Citation: *R.* v. *MacLeod*, 2007 YKTC 1 Date: 20061205
Docket: T.C. 06-00010
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Overend

REGINA

v.
EARL JOHN MACLEOD

Appearances:
Kevin Komosky Counsel for Crown
Greg Cranston Counsel for Defence

REASONS FOR JUDGMENT

[1] OVEREND T.C.J. (Oral): The accused is charged on Information -- with the offences colloquially known as impaired driving and driving while over .08. The offence is alleged to have occurred on the 3rd of February 2006 at or near Whitehorse in the Yukon Territory.

[2] On the day in question, in the late afternoon at kilometre 209 on the Klondike Highway, the accused, Mr. MacLeod, was pulled over by Sergeant Millward, who had seen no seatbelt. Mr. MacLeod was the driver of the vehicle. Sergeant Millward, having detected the smell of alcohol and not having an approved screening device with him, enlisted the aid of Constable Gork, who was in a following police vehicle. Gork

was told by Millward that he had detected the odour of liquor on the breath of the accused. On attending the defendant's vehicle, where the accused was seated in the driver's seat, at 16:16 hours, the police officer asked the defendant if he had anything to drink. The defendant said one beer about one hour ago. The defendant was returned to the police vehicle. He was not under arrest. The police officer detected the odour of alcohol and observed red watery eyes. The defendant had been smoking.

[3] The police officer at 16:21 read the demand for breath samples but decided to wait five minutes because the accused had been smoking. During this time, at 16:25 hours, the accused coughed and the police officer believed he may have regurgitated so decided to wait an additional 15 minutes. At 16:41 the defendant provided a sample of breath into what the police officer called an Alco-Sensor, and the instrument showed fail.

[4] The police officer arrested the defendant for impaired driving, or impaired operation of a motor vehicle, read him his *Charter of Rights* and the police warning, returned the accused to the police station, where the accused, in due course, provided samples. The certificate of the qualified technician shows readings of 110 milligrams percent or 110 milligrams of alcohol in 100 millilitres of blood. The defendant was provided a copy of the qualified technician's certificate.

[5] Those briefly are the facts.

[6] The accused has advanced a number of arguments as to why the evidence on the v*oir dire* -- I should say all the evidence that was heard was heard on a v*oir dire.* Although the *voir dire* was not declared at the beginning of the trial, partway through the

evidence it was clear that it would be better that the evidence be dealt with as though it were on a v*oir dire* and evidence to that point was read in as though a *voir dire* had been started at the commencement of the trial.

[7] The issues as raised by the accused are firstly that the police officer had no reasonable and probable grounds to ask for a breath sample into the approved screening device. That is not of course the test. The test is reasonable suspicion, and clearly here, where the police officer had been informed by Sergeant Millward that the accused had liquor on his breath, where the accused admitted to drinking a beer, and where he had red watery bloodshot eyes, this certainly was sufficient to raise a suspicion that he had alcohol in his body.

[8] The second issue by the accused was the question of the Alco-Sensor. The police officer indicated on several occasions throughout his evidence that he used an Alco-Sensor to take the breath sample from the accused. The *Criminal Code* in *s.* 254 talks about approved screening device, and it says it means:

> …a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada.

The Attorney General of Canada has listed seven devices which are approved screening devices in the following words set out in the *Code*:

> The following devices, each being a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person, are hereby approved for the purposes of section 254 of the *Criminal Code*.

The seven devices are then listed, among which are:

> (e) Alco-Sensor IV DWF;
>
> (f) Alco-Sensor IV PWF.

[9] The accused says that the police officer's use of the expression Alco-Sensor does not meet the requirements of the *Code*, and that an Alco-Sensor, *simpliciter*, is not an approved screening device as contemplated by Parliament. This is a very technical argument, but the section itself is technical. The accused is entitled, when Parliament passes this kind of legislation, to expect the Crown to prove its case in a technical fashion. They have failed to do so in this case.

[10] The section, Alco-Sensor IV DWF, one might reasonably conclude there may well be Alco-sensor I, II, III that preceded Alco-Sensor IV; there may have been an Alco-Sensor without a number after it. Anything is possible. I do not have to delve into that. All I know is that the only approved instrument is the Alco-Sensor IV DWF or Alco-Sensor IV PWF. Neither of those instruments was described as being used by the police officer when he took the sample of the breath of the accused.

[11] The next argument advanced by Mr. MacLeod was that you need to be an expert to be able to give evidence with respect to the workings of this machine. This is a legislative scheme passed by Parliament. Parliament has authorized the police officer to use the machine; nothing further is required. You do not need to be an expert as suggested by the accused.

[12] This next argument was the delay with respect to the fact that the police officer waited 15 minutes before administering the test, based only on the fact that the accused had coughed and that the police officer said he may have regurgitated. The section of the *Code* states that where a peace officer suspects:

> …that a person…has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample as in the opinion of the peace officer is necessary….

To provide forthwith. Well, forthwith has been interpreted by the Supreme Court of Canada as a section which is to be given some flexibility, depending on the circumstances.

[13] The circumstances here satisfy me that the tests were applied forthwith. I accept the evidence of the officer that he thought that the accused had coughed, and that cough associated in his mind the possibility of regurgitation. The fact that he said he may have regurgitated does not detract from the fact that there was a belief in the officer's mind that this might have affected the results and so I am satisfied that he was entitled to wait the additional 15 minutes before administering the test. Therefore, that argument also fails.

[14] The police officer also referred to the certificate of the qualified technician as a certificate of an analyst, and there was some evidence of a certificate of an analyst on the wall of the police station. The accused says that this is confusing and that there is a reasonable doubt about what the Court is required to conclude with respect to whether or not the document, Exhibit A on this hearing, should be admitted in evidence. There is no doubt in my mind that the police officer, in talking about a certificate of analysis, was in fact talking about the certificate of the qualified technician, as he held the document in his hand and said this is the document I am referring to and this is the document, a copy of which I served on the accused.

[15] Finally, there is the observation period of 13 minutes which was not face to face. The officer said that his training is that 15 minutes is required to be satisfied that the person has no alcohol in his mouth so that any readings obtained can be said to accurate. The officer did not meet the requirements as set out in his training and therefore this raises a question as to whether or not the contents of the certificate are accurate. That is a question of weight. The certificate itself is admissible in evidence.

[16] However, having decided that the Alco-Sensor as described by the officer fails to meet the requirements of the *Criminal Code,* the officer had no reasonable and probable grounds to make the demand. The certificate is therefore not admissible. It is not going to go in. So we have one exhibit, Exhibit B, will now be Exhibit 1 on the trial itself.

[17] MR. KOMOSKY: If the remaining evidence from the v*oir dire* could be put toward the trial proper.

[18] THE COURT: By consent?

[19] MR. CRANSTON: By consent.

[20] THE COURT: The evidence on the trial, save for the certificate, is evidence on the trial.

[21] MR. CRANSTON: I don't know if my friend is seriously considering the Count 1 or not anymore.

[22] MR. KOMOSKY: Your Honour, just to clarify, you have now ruled that the certificate is not admissible.

[23] THE COURT: No, the certificate is not admissible. The test itself was not authorized by law, and therefore because it was not authorized by law, there is no evidence before me of a breath test.

[24] MR. KOMOSKY: No further submissions by the Crown. I would suggest to my friend he does not need to present argument.

[25] MR. CRANSTON: I appreciate that.

[26] THE COURT: I do not think your friend needs much help on this one. The Information is dismissed, both counts.

[27] MR. CRANSTON: Thank you.

[28] MR. KOMOSKY: Thank you.

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OVEREND T.C.J.