

Citation: *Smith (Re)*, 2013 YKTC 74

Date: 20130910
Docket: 13-08529
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Schmidt

IN THE MATTER OF THE *MOTOR VEHICLES ACT*, R.S.Y. 2002, c. 153, as amended and S.259(1) thereof, And in the matter of an application for review of a 90 day driver's operator's licence suspension or disqualification

PAUL SMITH

Applicant

Appearances:
Paul Smith

Appearing on his own behalf

DECISION OF THE REVIEW OFFICER

[1] Mr. Paul Smith was given a roadside driving suspension by a peace officer on March 4, 2013 pursuant to s. 257(1) of the *Motor Vehicles Act*.

[2] Mr. Smith seeks to have the suspension reviewed pursuant to s. 259 by a review officer and has filed the appropriate application and paid the application and hearing fees. The applicant has requested an oral hearing pursuant to s. 259(5).

[3] The registrar has not presented evidence or arguments pursuant to sc. 259(7) although duly notified.

[4] There is only one issue for consideration by a review officer at a hearing. That restriction is contained in subsection 8 which reads as follow:

(8) The only issue before the review officer in a review under this section is whether the peace officer had reasonable grounds to suspend the driver's operator's licence, or to disqualify the driver, under subsection 258(1). That issue is to be determined on the balance of probabilities.

[5] As a result of the incident leading up to the roadside suspension, a charge was laid but subsequently stayed by the Crown.

[6] Section (9) stated that the fact that no charge was laid or that a charge was laid and was subsequently stayed is not a ground for revoking a roadside suspension.

[7] The *Act* is clear that the review officer must only consider whether the peace officer had, at the time of the incident, reasonable grounds to suspend the driver's operator's licence. The *Act* sets the standard of proof for that determination on the balance of probabilities i.e., was it more probable that the peace officer had reasonable grounds to suspend based on the criteria in s. 257(1).

[8] Section 257(1) sets out three reasons why a peace officer may suspend an operator's license at roadside. In this case it appears that there was a suspension pursuant to s. 257(1)(a) which reads as follows:

257(1) A peace officer may suspend the operator's licence of the driver of a motor vehicle, or disqualify the driver from driving, if

(a) because of an analysis of the driver's breath or blood, the peace officer believes on reasonable grounds that the driver has consumed alcohol in such a quantity that the concentration of it in their blood exceeds 80 milligrams of alcohol in 100 millilitres of blood;

[9] An unsworn report from a peace officer filed in this case indicates that breath tests were administered and that those breath tests exceeded 80 mg. The only reference to that is the following sentence in the report on file “Samples provided in excess of 80 mg.”

[10] The suspension period for the applicant is over, but the suspension remains on his Driver Abstract and thereby creates issues for him. He requests that the suspension be revoked and that his Driver Abstract be corrected if the application is successful.

[11] The evidence the review officer must consider are stated in section 259(6). That section reads as follows:

- (6) In a review under this section, the review officer must consider
 - (a) any relevant sworn or solemnly affirmed statements and any other relevant information;
 - (b) the report of the peace officer;
 - (c) a copy of any Certificate of Analysis under section 258 of the *Criminal Code* (Canada) without proof of the identity and official character of the person appearing to have signed the certificate or that the copy is a true copy; and
 - (d) if an oral hearing is held, in addition to matters referred to in paragraphs (a), (b), and (c), any relevant evidence and information given or representations made at the hearing.

[12] In this case the court has only a brief description of the events leading up to the roadside suspension in a report prepared by the peace officer. There is nothing else before the court.

[13] Missing from the materials a review officer must consider are any sworn or affirmed statement, a copy of the Certificate of Analysis or any other representations, or relevant evidence or information.

[14] The report of the peace officer is not sworn, but the form upon which he prepared the report is filled in with respect to the swearing of the information contained in the report, but a commissioner for taking oaths has not signed it.

[15] Apparently a breath test was conducted but either a certificate was not prepared or was inadequate. In any event, it was not provided to the court and the court is therefore unable to consider what it is required to consider.

[16] Since the only ground alluded to in the report of the peace officer for suspension was 257(1)(a) "because of the analysis of the driver's breath or blood" the review would require a consideration by the reviewing officer of the Certificate of Analysis of his breath or blood. That has not been provided by the Registrar nor has it been placed in the file for review.

[17] Essentially, there is nothing upon which the court can base a finding on the balance of probabilities that a peace officer had reasonable grounds to believe that because of a sample of his breath or blood exceeded 80 mg. The only thing the court has is an unsworn note by a peace officer which is not verified, as required by the legislation, by a copy of the Certificate of Analysis.

[18] There is no requirement that the Certificate be proved as it would in an impaired driving case, only that a copy of it, uncertified, be produced for consideration by a

review officer, presumably as a means of determining whether a peace officer, on a subjective standard, had a reason under s. 257 to make the suspension.

[19] A simple statement that samples were taken that exceeded 80 mg cannot tip the scale on a review to determine, even on a balance of probabilities, that the peace officer had reason to believe that he had grounds to suspend the licence.

[20] The legislation provides that some assurance be given to a review officer that he or she is making a correct decision by requiring the Certificate of Analysis to be produced to the review officer.

[21] The legislation quite fairly requires that the review officer must consider a copy of the Certificate of Analysis. In many cases that will be a strong confirmation of a peace officers report. That together with the swearing of the report as provided for in the prescribed form for the Notice of 90 Day Suspension or Disqualification would be of great value in determining reasonable grounds.

[22] Without either being produced the review officer should take an adverse inference with respect to the grounds the peace officer had, when challenged by a review application.

[23] Even under this administrative process the appropriate checks and balances provided by the legislation need to be adhered to. Otherwise the peace officer becomes in addition to peace officer, the judge and executioner as well.

[24] While a roadside suspension has been determined by the Yukon Legislature to be appropriate, the legislation also provides that a review be available and at that

review something more be available for evaluation than the simple fact that the peace officer was advised that a sample exceeded a certain limit.

[25] The Certificate is a vital part of the review process and if it is not produced to the review officer, the review process would come perilously close to a rubber stamp procedure in favour of guilt based on nothing more than a peace officers' actions. It would be like the common sayings "He must be guilty or the police wouldn't have charged him", or "It must be true, I read it in the newspaper."

[26] The review process as crafted in the legislation is an important if not vital link to the rule of law and must not be diminished by ignoring its most basic requirements.

[27] I find that the peace officer did not have reasonable grounds to suspend the operator's licence and I therefore revoke the suspension, direct that his licence be returned, if it has not been, and direct that the fees paid for the review be refunded pursuant to s. 259(12).

[28] Since the application was launched by Mr. Smith because the suspension appears on his Driver Abstract and his employment has been adversely affected, I order that the suspension dated March 18, 2013 be removed from his Driver Abstract, Operator's Licence Number 132555.

SCHMIDT T.C.J.