Citation: *Peterson (Re),* 2021 YKTC 38

Date: 20211007
Docket: 21-08562
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

IN THE MATTER of the *Motor Vehicles Act,* RSY 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 licence suspension

TRISHA ROSE PETERSON

Applicant

Appearances:
Kelly McGill — Counsel for the Registrar of Motor Vehicles
Trisha Rose Peterson — Appearing on her own behalf

RULING ON APPLICATION

[1] Trisha Peterson filed an application for a review of a 90-day suspension of her driver's license imposed pursuant to s. 257 of the Yukon *Motor Vehicle Act*, RSY 2002, c. 153, as amended (the "*Act*"). The application was heard on September 3, 2021 and judgment was reserved until September 17, 2021. On that date, I directed that the licence suspension be revoked and stated that written reasons for my decision would follow. These are those reasons.

[2] The evidence of Cst. Cook was provided both by way of his General Report and *viva voce* evidence.

[3] The relevant facts, which are not disputed, are as follows:

[4] On August 12, 2021 at approximately 00:25 hours, Cst. Cook pulled over the vehicle being driven by Ms. Peterson after observing that it was bearing an expired license plate. In speaking with Ms. Peterson, Cst. Cook formed the suspicion that she had alcohol in her body. He then read Ms. Peterson the approved screening device ("ASD") demand. Ms. Peterson, after a number of attempts, provided a suitable breath sample that resulted in a "Fail" reading.

[5] Cst. Cook testified that his training had taught him to understand that a "Fail" reading meant that the subject providing the breath sample had a blood alcohol content equal to or greater that 100 mg%.

[6] Due to the operational demands on the RCMP at that time, Cst. Cook decided that he would not further continue with an impaired driving investigation, but rather issue Ms. Peterson the 90-day licence suspension.

Position of the Parties

[7] Ms. Peterson, who was not represented by counsel, challenges the 90-day suspension, as I understand it, on the basis that she was not charged criminally.

[8] Counsel for the Registrar of Motor Vehicles submits that Cst. Cook was acting within his lawful authority under the *Act* when he issued the licence suspension, and that there is no basis in the evidence and under the *Act* for his decision to issue the licence suspension to be revoked.

Analysis

[9] Section 257(1) of the *Act* reads:

> A peace officer may suspend the operator's licence of the driver of a motor vehicle, or disqualify the driver from driving, if
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> (a) because of an analysis of the driver's breath or blood, the police 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;
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> (b) the peace officer believes on reasonable grounds that the driver failed or refused to comply with a demand made on them to supply a sample of their breath or blood under section 254 of the *Criminal Code* (Canada); or
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> (c) the peace officer believes on reasonable grounds that the driver is driving a motor vehicle while their operator's licence is suspended or they are disqualified or prohibited from holding an operator's licence.

[10] The scope of a review of the s. 257(1) suspension is set out in s. 259(8) as follows:

> 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 licence, or to disqualify the driver, under subsection 257(1). That issue is to be determined on a balance of probabilities.

[11] Subsection (6) reads:

> In a review under this section, the review officer must consider
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> (a) any relevant sworn or solemnly affirmed statements and any other relevant information;
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> (b) the report of the peace officer;

> (c) a copy of any certificate of analysis under s. 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
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> (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 addition, subsection (9) reads:

> The fact that no charge is laid under the *Criminal Code* (Canada) or under this Act, or that one is laid and then withdrawn or stayed or is disposed of by an acquittal or a discharge, is not a ground for revoking the suspension or disqualification.

[13] Counsel submits that the analysis of Ms. Peterson's breath by the ASD and the "Fail" result provided Cst. Cook, given his training, gave him the requisite reasonable grounds to believe that Ms. Peterson had a blood alcohol concentration in excess of 80 mg%.

[14] Counsel submits that there is no requirement that a Certificate of Analysis be provided in order to justify a s. 257(1)(a) suspension; it is only if there is one available that it must be considered. In this case, as the basis for Cst. Cook's reasonable belief was the ASD "Fail" result, which does not result in a Certificate of Analysis being created, there is not "any" Certificate of Analysis available to be considered.

[15] Section 24(2) of the *Interpretation Act*, RSY 2002, c. 125, as amended, stipulates that the provisions of the *Act* with respect to the *Criminal Code* apply to the re-numbered sections of the *Code*. Therefore the reference in the *Act* to s. 258 of the *Code*, is a reference to s. 320.31 of the *Code*.

[16] The *Code* allows for a police officer who has reasonable grounds to suspect that a person who has operated a motor vehicle in the previous three hours has alcohol in his or her body, to may make a demand that the person provide a breath sample into an ASD (s. 320.27(1)).

[17] The *Code* further allows for a police officer who has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paras. 320.14(1)(b), the officer may make a demand that the person provide a breath sample into an approved instrument to enable a proper analysis to be made (s. 320.28(1)).

[18] Section 320.14(b) makes it an offence to have operated a conveyance within the preceding two hours if the person has a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 millilitres of blood.

[19] In the event that a "Fail" result is recorded on the ASD, and in particular, if there is also any admission of prior drinking or other indicia of the consumption of alcohol, the jurisprudence generally accepts that the police officer has sufficient reasonable belief that an offence under s. 320.14(1)(b) has occurred to allow for the breath demand under s. 320.28(1) to be made.

[20] In ***R.*** v. ***George***, [2021] N.J. No. 7, Gorman J. states in para. 83:

> In ***R. v. Bernshaw***, [1995] 1 S.C.R. 254, Sopinka J. described the standard of "reasonable grounds to suspect" and the purpose of roadside screening tests in the following terms (at paragraph 63):
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> > It is clear that Parliament has set up a statutory scheme whereby a screening test can be administered by the police

> merely upon entertaining a reasonable suspicion that alcohol is in a person's body. The purpose behind this screening test is evidently to assist police in furnishing the reasonable grounds necessary to demand a breathalyzer. The roadside screening test is a convenient tool for confirming or rejecting a suspicion regarding the commission of an alcohol-related driving offence under s. 253 of the *Code*. A "fail" result may be considered, along with any other indicia of impairment, in order to provide the police officer with the necessary reasonable and probable grounds to demand a breathalyzer. Normally, where a properly conducted roadside screening test yields a "fail" result, this alone will be sufficient to furnish a police officer with such grounds.

[21] Reliance by the officer on the ASD “Fail” alone, however, will become unreasonable:

> …if the constable has some basis for believing that the approved screening device is not operating properly, or is not reliable in the particular circumstances (in ***Bernshaw***, due to the possibility of alcohol in the mouth from recent consumptions)… (See ***R.*** v. ***Slagter***, 2020 ABPC 229 at paras. 33 to 35)

[22] There was no reason for Cst. Cook to doubt the reliability of the ASD “Fail” result in the circumstances of this case. Logically, therefore, it would seem that the “Fail” result noted by Cst. Cook, in the present circumstances, if sufficient to allow for the s. 320.28(1) breath demand to be made, must also allow for him to issue the suspension under s. 257(1)(a) of the *Act*.

[23] However, a decision at trial that reliance on an ASD “Fail” result was considered insufficient to issue a license suspension under the British Columbia legislation, was upheld in the case of ***Goodwin*** v. ***British Columbia (Superintendent of Motor Vehicles)***, 2015 SCC 46. In para. 7, Karakatsanis J. stated:

> The chambers judge…concluded that the ARP [Automatic Roadside Prohibition] scheme violates s. 8 of the *Charter*. He subsequently clarified that the s. 8 infringement arises only from the screening device registering a "fail" reading over 0.08, and not from a refusal to provide a breath sample. …

[24] Karakatsanis J. noted in para. 10 that:

> The introduction of the new ARP scheme in 2010 marked a shift in British Columbia's approach to the regulation of drunk driving. Instead of relying on the use of breathalyser tests at the police station, driving prohibitions would now be issued following a roadside analysis, using an ASD. While a "fail" reading captures the same blood alcohol concentration that triggers a prohibition under the ADP scheme, a concentration of 0.05 to 0.08, detected through a "warn" reading, would now also result in the issuing of a roadside suspension, although for a shorter duration. Similar to the earlier scheme, a "fail" reading and a driver's refusal or failure to provide a sample both result in a 90-day suspension: *MVA*, s. 215.43(2). A "warn" reading results in a shorter suspension of between 3 and 30 days, depending on whether the driver has previously been served with a prohibition: *MVA*, s. 215.43(1). All prohibitions take effect immediately upon being served on a driver: *MVA*, ss. 215.41(6) and 215.43(3).

[25] In paras. 62, 63, 66 and 68, Karakatsanis J. states:

> 62 The ASD test is the sole basis for the penalties and suspensions provided for in the ARP scheme. This is markedly different from the criminal context, in which the ASD test is only the first part in the *Criminal Code*'s two-step process for investigating drunk-driving offences. At this first stage, an officer need only have a reasonable suspicion that the driver has alcohol in their body: *R. v. Lindsay* (1999), 134 C.C.C. (3d) 159 (Ont. C.A.); *R. v. Butchko*, 2004 SKCA 159, [2005] 11 W.W.R. 95. However, these reduced protections for drivers at the roadside screening stage are counterbalanced by limitations on the use to which a potentially unreliable ASD result can be put. It has the limited role of constituting the grounds for a further breath demand, conducted using a breathalyser at a police station, and cannot [page282] alone establish an offence under the *Criminal Code*: s. 254(3).
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> 63 Driving on highways is, of course, a highly regulated activity, and drivers expect that the rules of the road will be enforced. This reality, combined with the scheme's location within a broader regulatory framework targeting driving and highway safety, supports characterizing

> the regime as regulatory and applying a more flexible standard in assessing its reasonableness. However, other features of the scheme suggest that closer scrutiny is required to ensure the state does not unreasonably interfere with a driver's privacy interest. First, while the breath seizure occurs for a regulatory purpose, it nonetheless has certain criminal-like features, such as its administration by a police officer pursuant to *Criminal Code* authorization. Second, while the consequences that follow a "fail" reading or the failure to provide a sample are not criminal, they are immediate and serious, and arise without a further test using a (more reliable) breathalyser.
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> …
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> 66 However, the use of an ASD to obtain a breath sample also raises concerns that undermine the reasonableness of the seizure, specifically regarding the reliability of test results. The chambers judge concluded, based upon the evidence, that owing to an ASD's inability to account for the presence of mouth alcohol, "in some circumstances there can be serious issues concerning whether an ASD accurately reflects blood-alcohol readings": paras. 286-92.
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> …
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> 68 While the ARP scheme as enacted in 2010 allowed a driver to obtain a second analysis with a different ASD upon request, it placed no obligation on the police officer to advise the driver of this right: *MVA*, s. 215.42(1) and (2). The ARP scheme also required that the second analysis would govern, regardless of whether it was higher or lower than the initial reading: s. 215.42(3). While a second test with a second device may significantly help resolve the reliability concerns raised by roadside ASD testing, the availability of this safeguard could prove illusory where a driver is unaware of its existence, particularly where there is no guarantee that the lower result will prevail. Absent meaningful safeguards to ensure reliability, this factor raises serious concerns about the reasonableness of the law authorizing the seizure.

[26] Karakatsanis J. considered the meaningfulness of the review of the ARP scheme in paras. 72 to 75:

> 72 In my view, the chambers judge was correct to consider the scope and availability of review as part of his analysis under s. 8. While s. 8 is not primarily concerned with issues of procedural fairness and safeguards, the restrictive review of the basis and consequences of the breath demand was a central feature of the ARP scheme, particularly given the concerns about the reliability of the ASD, the lack of an intermediate step between

> the ASD analysis and the roadside suspension, and the immediacy [page286] of the penalties that ensue. A driver's ability to challenge the accuracy of the ASD result is thus critical to the reasonableness of the ARP scheme.
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> 73 It is common ground that the ARP scheme permits a driver to apply to the Superintendent for review of a driving prohibition, and that the Superintendent's decision is subject to judicial review. However, the process for review of suspensions under the ARP regime only permits the Superintendent to consider two issues: whether the applicant was a "driver" and whether the ASD registered a "fail", "warn", or the applicant refused to provide a sample. If both criteria are met, the Superintendent is required to confirm the suspension: s. 215.5(1). The chambers judge concluded that "[t]he result of the limited scope of review is that if a driver did not have a blood-alcohol level over 0.08 or 0.05 at the time of the prohibition, he or she still cannot challenge the suspension based on the roadside screening device": para. 305.
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> 74 McLACHLIN C.J. raises the possibility that the Superintendent could hear challenges to the reasonableness of the manner in which a search or seizure is conducted under s. 8 of the *Charter*. These reasons should not be taken as expressing an opinion on this point. However, this case is not about the reasonableness of a police officer's behaviour in conducting a particular seizure. It concerns a more fundamental issue: whether the law authorizing the seizure is itself reasonable. The fact that a driver may be able to challenge the conduct of a particular seizure does not resolve whether the ARP scheme itself complies with s. 8.
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> 75 While I agree with the Chief Justice that the administrative nature of the scheme justifies the administrative nature of the review, this does not, in my view, resolve the issue of whether the scope of such review is adequate in the circumstances. I agree with the chambers judge's conclusion that the [page287] absence of meaningful review of the accuracy of the result of the seizure, in light of the unreliability of the test, raises concerns about the reasonableness of the ARP scheme. Absent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism for redress.

[27] Karakatsanis J. concludes in paras. 76 and 77:

> 76 The chambers judge found that the serious consequences of a driver registering a "fail", combined with an inability to challenge the basis on which these consequences are imposed, rendered the ARP scheme unreasonable. I agree.

> 77 The ARP scheme as enacted in 2010 depends entirely on the results from a test conducted using an ASD, a device known to produce false positives where mouth alcohol is present. Despite this defect regarding ASD reliability, the scheme provides no meaningful opportunity to challenge a licence suspension issued under this scheme on the basis that the result is unreliable. In the particular circumstances of these appeals, in which a "fail" result automatically triggers serious consequences for a driver without the possibility of review, the scheme fails to provide adequate safeguards. Thus, despite the pressing objective and minimal intrusiveness of the seizure, the ARP scheme fails to strike a reasonable balance between the interests of the state against those of individual motorists, and infringes drivers' s. 8 rights.

[28] In para. 85, Karakatsanis J. concludes that “fail” branch of the ARP is not able to be saved under s. 1 of the *Charter*, stating:

> The constitutionality of the amended ARP scheme is not before this Court. However, the enhanced review measures in the amended scheme speak to the less-impairing legislative options available to the Province. In the circumstances, I agree with the chambers judge that the ARP scheme as it existed “does not minimally impair the right of a driver to be free of unreasonable search and seizure”…I conclude that the former “fail” branch of the ARP scheme is not saved under s. 1.

[29] I appreciate that the review under the *Act* is broader than that under the ARP scheme the Court was considering in ***Goodwin***. Under the *Act*, the applicant for a review has the ability to challenge the reasonable grounds that the police officer had to make the ASD demand, including the ability to call evidence and, if present, cross-examine the police officer who issued the suspension.

[30] I will say that, generally speaking, police officers do not attend at the reviews under s. 259, nor is the Registrar of Motor Vehicles generally represented. Further, the applicants themselves are generally unrepresented by counsel. In addition, the Criminal Practice Directions require the form of and time requirements for Notice of

Charter Applications when a *Charter* issue is to be raised at a hearing. While the s. 259 review is not a criminal procedure, there is an argument to be made that the practice directions are required to be followed in the review process.

[31] So, while the review under the *Act* is broader and allows for a more meaningful opportunity to challenge the suspension, thus distinguishing the present circumstances from those in ***Goodwin***, the reality is that the legal issues that arise in such a challenge are more akin to those that arise when the results of an ASD "Fail" result are challenged at trial in the criminal context. These issues are not particularly well-suited to a s. 259 review in the circumstances and time frames in which these are usually conducted.

[32] Further, and of considerable concern, is that there are no safeguards built into the police officer's reliance on the ASD. As noted in ***Goodwin***, under the ARP there was the statutory availability of a second ASD test to be conducted, although this was found to be problematic in the sense that there was no obligation on the police officer to advise the driver of this, something that was rectified in the amended ARP scheme mentioned in ***Goodwin***. There are no safeguards such as even this in the *Act*.

[33] The *Act*, when drafted, could have specified that a "Fail" result on the ASD was sufficient grounds to impose a licence suspension, and build into the *Act* safeguards, such as the availability of a second ASD test, and an accompanying obligation on the policer officer to advise the driver of the right. The *Act* does not do so.

[34] I was unable to locate anything in Hansard that speaks to the objectives of the *Act* with respect to what an ASD "Fail" result was intended to allow a police officer to conclude with respect to the issuance of a licence suspension.

[35] It appears to me that the *Act* contemplated that there would be a breath sample into an approved instrument that would result in a Certificate of Analysis that could then be produced as evidence at a review hearing. It seems to me that, in the absence of specific legislative direction, the Registrar is attempting to "back-door" an ASD "Fail" result and dispense with the need for a Certificate of Analysis as grounds for the police officer's reasonable belief.

[36] I appreciate that s. 259 says, "any" Certificate of Analysis. However, as the licence suspension could be imposed for reasons other than a belief that the driver had a blood alcohol level over .08, and the s. 259 review and evidentiary criteria are also in respect of those other grounds for the licence suspension, it is the case that there will not always be a Certificate of Analysis in every s. 259 review. Therefore the use of the word "any" does not mean that a Certificate of Analysis is not required when the licence suspension is a result of the police officer's belief that the driver has a blood alcohol level of over 80 mg%.

[37] In this regard, the decision of Schmidt J. in ***Smith (Re)***, 2013 YKTC 74, holds that a Certificate of Analysis is required in such a case. In ***Smith***, there was no Certificate of Analysis provided to the Court. The only evidence as to the driver's blood alcohol level was the unsworn report of the police officer that breath tests were administered, and a sentence in the report that reads: "Sample provided in excess of 80 mg".

[38] Schmidt J. held that the Certificate of Analysis is evidence that must be before the court upon a review of a licence suspension based on the police officer's reasonable belief that the driver's blood alcohol level is over 80 mg%, stating in paras. 20 and 21:

> 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.
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> 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.

[39] I appreciate that in the case before me I have the sworn testimony of Cst. Cook, which is substantially different than the unsworn document that was the only evidence before Schmidt J. The decision in ***Smith*** links the absence of a Certificate of Analysis together with the limited value of the evidence of the unsworn document, in overturning the licence suspension.

[40] To that extent, the decision in ***Smith***, while appearing to state that a Certificate of Analysis is required in all cases where the licence suspension is based on the police officer's reasonable belief in the drivers blood alcohol level being over .08 mg%, does not unequivocally state this to be the case, although it provides a foundation for such an argument to be made.

[41] However, in my opinion, as ss. 257 and 259 of the *Act* are currently constituted, I find that a Certificate of Analysis is required to be produced to the review officer in order to substantiate the police officer's reasonable grounds that a driver's blood alcohol level

is over 80 mg%. Reliance on a "Fail" result of a breath sample into an ASD is insufficient, for the reasons stated in ***Goodwin***. The sworn testimony of Cst. Cook, credible and reliable as his testimony was, does not overcome the problems associated with reliance on the ASD which, as noted by Chisholm J. in para. 18 of ***Sawrenko (Re)***, 2015 YKTC 53, in the context of a review of an impoundment under ss. 235(1) and 243.1(1) of the *Act*: "…It should be noted that this is a screening device only and is used solely for that purpose".

[42] Should the *Act* be amended in future to state that an ASD "Fail" result provides sufficient grounds for a police officer to impose a licence suspension, with such procedural safeguards as are determined to withstand *Charter* scrutiny, it may be the case that a Certificate of Analysis will not be a required part of the evidence before the review officer. As the *Act* is currently constituted, however, I find that the Certificate of Analysis is required to be before the review officer.

[43] Therefore, I revoke the licence suspension imposed on Ms. Peterson.

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COZENS C.J.T.C.