

CANADA / JUDGMENT

Nguyen v. Superintendent (Motor Vehicles)

2023 BCSC 778

COURT

Supreme Court of British Columbia

DECIDED

9 May 2023

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2023 BCSC 778 Nguyen v. Superintendent (Motor Vehicles)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nguyen v. Superintendent (Motor Vehicles),

2023 BCSC 778

Date: 20230509

Docket: S190226

Registry: Vancouver

Between:

Nghia Van Nguyen

Petitioner

And:

The Superintendent of Motor Vehicles and The Attorney General of British Columbia

Respondents

Before: The Honourable Madam Justice Morellato

On judicial review from: A Decision of the adjudicator with the Superintendent of Motor Vehicles, dated December 12, 2018

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

A. Chamgoulova

Counsel for the Respondents:

C. Bant

Place and Dates of Hearing:

Vancouver, B.C.

September 9, 2022

November 17, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 9, 2023

I. Introduction

- [1] Mr. Nguyen applies for judicial review of a decision of the Superintendent of Motor Vehicles ("Superintendent" or "Adjudicator"), which confirmed an Immediate Roadside Prohibition ("IRP") made against him. The issue before me, cast broadly, concerns whether the Superintendent reasonably concluded that there was a valid demand made by Constable Lee to Mr. Nguyen to provide a breath sample into an approved screening device ("ASD").
- [2] Mr. Nguyen seeks an order that the matter be remitted back to the Superintendent for a re-hearing.

II. Legislative Framework

- [3] The IRP was issued pursuant to s. 215.41(4) of the Motor Vehicle Act, R.S.B.C. 1996, c.318 ["Act"], which provides:

215.41(4) If a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with a demand made under the Criminal Code to provide a breath sample for analysis by means of an approved screening device, the peace officer, or another peace officer, must take those actions described in subsection (3.1)(c) and (d).

- [4] In *Mackenzie v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 354, the Court outlines the legislative scheme, at paras. 8-16, and explains its operation, in part:
- [8] Section 254(2) of the Code provides that if a peace officer has reasonable grounds to suspect that a person has alcohol in his or her body and that the person has, within the preceding three hours, operated a motor vehicle, the peace officer may, by demand, require the person to provide forthwith a sample of breath that will enable a proper analysis to be made by means of an ASD.

- [9] The IRP provisions of the Act utilize as their starting point the investigative power conferred on peace officers under s. 254(2) of the Code. Section 215.41(4) of the Act provides that if a peace officer has reasonable grounds to believe that a driver failed or refused, without reasonable excuse, to comply with an ASD demand, the peace officer must take possession of the person's driver's licence and serve upon them a notice of driving prohibition. Drivers who refuse, without reasonable excuse, to comply with a demand are treated the same as those who submit to an ASD demand and register a "fail", indicating a blood-alcohol concentration of at least 80mg/100ml. In either circumstance, the IRP must be for 90 days (s. 215.43(2)), a monetary penalty of \$500 applies (Motor Vehicle Act Regulations, BC Reg. 26/58 s. 43.09(d)) and the driver's vehicle is impounded for a period of 30 days (s. 253(7)).
- [10] The Act is intended to provide a speedy process for enhancing public safety by ensuring that individuals who drive with not less than a blood-alcohol concentration of 50mg/100ml and thereby register a "warn" are immediately prohibited from driving: see s. 215.43(1) and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paras. 58-9.
- [11] A police officer who serves a notice of IRP must promptly forward to the Superintendent a number of supporting documents, including a report sworn or solemnly affirmed providing evidence of the basis upon which the IRP was issued: s. 215.47.
- [5] A person who has been issued an IRP may apply to the Superintendent for a review: s. 215.48 (1) of the Act and bears the burden of proof under s. 215.5(1).
- [6] Section 215.49 of the Act provides that in such reviews the Superintendent must consider the following record:
- 215.49 (1) In a review of a driving prohibition under section 215.48, the superintendent must consider
- (a) any relevant statements and evidence submitted to the superintendent,
 - (b) the report of the peace officer forwarded under section 215.47(d),
 - (c) a copy of the notice of driving prohibition,
 - (d) any other relevant documents and information forwarded to the superintendent by the peace officer who served the notice of driving prohibition or any other peace officer, including peace officers' reports that have not been sworn or solemnly affirmed,
 - (e) in the case of an oral hearing, any relevant evidence given or representations made at the hearing, and
 - (f) in the case of a second or subsequent prohibition, as described in section 215.43(4) and (5), the person's driving record.
- [7] Section 215.49(2) provides that in a review under section 215.48, no person may be cross-examined. Further, as affirmed in *Mackenzie*, the usual rules of evidence do not apply:

- [14] As Newbury J.A. recently commented in *Rohl v. British Columbia* (Superintendent of Motor Vehicles), 2018 BCCA 316 at para. 7, the review process is a bit "rough and ready". A similar observation was made by this Court in *Kenyon v. British Columbia* (Superintendent of Motor Vehicles), 2015 BCCA 485 at para. 59. The usual rules of evidence do not apply. In conducting a written review, the adjudicator must consider the report of the peace officer who served the IRP and any other documents or information provided by that officer. In addition, the adjudicator must consider any other relevant documents and information forwarded by another peace officer, including police reports that have not been sworn or solemnly affirmed. The adjudicator must also consider any written statements or evidence provided by the applicant: s. 215.49(1). Even where an oral hearing is held, no person may be cross-examined on the review: s. 215.49(2). The adjudicator may determine the weight to be given to any document or other information: s. 215.49(4).
- [8] Notably, how evidence is addressed and weighed, by the Adjudicator, is an important factor in this case.

III. record before the adjudicator

A. Evidence of Constable Lee

- [9] On the evening of November 21, 2018, at approximately 11:45 p.m., Constable Lee and his partner, Constable Killoran, attended the scene of a motor vehicle accident at the intersection of Lougheed Highway and Boundary Road, near Vancouver ("Accident").
- [10] It is undisputed that Mr. Nguyen was driving north on Boundary Road when he went through a red light at the intersection of Boundary Road and Lougheed Highway, causing a collision.
- [11] Constable Lee's "solemnly affirmed" a "Report to Superintendent" form, subtitled "Immediate Roadside Prohibition Section 215.47 (MVA)", which I will refer to as the "IRP Form."
- [12] The IRP Form is dated November 11, 2018. Constable Lee also authored a related "Occurrence Report".
- [13] The IRP Form addressed several facts including the date of the IRP, as well as various times of day described as follows in this standard form: "driving or care or control": 23:49; "suspicion formed": 23:49; "ASD demand": 23:50.
- [14] The IRP Form contains the following questions, answered by Constable Lee as follows:
- Did the driver refuse to provide a breath sample? Yes

Time of Refusal: 23:52

- [15] Under the heading "First ASD Test" in the IRP Form, the time of "2352" is written in the form by Constable Lee. He does not fill out either the portion of the IRP Form that refers to "result shown to driver" (with check boxes for either "yes" or "no") or the portion that of the IRP Form that refers to "result" of the ASD (with check boxes for either "warn" or "fail").
- [16] Constable Lee did not fill out the portion of the IRP Form under the heading "Second ASD Test"; the time of this second test is not indicated and the result of "warn" or "fail" is not filled-out. However, Constable Lee provides an accompanying narrative in his Occurrence Report, which I address later in these Reasons.
- [17] The IRP Form contains specific inquiries regarding applicable grounds for reasonable suspicion, as follows:

Applicable grounds for reasonable suspicion? (explain in narrative)

☐Odor on breath ☐Admission ☐Witnessed consumption ☐Other

- [18] Constable Lee addresses some of the facts surrounding the ASD tests in his Occurrence Report. He does not address whether Mr. Nguyen specifically had the odor of alcohol on his breath but he does state in the Occurrence Report that Mr. Nguyen had told him that he had consumed one beer. Constable Lee also states in his Occurrence Report that Mr. Nguyen's "eyes were glassy and showed signs of impairment."
- [19] The IRP Form, also contains the following question:

When did you finish your last drink (Driver's response): _____

- [20] This question was not filled out in the IRP Form by Constable Lee, and the answer to this question does not appear in Constable Lee's Occurrence Report.
- [21] There are two subsequent questions in the IRP Form:

Was there a delay in making the demand or administering the first ASD test?

No_ Yes_ (explain in narrative)

Was the driver observed continuously from the time of driving or control to the time of administering the first ASD test? (explain in narrative)

Yes No

- [22] Neither of these questions were filled out in the IRP form, although the Occurrence Report provides further factual context as follows.
- [23] Constable Lee and Constable Killoran were on duty, working in plain clothes, and were "conducting patrols" when they "observed the Accident scene." His Occurrence Report summarizes what occurred prior to their arrival at the scene of the Accident, based on his

witness interviews. [Driver A] was driving west on Lougheed Highway approaching Boundary Road and [Driver B] was driving east on Lougheed Highway, travelling through the intersection at Boundary Road on a green light. Mr. Nguyen was driving north on Boundary Road when the front of his vehicle collided with another vehicle, causing it to collide into a third vehicle.

- [24] Constable Lee records in his Occurrence Report that he spoke to a female driver who was "frazzled"; she explained she was driving west when "all of a sudden" two vehicles "careened" towards her. Constable Lee also spoke to a male driver who stated he was "driving east on a green light when he was "T-boned" by Mr. Nguyen's minivan. The driver advised Constable Lee that Mr. Nguyen "exited his vehicle" and "attempted to run away from the Accident." This driver advised Constable Lee that he "caught up with Nguyen", and a "brief struggle" ensued as he attempted to keep Mr. Nguyen at the scene.
- [25] Constable Lee records in his Occurrence Report that he spoke to two witnesses who "were passersby" but who were not involved in the Accident. Witness 1 advised that she did not observe the Accident, but did observe Mr. Nguyen "attempt to flee" the scene of the Accident, while the driver of the car that was struck by Mr. Nguyen's vehicle ran after Mr. Nguyen. Witness 2 advised Constable Lee that she observed the Accident; she saw Mr. Nguyen driving north on Boundary Road, drive through the intersection on a red light and collide with another car. She also advised Constable Lee that Mr. Nguyen attempted to flee the scene and the driver of the vehicle that Mr. Nguyen hit with his car ran after him and caught Mr. Nguyen. As I note later in these Reasons, Mr. Nguyen deposed in his affidavit that he did not attempt to flee the scene of the Accident.
- [26] After setting out the witness statements, as outlined earlier in these Reasons, Constable Lee states in his Occurrence Report:

NGUYEN refused to provide a statement. NGUYEN eyes were glassy and showed signs of impairment. When asked if he consumed drugs or alcohol, Nguyen stated he consumed 1 beer.

ASD DEMAND

At 2349 hrs PC 2642 LEE determined that NGUYEN had care and control of this motor vehicle and formed reasonable suspicion that NGUYEN had operated his vehicle within the previous 3 hours with alcohol in his body. At 2350 the ASD Demand was read to NGUYEN. NGUYEN was given instructions on how to provide a sufficient sample of breath into the device and PC 2643 LEE demonstrated the practice.

FIRST ATTEMPT

At 2352 hrs NGUYEN was provided with the first test and NGUYEN placed his lips around the device but did not blow. Instead he could be heard sucking air into the straw from the vented hole. PC 2642 LEE held his finger over the vented hole and felt no air pressed through the straw into the device.

NGUYEN was warned and given 3 more opportunities to provide a sufficient sample but the device timed out and NGUYEN was determined to have refused the demand.

B. Evidence of Mr. Nguyen

[27] Mr. Nguyen deposes, in part, as follows in his affidavit sworn December 6, 2018:

4. On November 21, 2018, another friend invited me over for dinner to his house near Boundary Road and 49th Avenue in Vancouver. I went over there and had dinner. I had one beer with dinner around 7 pm.
5. Around 11:15 p.m., I left my friend's house and headed back to where I was staying on Venables Street. At approximately 11:45 p.m. I was involved in a motor vehicle accident at the intersection of Lougheed Highway and Boundary Road my vehicle hit a vehicle in the middle of the intersection.
6. Immediately after the collision, I felt stunned and remained sitting in my vehicle for a couple of minutes to collect myself. The occupant of the other vehicle did not approach me at this time.
7. During these two minutes, I felt a strong urge to urinate overcome me. I saw a McDonald's restaurant on the northwest corner of Boundary Road and Lougheed Highway. The need to urinate was distracting me from thinking clearly, and I decided to relieve myself in the restaurant, I that I would be better equipped to interact with the occupant of the other vehicle. I exited my vehicle and walked briskly towards the sidewalk to cross the intersection toward the McDonald's restaurant.
8. As I was walking, the driver of the other vehicle chased me. He caught up to me and dragged me back to his vehicle. He pushed me down on the ground and put his knee on my chest to hold me down. He remained in that position for about 5 minutes while we waited for the police to arrive. During these 5 minutes I could no longer hold the urge to urinate and soiled myself.
9. When the police arrived, an officer, who I later learned to be Constable Lee, approached us. He asked the other driver to let me get up. Then he put my hands in handcuffs behind my back.

[28] Mr. Nguyen then describes how he was "startled" by the ASD demand:

12. I was startled by the demand. I was not impaired by alcohol. I had only consumed one beer all day. However, I wanted to be cooperative with the officer so I told him I understood.
13. I blew into the machine as requested by the officer
- [29] Mr. Nguyen describes the first, second, and third attempts he made to provide the sample requested, and adds:
15. I provided a third sample into the machine. Constable Lee told me that this sample did not register either.
16. All this time I still have my hands handcuffed behind my back.
18. Each time. I was making a genuine attempt to provide a sample. I was blowing into the machine as hard as I could every time the officer asked until he told me the machine timed out. I did not believe that I would fail the test. At no point was sucking on the straw, clocking it with my tongue, biting down or chewing on the mouthpiece or doing anything to try to prevent the machine for accepting my breath sample. I was not blowing too lightly or not blowing enough air. I was not at any point intentionally trying to fake or falsify my attempts to provide a sample into the machine. However, after three attempts the machine timed out and the officer did not give me another chance to provide a sample.
19. I wanted to provide a sample for the officer. Despite my best effort, the machine did not accept my sample. I could not make it work. I tried my best to blow into the machine properly each time.
20. Constable Lee left me standing in the intersection, with my hand handcuffed behind my back. He was filling out some paperwork.
21. After a long wait, Constable Lee put two blue papers into the pocket of my jacket. Then he uncuffed me.
22. Constable Lee then asked me if I had had anything to drink that night. This was the first time he asked me what I had to drink. I told him I had one beer. Constable Lee did not ask me what time this beer was at or when my last drink was. He only asked me if I had consumed any drugs or alcohol, to which I answered one beer.
23. I was completely honest with the officer. I had no reason to be dishonest. At all times I was polite and cooperative with the officer. I was not rude or belligerent.
24. My memory of the events in question is very clear.

IV. REASONS OF THE ADJUDICATOR

- [30] The Adjudicator conducted a hearing at which Mr. Nguyen was represented by legal counsel. The Adjudicator noted that Mr. Nguyen applied for a review of his driving prohibition on the following grounds:

- he was not driving or in care or control of the motor vehicle;
- he did not refuse or fail to comply with the officer's demand to provide a breath sample; and
- he had a reasonable excuse for refusing or failing to comply with the officer's demand to provide a breath sample.

[31] The Adjudicator began his analysis by addressing and then dismissing a number of preliminary issues raised by Mr. Nguyen. These included: whether Constable Lee submitted an incorrect IRP Form to the Superintendent; whether the "form provided" gives rise to a reasonable apprehension of bias and whether the tribunal was not neutral and independent in creating the IRP Form's contents; whether the IRP Form was properly sworn; challenges to the disclosure policy and hearing scheduling policy; whether Constable Lee's evidence was credible in light of alleged internal inconsistencies in his evidence relating to the total number of pages in his report to the Superintendent (that included the IRP Form, Occurrence Report and other documentation); whether Constable Lee both authored and swore to the evidence in this report and narrative; and, finally, whether Constable Lee was required to establish a prima facie case.

[32] The Adjudicator addressed these preliminary issues and dismissed each of them. None of these preliminary issues were raised before me at the hearing, and counsel for Mr. Nguyen confirmed that they were not the subject of judicial review.

[33] After dismissing the preliminary issues, the Adjudicator identified the following remaining issues before him as follows:

The issues in this review are:

- Were you not a driver within the meaning of section 215.41 of the Act?
- Did you not fail or refuse to comply with an ASD demand?
- If you failed or refused to comply with the demand, did you have a reasonable excuse?

[34] As to the question of whether Mr. Nguyen was the driver of the vehicle pursuant s. 215.41(1) of the Act, the Adjudicator refers to Mr. Nguyen's affidavit wherein he states that he was driving his vehicle "at 23:45" and was involved in a motor vehicle Accident. The Adjudicator considers other evidence, including that of the two witnesses who were not involved in the Accident and concludes:

The totality of the evidence before me is that you were a driver and had care and control of a motor vehicle. There is no evidence before me that there was another person present in your vehicle or that any other person was driving your vehicle.

You have not satisfied me that you were not a driver within the meaning of s. 215(4)(1), of the Act.

[35] This conclusion is also not challenged by Mr. Nguyen in this judicial review.

[36] The Adjudicator then considers the question of whether Mr. Nguyen failed or refused to comply with an ASD demand. Counsel for Mr. Nguyen submits that, subsumed within this issue, is the question of whether the ASD demand was valid; counsel argues it was not.

[37] The Adjudicator summarizes the facts before him on this issue, in part, as follows:

You state, in your affidavit, you were attending a dinner with your friend and had one beer around 1900 hours. Around 2315 you left to return to another friend's house and were involved in a motor vehicle accident around 2345. You then needed to urinate badly and walked away from the scene of the accident to use the bathroom at a nearby McDonalds. You were detained by the other driver and pushed to the ground and pinned while waiting for police to arrive.

You state police arrived about 5 minutes later and handcuffed you. You were not asked any questions. Cst. Lee instead went to his vehicle and retrieved a black box which contained a small and dark grey device. You state Cst. Lee put a mouthpiece onto the device and you were told to blow into the machine. You indicate Cst. Lee told you your sample did not register. You were "given some information" on how to blow properly. You indicate your second attempt did not register. You were told not to suck on the straw. You then made a third attempt which did not register. You indicate you were then asked if you had anything to drink that night and you answered one beer. You note Cst. Lee did not ask when your last drink was. You inform you were not sucking on the straw, blocking it with your tongue, biting down on it, or chewing on the mouthpiece. You were not given any further attempts to provide a sample after your third test.

[38] The Adjudicator summarizes the arguments of counsel for Mr. Nguyen at the hearing before him, on this issue, as follows:

Mr. Doroshenko argues that Cst. Lee did not have grounds to form a reasonable suspicion you were driving with alcohol present in your body. He notes that on the RTS ["Report"], Cst. Lee has not checked any of the boxes under the heading "Applicable grounds for reasonable suspicion". He further argues that since Cst. Lee has redacted all of the names of the witnesses there is no indication to who witnessed what. He stated this evidence is hearsay evidence and should not past a threshold test for reliability. He also notes that Cst. Lee stated you placed your lips around the device instead of the straw, this would indicate he provided incorrect instructions on how to provide a valid sample. He also argues that the phrase "showed signs of impairment" is not sufficient evidence. There is no specific indication of motor skill problems, odour of liquor on the breath, or other symptoms of impairment.

[39] The Adjudicator addresses submission, in part, as follows:

Cst. Lee indicates he arrived at the scene of a collision. He noted your eyes were glassy and you showed signs of impairment. When asked if you had consumed any drugs or alcohol you noted you had consumed one beer. At 2350 the ASD demand was read to you and you were given instructions on how to provide a sample, and a demonstration was given. At 2352 you were provided a first test. You placed your lips around the device but did not blow. You could be heard sucking air into the straw and Cst. Lee held his finger over the vented hole and felt no air being

pressed through the straw. You were given three more opportunities to provide a sample but the device timed out.

[40] The Adjudicator then reasons:

Section 215.49(5) and (6) of the Act states that I may consider technical materials that, in my opinion, may assist me in determining the issues raised by an applicant. I will consider the Alco-Sensor FST Operator Manual for British Columbia Users (the "Manual") as a technical manual I may rely on in this review. The Manual, for your reference, can be found on the RoadSafetyBC website.

In order to determine if you failed or refused to comply with an ASD demand it must be determined that a valid ASD demand was made based on reasonable suspicion you had alcohol in your body and that you refused to comply with the demand.

[Emphasis added]

[41] Counsel for Mr. Nguyen in this judicial review submits that the Adjudicator framed the issue before him correctly in the underscored paragraph above. She submits, however, that the Adjudicator's considerations and reasons in this specific regard were manifestly flawed and should not withstand judicial scrutiny.

[42] It is noteworthy that counsel for Mr. Nguyen also did not challenge the reasons of the Adjudicator relating to the issue concerning whether Mr. Nguyen failed or refused to comply with the ASD demand and whether he had a reasonable excuse. The Adjudicator concluded that "it is more likely than not" that Mr. Nguyen did not make a "genuine effort" to provide a breath sample into the ASD and that Constable Lee was reasonable in determining Mr. Nguyen refused to provide a sample. This issue was also not challenged on judicial review.

[43] I note that there were also other issues raised by counsel for Mr. Nguyen before the Adjudicator, which were based on the Canadian Charter of Rights and Freedoms. These issues were also not pursued in this judicial review. The Adjudicator's decision ably addressed numerous issues raised before him by counsel for Mr. Nguyen. To his credit, only one of those issues, relating to the validity of the ASD demand, was marshalled at the judicial review hearing.

[44] The parties are agreed, that this judicial review may be distilled down to the sole question of whether the Adjudicator's reasons were unreasonable in finding the ASD demand was valid, based on the reasonable suspicion that Mr. Nguyen had alcohol in his body.

[45] In this specific regard, the Adjudicator reasoned as follows:

In reviewing the evidence you were located at the scene of a collision. As noted previously in the letter you were established as the driver of one of the vehicles involved in the collision and you were noted as having glassy eyes and signs of impairment. I am mindful that Cst. Lee does not clarify what these symptoms were; however, I am also mindful that the threshold for an ASD demand is low, and simply requires the reasonable suspicion that alcohol be present in a person's

body to issue the ASD demand. The undisputed evidence before me is that you were involved in a traffic collision where you went through a red light and struck another vehicle. Further you presented with having glassy eyes which is a well-known symptom of impairment, and you admitted to having consumed alcohol. I find that these circumstances would provide reasonable grounds for Cst. Lee to form a reasonable suspicion you had alcohol present in your body.

I am not satisfied that the demand was not valid .

[46] As a result of these findings, the Adjudicator concluded that Mr. Nguyen's driving prohibition and corresponding vehicle impoundment, as well as his monetary penalty, were valid.

V. ANALYSIS

A. Standard of Review

[47] It is well established that "reasonableness" is the standard of review applicable to adjudicators' decisions concerning immediate roadside prohibitions, issued pursuant to s. 215.41(4) of the Act. In Mackenzie, at para. 55, our Court of Appeal confirmed the "deferential standard of reasonableness" in such cases. Following the decision in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, reasonableness remains the applicable standard: Wood-Tod v. The Superintendent of Motor Vehicles, 2020 BCSC 155, at para. 45; Rossiter v British Columbia (Attorney General), 2021 BCSC 1743 at paras. 8-11.

[48] As indicated above, the parties agree that reasonableness is the standard of review; however, they disagree on its application.

[49] Our courts have endorsed a "two-pronged" analysis in assessing the reasonableness standard, as expressed in Telus Communications Inc. v. Telecommunications Workers Union, 2018 BCCA 331. In Telus Communications, the majority of our Court of Appeal focused not only on the substantive outcome of the decision but also the process through which the adjudicator articulates the outcome:

[93] the Supreme Court of Canada in both Dunsmuir v. New Brunswick, 2008 SCC 9, and Canada (Attorney General) v. Igloo Vikski Inc., 2016 SCC 38, identified two crucial aspects to meaningful judicial review: on one hand, we are called upon to examine the reasonableness of the substantive outcome of the decision, and, on the other, the process of articulating that outcome.

[94] As Bastarache and LeBel JJ. noted in that case, at para. 47:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

- [50] In a similar vein, at para. 35 of *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316, our Court of Appeal reasoned that the deference will not shield a decision from interference on judicial review if the route or path to the decision is demonstrably unreasonable:
- [39] Given the seriousness of a driving prohibition and the highly constricted review procedure set out in Part 4, it is not surprising that courts in this province have been assiduous to hold the Superintendent strictly to the requirements of the statute and of procedural fairness. Nevertheless, the reasonableness standard must be applied by reviewing courts in accordance with the governing jurisprudence. I have already mentioned this court's decisions in *Whyte*, *Scott* and *Kenyon*. The Court recently reviewed those cases in discussing the reasonableness standard in *Cooper v. British Columbia (Liquor Control and Licensing Branch)* 2017 BCCA 451. At para 36 thereof, we noted that in *Scott*, the Court had expressly disagreed with the proposition that a reviewing court will "never interfere as long as there was 'some evidence' upon which the adjudicator's finding could reasonably have been made." The Court in *Scott* stated indeed that appellate interference will be justified "if the route to a decision is demonstrably unreasonable, even where the ultimate findings might be capable of being supported by the record." .

[Emphasis added]

- [51] In *Telus Communications*, our Court of Appeal reasoned that the route to a decision may be found to be demonstrably unreasonable, warranting judicial intervention in circumstances where the ultimate finding is capable of being supported by the record:
- [97] In *Rohl* (at para. 39), this Court reiterated what was said in *Whyte v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCCA 454; *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCCA 554; and *Cooper v. British Columbia (Liquor Control and Licensing Branch)*, 2017 BCCA 451: appellate interference will be justified if the route to a decision is demonstrably unreasonable, even where the ultimate findings might be capable of being supported by the record.

[Emphasis added]

- [52] In *Mains v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCSC 1701, the Court provides a useful summary of the types of flawed reasoning that justifies a Court's interference in judicial reviews such as this:
- [21] Examples of manifest flaws in reasoning that have been found to justify the setting aside of an adjudicator's decision to confirm an immediate roadside prohibition include the following:
- the failure to resolve conflicts in the evidence that go to the heart of the dispute as in (as in *Whyte*);

- according the evidence of a police officer a presumption of baseline reliability and placing a burden on the driver to refute it (as in *Scott*) or failing to assess the weight that should be accorded to the officer's evidence in light of the application of legitimate credibility considerations (as in *Petrov v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 274);
- the failure to account for or consider cogent evidence (as in *Naughton v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 1250 and *Yi v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 304);
- the reliance on facts not supported by evidence (as in *Naughton*);
- the failure to come to grips with the lack of any evidence on a crucial point (as in *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 168); and
- making negative credibility findings on the basis of a manifestly flawed rationale (as in *Scott*).

[53] In light of the petitioner's focus on the reasonable suspicion standard, I address the applicable principles in this regard below.

B. The Reasonable Suspicion Standard

- [54] In *Mackenzie*, the Court affirmed that there is both a subjective and objective aspect to the reasonable suspicion assessment. It also reinforced the fact-based nature of this assessment:
- [35] The demanding officer must subjectively entertain an honest suspicion that the detained driver has alcohol in his or her body. Credibility issues and the need to make factual findings as a consequence thereof will most commonly arise in resolving whether the officer subjectively entertained the requisite honest suspicion.
- [36] Further, the suspicion must be based on objectively verifiable circumstances which, taken together and subjected to independent judicial scrutiny, establish that the suspicion subjectively entertained by the officer was reasonable: *R. v. Chehil*, 2013 SCC 49 at paras. 26 and 29. The inquiry is based on circumstances known to the police officer at the time and asks whether it was reasonable, based on the totality of those circumstances, for the officer to suspect that the driver had alcohol in his or her body. The objective component of the test may be framed in these terms: "[W]ould a reasonable person, standing in the shoes of the investigating police officer and aware of all of the objectively verifiable evidence, reasonably suspect the driver had alcohol in his or her body?": *R. v. Yates*, 2014 SKCA 52 at paras. 33–34.
- [37] The inquiry is "fact-based, flexible, and grounded in common sense and practical, everyday experience": *Chehil* at para. 29.

[Emphasis added]

- [55] The Court in Mackenzie then reaffirmed that the reasonable suspicion test engages the reasonable possibility, not a reasonable probability, that a driver has alcohol in their body: at para. 38; see also Chehil at paras. 27–28. The Court warns, at para. 40, that the reasonable suspicion assessment cannot consider facts gathered after the ASD demand is made:
- [40] Importantly, the reasonable suspicion inquiry cannot logically take account of circumstances learned after the demand was made. If, for example, Constable Christians' observation that the respondent had difficulty extracting his driver's licence from his wallet was made after the ASD demand (as the appellant asserts), it is not a factor that could be taken into account in determining whether the officer's suspicion that the respondent had alcohol in his body was reasonable at the time of the demand.
- [56] I should note that the Court in Mackenzie dismisses the argument that: "an ASD demand was made with insufficient indicia of impairment is invalid". In this regard, the Court reasons:
- [41] This takes me to the respondent's assertion that "an ASD demand made with insufficient indicia of impairment is invalid". On hearing of the petition, counsel for the respondent explained that the Superintendent uses this language to describe the reasonable suspicion inquiry. Regardless of the source of this language, it is wrong as a matter of law and should be avoided in the future. While objectively discernible indicia of impairment may be sufficient to ground a valid ASD demand, such observations are not necessary to the making of a valid demand. A detaining officer who is found to have detected a strong odour of liquor on the mouth of a driver but no observable signs of impairment will, in all likelihood, have a reasonable suspicion that the driver has alcohol in his or her body.
- [57] Further, the Court in Mackenzie also dismisses the argument that, without ascertaining the time of his last drink, a constable can not form the requisite reasonable suspicion:
- [42] The respondent's suggestion on appeal that "without ascertaining a time of last drink, there can be no reasonable suspicion" is also wrong. An officer may reasonably suspect that a driver has alcohol in his or her body based on mouth odour even if the driver refuses to respond when questioned as to when he or she consumed their last drink. Alternatively, an officer may reasonably suspect that a driver has alcohol in his or her body based on other indicia of impairment in the absence of a detectable odour of liquor on the driver's breath.
- [58] With these principles in mind, both in regard to the standard of review and the proper assessment of reasonable suspicion, I now address the record before me.

C. Was the Adjudicator's Decision Unreasonable?

- [59] In considering the question of whether the Adjudicator's reasons were unreasonable, I am particularly mindful of the Court of Appeal's reasons in *Telus Communications*, at para. 93–94, that "reasonableness" concerns both the substantive outcome of the decision and the process of articulating the outcome. Further, as reasoned in *Rohl* at para. 39, the Court was clear that a decision is not reasonable if the route to the decision is demonstrably unreasonable, even where the ultimate findings might be capable of being supported by the

record. I have concluded that this is such a case.

- [60] To render reasonable decisions, which garner the court's deference, adjudicators must scrutinize the evidence and assess whether the conclusions they reach are supported by the evidence as a whole. If there are portions of the evidence that do not support their conclusions, the credibility, reliability, and materiality of that evidence ought to be clearly addressed, assessed and articulated in order to arrive at justified, coherent and transparent conclusions. That was not done in this case.
- [61] There was evidence before the Adjudicator, material to his findings of fact and his conclusions, that his decision did not assess. Findings of credibility regarding Mr. Nguyen's evidence, material to the Adjudicator's decision, were necessary but were not made. Mr. Nguyen deposed, that he had only one beer, at 7:00 p.m., on the evening in question. The credibility and reliability of his evidence in this regard was not assessed by the Adjudicator in his reasons, yet this evidence goes directly to the question of whether Constable Lee had an objectively reasonable suspicion that Mr. Nguyen had alcohol in his body at the time of the ASD demand. As a consequence, it is not clear if and how the Adjudicator resolved the apparent conflict between Mr. Nguyen's evidence that he had only one beer at 7:00 p.m., and Constable Lee's evidence that he had glassy eyes and showed signs of impairment.
- [62] In addition, Mr. Nguyen deposed that he told Constable Lee that he had a single beer after the ASD demand was made. The Adjudicator noted this evidence but did not assess its credibility, nor did the Adjudicator address the principle affirmed in Mackenzie, at para. 40, that the reasonable suspicion inquiry can not logically consider circumstances learned after the ASD demand was made.
- [63] It is not clear whether the Adjudicator weighed Mr. Nguyen's evidence and then found that it was not credible or reliable, or whether the Adjudicator accepted Mr. Nguyen's evidence but did not find it material or relevant, or whether this evidence figured into his analysis at all in reaching the conclusions he did. As a consequence, and with the utmost of respect, the route to the Adjudicator's conclusions was not transparent, intelligible or justified. Accordingly, the Adjudicator's decision does not meet the standard of review of reasonableness. I note that in reaching this conclusion I have also been guided by the following authorities: *Earl v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 340 at paras. 22-23; *Mains*, at paras. 21 and 31-37; *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 554; *Whyte v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCCA 454; *Kenyon v. British Columbia (Superintendent of Motor Vehicles)* 2015 BCCA 485 at paras. 52-57; and *Kirby v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCSC 1625.
- [64] I do not mean to suggest that the Adjudicator's final conclusion was necessarily wrong regarding whether there was a reasonable suspicion that Mr. Nguyen had alcohol in his body. Nevertheless, the route to his decision is not transparent, justifiable or intelligible in light of the entirety of the record before the Adjudicator.

[65] In conclusion, for the reasons set out above, I find the decision of the Adjudicator should be set aside. Accordingly, the matter is remitted to the Superintendent for re-hearing.

[66] The petitioner has not sought costs. As such, there will be no order for costs.

"MORELLATO J."

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Prepared on 26 October 2026 · Esheria