

Citation: *R. v. Peter*, 2017 YKTC 52

Date: 20171024
Docket: 16-00801
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

MICHELLE DOREEN PETER

Appearances:
Paul Battin
Joni Ellerton

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Michelle Peter has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

[2] Counsel for Ms. Peter has filed a Notice of *Charter* Application seeking exclusion of the evidence, based upon breaches of ss. 8 and 9 of the *Charter*.

[3] The evidence in respect of the *Charter* application was heard in a *voir dire*, without decision being rendered at the time. The remainder of the evidence in the trial proper was heard on the same date, with all the admissible evidence heard in the *voir dire* being evidence in the trial proper.

[4] The matter was adjourned and counsel filed written submissions on both the *Charter* and trial issues.

[5] This is my decision on both the *voir dire* and the trial.

***Voir Dire* Evidence of Cst. Matthew Beckett**

[6] Cst. Beckett was the arresting officer and the breath technician in this case. He was qualified as a certified breath technician in 2014.

[7] Cst. Beckett testified that in his 8 years as an RCMP officer he has been involved in numerous impaired driving investigations, as well as having dealings with persons intoxicated by alcohol.

[8] He testified that on March 12, 2017, he was on routine patrol in the community of Mayo at approximately 9:50 p.m. He stated that he was not specifically looking for impaired drivers.

[9] He noticed a truck, subsequently determined to be driven by Ms. Peter. While the speed he paced it at of 60 kmh in a 50 kmh zone did not raise any particular concern, his observations that the brake lights on the truck flashed on and off repeatedly and continuously did. He noted that this occurred while he was pacing the vehicle close behind it.

[10] He surmised that the repeated and continuous flashing may have been due to the driver being nervous because a police cruiser was behind them, and was therefore

trying to slow down. However, he testified that there was no change in the vehicle's speed despite the brake lights flashing on and off.

[11] As a result, Cst. Beckett decided, as part of his duty to ensure the safety of the public and other drivers, to engage the police cruiser's emergency lights and have the vehicle pull over. He stated that it was his intention to ensure that the driver's and vehicle's paperwork were in order, as well as to check for driver sobriety.

[12] I note from watching the video from the police cruiser's Video In Car System ("VICS") the following:

- The video records Cst. Beckett following the vehicle for approximately 31 seconds before activating the emergency lights.
- The vehicle's brake lights flashed once during this time, approximately 6 seconds into the video, as the vehicle was entering a bend in the road.
- The vehicle's brake lights flashed a second time approximately 3 seconds after the emergency lights were activated. On this second occasion the vehicle was approaching a T-intersection, at which the driver turned right towards Mayo, utilizing the turning lane. The driver entered the turn approximately 5 seconds after the emergency lights had been activated, and brought the vehicle to a complete stop approximately 26 seconds after the emergency lights had been activated. The vehicle stop was completed approximately 7 seconds after completing the turn, and approximately 57 seconds after the video started. The vehicle stopped at the first pull out available after the emergency lights had been activated, although I note that it did not pull completely off the road at this pull out.
- There was no weaving or erratic driving captured in the video.

[13] Cst. Beckett approached the driver-side door. He requested the driver and vehicle documentation from Ms. Peter, whom he knew from having had prior dealings with her. She was able to provide this documentation without any problem.

[14] There were a male and a female passenger in the vehicle, seated in the front and rear passenger and passenger-side seats.

[15] Cst. Beckett testified that the inside of the truck smelled like liquor. He noted it as being a strong smell of liquor. He also noticed an overwhelming smell of perfume, something that, from his experience, was often used to mask the smell of liquor or drugs.

[16] He stated that Ms. Peter's eyes appeared to be rather glossy and red or bloodshot.

[17] He asked Ms. Peter to step away from the vehicle. He stated that he did so in order to isolate Ms. Peter so that he could determine whether or not there was an odour of liquor on Ms. Peter's breath when she was not in the vehicle.

[18] Cst. Beckett testified that Ms. Peter had no problems with her balance while she was walking. I also note this to be the case from the video.

[19] Cst. Beckett asked Ms. Peter where she was coming from. While doing so he stated that he detected an odour of liquor coming from Ms. Peter's mouth. He asked her to remove the chewing gum from her mouth.

[20] He testified that it was at this time that he formed the suspicion that Ms. Peter had consumed alcohol at some point that evening before operating the vehicle and that she had alcohol in her body while she was driving the vehicle.

[21] Cst. Beckett stated that his suspicion was based upon:

- The continuous hitting of the brakes once she noticed the police car;
- The strong odour of liquor coming from the vehicle;
- The odour of liquor on Ms. Peter's breath; and
- her red and glossy eyes.

[22] He then asked her when her last drink was and she stated that it was at 4:00 a.m. However she later re-stated to him that it was 4:00 p.m.

[23] As a result of Ms. Peter having gum in her mouth, Cst. Beckett decided to wait five minutes before requiring her to provide a sample of her breath into the approved screening device. He said he did this to ensure that there was no interference with the breath test and to avoid a false high reading. He stated that after an admission of alcohol consumption, he had been trained to wait 15 minutes before obtaining a breath sample.

[24] Ms. Peter was in the rear seat of the police cruiser at this time with the silent patrolman open. Cst. Beckett had Ms. Peter accompany him in part for safety reasons and in part to maintain continuity of her in order to ensure that there would be no mouth alcohol present when he administered the breath test, or any other issue that would interfere with the accuracy of the breath test.

[25] After failing to provide an adequate breath sample on the first attempt at approximately 21:56 hours, a "Fail" reading was registered on the second attempt at 21:57 hours.

[26] After the “Fail” reading, Cst. Beckett advised Ms. Peter that she was under arrest for impaired operation of a motor vehicle, and read her the breath demand, the police warning and the *Charter* right to counsel.

[27] Cst. Beckett also arrested the male passenger in Ms. Peter’s vehicle for breach charges. Cst. Beckett then transported both Ms. Peter and the male passenger to the RCMP Detachment, where Cst. Traer met him. They arrived at the RCMP Detachment at 22:07 hours.

[28] Ms. Peter was taken into the breath test room at 22:15 hours. She was able to speak to legal counsel at 22:25 hours. The observation period was commenced at 22:26 hours. Nothing of concern was noted during this observation period by the attending officer, Cst. Traer.

[29] The first breath testing sequence commenced at 22:43 hours and a mouth alcohol reading was obtained at 22:50. Cst. Beckett testified that this reading was a result of the instrument detecting mouth alcohol. Generally speaking, a mouth alcohol reading results from burping, hiccupping, regurgitating etc. However none of those were observed to his knowledge, so he was unable to explain why the false reading occurred. He agreed that Ms. Peter may have burped or hiccupped, and that this simply was not noticed.

[30] After a further observation period, a second breath test procedure was commenced at 23:05 hours and at 23:10 hours a reading of 90 mgs% was obtained.

[31] Following a further 15 minute observation a second breath sample was obtained at 23:31 and a reading of 80 mgs% was obtained.

Trial Evidence of Ms. Karen Chan

[32] Ms. Chan was qualified as an expert in the areas of the physiology of alcohol, which includes absorption, distribution and elimination of alcohol from the human body, and the pharmacology of alcohol, which includes the effects of alcohol on behaviour and motor function and how this relates to operation of a motor vehicle.

[33] Ms. Chan had back-extrapolated from the time of the breath tests and the readings that were obtained, in order to provide her opinion as to the blood alcohol level in Ms. Peter's body at the time of driving.

[34] She testified that the information she required to provide her opinion as to Ms. Peter's blood alcohol level at the time of driving was the time of driving, the time the samples were obtained, and the results of the testing of the samples. She testified that this calculation is independent of the gender and weight of the individual involved.

[35] Ms. Chan estimated, based upon the time of driving of 21:10 and the breath test result of 80 mgs% at 23:31 hours, that Ms. Peter's blood alcohol level at the time of driving was between 97 and 114 mgs%.

[36] Ms. Chan used the following assumptions in providing this estimate:

- that Ms. Peter eliminated alcohol from her body at the rate of between 10 and 20 mgs% per hour;
- Ms. Peter did not consume any alcohol in the 30 minutes prior to 21:10 hours; and

- Ms. Peter did not consume any alcohol between the time of driving at 22:10 hours and the time of the breath sample being obtained.

[37] Ms. Chan testified that in order for Ms. Peter's blood alcohol level to be at 80 mgs% at the time of driving, she would have to have had an unabsorbed amount of alcohol in her body of .8 to 1.5 ounces of 40% liquor, or .5 to one 341 ml bottle of 5% beer, or 2.5 to 5.1 oz. of 12% wine.

[38] In order to form this opinion, Ms. Chan used a weight of 72.5 kg for a female individual. She indicated that Ms. Peter's gender and weight had been provided to her by the RCMP on the check sheet accompanying the request. It is a requirement that the RCMP provide this check sheet whenever they submit a toxicology service request. A weight difference of 5 kg would likely have no impact, while one of 10 kg might.

[39] Ms. Chan agreed that, while the elimination rate of 10 – 20 mgs% applied with respect to 90% of the general population, it does not apply to every individual. In order to establish the actual elimination rate for an individual, that individual would need to be tested on the given day. A variety of factors, including: the rate of consumption of alcohol, diseases, mood, medications, or presence of food in the stomach, could impact absorption and elimination rates. Ms. Chan stated that she would expect that an elimination rate outside of the 10 – 20 mgs% would usually be at a higher rate, as a lower rate would usually be associated with a severe liver disease or equivalent health issue.

[40] Ms. Chan stated that an individual, who is an average social drinker, with a blood alcohol level of between 97 and 114 mgs% should exhibit some or all of the following symptoms:

- Odour of liquor on breath;
- Flushed face;
- Bloodshot watery eyes;
- Some deterioration with fine and gross motor control and coordination, such as fumbling with objects and balance problems.

[41] An individual at the higher end of this range would likely demonstrate more outward signs of intoxication.

[42] Ms. Chan noted that alcohol is a central nervous system depressant, meaning that it slows down the brain's activity. As such, alcohol consumption affects the functions required to safely operate a motor vehicle; the greater the concentration of alcohol in the blood, the more severe the impact on the ability to drive.

[43] The following are some of the impacts of alcohol consumption on driving:

- Visual acuity, depth perception and peripheral vision deteriorate, as does the driver's ability to adjust to changes in light conditions, including oncoming headlights;
- Judgment is affected leading to an increase in self-confidence, risk-taking and a decrease in inhibition. This can show in speeding, ignoring traffic signs and signals and dangerous manoeuvres being performed;
- Fine motor control and coordination are affected leading to problems in respect of the ability to steer, brake and accelerate, often illustrated by weaving in and out of a traffic lane; and
- Reaction time becomes slower.

[44] Ms. Chan stated that, in her opinion, an individual with a blood alcohol level between 97 and 114 mgs% would be impaired in their ability to drive. This is so regardless of whether an individual is a seasoned or a novice drinker. At least one of the driving skills of the individual to safely operate a motor vehicle would be impaired.

[45] The difference between a seasoned and a novice drinker at the same blood alcohol level would be with respect to the signs and symptoms observed, and possibly also in the seasoned drinker having a higher elimination rate. However, both would be impaired in their ability to drive.

[46] It was her opinion that every individual with a blood alcohol level of 80 mgs% would be impaired with respect to the ability to drive. She believes that her view is generally supported by the scientific community, and she is not aware of any recent studies that would state otherwise. Ms. Chan went so far as to state she held the same belief in regards to the impairment of individuals with a blood alcohol level of 50 mgs%, although acknowledging that there is not the same level of support for this opinion within the scientific community.

Trial evidence of Ms. Michelle Peter

[47] Ms. Peter stated that just prior to being pulled over by Cst. Beckett she was at home. She was hung over from the night before and not feeling well. Some friends arrived at her house around 8:00 p.m. She said that she had a couple of 5% Budweiser beers with them but, as they were pretty intoxicated and getting on her nerves, she offered to drive them somewhere.

[48] She stated that they finished their beers, got into the truck and then drove towards downtown. In particular, when asked how long after she finished drinking she had left to drive, Ms. Peter stated: "I just finished my beer and we left".

[49] Cst. Beckett conducted the traffic stop perhaps six or seven minutes after Ms. Peter left her house to drive downtown.

[50] Ms. Peter said that she made a mistake in not telling Cst. Beckett about the two beers she had just had. She agreed that it was because she did not want to admit that she had consumed alcohol before driving.

[51] Ms. Peter testified that she had in fact told Cst. Beckett that she had been drinking until 4:00 a.m. that day, and not 4:00 p.m. She said that she mistakenly had said 4:00 p.m. because she was nervous talking to him. She re-stated that she had meant 4:00 a.m.

[52] She said that she was surprised that she had blown over because she did not feel drunk or anything.

Submissions of Counsel

Counsel for Ms. Peter

[53] Counsel for Ms. Peter states the issues as follows:

The issues for consideration in this case are:

- 1) Did the arresting officer, Cst. Beckett, have the requisite reasonable suspicion to make an approved screening device ("ASD" demand pursuant to s. 254(2) of the *Criminal Code*? It is submitted that he did not, such that

the demand, sample and subsequent detention of the accused were in breach of the accused's s. 8 and s. 9 *Charter* rights. It is the position of Defence that all of the evidence obtained as a result of the breaches must be excluded under s.24(2) of the *Charter*.

- II) Is there sufficient evidence before the Court that the accused's blood alcohol level was in excess of 80 milligrams in 100 millilitres of blood? It is submitted there is not as the expert's report and evidence was based on unproven assumptions and cannot be relied upon.
- III) Is there sufficient evidence before the court that the accused's ability to operate a motor vehicle was impaired by alcohol? It is submitted there is no evidence of impairment before the Court and the accused must be found not guilty.

Issue 1

Charter ss. 8 and 9

[54] Counsel submits that Cst. Beckett did not possess the requisite grounds to suspect that Ms. Peter had alcohol in her system and thus the s. 254(2) breath demand was unlawful.

[55] She submits that there was no basis on which Cst. Beckett "...could have observed an odour of alcohol emanating from the accused's breath while the accused was chewing gum from a distance of one foot in addition to the strong odour of perfume, and there was no admission of consumption".

Issue II

Evidence of over .08 and Impairment

[56] Counsel submits that the Crown has not proven the factual basis for two of the assumptions Ms. Chan relied on in providing her opinion as to the blood alcohol level of Ms. Peters at the time of driving. In particular the Crown has not proven that Ms. Peter's rate of elimination is between 10 and 20 mgs% per hour, and that no alcohol was consumed by Ms. Peter within 30 minutes of the time of driving.

[57] Counsel states in her submissions:

13. This requirement does not put a burden on the Crown of anticipating and refuting any defence that may be raised. It is simply to require the Crown to prove the foundation of its own opinion evidence as a prerequisite to *that* evidence having any probative value. It is not the law that a party must provide opinion evidence on unproven facts and call upon the other side to disprove the assumptions: *R. v. Popkov*, 2014 ABPC 256 at paras. 105 & 111.

[58] Further, in addition to the Crown failing to prove the factual basis for the assumptions, Ms. Peter provided testimony that she had consumed alcohol just prior to driving.

[59] As such the Crown is unable to prove that Ms. Peter's blood alcohol level was over 80 mgs% at the time of driving.

Issue III

Impaired driving

[60] Counsel submits that there were few observations made of Ms. Peters that would support a finding that her ability to operate a motor vehicle was impaired at the time of driving. Counsel submits that the testimony of Cst. Beckett that he relied on the ASD result of “Fail” to form the opinion that Ms. Peters was impaired by alcohol is evidence that he had not observed sufficient indicia to believe she was impaired by alcohol such that he could charge her with impaired driving.

[61] Counsel also notes that it is trite law that self-incriminating evidence obtained from an accused compelled to participate in a roadside screening process is not admissible for proving guilt: *R. v. Orbanski*, *R. v. Elias*, 2005 SCC 37; and *R. v. Braithwaite*, unreported, December 4, 2014 (Calgary, AB).

[62] Counsel further submits that the opinion of Ms. Chan as to everyone being impaired by alcohol with respect to their ability to drive at a blood alcohol level of 80 mgs%, or even 50 mgs%, is contrary to the law as stated in *R. v. Stellato*, [1994] 2 S.C.R. 478, which requires that the Crown prove impairment by evidence that relates specifically to the accused before the Court.

Counsel for the Crown

Issue I

[63] Crown counsel submits that Cst. Beckett had the requisite suspicion that Ms. Peters had alcohol in her body to make the s. 254(2) demand.

[64] Counsel submits that the smell of liquor on the breath of Ms. Peters while outside of her vehicle was, on its own, enough to raise a reasonable suspicion (*R. v. Carson*, 2009 ONCA 157 at para. 1). He further submits that the other observations relied upon by Cst. Beckett provided a basis for a reasonable suspicion to be formed.

Issue II

[65] Counsel submits that the elimination rates of between 10 and 20 mgs% per hour have been accepted as scientific knowledge and the Crown is not required to prove that Ms. Peters eliminated alcohol within this rate. (*R. v. Paszczenko*, 2010 ONCA 615 at paras. 42, 43, 61, 62 and 65).

[66] Counsel further submits that the evidence of Ms. Peters as to having consumed alcohol within 30 minutes of the relevant time of driving is vague and lacking sufficient specificity to be considered reliable.

Issue III

[67] Counsel relies on the opinion of Ms. Chan that everyone with a blood alcohol level in excess of 50 mg/% is impaired, as further illustrated by the fact that, as Ms. Chan noted, various jurisdictions and governments are imposing a lower legal limit to reflect this.

[68] He also notes that the cases relied upon by counsel for Ms. Peter are courts of first instance and have not been followed by superior courts.

Analysis

Issue 1: Charter ss. 8 and 9

[69] Firstly, Cst. Beckett testified that when he observed the vehicle being driven, it was travelling at a speed of 60 kmh in a 50 kmh zone.

[70] He also testified as to having seen the vehicle's brake lights flashing on repeatedly and continuously while he was following the vehicle.

[71] Having viewed the video, I do not see any repeated or continuous flashing of the brake lights such as Cst. Beckett testified to having observed. I am not certain, however, whether the video captured everything observed by Cst. Beckett in the time he followed the vehicle.

[72] Although not testified to, I am aware from my experience sitting on trials in the Yukon that, once the police cruiser's emergency lights are activated and the VICS engaged, the video recording picks up the 30 seconds before the lights were activated. That would coincide with the timing of events that I observed on the video.

[73] It may be that there were observations made by Cst. Beckett prior to what is visible on the video recording. I am not going to speculate that there were such observations, as there was no evidence called to establish this, but neither am I going to draw an adverse inference as to Cst. Beckett's credibility on the basis of what I did or did not observe on the video on this point.

[74] I am satisfied that there was legal authority for the roadside stop.

[75] With respect to the s. 254(2) breath demand, Cst. Beckett needed to have only a reasonable suspicion that Ms. Peter had alcohol in her body at the time of driving in order to require her to provide a breath sample into a roadside screening device.

[76] In my opinion, the evidence of the strong odour of liquor in the vehicle, the overwhelming smell of perfume and the subsequent observation of the smell of liquor on Ms. Peter's breath provided Cst. Beckett with a satisfactory evidentiary foundation for him to have a suspicion that Ms. Peter had been consuming alcohol and that alcohol was in her body at the time of driving.

[77] I note that Cst. Beckett also testified that the repeated and continuous braking of the vehicle was a factor that he included as part of his reasonable suspicion. Based only upon what I saw in the video, Cst. Beckett would have difficulty relying on that as a ground, as I observed nothing in that regard, objectively speaking, that would warrant any concerns, and I will not speculate as to what may have been observed prior to the video recording starting.

[78] However I am satisfied that the other observations I have referred to, viewed cumulatively and in consideration of Cst. Beckett's experience, provide the grounds for a reasonable suspicion to arise.

[79] Therefore I find that there has been no breach of Ms. Peter's ss. 8 and 9 *Charter* rights.

Issue 2: Reliability of the Expert Opinion Evidence

[80] This issue relates to what has been termed as bolus drinking.

[81] In *R. v. Saul* 2015 BCCA 149, the court stated:

25 "Bolus drinking" is the consumption of a large amount of alcohol within 30 minutes of the alleged driving offence. See *R. v. St-Onge Lamoureux*, 2012 SCC 57 at paras. 95 and 117; *R. v. Hall*, 2007 ONCA 8 at para. 14; *R. v. Paszczenko*, 2010 ONCA 615 at para. 27; *R. v. Truong*, 2010 BCCA 536 at para. 10; and *R. v. Flight*, 2014 ABCA 185 at para. 76. It is a "relatively rare" phenomenon (*R. v. Phillips* (1988), 42 C.C.C. (3d) 150 (O.N.C.A.) at pp. 158-162, cited in *Paszczenko* at paras. 27 and 29).

26 The lack of bolus drinking was an underlying factual assumption (sometimes referred to as a "hypothetical fact") for Ms. Brisson's opinion evidence with respect to the respondent's BAC at the time of the accident. The Crown had to prove that assumption or Ms. Brisson's opinion would have no probative value and could not be given any weight. Absent her opinion on the respondent's BAC at the time of the accident, the Crown could not establish beyond a reasonable doubt the offence of driving over .08.

[82] Similarly, in the case before me, Ms. Chan testified that her opinion that Ms. Peter's blood alcohol level at the time of driving was between 97 and 114 mgs%, was based upon Ms. Peter not having consumed alcohol in the 30-minute period prior to driving. Ms. Chan testified that, in her opinion, in order for Ms. Peter to have had a blood alcohol level of 80 mgs% at the time of driving, she would have to have an unabsorbed amount of alcohol in her body the equivalent of between .5 to a full 341 ml can of beer.

[83] Ms. Peter testified that she had "probably" consumed two beer in the hour that her friends were at her house. She finished her beer and then they left. She was stopped by Cst. Beckett approximately six or seven minutes later. Ms. Peter did not give evidence as to just how much beer she consumed in the last 30 minutes before driving. She testified only that she finished her beer and they left.

[84] The Court in **Saul** stated:

42 In short, [Blair J.A. in *Paszczenko*] summarized the burden on the Crown as: "[a]bsent something to put bolus drinking in play -- an inference may (but not must) be drawn [of no bolus drinking]" (para. 37).

43 The potential difficulty for the Crown to prove the absence of bolus drinking was recognized in *R. v. St-Onge Lamoureux*, 2012 SCC 57 where the Court stated that in the absence of any evidence on the issue, a court is entitled to apply a common sense inference that most individuals do not bolus drink:

[95] ... To do this, the expert must make certain factual assumptions, for example, that the accused did not consume a large quantity of alcohol within approximately one half hour before the alleged offence (in other words, that a portion of the alcohol consumed had already been absorbed when he or she was pulled over), or between the time when he or she was pulled over and that of the test. If nothing in the evidence makes it possible to cast doubt on the expert's assumption, the court may make a deduction, based on common sense, that a person will not generally ingest large quantities of alcohol immediately before driving or while driving, or after being pulled over by the police (*R. v. Paszczenko*, 2010 ONCA 615, 103 O.R. (3d) 424; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (C.A.); *R. v. Hall*, 2007 ONCA 8, 83 O.R. (3d) 641; *R. v. Bulman*, 2007 ONCA 169, 221 O.A.C. 210).

[96] In sum, even without the presumption of identity, the accused might be required to raise a doubt about his or her unusual alcohol consumption if nothing in the evidence indicates that the expert's assumptions are erroneous. It therefore seems artificial to say that requiring the accused under s. 258(1)(d.1) to testify about his or her alcohol consumption imposes an evidentiary burden on the accused. The choice by the accused to testify in this regard flows from a decision that must be made whenever the Crown's evidence is sufficient to support a conviction. Thus, s. 11 (c) of the *Charter* is not infringed.

44 In summary, the application of the common sense inference does not place an onus on the accused to prove that he or she had engaged in bolus drinking but rather gives rise to a "practical evidentiary burden" on an accused to point to some evidence in the totality of the evidence that at

least puts the possibility that the accused had engaged in bolus drinking into play. [Emphasis in *Saul*]

[85] I am satisfied on the evidence of Ms. Peter, which I accept, that she had engaged in drinking within the 30 minutes prior to the time of driving. While I do not know exactly how much alcohol Ms. Peter consumed, I am satisfied that the factual assumption of her not having consumed alcohol within 30 minutes prior to driving has been shown to be incorrect.

[86] It is not contrary to common sense that Ms. Peter would have consumed one-half of a beer in the 30 minutes prior to the time of driving, which, if you allow for seven minutes of driving, and not having consumed alcohol while in the vehicle, would still allow for her to have done so in 23 minutes at home. This is not the consumption of a large or extraordinary amount of alcohol.

[87] This is, in my opinion “some” evidence capable of undermining the factual assumption the Crown expert relied upon in forming the opinion that she did.

[88] As stated in *Saul* in paras. 29 and 30:

29 The assessment of the weight to be given to an expert's opinion evidence was explained in *R. v. Gibson*, 2008 SCC 16:

[58] Relevance is distinct from foundation. Even admissible expert evidence cannot be given any weight without a proper factual foundation: as this Court stated in *R. v. Abbey*, [1982] 2 S.C.R. 24, “the facts upon which the opinion is based must be found to exist” (*per* Dickson J. at p. 46). In *R. v. Lavallee*, [1990] 1 S.C.R. 852, the Court added that as long as there is some admissible evidence to establish a foundation for it, the expert's opinion may be accepted. The purpose of the factual foundation requirement is to ensure that expert evidence is reliable.

30 In sum, before an expert's admissible opinion evidence may be given any weight, the underlying facts upon which the opinion is based must be proven in evidence. Failure to prove the factual assumptions upon which the opinion is based may result in little, if any, weight being given to the opinion. [Emphasis in *Sau*]

[89] As this underlying factual assumption relied upon by Ms. Chan in forming the basis for her opinion as to Ms. Peter's blood alcohol level at the time of driving has not been established, I have a reasonable doubt as to whether Ms. Peter was operating a motor vehicle with a blood alcohol level in excess of 80 mgs% mgs. She is therefore acquitted of the s. 253(1)(b) charge.

[90] Although not necessary to address, I do not accede to the argument that the Crown has not established that Ms. Peter eliminated alcohol at a rate of 10 to 20 mgs% per hour. As stated in *Paszczenko* in paras. 22 to 24, experts are entitled to rely upon information that is "...widely used and acknowledged as reliable in the field and that is employed as an accepted means of making decisions within that area of expertise".

[91] Nothing precludes defense counsel from adducing evidence that shows that a particular accused eliminates alcohol at a different rate in order to undermine this factual assumption that has been widely accepted as accurate.

Issue 3

[92] The remaining issue is whether Ms. Peter was operating the vehicle while her ability to do so was impaired by alcohol.

[93] In *R. v. Schmidt*, 2012 YKCA 12, the Court noted the test for impaired driving to be as follows:

15 In *R. v. Stellato*, [1993] O.J. No. 18, aff'd [1994] 2 S.C.R. 478, the Ontario Court of Appeal held that the offence of impaired driving is proved if the trial judge is satisfied that an accused's ability to operate a motor vehicle was impaired by alcohol or drugs to any degree ranging from slight to great. In order to make out the offence, it must be proven not simply that the accused has consumed alcohol, but also that such consumption impaired the accused's ability to operate a motor vehicle (*R. v. Andrews*, 1996 ABCA 23).

[94] I find on the evidence that the indicia of alcohol consumption, and possible impairment of Ms. Peters, are as follows:

- the odour of liquor on her breath;
- her testimony as to having recently consumed alcohol; and
- her rather red (bloodshot) and glossy eyes as noted by Cst. Beckett.

[95] An odour of liquor does not necessarily lead to a conclusion that a driver is impaired (***Schmidt*** at paras. 18 -20). Further, I note that the odour of liquor on Ms. Peter's breath was an observation made only after Ms. Peter complied with Cst. Beckett's direction to step out of the vehicle, and she was speaking to him outside the vehicle. As he testified, he directed Ms. Peter to step out of the vehicle for the purpose of determining whether the odour of liquor was coming from her and not just from the passengers in the vehicle. Prior to that Cst. Beckett was only aware of the strong odour of liquor coming from the inside of the vehicle.

[96] While red and glossy eyes are often associated with impairment, there can be other explanations for this. Unlike in ***Schmidt***, here there was no alternative explanation proffered. This said, Ms. Peter testified that she had been out the night

before and was "...kind of hungover and not feeling well". While I am not prepared to say that this was why Ms. Peter's eyes looked as they did, it remains part of the context.

[97] I also do not discount her red and glossy eyes as being some evidence which could, in consideration with other indicia, contribute to a finding of impairment of Ms. Peter's ability to drive. On its own, however, or even coupled with the odour of liquor on Ms. Peter's breath, assuming for the moment I were to consider this evidence as admissible, are not sufficient in my view.

[98] Having viewed the video, I find nothing in the driving that I observed that would in any way be indicative of what is generally considered to be associated with impaired driving. I find that Ms. Peter operated the vehicle, in the time I was able to observe, in an entirely normal fashion.

[99] Even if there was repeated or continuous flashing of the brakes without a noticeable slowing down that occurred before the video captured the driving, this would not be of particular probative value in concluding Ms. Peter was impaired.

[100] I consider that it would not be unusual for an individual who observes that a police car is following close behind them, in particular if they have been driving somewhat above the speed limit, to touch the brakes in order to gradually slow down, without there being any significant decrease in speed, particularly when the speed was not much above the proscribed limit. I do not have evidence before me as to whether this flashing of the brakes occurred over a lengthy period of time and distance travelled, or not. Certainly, from the video, it is apparent that Ms. Peter was slowing down as she approached and executed the right hand turn just prior to be stopped.

[101] The two incidents of braking I observed were logically connected with Ms. Peter's vehicle entering a bend in the highway, and with slowing down to enter into a turning lane.

[102] The fact that Ms. Peter was travelling at an estimated speed of 60 kmh in a 50 kmh zone is not indicative of impaired driving (**Schmidt** at para. 22). While excessive speed may, in association with other indicia of impairment, be a factor in determining that a driver was impaired, I find that it is not so in this case. In any event, her speed was not particularly excessive.

[103] I find that Ms. Peter pulled the vehicle over, while not immediately, within a reasonable time and at the first location where she could do so without, of necessity, being in a traffic travel lane. She did so without any difficulty from what I could see in the video.

[104] Ms. Peter was able to provide Cst. Beckett with the requested documentation without problems, therefore not showing any issues with fine motor control, such as fumbling.

[105] Cst. Beckett testified that he did not observe Ms. Peter exhibit any balance issues when she was walking outside of her vehicle.

[106] He did not testify as to her having a flushed face.

[107] The remaining evidence is the blood alcohol reading of Ms. Peter. On the basis of the testimony of Ms. Chan, Crown counsel submits that her opinion evidence that anyone over 50 mgs% is impaired in their ability to operate a motor vehicle, and

certainly, as universally accepted in the scientific community, anyone with a blood alcohol level of 80 mgs%, should lead to a finding that Ms. Peter was therefore impaired.

[108] The reality is that I do not actually know what Ms. Peter's blood alcohol level at the time of driving was, given that the factual assumption underlying the opinion evidence of Ms. Chan, that there had been no bolus drinking, was disproved.

[109] It remains as an argument for a future occasion as to whether a blood alcohol reading of an individual that is between or inclusive of 50 and 80 mgs%, at the time of driving, is sufficient to establish that the driver was impaired contrary to s. 253(1)(a), without the need for any other indicia of impairment to be present.

[110] In the end, at most, I have an admission of drinking the night/morning before which led to a hangover and not feeling well, the odour of liquor in the vehicle, which was carrying two intoxicated passengers, Ms. Peter's admission of consuming probably two beers in the hour or so before driving - hence the odour of liquor on Ms. Peter's breath - and her red and glossy eyes, as indicative of the impairment of Ms. Peter. This is to be considered in association with Ms. Peter's otherwise normal appearance and actions, including her driving, all of which are inconsistent with impairment.

[111] I am therefore left with a reasonable doubt as to whether Ms. Peter was impaired in her ability to operate a motor vehicle at the time of driving, and she is acquitted of the s. 253(1)(a) charge as well.

COZENS T.C.J.