made to counsel by Mr. Handley, the first of which was placed at 5:55 p.m.

[61] In essence, the issue for this Court is whether the failure of Cst. McFarlane to read verbatim from her *Charter* card amounts to a breach of s. 10(b).

(b) *Position of the Parties*

[62] Mr. Handley argues that the initial failure to provide rights *verbatim* from the *Charter* card resulted in inadequate information being provided to him. For instance, the officer stated that while she told him that he had a right to a lawyer, Mr. Handley was not asked at that time if he wanted to call a lawyer, but rather told that they would deal with it all at the station.

[63] The Crown states that the officer responded appropriately to the emotional and upset person with whom she was engaged. She provided an informal version of the rights in a manner responsive to his elevated emotional state, but ensured that shortly after arriving at the station, his rights were more formally read to him.

(c) Governing Principles

[64] Section 10(b) states as follows:

> Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right.

[65] *R. v. Sinclair,* 2010 SCC 35 discussed the purpose of s. 10(b):

> [24] The purpose of s. 10(b) is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation. In the context of a custodial interrogation, chief

> among the rights that must be understood by the detainee is the right under s. 7 of the *Charter* to choose whether to cooperate with the police or not.

[66] Section 10(b) creates two duties that the police must fulfill. The first is advising the arrested or detained person about their rights to retain and instruct counsel: "the informational component." The second is to provide an individual who wishes to retain counsel an opportunity to do so: "the implementational component." Our law continues to outline and animate the scope and boundaries of these duties.

[67] The informational component is to be provided immediately (*R. v. Suberu*, 2009 SCC 33 at para. 42).

(d) Principles Applied

[68] There is no magic to the police reading s. 10(b) *Charter* rights from a pre-printed card; however, it does ensure that all necessary information is provided to a person who has been detained or arrested. This case is a good example of why. Cst. McFarlane was unable to reproduce for the Court exactly what was conveyed to Mr. Handley initially while they were in the vehicle.

[69] I note that Mr. Handley bears the burden of demonstrating, on a balance of probabilities, that his *Charter* rights were violated. He did not testify, and I am left solely with the evidence of Cst. McFarlane. While I have some reservations, given that Cst. McFarlane could not remember exactly what she conveyed to him in the vehicle, I am not satisfied that Mr. Handley has established a breach of his s. 10(b) rights occurred.

[70] While it would have been preferable for Cst. McFarlane to read his rights verbatim off the card, I accept that Mr. Handley's initial emotional state at roadside was such that had the officer done so, it was unlikely to be more meaningfully received than in the informal manner she did. I accept her evidence – and indeed the only evidence I have on the point - that he was overwrought with emotions and was generally unresponsive to her words during the short car ride to the detachment. Within minutes of arriving, Cst. McFarlane then read verbatim the *Charter* card shortly before Mr. Handley exercised his right to contact counsel.

[71] I find that Mr. Handley was told his rights to counsel under s. 10(b) in the car ride and then at the detachment, such that she complied with the informational

duty placed upon her. If I am wrong and his s. 10(b) rights were breached by failing to comply with the informational component, I would not exclude the evidence which was obtained from him for the reasons that follow.

(e) Section 24(2)

[72] The first factor only weakly favours exclusion. The officer's motivation did not evidence bad faith. I accept her evidence that she subjectively believed she had complied with the informational component of s. 10(b) by dealing with it informally, given the public space she was in and Mr. Handley's heightened emotional state. I accept that she was attempting to dissuade Mr. Handley from engaging with her, and that her advising him not to say anything and his entitlements to a lawyer were generally unheard by him. When the officer arrived at the station, Mr. Handley's rights were promptly read verbatim off the *Charter* card, before he exercised his right to counsel. On scale of culpability, I situate her conduct on the low-end.

[73] The second factor moderately favours exclusion. Again, following *Zacharias,* the impact upon Mr. Handley's *Charter* protected interests must be considered in light of the consequential breaches. Relatedly, while he was read his rights verbatim, and exercised counsel before providing eventual samples, this does not render the initial failure to provide full informational components as merely technical (see *R. v. Davis*, 2023 ONCA 227).

[74] Finally, I would conclude, similar to the first analysis, that society has a significant interest in the adjudication of the case on its merits.

[75] I conclude that upon balancing the three factors identified in *Grant,* admission of the evidence will not bring the administration of justice into disrepute, and therefore, it is admitted.

Issue #3 - Has the Crown Proven the Offences Charged?

[76] Mr. Handley is charged with four offences:

- **Count #1**: Impaired operation of a conveyance, contrary to s. 320.14(1)(a)
- **Count# 2**: Having a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 ml of blood within two hours of ceasing to operate a conveyance, contrary to s. 320.14(1)(b)

- **Count #3**: Operating a conveyance while prohibited from doing so, contrary to s. 320.18(1)(b)

- **Count #4** – Failing without lawful excuse to comply with an undertaking to not occupy the driver's seat of a motor vehicle, contrary to s. 145(5.1)

[77] The accused is presumed innocent of these charges until all elements have been proven beyond a reasonable doubt against him.

[78] To be convicted of impaired driving, the Crown must establish an impairment to operate the vehicle. As noted by the Ontario Court of Appeal in *R. v. Bush*, 2010 ONCA 554 at para. 47:

> …[i]mpairment may be established where the prosecution proves any degree of impairment from slight to great: *R. v. Stellato* (1993), 1993 CanLII 3375 (ON CA), 12 O.R. (3d) 90, [1993] O.J. No. 18 (C.A.), affd (1994), 1994 CanLII 94 (SCC), 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, [page655] reaction or response time, judgment and regard for the rules of the road: *Censoni*, at para. 47.

[79] Impairment may impact the physical or mental ability to operate a motor vehicle, or both.

[80] In this case, there is no direct, non-hearsay evidence before the Court that would prove impairment. The officer observed the accused driving for only a very short distance and did not note any concerns. The officer's observations of Mr. Handley's physical state and symptoms that day did not reveal any concerns sufficient to support a reasonable suspicion that he had consumed alcohol. Moreover, while the front bumper was said to be hanging down, it is not clear the degree or extent to which it was, such that it could possibly support an inference that the driver was likely impaired, given their decision to persist in driving a vehicle in such a condition.

[81] I appreciate that the use of blood alcohol concentration levels to prove impairment has been somewhat divisive in this province and was recently addressed in *R. v. Morrison*, 2024 NSPC 28. Following a thorough and careful consideration of the issue, Judge Russell concluded that while blood alcohol concentration levels can be used to demonstrate that the accused had consumed

alcohol, using such levels to prove impairment – without expert evidence to interpret those readings – is something that merits caution, if not strict avoidance.

[82] This is not a case which features other evidence of impairment that may be corroborated by blood alcohol concentration levels. In this regard, I note the following from the Alberta Provincial Court in *R. v. Laboucan*, 2022 ABPC 58:

> Evidence of blood alcohol level alone is insufficient to establish impairment of faculties. However, that evidence may be corroborative of other evidence of impairment, such as the testimony of the arresting police officer: *R. v. Slykhuis,* 2013 ONSC 134 (Ont. S.C.J.) at paras 42-45, (2013), 104 W.C.B. (2d) 1208 (Ont. S.C.J.); *R. v. Fisher* (1992), 1992 CanLII 2106 (BC CA), 13 C.R. (4th) 222, 36 M.V.R. (2d) 6 (B.C. C.A.); *R. c. Laprise* (1996), 1996 CanLII 6000 (QC CA), 113 C.C.C. (3d) 87, 26 M.V.R. (3d) 240 (C.A. Que.).

[83] What perhaps separates this case from others is the exceptionally high nature of Mr. Handley's blood alcohol concentration levels. Both levels exceeded four times the legal limit. One might argue that readings of 330 mg of alcohol in 100 ml of blood not just speak, but rather, shout for themselves when it comes to impairment.

[84] Is there ever a level of blood alcohol concentration in which a Court could safely take judicial notice of impairment? Relatedly, could a court inform themselves from other cases which recite generic expert opinion on the effects of blood alcohol concentration at such high levels (See e.g., *R. v. Robertson*, 2002 ABPC 13 at para. 24 or *R. v. So,* 2024 BCCA 101 at para. 104)?

[85] I have not received submissions from counsel on these issues. Absent comprehensive arguments, I will not make any rulings against what I find to be the general rule which holds that absent any other additional evidence, blood alcohol concentration levels alone cannot establish proof of impairment.

[86] Accordingly, I find Mr. Handley not guilty of Count #1.

[87] I now turn to the second count. The evidence clearly establishes that Mr. Handley had a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 ml of blood within two hours of ceasing to operate his motor vehicle. Mr. Handley's samples were taken at 6:33 p.m. and 6:55 p.m., both of which were within two hours of him being found operating his white SUV. There is no dispute taken with the certificates that have been tendered. I find the Crown has proven all elements of Count #2 beyond a reasonable doubt.

[88] With respect to the third count, on the day in question Mr. Handley was subject to an Order of Prohibition to Operate a Motor Vehicle originating from the Nova Scotia Provincial Court. This order was dated July 7, 2020, and was to remain in effect for three years.

[89] Count #3 reads as follows:

> And furthermore that on the 19th day of May, 2023, at Elmsdale, Nova Scotia, did operate a conveyance while prohibited from doing so by reason of the legal disqualification in the Province of Nova Scotia of his privilege to operate a motor vehicle, contrary to s. 320.18(1)(b) of the *Criminal Code* of Canada.

[90] Mr. Handley argues that he has been charged under the wrong section of the *Criminal Code*. Section 320.18(1) reads as follows:

> 320.18 (1) Everyone commits an offence who operates a conveyance while prohibited from doing so
>
> > (a) by an order made under this Act; or
> >
> > (b) by any other form of legal restriction imposed under any other Act of Parliament or under provincial law in respect of a conviction under this Act or a discharge under section 730.

[91] He argues that s. 320.18(1)(b) – the offence he is charged with – relates to non-*Criminal Code* prohibitions on driving that arise from some other Act of Parliament or the Legislature, for example, revocation of a license from the Provincial Registry of Motor Vehicles.

[92] The Crown maintains that the reference to subsection (b) or (a) should be considered surplusage, in that it is additional or excess information that need not be proven.

[93] I am not persuaded by Mr. Handley's argument. Ideally, a charge contains the correct section number; however, s. 581(5) of the *Criminal Code* does not require that a section of the enacting law be referenced in a charge. When included in a charge, erroneous section numbers have been considered surplus where there is no suggestion that the accused was in fact misled (see *e.g. R. v. Sourwine,* 1970 Canlii ABKB and *R. v. Kavanagh*, 1988 CanLII 4927 (SK KB). While it would have been vastly preferable for the subsection to be correctly noted, in my view, Mr. Handley knew what charge he was facing in relation to this

allegation, and I do not believe he has been taken by surprise or prejudiced by the error.

[94] By operating the white SUV, Mr. Handley intentionally violated the prohibition order he was subject to, and I find him guilty as charged.

[95] With respect to the final count, on the day in question, Mr. Handley was subject to an Undertaking given to a Peace Officer, dated November 25, 2022, order #2405135. A condition of this undertaking required Mr. Handley not to occupy the driver's seat of a motor vehicle.

[96] Mr. Handley has been charged with the following offence:

> On or about May 19, 2023 at, or near, Elmsdale, Nova Scotia did, being at large on his undertaking given to a peace officer and being bound to comply with a condition of that Undertaking (Order #2405135) directed by the said peace officer fail without lawful excuse to comply with that condition to wit: not to occupy the driver's seat of a motor vehicle with no exceptions contrary to s. 145(5.1) of the *Criminal Code*.

[97] Mr. Handley advances a similar argument to this count as he did for count #3. He rightfully points out that s. 145(5.1) has been repealed. The correct charging section is s. 145(4).

[98] Without condoning sloppy drafting of the Information, I again find that Mr. Handley's argument must fail for reasons similar to Count #3. Here, the charge specifically refers to the undertaking by number. I cannot see any actual prejudice to Mr. Handley in the conduct of this case. While the count references an incorrect subsection of s. 145, Mr. Handley knew exactly what undertaking, and what condition of it, he was alleged to have breached.

[99] There is no question that Mr. Handley was occupying the driver's seat of the white SUV and that by doing so, he intentionally violated the undertaking to which he was subject.

[100] Accordingly, I find Mr. Handley not guilty of Count #1, but guilty of all remaining counts.

Heerema, JPC