Summary conviction appeal from a Provincial Court Judge

Date: 20261005
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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING	)	Manoja Moorthy
	)	Valerie Hebert
	)	for the Crown
- and -	)	
	)	
	)	Mark Wasyliw
CHAD LUCIEN JOSEPH WALLACK,	)	for the accused
	)	
accused.	)	Judgment Delivered:
	)	October 5, 2026

KOTLER J.

[1] The accused appeals his conviction, entered July 23, 2025, on one count of operating a conveyance with an elevated blood alcohol level contrary to ***Criminal Code*** s. 320.14(1)(b). He was also found guilty of one count of impaired operation of a conveyance contrary to ***Criminal Code*** s. 320.14(1)(a); this charge was stayed pursuant to the rule in ***R. v. Kienapple***, [1975] 1 S.C.R. 729, 1974 CanLII 14 (SCC).

[2] For the reasons that follow, I have concluded that while one ground of appeal has merit, the appeal must nevertheless be dismissed.

FACTS

[3] Shortly before midnight on February 6, 2024, RCMP officers in St. Pierre-Jolys received a "crash notification" advising that an iPhone had been involved in a serious impact in Ste. Agathe. Constables Raymond, Fall and Charles responded. Constable Raymond testified that he arrived at 12:07 a.m. and observed a Ford F150 truck stuck in a long sloping ditch on the side of the highway. First responders were present, and the appellant was sitting in the driver's seat of the truck.

[4] Constable Raymond spoke to the appellant. The appellant appeared confused and was having coordination issues. His speech was slurred. He showed the officer some medication, which he said was for diabetes.

[5] Constable Raymond believed the appellant was having a diabetic episode and required medical assistance. Emergency Medical Services ("EMS") personnel attended and brought the appellant to an ambulance. They gave him his medication and some juice, after which his condition appeared to improve.

[6] While the appellant was being treated, Constable Raymond asked him where his identification was. He testified that he wanted to confirm the appellant's identity and ownership of the truck, as well as ensure that the appellant had a valid license and was not subject to conditions or warrants.

[7] The appellant told Constable Raymond that his identification was possibly in his truck. Constable Raymond attended to the truck and checked the sides, the center console, the back seat and other areas where he thought the appellant's wallet might

have ended up following the crash into the ditch. He did not seek permission from the appellant.

[8] Under the driver's seat of the truck, he located a half-empty bottle of liquor. He revisited his earlier impression that the appellant's coordination issues and slurred speech were entirely due to a medical condition and went to the ambulance to administer an approved screening device ("ASD"). He formed the requisite suspicion regarding alcohol in the appellant's body at 12:40 a.m. on February 7, 2024, and made the demand shortly thereafter.

[9] The appellant provided a sample promptly and failed the ASD, leading Constable Raymond to believe that his blood alcohol level exceeded the permissible amount under ***Criminal Code*** s. 320.14. Before arresting him, however, Constable Raymond wanted to ascertain whether he was a candidate for administrative diversion. He explained that he had been trained that once he made an arrest, he could not go back afterwards and proceed administratively. He also wanted to know whether the appellant was going to be taken to the hospital. If so, he would have made a blood demand rather than a breath demand.

[10] Determining that the appellant was not eligible for diversion, Constable Raymond placed him under arrest at approximately 12:50 a.m. EMS staff continued dealing with the appellant, then he was taken to the cruiser car and formally arrested by Constable Fall just after 1:00 a.m. He was read his rights and Constable Fall made a breath demand.

[11] The officers took the appellant to the RCMP detachment, where he spoke to counsel and ultimately provided two breath samples: 90 milligrams percent and 80 milligrams percent.

[12] Constable Fall also testified, confirming that he and Constable Raymond had arrived at the scene near midnight. They saw the appellant's truck in the ditch and observed tracks leading from the road to the vehicle's location. There were also tracks suggesting that the vehicle had driven back and forth trying to get out of the ditch.

[13] Constable Raymond spoke to the appellant via the driver's side window. The appellant appeared confused but insisted he was fine. Eventually, he left the truck and accompanied EMS staff to the ambulance.

[14] Constable Fall called for a tow truck and waited while EMS treated the appellant. He testified that while they had identified the owner of the vehicle, they had not yet identified the appellant. He heard Constable Raymond ask the appellant for his wallet or identification, to which the appellant replied, "Yes, I have my wallet, it's in the truck." Constable Raymond then briefly searched the vehicle.

[15] Constable Raymond advised that he had located a bottle of alcohol in the truck and administered an ASD test to the appellant. The appellant was placed under arrest. Once he was treated and released by EMS, he was brought to the police car and read his rights and breath demand at 1:02 a.m.

[16] They left the scene with the appellant at 1:10 a.m. and arrived at the RCMP detachment approximately 20 minutes later. The appellant spoke to counsel between

1:30 and 1:34 a.m., then provided two samples. A certificate was served on the appellant containing the results of those samples.

THE TRIAL

[17] The appellant challenged the search of his truck, the grounds for the ASD demand and the timing of his breath demand, ***Charter*** warnings and access to counsel. As to the search, the trial judge accepted Constable Raymond's evidence that he only entered the truck to locate the appellant's identification. She found that given the appellant's indication that the wallet was in the vehicle and the fact that he was being treated by EMS, Constable Raymond's reasoning was "logical" and "his conduct was appropriate." In her view, the search was authorized by ***The Highway Traffic Act***, C.C.S.M. c. H60, s. 241.1(4), which provides, *inter alia*, that "[a] peace officer may at any reasonable time enter a place and make any inspection that is reasonably required for the purpose of determining compliance with this Act[.]"

[18] As to the grounds for the ASD demand, the trial judge concluded that the combination of the appellant's having driven into the ditch and the presence of a half-empty bottle of liquor under the driver's seat provided "ample" grounds to suspect that the appellant had alcohol in his body, notwithstanding his medical condition.

[19] She also concluded that the police had acted "as soon as practicable" in making the breath demand. In doing so, she made a number of findings. The ASD process had been completed at 12:41 a.m. Over the next nine minutes – that is, until 12:50 a.m. – the officers were attempting to confirm the appellant's identity and ascertain whether he was eligible for a non-criminal diversion program. In her view, these were

reasonable steps to take. At 12:50 a.m., the appellant was arrested while he was still being treated by EMS. Police waited to make a demand until they knew whether EMS would release him, as this would affect the nature of the demand – blood or breath. Once EMS released the appellant, he was taken to the police car, read his rights and given the breath demand at 1:02 a.m. Given the "entire context," she held, the demand had been made as soon as practicable.

[20] As to the timing of the appellant's ***Charter*** warnings, the trial judge held that consistent with ***R. v. Duma***, 2011 MBPC 19 (unreported), the situation leading up to the ASD demand was "akin to" a roadside stop carried out pursuant to ***The Highway Traffic Act***, s. 76.1 during which the right to counsel is suspended. (See ***R. v. Orbanski***; ***R. v. Elias***, 2005 SCC 37, paras. 38-50) While the appellant had been moved from his vehicle to an ambulance in order to prioritize treatment, this did not turn the incident into an investigative detention giving rise to a right to counsel. No s. 10(b) rights were required at the time of the ASD demand, either by operation of s. 76.1 or pursuant to the common law principles set out in ***Orbanski*** and discussed in ***R. v. Harrison***, 2019 MBQB 131, paras. 48-50.

[21] Nor did the nine-minute delay between the ASD test and the arrest violate s. 10(b). Again, the trial judge accepted Constable Raymond's explanation that he was attempting to determine whether the appellant could avoid arrest in favour of administrative diversion. Providing an immediate notice of arrest would have deprived the appellant of this opportunity. In the circumstances, she found the delay justified.

[22] The 12-minute delay following the notice of arrest, however, did violate s. 10(b). At that point, the trial judge observed, police were waiting to hear whether the appellant would be released to them or taken to hospital for further treatment. While this explanation satisfied the "as soon as practicable" requirement in ***Criminal Code*** s. 320.28, it did not justify waiting to advise the appellant of his right to counsel. That said, she found that s. 24(2) ***Charter*** did not require exclusion of the ensuing breath sample evidence. As an initial matter, the appellant received his s. 10(b) warnings – and, indeed, spoke to counsel – before any of this evidence was gathered. Moreover, the good faith of the officers, who wrongly but innocently believed that they should allow EMS to finish treating the appellant before addressing s. 10(b), tempered the seriousness of the breach. The impact on the appellant's rights was minimal, as police had made no attempts to gather evidence during the delay, nor had the appellant been required to make any meaningful decisions. Society's interest in the adjudication of the matter on its merits was significant. The analysis directed by ***R. v. Grant***, 2009 SCC 32, thus favoured inclusion.

[23] On the merits of the case, the trial judge found that the appellant had care and control of the vehicle when the police found him and was thus "operating" it within the meaning of ***Criminal Code*** s. 320.11. He was in the driver's seat and the tracks suggested that he had been trying to get the truck out of the ditch. While the truck was not running when police arrived, keys were located in the center console in close proximity and readily accessible. There was no suggestion that anyone else had been driving or was expected. In the circumstances, the appellant had not rebutted the

presumption of care and control set out in ***Criminal Code*** s. 320.35 – on the contrary, the only reasonable conclusion was that he had occupied the driver's seat for the purpose of setting the vehicle in motion and had never relinquished control over it.

[24] As to impairment, the trial judge observed that while the appellant had been treated for low blood sugar, this did not mean that his ability to drive was not also impaired to some degree by alcohol. Considering "the whole record including the manner of driving, partially consumed liquor bottle and breath sample readings," she found that the Crown had established impairment. Accordingly, she convicted the appellant of impaired driving. Given his readings, she also convicted him of having a blood alcohol content equal to 80 milligrams percent. As noted above, this latter charge was stayed pursuant to ***Kienapple***.

GROUNDS OF APPEAL

[25] The appellant raises eight grounds of appeal, most of which correspond to the issues argued at trial. Some can be addressed summarily while others require lengthier discussion.

ANALYSIS

A. Was the search of the vehicle authorized by law?

[26] Section 8 of the ***Charter*** prohibits unreasonable searches. As Jamal J. recently reaffirmed in ***R. v. Singer***, 2026 SCC 8, para. 86, a warrantless search is reasonable if it is authorized by a reasonable law and carried out in a reasonable manner. Here, the appellant argues that the trial judge erred in finding that Constable Raymond's search

of the truck was authorized by ***The Highway Traffic Act*** s. 241.1(4). This is a question of law reviewable on a correctness standard. The section reads as follows:

> 241.1(4). A peace officer may at any reasonable time enter a place and make any inspection that is reasonably required for the purpose of determining compliance with this Act and the regulations and, without limitation, the peace officer may
> (a) examine, and require the production of, any records or documents in the place that are relevant for the purposes of the inspection;
> (b) use a computer system at the place to examine any data in or available to the system;
> (c) reproduce any record or document from the data in the form of a print-out or other intelligible output for the purpose of examination or copying;
> (d) use any copying equipment at the place to make copies of any record or document; and
> (e) require any person to present any vehicle or thing for inspection in the manner and under the conditions that the peace officer reasonably considers necessary to carry out the inspection.
>
> [Emphasis added}

[27] The appellant concedes that verifying a driver's identity and license status is a legitimate exercise of an officer's authority under this section but argues that an "inspection" must be distinguished from a search. In his view, s. 241.1(4) grants officers the ability to ensure compliance with ***The Highway Traffic Act*** by attending to workshops, offices, etc. and requiring the production of documents, but does not authorize the warrantless entry or search of vehicles, a space in which the Supreme Court has recognized a reasonable expectation of privacy, at least for drivers. (See ***R. v. Belnavis***, [1997] 3 S.C.R. 341, 1997 CanLII 320 (SCC), at para. 19)

[28] With respect, I am unable to agree that the section does not authorize officers to enter vehicles. On the contrary, s. 241.1(1) explicitly provides that "In this section, "place" includes a vehicle." Nor can I agree that the section only contemplates a

request for documents which the owner is then required to produce. Again, s. 241.1(4) allows officers to make "any inspection that is reasonably required" to ensure compliance with the ***Act***. It also allows officers to inspect "in the manner … that the peace officer reasonably considers necessary." In my view, the section authorizes officers to not only request relevant records or documents but to look for them themselves, so long as they are acting reasonably.

[29] Case law supports this interpretation. In ***R. v. Dhillon***, 2012 MBQB 39, an RCMP officer entered the sleeper berth of the accused's semi-trailer truck to check for compliance with hours-of-service regulations. He opened drawers and lifted the bunk to inspect the storage area underneath, where he located a large amount of cocaine. Greenberg J. held that the search was authorized by s. 241.1(4), observing that "the objective of the inspection provisions of the ***HTA*** … is to ensure compliance with provisions of the Act that are designed to protect the public. To effect that objective, broad search powers are necessary." (See para. 42)

[30] The appellant suggests that ***Dhillon*** was wrongly decided. I disagree. As an initial matter, it is consistent with the broad wording of the provision, as noted above. Moreover, it is supported by additional caselaw, including ***R. v. Bolczak***, 2005 MBQB 56, and ***R. v. Kenyon***, 2009 MBQB 259, aff'd 2010 MBCA 70. In both of these cases, officers actively searched the sleeping areas of tractor-trailers pursuant to their inspection powers under s. 241.1(4) and discovered evidence that led to criminal charges. In both cases, the search was held to be authorized. As McKelvey J. stated in

Bolczak, "[t]he right to inspect is both broad and general and must include an examination of the exterior and interior of the vehicle." (See para. 34)

[31] Like the appellant, McKelvey J. distinguished in ***Bolczak*** between regulatory inspections and searches. Unlike the appellant, however, she drew this distinction based on the purpose of the intrusion rather than its nature. The inspection of a vehicle for regulatory purposes aims to ensure compliance with ***The Highway Traffic Act***, not to further a criminal investigation. Criminal investigations are addressed, *inter alia*, by ss. 241.1(10) and (11), which provide for searches where an officer believes on reasonable and probable grounds that an offence has been committed and that evidence of the offence is in a "place," including a vehicle. Again, it is the purpose of such intrusions that distinguish them from inspections under s. 241.1(4) – the officer has grounds to believe that a crime has occurred and is attempting to gather evidence to solve it. I agree with this interpretation.

[32] Here, the trial judge accepted Constable Raymond's evidence that he only entered the appellant's truck to locate his license and confirm his identity. He was not investigating a crime and, at that time, did not suspect that one had been committed. As in ***Bolczak***, the officer's purpose was simply to "inspect the vehicle for what is reasonably required to ensure compliance with the Act." (See para. 19) Subject to the reasonableness requirement in s. 241.1(4), such an inspection "may encompass a review and inspection of all aspects of the vehicle, accompanied by questioning, to ensure compliance has occurred." (See para. 19)

[33] I have considered whether the provision should be read more narrowly in relation to recreational vehicles than commercial ones. Several decisions suggest that this is the primary goal of the legislation – e.g., ***Kenyon***, which refers at para. 7 to broad powers of search and inspection of commercial vehicles." Similarly, ***Bolczak*** refers at para. 37 to inspections authorized under the provision "for the purposes of regulating commercial trucking activity." [Emphasis added] Moreover, the reasonable expectation of privacy attached to a commercial vehicle is attenuated by the highly regulated nature of the industry. (See ***R. v. Debot***, 2010 SCC 24, para. 31)

[34] That said, as the Crown observed, recreational driving is also a highly regulated activity, albeit less than commercial driving. More importantly, the section does not appear to distinguish between commercial and recreational vehicles. On the contrary, the drafters took pains to clarify that a "place" includes a "vehicle", which is defined in s. 1(1) of the ***Act*** and includes both commercial and recreational means of transport. Had they intended to distinguish between these types of vehicles, it would have been easy to do so. Rather, in my view, any differences between inspections of commercial and recreational vehicles are properly reflected in the section's reasonableness requirement, which requires consideration of all the circumstances – what is reasonable in one case may not be in another. (See ***Bolczak***, para. 21)

Were Constable Raymond's actions reasonable?

[35] A warrantless search must be carried out in a reasonable manner to satisfy ***Charter*** s. 8. Moreover, as discussed above, s. 241.1(4)(e) requires that the manner and conditions of an inspection must have been "reasonably consider[ed] necessary."

[36] The appellant concedes that the officer was entitled to examine his license, but argues that before entering the truck, he should have made a clear and unequivocal demand and provided an opportunity to produce it or else attempted to get consent. With respect, the evidence suggests that the officer acted reasonably in the circumstances.

[37] At the time the officer raised the issue of identification with the appellant, he was in the midst of medical treatment for an apparent diabetic attack. It would have been inappropriate to interrupt this treatment so that the appellant could go search for his wallet. Having asked the appellant whether he had identification or a wallet, the officer was told that there was a wallet and that it was in the truck. I do not believe that an unequivocal demand was necessary in these circumstances and given the appellant's unavailability, I do not find it unreasonable for the officer to have attempted to locate the wallet where the appellant had told him it would be.

[38] Moreover, as discussed above, caselaw in this area suggests a "broad" and "general" inspection power. Section 241.1(4) does not require a formal demand for records or documents – on the contrary, it provides for "any" inspection reasonably necessary to determine compliance with ***The Highway Traffic Act***. In many cases, officers will be able to simply request a driver's license. In this case, it was reasonable for the officer to conclude that the appellant was not in a position to produce it himself.

[39] The trial judge found that Constable Raymond's conduct was "appropriate," "logical" and "made sense." In my view, the evidence supported her conclusions and

there is no reason to depart from them. The search was both authorized by law and carried out in a reasonable manner.

[40] The final requirement for a warrantless search is that the law justifying it must itself be reasonable. The constitutionality of s. 241.1(4) has not been raised and is not before me. The appellant's ***Charter*** s. 8 rights were not violated.

B. Did Constable Raymond have grounds for the ASD demand?

[41] The appellant argues that the trial judge erred in concluding that police had sufficient grounds for the ASD demand. As to the half-full bottle of liquor under the driver's seat, he notes that the vehicle was not registered to the appellant and that the officers noted no smell of alcohol in the vehicle or from the appellant. As to the fact that the appellant had apparently driven off the road into the ditch, he points to the undisputed evidence that he was having a medical episode when police arrived.

[42] This is a question of law reviewable on a correctness standard. ***Criminal Code*** s. 320.27(1)(b) provides that:

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person 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 an approved screening device and to accompany the peace officer for that purpose.

[43] There are well-settled principles applicable to this test. In ***R. v. Mitchell***, 2013 MBCA 44, Monnin J.A. held, *inter alia*, that:

- Reasonable grounds to suspect is a less demanding standard than reasonable grounds to believe. (Para. 20. See also ***R. v. Chehil***, 2013 SCC 49, paras. 27-28)
- Similarly, the test is only whether the suspect has alcohol or a drug in their body. The amount or impact of that consumption is not a required factor. (Para. 23)
- The totality of the circumstances must be considered in assessing whether there was a reasonable basis for suspicion. Individual pieces of evidence should not be considered in isolation. (Paras. 19, 35-36)
- Further to that, exculpatory evidence or alternative explanations for evidence cannot be disregarded. However, reasonable suspicion does not require that the belief be probable, only that it be one of a number of possible conclusions based on the supporting facts. In other words, it requires only that there is a reasonable possibility that the suspect has drugs or alcohol in their body at the time of the demand. (Paras. 21-22)

[44] Applying these principles to the appellant's case, I agree with the trial judge that ample grounds existed for an ASD demand. The appellant had apparently driven off the road notwithstanding good driving conditions. Constable Raymond initially attributed this to a medical condition but reconsidered when he discovered a half-empty bottle of liquor in the vehicle. This was neither surprising nor unreasonable. It was possible, as the appellant argues, that the liquor had been left in the truck by its registered owner and the appellant's unusual manner of driving was due solely to a

diabetic attack. But it was also possible that consumption of alcohol may have had something to do with it. In my view, the officer was entitled to investigate this possibility by way of an ASD sample. As the Supreme Court observed in ***Chehil***, at para. 32:

> [R]easonable suspicion need not be the only inference that can be drawn from a particular constellation of factors. Much as the seven stars that form the Big Dipper have also been interpreted as a bear, a saucepan and a plough, factors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the *possibility* of uncovering criminality, and not a *probability* of doing so.
>
> [Emphasis in original]

[45] It was also necessary that Constable Raymond have reasonable grounds to suspect that the appellant had operated the truck within the preceding three hours. The trial judge found that the appellant was still operating the vehicle when the officers arrived, satisfying this condition. As discussed below, I agree with her conclusion. This ground of appeal is dismissed.

C. Was the breath demand made as soon as practicable?

[46] The appellant objects to the 12-minute delay between 12:50 a.m., when Constable Raymond notified him that he was under arrest, and 1:02 a.m., when he was taken to the police cruiser and read his rights and the breath demand. He argues that police did not adequately justify this delay and that the trial judge failed to consider the importance of detainees receiving prompt information as to their obligations.

[47] A brief factual matter before turning to the law. The trial judge found that during the 12 minutes at issue, the appellant was being treated by EMS and that

Constable Raymond did not make an immediate demand because he was waiting to see whether the appellant was going to be released or taken to the hospital. The officers' evidence was not totally consistent on this point: Constable Raymond testified that the appellant was released by EMS at "around, like … 50 after midnight approximately," but the appellant had questions and continued to speak to EMS before being taken to the cruiser. Constable Fall was clearer that after his initial notice of arrest, the appellant was "still getting treated … in the ambulance with EMS," and that the appellant was taken back to the cruiser once he was released by EMS. In my view, it was open to the trial judge to reconcile the evidence the way she did. I have not been asked to overturn her finding and I see no basis to do so.

[48] As to the law, ***Criminal Code*** s. 320.28(a)(i) provides that with the requisite grounds, a peace officer may "by demand made as soon as practicable" require a suspect to provide breath samples for analysis. In ***R. v. Fenske (HB)***, 2016 MBCA 117, at para. 28, the Manitoba Court of Appeal followed other appellate courts in adopting the following principles in relation to this test, per Beard J.A.:

> I would adopt Klebuc J.A.'s summary [in *R. v. Burwell*, 2015 SKCA 37] of the "as soon as practicable" standard … :
>
> (a) The phrase "as soon as practicable" means nothing more than that the breath samples [must] be taken within a reasonably prompt time under the circumstances.
>
> (b) Where a breath demand ha[s] been made, there is no requirement that the breath tests be taken as soon as possible.
>
> (c) The touchstone for determining whether the breath samples were taken as soon as practicable is whether the police acted reasonably.
>
> (d) The trial judge is to look at the whole chain of events, bearing in mind what occurred within the two-hour limit prescribed by the *Criminal Code*.

> (e) While the Crown is obligated to demonstrate – in all the circumstances – that breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred while the accused was in custody.
>
> [Emphasis added]

[49] While ***Fenske*** predated the significant 2018 amendments to the driving provisions of the ***Criminal Code***, this court has held that these principles continue to apply to the current law, with technical adjustments where necessary. (See ***R. v. Dzananovic***, 2024 MBKB 46, paras. 18-19, 32-33) Applying them here, I note Constable Raymond's explanation, which the trial judge accepted, that he was waiting to see whether the appellant would be released or taken to hospital. In the latter case, he would have issued a blood demand rather than a breath demand. I also note that the appellant was in the midst of receiving medical treatment at the time of the delay, though his condition appeared to be improving.

[50] The standard of review is correctness. (See ***Fenske***, paras. 13-14.) The appellant argues that the trial judge erred by asking only whether the officers' actions were reasonable in the abstract, rather than weighing them against the importance of making a prompt breath demand. He suggests that Constable Raymond could have made an initial breath demand, then withdrawn it in favour of a subsequent blood demand if it turned out that the appellant would be taken to the hospital.

[51] As to the first argument, I take the appellant's point but see nothing to suggest that the trial judge failed to appreciate it. Her reasons reference "the cases relied upon by [the] defence concerning whether [the officers' actions] were necessary before

making the breath demand." In closing submissions, defence counsel defined the issue as "whether or not what [the police did during the delay] … needed to be given objective precedence over complying with ***Charter*** rights." [Emphasis added] Trial judges are presumed to know the law they work with, especially in common areas such as impaired driving. Their reasons are to be read "generously" in light of this presumption. (See ***R. v. Ji***, 2025 MBCA 86, para. 29) Nothing in the record displaces the presumption in this case.

[52] As to the second argument, even if police could have switched demands without confusing the appellant, that does not mean that the way the police chose to proceed was unreasonable. As noted above, the test does not require that officers identify and pursue the shortest possible delay – it requires only that the course of action they adopt be reasonable in the circumstances. Here, the trial judge concluded that waiting – at least for a few minutes – to determine the appellant's medical status and proceed accordingly "made sense." I agree.

[53] At the hearing of the appeal, the appellant broadened his argument to include the nine minutes between the appellant's ASD result and his notice of arrest. Applying the principles set out in ***Fenske***, I see no error in the trial judge's conclusion that verifying the appellant's identity and ascertaining whether he could benefit from administrative diversion were important inquiries that justified a brief delay in making the demand.

D. Was the Appellant entitled to counsel at the time of the ASD demand?

[54] The parties agree that the appellant was detained once Constable Raymond required him to provide an ASD sample. Ordinarily, detained individuals are entitled to be advised of their right to counsel under ***Charter*** s. 10(b). (See ***R. v. Suberu***, 2009 SCC 33, para. 41) In cases of roadside stops, however, these rights are suspended pursuant to s. 76.1 of ***The Highway Traffic Act***, which allows officers to screen drivers for potential impairment without providing access to counsel. These stops, in which police pull drivers over and screen them for sobriety, are an important element of maintaining road safety. (See ***Orbanski***, paras. 40-41) The trial judge found that the appellant's situation was "akin to" a roadside stop and that ***Charter*** warnings were not required – either because of s. 76.1 or pursuant to the principles set out in ***Harrison*** applying ***Orbanski***.

[55] The appellant objects to this characterization. In his submission, once he stopped operating his vehicle on a highway – initially, when he left the road and rolled into the ditch, but certainly once he left the truck and went to the ambulance for treatment – s. 76.1 had no application. If police wished to detain him for an ASD, compliance with ***Charter*** s. 10(b) was required.

[56] This is a legal issue reviewable on a correctness standard. The appellant relies on the following cases:

- ***R. v. Bowler***, 2007 MBQB 200;
- ***R. v. Rovere*** (1 February 2017), Manitoba 556-19647 (MBPC);
- ***R. v. Powell***, [2017] N.J. No. 90 (Prov. Ct.), 2017 CarswellNfld 100; and

- ***R. v. Dolynchuk***, 2004 MBCA 45.

[57] The Crown relies on:

- ***R. v. Duma***, 2011 MBPC 19 (unreported);
- ***R. v. Harrison***, 2019 MBQB 131; and
- ***R. v. Sillars***, 2022 ONCA 510.

[58] I have reviewed these decisions and a number of others. For the reasons that follow, I am of the view that the question is not whether s. 76.1 applied to the appellant, but rather what the ***Charter*** requires in circumstances where police respond to an accident and, in the course of their activities, determine that an ASD test is called for.

[59] In that regard, ***Duma***, ***Rovere***, ***Powell***, ***Harrison*** and ***Sillars*** call for particular attention. In ***Duma***, police attended the scene of an accident. The accused had been extracted by EMS personnel and was sitting in the back of an ambulance when officers spoke to her. Based on their observations, they formed the requisite suspicion and made an ASD demand. As in this case, the defence argued that s. 76.1 did not apply, since the police had not stopped the accused. (See s. 76.1(1).) LeMaistre P.C.J. (as she then was) rejected this argument on the basis that it was "too narrow and would produce a perverse result having regard to the purpose of the legislation," which was ensuring roadway safety by screening the sobriety of drivers. Noting the limited use of the ASD results, she applied s. 76.1, along with its suspension of right to counsel, to the accused's scenario. (See paras. 50-59)

[60] In ***Rovere***, the trial judge reached the opposite conclusion. Police had, again, arrived at the scene of an accident and spoken to the accused in an ambulance, then made an ASD demand. The judge rejected the application of s. 76.1, holding that "[t]he whole scheme of this section, in addition to [its] plain wording, contemplates roadside stops." She declined to expand the section to include situations where "police are detaining a person for [an ASD test following] a traffic-related incident," holding that "the Supreme Court did not intend an accident zone to be a Charter free zone." (See pp. 16-18)

[61] In ***Powell***, the accused was taken to hospital following an accident. An officer accompanied him in the ambulance, observing indicia of impairment along the way. At the hospital, she made a blood demand. The trial judge concluded that the officer's presence in the ambulance constituted detention and that the officer should have provided s. 10(b) rights before they reached the hospital. (See paras. 34-36)

[62] In ***Harrison***, police arrived at the scene of an accident and spoke to both drivers in the back of an ambulance. Based on their observations, officers made an ASD demand. Kroft J. (as he then was) agreed in principle with the reasoning in ***Duma***, but was reluctant to "interpret[] the specific words of s. 76.1 … broadly enough to extend beyond a roadside stop." Even absent a strict application of s. 76.1, however, he held that "authority for police to briefly suspend section 10(b) ***Charter*** rights in [the] circumstances of this case is supported by the overall logic and analysis articulated in ***Orbanski***[.]" In that regard, he concluded that (i) police had had the authority to check the accused's sobriety; (ii) the reasons expressed in ***Orbanski*** for suspending

the right to counsel applied with similar force in the accused's situation; and (iii) the limitation was similarly justified under ***Charter*** s. 1. (***Harrison***, paras. 45-49)

[63] Finally, ***Sillars*** involved a canoeing accident in which a child died. The accused was found suffering from hypothermia and taken to the hospital. There, police spoke to him and made an ASD demand. Like the accused in ***Harrison***, he argued that there was no urgency to obtain a sample – in his case, because he was in the hospital. The rationale for relieving police of their ***Charter*** obligations was thus absent. (***Sillars***, paras. 5-18, 54)

[64] The Ontario Court of Appeal rejected this argument, holding that the need for speed in administering ASD demands stemmed not only from the roadside setting in which they are frequently made, but from the legislation itself, which required that the subject of the demand provide a sample "forthwith." As Benotto J.A. observed, this would not be possible if subjects were first allowed to consult with counsel. Indeed, a delay long enough to have allowed compliance with s. 10(b) would suggest that the test had not been administered quickly enough. (***Sillars***, paras. 54-67)

[65] In my view, the preferred approach is that taken in ***Harrison***. Whether a given ASD test was administered pursuant to s. 76.1 is not determinative. Roadside stops are an important aspect of ensuring highway safety and stopping impaired drivers but they are not the only tool at officers' disposal, nor are they the only situation in which ***Charter*** rights are suspended. Rather, as Kroft J. held, three questions should be asked when addressing an ASD demand made without providing access to counsel:

(i) Did police have authority to make the demand?

(ii) If so, were the driver's section 10(b) rights suspended at the time of the demand, either explicitly or implicitly?

(iii) If so, was the suspension of those rights justified under ***Charter*** s. 1?

[66] This does not mean that s. 76.1 is irrelevant. On the contrary, in many cases, it will be the basis on which police proceed. Caselaw interpreting the scope and application of the provision is still important in that regard. But it does not on its own determine the question of whether a driver's ***Charter*** rights have been breached by an ASD demand made without access to counsel.

[67] The appellant submits that ***Harrison*** was wrongly decided because it is inconsistent with ***Dolynchuk***. I respectfully disagree. In that case, police had received a call about an impaired driver and were attempting to locate the suspect vehicle. They drove to the address associated with the license plate number they had received and observed the vehicle in the parking lot. The accused stumbled out from between two parked cars. Police began asking him questions, including whether he had just been driving. He was not given access to counsel prior to answering. At trial, the Crown sought to lead his answers as substantive evidence of guilt. The Court of Appeal found that the accused had been psychologically detained and excluded the evidence because police had not complied with s. 10(b). (pp. 2-10)

[68] Neither s. 76.1 nor the suspension of ***Charter*** rights were raised in ***Dolynchuk*** – it was not an ASD case and the argument was simply about whether or not the accused had been detained. Further to that, as Steel J.A. observed at p. 11:

> … By the testimony of the police officers themselves, the investigation had reached the stage where they had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission. In that context, the question as to whether he had just been driving his vehicle was not of a general nature to obtain information, but rather was for the purpose of obtaining incriminating statements from the accused.
>
> [Emphasis added]

[69] The appellant argues that ASD results are also incriminating evidence. With respect, this is simply not the case. As discussed below, ASD results obtained without access to counsel serve only as a screening tool – they cannot be used to incriminate an accused. (***Orbanski***, para. 58) I note the decision of Simonsen J. (as she then was) in ***R. v. Tummillo***, 2015 MBQB 111, which suggests that where an individual is detained on pre-existing suspicion of criminal activity, an ASD test may still be administered before providing right to counsel. (Paras. 44 and 46, citing ***R. v. Rowson***, 2014 ABQB 79, aff'd 2015 ABCA 354 and 2016 SCC 40) Here, as in ***Harrison***, this was not the case – the appellant's detention only arose as a result of the demand. Is the operation of s. 10(b) suspended in these circumstances?

[70] In my view, ***Dolynchuk*** does not speak to this question and is not controlling. Rather, the question is best answered along the lines of the three inquiries posed by Kroft J. Turning to those inquiries:

(i) Did police have authority to make an ASD demand in this case?

[71] As discussed above, I agree with the trial judge's ruling that police had grounds to suspect that the appellant had alcohol in his body at the time he was operating the truck and were thus authorized to make a demand pursuant to ***Criminal Code*** s. 320.27(1)(b). The timing of the ASD demand was never challenged, and the record

suggests that once Constable Raymond formed the grounds for his suspicion, he retrieved his ASD and made the demand, which the appellant immediately complied with. As discussed below, s. 320.27(1) allows a demand to be made anywhere, including an ambulance. The ASD demand was authorized by law.

(ii) Were the Appellant's s. 10(b) rights suspended at the time of the demand?

[72] In answering this question, it is helpful to review some of the legislative and jurisprudential history in the area. Early authorities involved situations where police stopped drivers, either to check them for sobriety or for another reason. In ***R. v. Thomsen***, [1988] 1 S.C.R. 640, 1988 CanLII 73 (SCC), for example, the officer pulled the accused over because of a defective taillight. Smelling alcohol on the accused's breath, he made an ASD demand pursuant to ***Criminal Code*** s. 234.1(1), the relevant section at the time. The accused refused. The officer then asked the accused to accompany him to the cruiser, explained the demand and provided two additional opportunities to provide a sample. At no point did he advise the accused of his right to counsel. (***Thomsen***, pp. 644-45)

[73] After clarifying that ASD demands constitute detentions that would ordinarily give rise to counsel, Le Dain J. noted that in ***R. v. Therens***, [1985] 1 S.C.R. 613, 1985 CanLII 29 (SCC), the court had held that limits on ***Charter*** rights will be prescribed by law if they are expressly provided for by a statute or regulation or if they result "by necessary implication" from the terms of the statute or its operating requirements. Noting Parliament's requirement that samples be provided "forthwith" and the section's

reference to a "roadside screening device," he held that the operation of the screening regime was inconsistent with exercise of the right to counsel:

> That there is to be no opportunity for contact with counsel prior to compliance with a s. 234.1(1) demand is, in my opinion, an implication of the terms of s. 234.1(1) when viewed in the context of the breath testing provisions of the *Criminal Code* as a whole. A s. 234.1(1) roadside screening device test is to be administered at roadside, at such time and place as the motorist is stopped, and as quickly as possible …
>
> [Emphasis added]

(See ***Thomsen***, at para. 19)

[74] After the decision in ***Thomsen***, the ASD demand section was amended. Notably, the word "roadside" was removed, raising the question of whether the implied limitation found in ***Thomsen*** still applied. In ***R. v. Grant***, [1991] 3 S.C.R. 139, 1991 CanLII 38 (SCC), the accused argued that given the expanded scope of the new provision, there was no longer a reason to read in a limit on the right to counsel. Lamer C.J.C. declined to rule on this question but made comments suggesting that notwithstanding the amendment, the reasoning in ***Thomsen*** remained applicable:

> While I am inclined to agree with the reasoning of [the trial judge] that the key word in [the new provision] is "forthwith" and that the reasons of this court in *Thomsen* are therefore directly applicable to the amended provision, I am of the view that it is not necessary to engage in a *Charter* analysis of [the provision] in disposing of this case.
>
> [Emphasis added]

(See ***Grant*** (1991), at p. 149)

[75] Provincial courts of appeal, including the Manitoba Court of Appeal, agreed with Lamer C.J.C.'s *obiter* comments and held in a series of cases that the removal of the word "roadside" from the ASD demand section did not affect the implied limit on access to counsel in ***Thomsen***. In her helpful decision in ***R. v. Fehr***, [1999] M.J. No. 449,

1999 CarswellMan 474., at para. 39, Giesbrecht P.C.J. reviewed these decisions and observed that "[b]ased on these authorities, it seems clear that [notwithstanding the amendment,] the limitation of the right to counsel set out in Thomsen still applies to [the ASD demand section] of the Code." [Emphasis added]

[76] Giesbrecht P.C.J. also rejected defence arguments that since cell phone technology meant that many drivers detained for ASD testing could now quickly access counsel in private without interfering with the operation of the legislative scheme, the rationale for finding a suspension of s. 10(b) no longer applied. Noting the Alberta Court of Appeal's statement in ***R. v. Mitchell***, 1994 ABCA 369, that ***Thomsen*** had "intended to lay down a general rule," she held that whatever the accused's individual circumstances, "an individual who is required to provide [an ASD] breath sample made under s. 254(2) of the *Code* is not entitled to consult counsel before complying with the demand." [Emphasis added] (See ***Fehr***, para. 54, quoting ***Mitchell***, p. 284).

[77] The ASD demand section was amended again in 2008. Whereas it had previously required that the subject of the test "is operating a motor vehicle or vessel" or has care and control of it, the new provision required only that police have grounds to suspect that the subject had done so "within the preceding three hours." Once again, a number of cases considered whether this expansion of the provision's scope called into question ***Thomsen***'s implicit limitation on the right to counsel.

[78] In ***R. v. Jaycox***, 2012 BCCA 365, the accused argued that since the new section no longer required that the demand take place when or where the vehicle was being operated, it was no longer necessary to imply a limit on the right to counsel. Further to

that, like the accused in ***Fehr***, she argued that cell phone technology, coupled with the availability of 24-hour duty counsel, meant that s. 10(b) could be accommodated within the ASD regime, especially given the expanded scope of the provision.

[79] The British Columbia Court of Appeal rejected these arguments, holding that "neither these differences [between the old provision and the new one] nor the advent of 24-hour duty counsel or the widespread access to cellular telephones … cast doubt on the applicability of *Thomsen*[.]" (at para. 42). Rather:

> [45] … [T]he right to counsel is suspended under *Thomsen* and its progeny such as *R. v. Grant*, … *Bernshaw* and *Orbanski* because of the brevity of the detention and the obligation of the detainee to provide a sample "forthwith". The requirement that a breath sample be provided "forthwith" is, from a pragmatic point of view, incompatible with the exercise of a right to counsel before responding to the demand …
>
> [Emphasis added]

[80] In other words, as Lamer C.J.C. had suggested in ***Grant*** (1991), the critical feature of the ASD screening regime was the brief duration of the contemplated detention, measured not in terms of the time or distance between the driving and the demand, but the time between the detention and the provision of samples. The "key word" in the original section that justified the decision in ***Thomsen*** was not "roadside" but "forthwith."

[81] Other courts have followed ***Jaycox*** or reached similar conclusions – see, e.g., ***R. v. Gunsch***, 2013 ABPC 104, paras. 58-64, ***Schiopu c. R.***, 2026 QCSC 1394, paras. 28-97, leave to appeal granted 2026 QCCA 843, and ***Sillars***, paras. 54 and 59.

[82] Finally, the ASD demand provision was amended again as part of Parliament's 2018 overhaul of the ***Criminal Code***'s impaired driving sections. As noted above, it is

now found at s. 320.27. The subsection in question in this case is s. 320.27(1)(b), which deals with breath samples taken based on grounds to believe that a person has alcohol in their body and has operated a conveyance in the preceding three hours. In ***R. v. Breault***, 2023 SCC 9, para. 39, the Supreme Court held that "[t]he wording of s. 320.27(1)(b) is substantially similar to that of s. 254(2)(b)," the predecessor provision at issue in ***Jaycox*** and ***Sillars***.

[83] ***Breault*** also reaffirmed yet again the connection between the brevity of the accused's detention and the suspension of access to counsel, reiterating that "the immediacy requirement is not met where the length of the detention was such that the stopped driver could realistically have consulted counsel" and confirming that s. 10(b) is suspended during ASD detentions "because the word 'forthwith' implicitly limits the right to counsel guaranteed by s. 10(b) of the ***Charter***." [Emphasis added] (Paras. 35 and 51).

[84] Reviewing the evolution of the legislation and jurisprudence over the years since ***Thomsen***, it is clear that while ASD screening was originally conceived as a method of screening drivers at roadside, it is no longer so limited and neither is the accompanying suspension of the right to counsel. The weight of authority does not consider the physical or temporal proximity of a driver to an operating vehicle at the time of the demand the reason for suspending s. 10(b). Nor is it the logistical difficulty of reaching counsel prior to complying with the ASD demand. Rather, access to counsel is suspended during this brief detention because the detention is intended to be brief – too brief to allow consultation with counsel.

[85] I agree with the reasoning in ***Jaycox*** and ***Sillars***. While the scope of what is now s. 320.27(1)(b) has expanded over the years, Parliament's intention to provide a rapid screening process to identify and separate potentially impaired drivers has remained constant. Pursuant to ***Thomsen***, the operation of this process is inherently inconsistent with the exercise of s. 10(b), which is therefore suspended. This is a rule of general application and does not vary with the particular circumstances of the driver, including their distance from the vehicle or the time between the suspected driving and the detention (subject, of course, to the three-hour limit contained in the section).

[86] To be clear, this does not entitle officers to delay an ASD demand once they form the necessary suspicion. On the contrary, the justification for suspending access to counsel during this screening procedure is the requirement that all parties act promptly in bringing it to a quick conclusion. An undue delay may mean that police have not complied with s. 320.27(1), and that the demand was thus unauthorized by law. But where the demand is made in accordance with the legislation, the suspension of the right to counsel is not affected by the accused's temporal or geographic proximity to the vehicle.

[87] To relate my conclusions to the appellant's case, the suspension of the right to counsel applied notwithstanding that he was in the ambulance at the time of the demand and had by then divested himself of care and control of the vehicle. None of these factors affected his entitlement to a constitutionally-brief screening detention in which he could immediately provide a sample and be screened accordingly.

[88] As a result of this conclusion, it is unnecessary to consider whether ***The Highway Traffic Act*** s. 76.1 applied to the appellant. To the extent that the decision in ***Rovere*** went beyond the application of s. 76.1, however, and declined to extend the suspension of s. 10(b) to ASD detentions made under other common law or legislative authority because "the Supreme Court did not intend an accident scene to be a ***Charter***-free zone," (p. 18) I respectfully disagree.

[89] As to the appellant's other authorities, ***Powell*** did not deal with ASD demands but with detention in an ambulance giving rise to a blood demand at the hospital. As discussed below, ***Charter*** rights are not suspended for breath or blood demands and it is well-settled that absent suspension, s. 10(b) applies in medical settings. (See ***R. v. Taylor***, 2014 SCC 50, para. 14) That does not answer the question raised by this appeal. Similarly, ***Bowler*** was about the police's authority to stop the accused's vehicle in the first place, which required consideration of whether it was being operated on a "highway" as defined by ***The Highway Traffic Act***. Again, this was not the issue here. As discussed above, the appellant was properly detained.

[90] The trial judge held that s. 76.1 applied and that "[e]ven if I did not interpret s. 76.1 so broadly, I would still conclude there is no section 10(b) violation based on the principles of *Orbanski* … as summarized in *Harrison*." (See Trial Judge's Reasons, para. 34, exh. A to the affidavit of Katie Herrick, sworn September 10, 2025) While I have addressed the issue under s. 320.27(b) rather than s. 76.1, I am of the view that this does not result in unfairness:

- The officers did not purport to rely on s. 76.1 for their actions. Even if they had, the demand would still have been justified by s. 320.27(1)(b), for the reasons discussed above.
- The application of ***Thomsen*** was a live issue at trial and the subject of submissions. The appellant argued that "We say this was a *Mann* stop as opposed to an *Orbanski* stop. And of course, under a *Mann* stop, the minute that you require somebody to do something self-incrimination like an ASD test, which there is *Thomsen* from the Supreme Court, the demand itself for an ASD is a detention. You are required to provide right to counsel." [Emphasis added] (Transcript of Proceedings, April 3, 2025, p. T28)
- Further to that, he added later in his submissions: "This is not a *Highway Traffic [Act]* stop. This is just, you know, elsewhere. So they can't use *Orbanski*. They can't use 76.1. And they have to do a *Mann* process. They have to let the subject know that they're a suspect and that they have a right to counsel, so that they can protect themselves from self-incrimination. And doing the ASD test would be no different." [Emphasis added] (Transcript of Proceedings, April 3, 2025, p. T29)
- I note that despite counsel's references to ***R. v. Mann***, 2004 SCC 52, it was clear at the trial that the appellant had been detained pursuant to s. 320.27(1)(b). In any event, as counsel highlighted, the issue was whether an ASD test was in fact "no different" and whether, as in

Thomsen, the rights that would ordinarily apply to an investigative detention were suspended.

- Further to that, the appellant argued that the justifications for suspending access to counsel while "pulling somebody over and making them do an ASD at roadside" did not apply in his situation. He specifically asked the trial judge to distinguish ***Harrison*** from ***Orbanski*** on this basis and find that it was wrongly decided. (Transcript of Proceedings, April 3, 2025, p. T31)
- For its part, the Crown summarized the argument as follows:

> … I had understood one of [the Appellant's] arguments. … to be that there was no suspension of a 10 -- 10(b) the way there would be if we're discussing a roadside stop. And I have submitted *Harrison* to submit that the Court can find that section 10(b) rights are still suspended in a situation where police officers come upon a scene.
>
> [Emphasis added]

(Transcript of Proceedings, April 3, 2025, p. T42)

[91] These issues having been raised at trial, they are properly before me for consideration. In my view, the appellant's s. 10(b) rights were suspended at the time of the ASD demand.

(iii) Was the suspension justified under Charter s. 1?

[92] In ***Harrison***, Kroft J. held that the suspension of access to counsel during an ASD detention at the scene of an accident was justified under ***Charter*** s. 1 for the same reasons provided by the Supreme Court in ***Orbanski*** in relation to roadside questioning and physical sobriety testing. To review, those included:

- Reducing the senseless deaths and injuries associated with impaired driving continues to be a compelling and pressing governmental objective.
- In order to do this, police require effective screening methods that allow them to assess drivers' potential impairment.
- Given the risks associated with operating motor vehicles at high speeds, driving is a privilege subject to extensive regulation and testing. It is not a right.
- Screening procedures are limited to what is necessary to accomplish their goal. The procedure must be completed quickly and the suspension of s. 10(b) does not extend to blood or breath demands capable of providing an actual reading of the driver's blood alcohol level, only to determining whether there are grounds for such a demand.
- Further to that, ASD results are not admissible as evidence of substantive guilt. They are simply investigative tools used to screen drivers and maintain highway safety. (See ***Orbanski***, paras. 54-60)

[93] As LeMaistre P.C.J. held in ***Duma***, at para. 54:

> … Sections 76.1 of the HTA and 254(2) of the *Criminal Code* are investigatory tools only which cause minimal inconvenience and constitute a fair balance between societal interests regarding roadway safety and the rights of the individual, particularly having regard to the fact that driving is a licensed activity.

While I have not relied on s. 76.1, I agree with these statements and with Kroft J.'s conclusion. At roadside or otherwise, the infringement of s. 10(b) in ASD screening is carried out in pursuit of a pressing and substantial objective to which it is rationally

connected, it is tailored to infringe the right as little as possible, and its positive effects are proportional to that impact. It is thus demonstrably justifiable in a free and democratic society.

[94] In the result, the trial judge did not err in concluding that the appellant's s. 10(b) rights were not violated by the administration of an ASD test without access to counsel while he was in the ambulance. This ground of appeal is dismissed.

E. Should evidence have been excluded pursuant to Charter s. 24(2)?

[95] As discussed above, the trial judge found that the appellant's s. 10(b) rights had been violated by the 12-minute delay between his notice of arrest and the provision of his right to counsel. She accepted Constable Raymond's testimony that he was waiting to see whether the appellant would be released by EMS or taken to the hospital as this would determine whether he would make a breath or blood demand but held that it was insufficient to justify the delay.

[96] That said, she declined to exclude the ensuing evidence. She held first that since the appellant had been read his rights and in fact spoken to counsel before any evidence was gathered, the breach had not resulted in evidence "obtained in a manner" that violated s. 10(b). In the alternative, she held that even if the evidence had been obtained in a manner that engaged s. 24(2), the factors outlined in ***Grant*** (2009) favoured inclusion.

[97] The appellant alleges several errors. As to the trial judge's conclusion that the evidence had not been "obtained in a manner" that violated the ***Charter***, he points out that a causal connection is not necessary and that the analysis is broader and more

contextual. (See ***R. v. Strachan***, [1988] 2 S.C.R. 980, 1988 CanLII 25 (SCC), and ***R. v. Beaver***, 2022 SCC 54, para. 95) As to the ***Grant*** (2009) criteria, he argues that the trial judge misapplied the relevant factors. In its factum, the Crown focused on the ***Grant*** (2009) route to admission. I will do the same.

[98] ***Grant*** (2009) requires an assessment of the impact of both admitting and excluding evidence obtained following a breach of the ***Charter***. The court must consider all the circumstances, having regard to:

(i) the seriousness of the ***Charter***-infringing conduct;

(ii) the impact of the breach on the accused's ***Charter***-protected interest; and

(iii) society's interest in the adjudication of the case on its merits. (***Grant*** (2009), para. 71)

[99] The appellant's arguments involve the first branch – the seriousness of the ***Charter***-infringing conduct. He argues that by saying that she did not consider the breach "so severe [as] to warrant exclusion," the trial judge elevated the threshold from "seriousness" to "severity," suggesting that to merit exclusion, a breach had to be "severe." With respect, I do not read the trial judge's reasons this way, nor do her reasons, read as a whole, suggest a misapprehension of the test. On the contrary, she observed that the first branch "requires the Court to consider the specific conduct in question and whether the admission of evidence would send the message to the public that the Court effectively condones the police action." (See Trial Judge's Reasons, para. 39) This is precisely the question that ***Grant*** (2009), directs trial judges to ask.

[100] Indeed, the Supreme Court itself used the word "severe" in assessing seriousness, writing that "[t]he more severe or deliberate the State conduct that led to the Charter violation," the greater the need for the court to disassociate itself from it. (***Grant*** (2009), para. 72, emphasis added) I find no error in the trial judge's similar use of the term.

[101] The appellant also argues that the trial judge erred in finding that the police's actions were not deliberate or intentional. The officer waited to provide a formal notice of arrest and advise the appellant of his rights because he was awaiting information from EMS. This was an intentional choice, the appellant argues, and should have been characterized that way.

[102] I take the appellant's point, but again, I do not think the trial judge meant to suggest that the delay had been accidental. What she was saying is that the officers were following the procedure they mistakenly believed was correct in the circumstances as it would determine their next steps. They were not disregarding the appellant's rights – they were just wrong about when they should have been provided. In other words, they were acting in good faith.

[103] The appellant disagrees, emphasizing that good faith cannot be equated with ignorance of ***Charter*** standards, negligence or willful blindness. (See ***Grant*** (2009), para. 75) This is true, but not every mistake is the result of ignorance, negligence or willful blindness. As the majority held in ***R. v. Le***, 2019 SCC 34, at para. 147, quoting ***R. v. Washington***, 2007 BCCA 540, para. 78, "for state misconduct to be excused as a "'good faith' … infringement of *Charter* rights, the state must show that the police

'conducted themselves in [a] manner … consistent with what they subjectively, reasonably and non-negligently believe[d] to be the law.'"

[104] Here, as noted above, the trial judge found that the officers' decision to wait for EMS to release the appellant was subjectively motivated by their desire to follow what they thought was the appropriate procedure. She also found that their reasoning "made sense in these circumstances." I agree and would not characterize their actions as negligent. The appellant was still undergoing medical treatment at the time and the officers did not know the extent of his condition, though he appeared to be improving. Their decision that it was better to wait a few minutes for clarity before imparting important information to him was understandable, even if incorrect and in fact a ***Charter*** breach. Again, I see no error in the trial judge's treatment of the issue.

[105] It is also important to note the other two branches of the test. As the trial judge observed, the brief delay in advising the appellant of his rights played no role in the gathering of evidence – he was not questioned during this period, nor was he asked to make any decisions requiring the advice of counsel. He was not only provided with access to counsel but in fact spoke to a lawyer before any evidence was gathered. In the circumstances, this branch of the test did not favour exclusion.

[106] As to the third branch of the test – society's interest in the adjudication of the case on its merits – ***Grant*** (2009) underlines the reliability of bodily samples and the risk of an erroneous conclusion if the trier of fact is deprived of this probative evidence:

> [110] The third line of inquiry … will usually favour admission in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the scale in favour of admission.

[107] Indeed, this will "often be the case with breath sample evidence, whose method of collection is relatively non-intrusive." (***Grant*** (2009), para. 111)

[108] Placing the breach in this case on a spectrum according to the three ***Grant*** (2009) factors, the trial judge concluded that the interests engaged by s. 24(2) were properly balanced by admitting the evidence. While reasonable people might disagree, I find no error in her analysis or her conclusion. The standard of review is deferential. (See ***R. v. Mian***, 2014 SCC 54, para. 77) The evidence was properly admitted.

F. Had the Appellant divested himself of care and control of the vehicle when police arrived?

[109] When police arrived at the scene, the appellant was in the driver's seat of the truck. ***Criminal Code*** s. 320.35 provides as follows:

> In proceedings in respect of an offence under section 320.14 or 320.15, if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion.

[110] ***Criminal Code*** s. 320.11 further provides that "operate" means "in respect of a motor vehicle, to drive it or to have care and control of it."

[111] The effect of these provisions is to create a rebuttable presumption of care and control – and thus of operation – for individuals occupying the driver's seat. As Bond J. explained in ***R. v. Truthwaite***, 2020 MBQB 180, it is not necessary in such circumstances that the Crown establish a realistic risk of danger to persons or property – rather, the risk is "embedded in the presumption." (Para. 10)

[112] The appellant argues that the trial judge erred in finding that he had failed to rebut the presumption. He points to his medical condition as well as (i) the fact that the vehicle was not running and the keys were not in the ignition; (ii) the fact that the vehicle was stuck and required towing; and (iii) the lack of affirmative evidence suggesting he had a current intention to drive, and suggests that the trial judge erred by failing to consider the evidence in totality.

[113] With respect, nothing suggests that the trial judge failed to consider these facts. On the contrary, she referred to them explicitly in her reasons, noting that while the keys were not in the ignition, they were readily available on the center console, and that while the car was in the ditch, tire tracks suggested that the appellant had been trying to drive the truck back and forth in an attempt to get out. As she observed, this showed both its operability and a continued intention to drive even after the vehicle had gone off the road.

[114] The trial judge acknowledged that in determining whether the presumption had been rebutted, she was required to "consider the entire record and surrounding context." (Trial Judge's Reasons, para. 48) There is no reason to think she did not do so.

[115] As to the merits of her conclusion, the presumption of care and control can apply even in the case of an inoperable vehicle, let alone one that is merely stuck. (See ***R. v. Maniatis***, 2023 ONSC 1682.) Similarly, removing keys from the ignition is not determinative and does not itself rebut the presumption. (See ***R. v. Day***, 2020 NWTTC 18, paras. 39-44) While the appellant argues that there was no evidence suggesting

that he might have changed his mind and tried to drive again, this misstates the applicable burden of proof. It was not up to the Crown to establish that the appellant intended to place the vehicle in motion. Given his position in the driver's seat when police arrived, it was up to him to demonstrate on a balance of probabilities that having initially been driving the vehicle, he had conclusively abandoned his intentions of doing so and divested himself of care and control of it. To put this another way, the risk that he might change his mind was part of the danger "embedded in the presumption" that he had to rebut.

[116] The trial judge found that given the totality of the evidence, including:

- The rural location of the accident, suggesting a lack of alternative means of transport;
- The absence of other people in the area;
- The ready proximity of the keys; and
- Tire tracks suggesting attempts by the appellant to escape the ditch;

the presumption was not rebutted and the appellant had retained care and control of the vehicle. These conclusions were available on the evidence and I see no error in her analysis.

G. Did the Trial Judge misuse the Appellant's blood alcohol readings?

[117] The appellant argues that the trial judge inappropriately used the results of his breathalyzer tests to determine that his ability to operate the truck had been impaired. He notes correctly that while these tests provide a scientific measurement of a driver's blood alcohol content, they do not relate that measurement to the driver's ability to

perform the functions associated with operating a vehicle. To make that connection, expert evidence is required. (See ***R. v. Letford***, 51 O.R. (3d) 737, 2000 CanLII 17024 (ON CA), para. 22, ***R. v. Noonan***, [2008] O.J. No. 699, 2008 CanLII 6867, para. 22 (ON SC))

[118] The Crown does not dispute this proposition, but argues that the trial judge used the appellant's test results only to conclude that he had recently consumed alcohol, not that he was impaired.

[119] After observing that the appellant's manner of driving, confusion and slurred speech were consistent with both impairment and a diabetic attack, the trial judge stated as follows:

> [The Appellant's] blood alcohol readings exceeded the legal limit and demonstrate he had consumed alcohol earlier. A partially consumed liquor bottle was found under the driver's seat he was found occupying. Based on the entire circumstances, I infer [he] had been drinking from this bottle prior to or while driving. I appreciate evidence of consumption does not automatically establish impairment of the ability to drive, however, when the whole record including the manner of driving, partially consumed liquor bottle and breath sample readings are considered, I am convinced beyond a reasonable doubt that [the Appellant's] ability to drive was impaired *to some degree* by alcohol.
>
> [Emphasis added]

(Trial Judge's Reasons, para. 52)

[120] As discussed above, trial judges' reasons must be read generously and in accordance with a presumption that they know and understand the law they work with on a regular basis. Impaired driving is a matter that comes before the criminal courts frequently, albeit less often in recent years due to the administrative suspension regime referenced by Constable Raymond. The trial judge in this case was experienced and

clearly familiar with the relevant authorities. In the circumstances, caution is warranted before jumping to the conclusion that an error occurred.

[121] All of that said, however, I am unable to read the underlined passages set out above and conclude that the trial judge was only using the Appellant's breathalyzer readings to infer consumption. Had that been her intention, she could have stopped after the first sentence and not referenced them again at the end of the paragraph. Nor would it have been necessary to note that his readings "exceeded the legal limit" if she was only using the breathalyzer results to infer consumption. Most compellingly, the last sentence starts by acknowledging that evidence of consumption does not necessarily imply impairment, and then goes on to say that even so, on the basis of "the whole record" – which specifically includes the appellant's "breath sample readings" – the trial judge was convinced that the appellant was impaired.

[122] I take the Crown's point that the trial judge could have been just including the evidence underlying her finding of consumption as part of the "whole record" – she did, after all, also include the half-empty liquor bottle, which she had clearly used to infer consumption. Respectfully, however, I am not sufficiently confident in this reading to dismiss the appeal on that basis, even with the benefit of the presumption discussed above. The plain meaning of the paragraph's conclusory sentence strongly suggests that the appellant's readings played a role in the finding that his ability to drive had been impaired by alcohol. As discussed above, this was an error.

[123] The appellant also argues that the trial judge's finding that he had been drinking from the bottle located under the driver's seat prior to or while he was driving

constituted palpable and overriding error. (See ***R. v. Denys (C.D.)***, 2009 MBCA 39, para. 16) In light of my conclusion on the first issue, it is unnecessary to address this question.

H. Did the Trial Judge err in granting an adjournment?

[124] Finally, the appellant argues that the trial judge failed to exercise her discretion judicially when she agreed to adjourn the trial so the Crown could produce Constable Fall, who had been previously excused pursuant to an agreement between counsel.

[125] It appears that the Crown became aware in advance of the trial that the officer would not be available and obtained permission from the defence to file his report for its truth. Then at the beginning of the trial, the Crown instead read in facts from the report, again with the consent of the defence. At the conclusion of proceedings, the Crown changed its mind and sought to file the report. At that point, the defence withdrew its consent, indicating that "things have materially changed" and that counsel was "no longer prepared to make that concession". The Crown then sought an adjournment to produce the officer, which the trial judge granted. (Transcript, February 5, 2025, pp. T49-T54)

[126] The appellant argues that the Crown was attempting to repair an evidentiary hole in its case, namely the service of the Certificate of Analysis (see ***Criminal Code*** s. 320.32) and that the trial judge should not have sanctioned it.

[127] The question of whether to grant an adjournment is discretionary and largely left to the judgment of trial judges. As Scott C.J.M. observed in ***R. v. Le (T.D.)***, 2011 MBCA 83, at para. 35:

> The law is quite clear that, generally speaking, whether to grant an adjournment or not is considered to be a matter within the discretion of the presiding judge and 'will not be reviewed by the court of appeal unless it is satisfied that the discretion was not exercised properly' …

[128] Here, the trial judge correctly noted that the adjournment request was governed by ***Darville v. The Queen***, [1956] S.C.J. No. 82, [1956] CanLII 463 (SCC), which provides three factors to consider when determining whether to grant an adjournment to produce a witness:

(i) Is the witness in question material to the proceedings?

(ii) Has the applying party been guilty of *laches* or neglect in failing to endeavour to procure the witness's attendance?

(iii) Is there a reasonable expectation that the witness can be produced?

[129] As to the first factor, the appellant argues that the evidence did not support a finding of materiality. I am unable to agree. The materiality of the witness was evident from the appellant's objection at trial – he argued that without Constable Fall's testimony, the Crown could not prove service of the certificate.

[130] As to the second factor, the appellant argues that there was no evidence that the officer had been subpoenaed for trial before his attendance was excused. This is not true. The Crown attorney advised the court that she had a subpoena return for the officer. It was open to the trial judge to accept this information from an officer of the court. In any event, the witness had been excused with the advance consent of defense counsel – it is hard to see how the Crown could be guilty of *laches* by failing to ensure his attendance.

[131] The third factor, the ability of the Crown to produce the officer at a subsequent date, was not seriously contested.

[132] In my view, the appellant's real complaint is not about the ***Darville*** criteria, but what he perceives as the "lack of Trial Fairness where the Court is assisting [t]he Crown in fixing mistakes when they were … not ready to proceed to trial on the day it was set." (Appellant's Factum, para. 90) In his view, the Crown should have prepared its case in advance and called it accordingly, not sought an adjournment when its litigation strategy did not pan out.

[133] It was open to him to make this argument to the trial judge, although, as she observed, both sides had actually changed their original positions, not just the Crown. Indeed, after Constable Raymond's evidence, the defence withdrew its earlier consent to file Constable Fall's report for its truth, clearly for strategic reasons. The trial judge could have accepted the appellant's argument and denied the adjournment request. (See ***R. v. Collins***, 2024 MBKB 50) But it was also open to her to reject the argument and grant the adjournment. Her decision is entitled to deference. This ground of appeal is dismissed.

DISPOSITION

[134] As indicated above, there is merit in relation to the finding of guilt as to impaired operation.

[135] However, the appellant was also convicted under ***Criminal Code*** s. 320.14(1)(b). The trial judge entered a stay of proceedings in relation to the impaired operation charge based on this conviction. The parties agreed at the hearing of the

appeal that the appellant's sentence would be the same no matter which conviction was entered. ***Criminal Code*** s. 686(1)(b)(iii) allows the dismissal of an appeal where "notwithstanding that the court is of the opinion that on any ground [representing an error of law] the appeal might be decided in favour of the appellant, it is of the view that no substantial wrong or miscarriage of justice has occurred." This section applies to this proceeding by virtue of s. 822(1).

[136] In my view, this disposition is appropriate here. The only successful ground of appeal relates to a charge that was conditionally stayed. The conviction for which the appellant was sentenced is affirmed and remains undisturbed.

[137] The appeal is dismissed.

[138] I wish to thank counsel for their helpful submissions, which I found of great assistance.

_____ J.