Citation: *R.* v. *Maxwell-Smith*, 2012 YKTC 76 Date: 20120810
Docket: 10-00258
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Orr

REGINA

v.

CHRISTOPHER JOHN MAXWELL-SMITH

Appearances:
Eric Marcoux Counsel for the Crown
Gordon Coffin Counsel for the Defence

REASONS FOR JUDGMENT

CHARGES:

[1] On a nice summer Yukon evening, on July 8th, 2010, six members of the scaffolding crew working on the bridge at Pelly Crossing got into a Kia Sedona van, driven by Christopher Maxwell-Smith, and headed south, towards Carmacks. Approximately 17 kilometres after leaving Pelly Crossing, and shortly after entering a section of the road that was under construction, the driver lost control of the vehicle on the gravel road. The vehicle rolled after leaving the road, and the one passenger who was ejected from the vehicle, Valentino Vella, died at the scene.

[2] Christopher John Maxwell-Smith now faces four charges arising from this accident, namely:

> Count #1: that on the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, that he did operate a motor vehicle and thereby caused the death of Valentino Vella, contrary to Section 255(3) of the Criminal Code;
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> Count #2: on the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in his blood exceed eighty milligrams of alcohol in one hundred millilitres of blood did, while operating a motor vehicle, cause an accident resulting in death to Valentino Vella, contrary to Section 255(3.1) of the Criminal Code;
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> Count #3: on the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle and thereby cause bodily harm to Gary Cummings, contrary to Section 255(2) of the Criminal Code; and
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> Count #4: on the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in his blood exceed eighty milligrams of alcohol in one hundred millilitres of blood did, while operating a motor vehicle, cause an accident resulting in bodily harm to Gary Cummings, contrary to Section 255(2.1) of the Criminal Code.

[3] On the 18th day of February, 2011, Mr. Maxwell-Smith elected to be tried by a Territorial Court Judge and pleaded not guilty to all four charges. After a number of proceedings, the trial on these matters was held the week of July 16th to 20th, 2012.

[4] Fundamental to our system of justice is the principle that Christopher Maxwell-Smith is presumed innocent until proven guilty. It is the Crown who must prove beyond a reasonable doubt that he committed each of the offences, as charged. Mr. Maxwell-Smith has nothing to prove. The onus remains on the Crown throughout. The Crown must establish each and every element of each of the four offences before the Court, beyond a reasonable doubt. There is no obligation on the accused to testify. He has the right to remain silent. Should he choose to testify, as he did in this matter, his evidence is subject to the same review as to credibility and reliability as that of any other witness. In determining whether the Crown has met its burden of proof, the evidence of all

witnesses who appeared before the Court during the trial must be scrutinized. In this case, the Crown called nine witnesses, including two expert witnesses. The defence called two witnesses, including an expert.

ISSUES:

1. Did the concentration of alcohol in the blood of Christopher Maxwell-Smith exceed eighty milligrams of alcohol in one hundred millilitres of blood at the time of the driving?

2. If it did, did Christopher Maxwell-Smith cause the accident that caused the death of Valentino Vella?

3. Was Christopher Maxwell-Smith's ability to operate a motor vehicle impaired by alcohol or a drug?

4. If Christopher Maxwell-Smith's ability to operate a motor vehicle was impaired by alcohol or a drug, did that impairment cause the death of Valentino Vella?

5. If the concentration of alcohol in the blood of Christopher Maxwell-Smith exceeded eighty milligrams of alcohol in one hundred millilitres of blood at the time of the driving, did Christopher Maxwell-Smith cause the accident that caused bodily harm to Gary Cummings?

6. If Christopher Maxwell-Smith's ability to operate a motor vehicle was impaired by alcohol or a drug, did that impairment cause bodily harm to Gary Cummings?

FACTS:

[5] An agreed statement of facts (Exhibit C-1) was filed with the Court setting out the findings of Dr. Carol Lee regarding the autopsy she conducted on Valentino John Vella. It indicated that the cause of his death was multiple blunt force injuries of head, torso and extremities. An agreed statement of facts (Exhibit C-2) was filed with the Court, setting out the findings of Sharon Hanley, the Chief Coroner for the Yukon Territory at the time. She determined that the immediate cause of Mr. Vella's death was multiple

blunt force injuries due to, or as a consequence of, a motor vehicle accident at kilometre 446, North Klondike Highway, Yukon Territory on July 8th, 2010.

[6] Justin John Cloutier was employed in Pelly Crossing, Yukon, as part of a scaffolding crew in July, 2010. They were building scaffolding on the bridge in Pelly Crossing so that another crew could sandblast and then paint it. He testified that he had known Mr. Maxwell-Smith since approximately 2008. Six members of the crew stayed in Pelly Crossing, in rooms behind the general store, namely, Mr. Maxwell-Smith, Ryan Baggott, Eoin Scully, Gary Cummings, Valentino Vella and Mr. Cloutier. Four had their own rooms, but Mr. Cloutier shared a room with Valentino Vella. Mr. Cloutier testified as to the background, the relationship between the crew, the nature of the work and the general activities that they engaged in when not working.

[7] Mr. Cloutier testified that on July 8th, 2010, they had finished work early, at approximately 6 p.m., as it was convenient to do so at that point in their work. Normally they worked from 7 a.m. to 7 p.m. with two breaks during the day. He went to his room to shower and estimated that approximately 10 or 15 minutes later he joined the others outside. He testified that he had a glass of Crown Royale and coke, while the others normally drank beer. He thought each person had one beer. As they did not have many groceries left, they decided to go to Carmacks to get groceries. He testified that for that reason, he believed that no one ate anything, although they might have had some snacks. He did not recall Mr. Maxwell-Smith eating tuna salad before leaving that night. He testified that they left Pelly Crossing shortly after 7 pm and that Mr. Maxwell-Smith was driving the SUV that they had rented. He believed that anyone with a valid license was entitled to drive the SUV, but acknowledged that most of the time it had been Ryan Baggott who drove it somewhere and he had usually driven it back. The keys were kept

by the person who had last driven the vehicle. It should be noted that everyone else had the time of the departure several hours later.

[8] Mr. Cloutier testified that it was quiet in the vehicle and that no one was drinking in it. He testified that Mr. Maxwell-Smith was driving, with Gary Cummings in the front passenger seat; Ryan Baggott was in the second row, immediately behind the driver, with Valentino Vella in the same row, on the passenger side, while Mr. Cloutier was in the third row, behind Ryan Baggott, and Eoin Scully was to his right. He indicated that both he and Eoin Scully had their seat belts on. He described Mr. Maxwell-Smith's driving as normal, and that it felt as though they were traveling at a normal speed. He recalled passing one vehicle, and said the reason he recalled it was because it was the only car they saw. He testified that he had no concerns about Mr. Maxwell-Smith driving, and was not concerned that he might be impaired. He testified that they were in the van for 10 - 15 minutes before the accident, and that there were several short sections of the road that were gravel, and then a longer section of the road that was gravelled. He indicated that they had been over that road perhaps four times prior to this night.

[9] Mr. Cloutier testified that when they got to the long stretch of gravel, he thought that Mr. Maxwell-Smith slowed down, swerved onto the shoulder and this caused the vehicle to roll. He did not know how many times it rolled. He was not hurt. He testified that Gary Cummings was hurt and that Valentino Vella had been ejected through a window. They located Mr. Vella and Mr. Cloutier went up to the road to flag someone down to get help. He did, and asked them to call for help, indicating there had been an accident. When he went back to the vehicle, he saw Mr. Vella lying on the ground, with Mr. Maxwell-Smith beside him, checking his breathing and vital signs. Mr. Vella was not

responsive. He testified that he believed that Mr. Vella did have vomit in his mouth and that Mr. Maxwell-Smith was trying to clear his airways and then did mouth to mouth resuscitation on him. Mr. Cloutier then took over doing mouth to mouth while Mr. Maxwell-Smith did CPR until the paramedics arrived and indicated that there was no purpose in continuing. Mr. Cloutier testified that he did not smell any alcohol while helping Mr. Maxwell-Smith with Mr. Vella.

[10] Ken Terpstra testified that he and his wife were traveling from Dawson City to Whitehorse around 10 p.m. on July 8th, 2010. He was driving a 1989 suburban half ton truck. About a mile outside of Pelly Crossing, a mini van passed his vehicle. He indicated that he was traveling approximately 100 to 105 km/h in a 90 km/h zone and estimated that the manner in which the van pulled away after passing his vehicle, and the simulation he later tried was the basis for his belief that the van was traveling around 130 km/h. He indicated that the weather was dry, it was not sunny, but it was not dark, had been a warm day and was a normal evening. Approximately 5-7 minutes later as he crested a hill he saw a man standing in the middle of the road. He started to slow down and then indicated that as a result of his panic stop, he had to brake and then brake harder so he could keep the vehicle on the road and get over to the edge so he did not hit the man on the road. He testified that the road was recently chip sealed and that there was a lot of pea gravel off the traveled portion of the roadway. He saw that the vehicle that had just passed his truck had gone off the road. He was asked to call the police and indications were that an ambulance was needed. Although his wife had a cell phone, there was no service. After asking if he could provide any help, he turned his vehicle and went back to Pelly Crossing, where he saw a police cruiser at the gas station and alerted the officer to the accident. He returned to the accident scene. He

testified that he was not close to anyone at the scene and did not smell any alcohol there.

[11] Cst. Jason Waldner testified that on July 8th, 2010, he was off duty when he got a call from dispatch around 10 p.m. to assist at a motor vehicle accident with injuries. He changed into his uniform and when he found that there was no one to drive the ambulance, he picked up the nurses and transported them in his RCMP vehicle to the accident scene. Cst. Waldner indicated that he had met members of the crews working on the bridge, and in fact several of them had been at his home socially for a backyard fire shortly prior to the accident. Cst. Whiles was already on scene when Cst. Waldner arrived at approximately 10:20 p.m. and within a very short time, one of the nurses had pronounced Mr. Vella dead at the scene. He indicated that there was a lot of emotion and hugging. Mr. Maxwell-Smith and others were emotional and crying. Initially on his arrival at the scene, Cst. Whiles had advised Cst. Waldner that Ryan Baggott was the driver of the vehicle, had lost control of it and that the injured person had not been wearing his seat belt, and so Cst. Waldner was focused on Mr. Baggott. Once Mr. Vella was pronounced dead, he saw Mr. Maxwell-Smith and Ryan Baggott talking and consoling each other and heard Mr. Maxwell-Smith say that it was his fault. Ryan Baggott then indicated that he was not the driver, as originally indicated, but that Mr. Maxwell-Smith was. He said he could not lie and things had changed. He indicated that he was the only one who was supposed to drive the vehicle, as it was rented under the company name, but that he had to think about his job and family and could not continue with the lie.

[12] Cst. Waldner testified that Mr. Baggott was distraught but did not seem to be impaired nor injured. As a result of the new information, attention was then focused on

Mr. Maxwell-Smith and Cst. Waldner could smell beverage alcohol coming from his breath. His eyes were blood shot but the officer also noted he had been crying. There was blood on his cheek but there did not seem to be any injuries and it appeared the blood came from when he had been attending to Mr. Vella. Cst. Whiles then joined them and after discussion between the two officers, Cst. Whiles administered the approved screening device (or ASD as everyone referred to it) and he advised Mr. Maxwell-Smith that he had blown a fail. As a result of that, Cst. Whiles formally arrested Mr. Maxwell-Smith for impaired driving causing death. Defence counsel took no issue with the *Charter* or caution that was provided to Mr. Maxwell-Smith. The road was closed off to preserve the scene.

[13] Cst. Waldner transported Mr. Maxwell-Smith and one of the nurses back to Pelly Crossing. At the detachment, Mr. Maxwell-Smith was again asked if he wanted to call a lawyer but Mr. Maxwell-Smith declined to do so, despite Cst. Waldner urging him to do so, given the seriousness of the charges. Cst. Waldner testified that he is a qualified technician and as such, he administered two tests on the BAC Datamaster C resulting in readings of 120 milligrams of alcohol in 100 millilitres of blood at 23:48 hours on July 8th, 2010 and 110 milligrams of alcohol in 100 millilitres of blood, (which I will refer to as mg%) at 0:10 hours on July 9th, 2010.

[14] Since it appeared that the best estimate of the time of the accident was at approximately 9:45 p.m., the first sample was not obtained within two hours of the time of the driving, and as such, the Crown could not rely on the presumption in section 258(1)(c) of the *Criminal Code* and thus could not rely on the breathalyzer certificate to establish the concentration of alcohol in Mr. Maxwell-Smith's blood at the relevant time. As a result, Cst. Waldner described in detail the process he followed in obtaining the

samples of Mr. Maxwell-Smith's breath. He noted two errors he had made on the Datamaster breath test tickets, and testified that as the solution had expired, he had to change it and he wrote down the expiry date for the bottle (which is good for up to two years) instead of the date the solution would expire, which is two weeks from the date it is put in the Datamaster. He noted that he also made an error when he filled in the certificate of a qualified technician, and indicated what that information should have been.

[15] Eoin Scully testified via telephone from Ireland, where he is currently employed. He indicated he is 24 years of age and had known the Mr. Maxwell-Smith since November 2009. He was part of the scaffolding crew at Pelly Crossing in June and July, 2010. He confirmed the background information about the group and the work. In respect of July 8th, 2010, he indicated that it was one of the few days that they had finished work early, around 6 p.m. and he detailed his activities following that. For the most part, he was by himself on the phone or the internet, until he joined the group around 8:30 or 8:45. He indicated that some were making a barbeque and that Mr. Cummings and Mr. Maxwell-Smith were just opening their first cans of beer. Since he had not been with them for an extended period of time, he did not provide any basis on which he would know that it was their first beer. He indicated that he was not drinking.

[16] He said he stayed with the group until they left for Carmacks where they were going to meet up with the paint crew and have a few drinks. He went to his room to get a jacket and a few things and indicated that the decision to go to Carmacks was made in less than five minutes. Someone had asked what time it was and he indicated he remembered it, as only Mr. Vella would have said that it was 9:37. He believed they were in the van within five minutes, by 9:42 or 9:43 (p.m.).

[17] He did not recall any discussion of who should drive and while he was surprised that Mr. Maxwell-Smith was driving, that was because to that point, Mr. Baggott had done most of the driving, or Mr. Cloutier. He did not recall Mr. Maxwell-Smith driving on any other occasion. He indicated that Mr. Vella was the most impaired but no one seemed intoxicated. Rather, they were more excited about the trip to Carmacks. Mr. Scully indicated that it was a very dry sunny day and that the road to Carmacks was very straight. As to speed, he did not see the speedometer, but said it seemed high and guessed it might have been 120 km/h. He recalled passing one vehicle, as Mr. Vella had made a gesture at the vehicle as they passed it. This confirmed Mr. Terpstra's evidence in this regard, further establishing that the vehicle Mr. Terpstra indicated had passed him at a high rate of speed was indeed the one driven by Mr. Maxwell-Smith. He confirmed that there was no drinking in the van.

[18] According to Mr. Scully, they had only been driving for 7 or 8 minutes when they approached a slight bend in the road to the left. There were loose chippings (his term) and he indicated there was no signage. As will be discussed later, there were in fact eight signs posted regarding the construction zone. He testified that Mr. Maxwell-Smith had slowed down, but went into a skid and before he knew it they had gone into the ditch, a 5-6 foot drop from the road and spun around a number of times before they crashed. He told everyone to get out quickly in case there was an explosion. He saw Mr. Cummings with a cut over his head.

[19] Within a few seconds, everyone realized that Mr. Vella was not with them and they started to look for him, quickly finding him under the van, with his feet sticking out. As he was not pinned by the van, Mr. Maxwell-Smith pulled Mr. Vella out from under the van and together with Mr. Cloutier, administered CPR. Mr. Scully had no injuries and

he went to the road to wave someone down, acknowledging that he did not want to look at Mr. Vella as he had seen something of his injuries and realized how serious they were. Mr. Scully testified that he saw Mr. Maxwell-Smith having a beer ten minutes before they left for Carmacks. It should be noted that no one else testified to seeing this and in fact Mr. Maxwell-Smith indicated that evening to the police that it had been a half hour after his last drink before he had driven.

[20] Staff Sergeant Paul Thalhofer was qualified as an expert in the field of collision reconstruction. His investigation report was entered as an exhibit (C-8) by consent. He attended the accident scene the following morning, July 9th, 2010 at approximately 10:15 a.m. He was there for approximately four hours and took a number of measurements and photos at the scene.

[21] Staff Sgt. Thalhofer determined that the collision was caused by driver inattention and excessive speed for the area. The only physical evidence to support seat belt usage was for the right front passenger. The vehicle occupants had indicated that the deceased was the only one not wearing a seat belt. The speed of the vehicle as determined by the marks on the roadway was 101 km/h as it left the roadway.

[22] The collision reconstruction investigation report included photos of the eight (8) posted signs in the area. The first sign indicated a “CONSTRUCTION ZONE” ahead and was 2.6 km from the accident scene. The second sign was 100 metres past the first and said “ROAD CONSTRUCTION NEXT 8 KM.” The third sign was 300 metres after the first sign and indicated uneven ground. The fourth sign indicated a “MAXIMUM 70" ahead, and was 500 metres from the first sign. The fifth sign indicated the start of the 70 KM speed zone and was 600 metres from the first sign. It was 1.5 kilometres from the

70 km speed zone sign to the accident scene. The sixth sign was 80 metres from the 70 km speed zone sign and indicated “CAUTION LOOSE GRAVEL”. The seventh sign was 90 metres from the 70 km speed zone sign and indicated “REDUCE SPEED”. The eighth signs were orange and black markers on both sides of the highway and so both were facing southbound traffic, and were where the gravelled portion of the highway started.

[23] These signs were 1.1 kilometres after the 70 km speed zone signs. It was 1.1 kilometres from the start of the gravel to the vehicle’s final resting place. To summarize, there were eight standard highway signs, all of which were of a warning or limiting nature, posted and clearly visible, that Mr. Maxwell-Smith passed in the 2.6 kilometres immediately before the final resting place of the vehicle after the accident.

[24] Ryan Baggott was a member of the scaffolding crew at Pelly Crossing in June and July, 2010, and he testified for the Crown. Much of his evidence was consistent with that of the other crew members as to the general background and workings of the group. At the time of the accident, Mr. Baggott had known Mr. Maxwell-Smith for about four months. He indicated that he got along well with everyone in the group except for Mr. Scully. He testified that the van had been rented by the company they worked for and he had signed the rental agreement and usually drove the van. When asked who could drive it, his replied that anyone with a valid license could drive it, and that he, Mr. Vella, Mr. Cummings, and Mr. Cloutier each had a license, and that Mr. Maxwell-Smith had a learner’s license. He testified that Mr. Maxwell-Smith had not driven the van in his presence prior to the night of the accident.

[25] According to Mr. Baggott, he drank three or four beer and part of a drink of rum and coke that Mr. Vella had poured for him. As a result, when the group decided to go to Carmacks that evening, he testified that he "*told everyone that I was probably above the limit and wouldn't drive".* Interestingly, no one else testified to that effect, but all of the other witnesses, except Mr. Maxwell-Smith, indicated that there was NO discussion about who was going to drive to Carmacks that evening.

[26] When asked how fast the van was going, Mr. Baggott indicated that he did not know, but indicated that they were likely going over the speed limit as they passed a vehicle going slow, but then slowed down after completing the pass. Mr. Baggott testified that he was familiar with the road to Carmacks, as he had driven over it several times. He knew that there were some potholes on it and that there was a gravelled section. He testified that when he saw the construction signs, he told Mr. Maxwell-Smith to be careful. He felt the back end of the van slip out, the van spun and there was a crunch and an abrupt stop, with the van facing the opposite direction.

[27] He described the scene following the accident, and the subsequent finding of Mr. Vella, with Mr. Maxwell-Smith starting to perform first aid on him. He testified that Mr. Vella spat up and that Mr. Maxwell-Smith then cleared his airways, and was doing mouth to mouth and CPR on Mr. Vella, with Mr. Baggott assisting by doing the count with him, until he could no longer take it. In his testimony, Mr. Baggott indicated that Mr. Maxwell-Smith was "*an absolute hero in that moment*". I must say that the manner in which Mr. Baggott made that statement during the trial and his characterization of Mr. Maxwell-Smith in the particular circumstances of this matter really put his testimony into proper perspective. He may have been a Crown witness, but his loyalty was clearly still

with Mr. Maxwell-Smith. He switched out with Mr. Cloutier and went to the roadside where he found Mr. Cummings sitting, and thought he had a concussion.

[28] Mr. Baggott indicated that the police and ambulance arrived within a short time and when asked if he was driving the van, he indicated to the police that he was. When asked why he said that, he testified that in the heat of the moment, he figured that Mr. Maxwell-Smith had enough on his plate, meaning that he had Mr. Vella between his legs trying to resuscitate him, and that he would alleviate the situation. Once Mr. Vella was pronounced dead, he indicated that Mr. Maxwell-Smith went over to him and said that they needed to clear this up, at which point he indicated it was a mistake, that he had lied and that Mr. Maxwell-Smith was the driver. On cross-examination, Mr. Baggott indicated that Mr. Maxwell-Smith had said to him "*you were driving*" to which he responded "*yeah, whatever*". His explanation was that he was just focused on Mr. Vella.

[29] Stephan Kirchgatter testified that he has been a registered nurse since 1988, and was so employed on July 8th, 2010 in Pelly Crossing. He received a call from the RCMP around 10:15 to 10:20 p.m. that evening regarding an accident with a possible death. He indicated he went to the scene of the accident with the police and arrived there within ten to fifteen minutes, where he found a number of people trying to resuscitate a man lying on the ground. He was advised that such efforts had been underway for 20 to 30 minutes, and at approximately 10:30 p.m., very shortly after he arrived at the scene, he pronounced Mr. Vella dead at the scene. He indicated that the deceased was shirtless, just wearing a pair of shorts and had lacerations to his head area. He did not see any vomit. He later attended to a number of people who had been in the van, but could not recall specifically who he had seen.

[30] Cst. Phil Whiles is a member of the RCMP and was stationed at Pelly Crossing and on duty on July 8th, 2010. He was approached in the parking lot of the convenience store in Pelly Crossing by Mr. Terpstra, who advised him of the accident at kilometre 446 on the Northern Klondike Highway, indicating that one person appeared to have head injuries and asking him to call an ambulance. He indicated it was approximately 17 kilometres to the accident scene and took him approximately 12 minutes to get there. On arrival he saw a number of vehicles and found the Kia van about 15 feet off the highway, looking as if it had been in a roll over. Mr. Vella was lying on his back, was unresponsive and had lacerations across his head. Mr. Maxwell-Smith was attending to him and indicated that there had been a pulse, he had been breathing and had just vomited.

[31] Cst. Whiles did rescue breathing on Mr. Vella, using a mask and indicated he noted the smell of alcohol but did not note any signs of vomit. An ex-paramedic came along and took over for the officer, who then spoke to Mr. Baggott. Mr. Baggott told Cst. Whiles that he had been driving the van, went too fast, and had three beers a number of hours before with dinner. Cst. Waldner then arrived with the nurses, and Mr. Vella was pronounced dead almost immediately after they had arrived.

[32] As Cst. Whiles was making arrangements regarding securing the scene, Cst. Waldner approached him and indicated that Mr. Baggott had told him he had been lying, that Mr. Maxwell-Smith was in fact the driver of the van and that Cst. Waldner smelled alcohol off him. As a result, Cst. Whiles approached Mr. Maxwell-Smith and asked him if he had anything to drink. Mr. Maxwell-Smith replied that he had three beers. Cst. Whiles smelled alcohol coming from his breath and determined that he was not injured, and that the dried blood on him was from his dealings with Mr. Vella. As a result of his own

observations, those of Cst. Waldner and Mr. Maxwell-Smith's acknowledgment of consuming alcohol, Cst. Whiles testified that he had a reasonable suspicion that Mr. Maxwell-Smith had alcohol in his body and as a result, he read him the demand for the approved screening device. Mr. Maxwell-Smith complied with that demand and blew a fail on the approved screening device.

[33] Cst. Whiles testified that he is qualified to administer the ASD and that he understood that blowing a fail indicated a reading of in excess of 100 mg of alcohol in 100 ml of blood. He testified that the results of the ASD, together with what Cst. Waldner had indicated to him, smelling liquor himself from Mr. Maxwell-Smith and his acknowledgment of having consumed three beer were the basis for the demand for the breathalyzer. As such, he then advised Mr. Maxwell-Smith that he was under arrest for impaired driving causing death and at 22:47 read him his *Charter* rights, the police caution and at 22:53 read the demand for the breathalyzer. Mr. Maxwell-Smith indicated that he understood what had been read to him and that he would provide a sample of his breath. He was then turned over to Cst. Waldner, who is a qualified breath technician.

[34] Cst. Whiles attended to matters at the scene, and once Cst. Waldner had finished conducting the breath tests back at the detachment, Cst. Whiles obtained a video and audio taped statement from Mr. Maxwell-Smith. As a result of the information provided in that statement, Cst. Whiles issued two summary offence tickets to Mr. Maxwell-Smith, one for driving an unreasonable speed and the other for driving against the endorsement on his license. It was determined that Mr. Maxwell-Smith had a class 7 license, described as a beginner's or learner's license, which included restrictions that he was not to have more than two people in the vehicle with him and that there was to

be zero consumption of alcohol. Cst. Whiles testified that he asked Mr. Maxwell-Smith when he had his last drink and had been advised that it had been about one-half hour before he was driving.

[35] Verna Mendes was qualified as an expert. She had prepared a report indicating the methodology she had used to calculate what Mr. Maxwell-Smith's blood alcohol readings would have been at the time of the accident, since it appeared that the Crown could not safely rely on the presumption in section 258(1)(c) of the *Criminal Code*. By the time of her testimony, Ms. Mendes had been provided a copy of the report from Dr. Wallener, the expert that the defence called later during the trial, and Ms. Mendes was given an opportunity to comment on that report during her testimony and the issues it raised. It should be noted that Dr. Wallener was provided the opportunity to watch and listen to Ms. Mendes' testimony, by video conference, and prior to testifying herself.

[36] I will deal with the evidence of the two expert witnesses in detail, shortly, since it goes to the very issues that this court must decide, but in summary, Ms. Mendes took the readings obtained by the BAC Datamaster C at 23:48h of 120 mg % and at 0:10h of 110 mg % and extrapolated those back to the time of the accident, indicated to be at approximately 21:45 h or 9:45 p.m. Her report and her testimony indicated that using the result of 110 mg% at 0010h, the BAC (blood alcohol concentration) of an individual at 21:45h would have been between 134 to 158 mg%. Ms. Mendes also testified at length about the effects of alcohol on a person.

[37] Dr. Wallener testified as an expert witness for the defence. In summary she took issue with some of the assumptions that formed the basis of Ms. Mendes' report. She noted that she did not dispute that back extrapolation was a valid method to use.

[38] Mr. Maxwell-Smith testified on his own behalf. He indicated that he is now 27 and came to Canada from Essex, England in August 2007 to work. He became a permanent resident in 2009, and has been a scaffolding supervisor since he has been in Canada. He confirmed much of the background information provided by the other members of the scaffolding crew, and indicated that he and Gary Cummings were in charge of the crew in Pelly Crossing. He testified that they were paid by the job, so the faster they were able to complete the work, the better it was. By July 8th, 2010, he considered they were ahead of schedule on the project, and they had finished work an hour early that day, around 6 p.m.

[39] Mr. Maxwell-Smith indicated they had walked from the bridge to the motel where they were staying, a distance of about 250 meters. He went to his room, stripped off his tools and hard hat and had a cold drink from the fridge, Mountain Dew, as it had been quite a hot day and he was dehydrated. He washed his hands and face and then spent time on the internet, looking at his facebook account, checked his emails and as there were some engineering discrepancies on the project, he sent a number of emails regarding them. He was a smoker at the time and would go out and smoke and converse with Mr. Cummings, who was in the adjacent room, regarding the engineering discrepancies. He indicated that this took about an hour. He then prepared his own dinner, which consisted of pre-packaged bag of salad, a can of tuna and sweet corn, and ate that. He indicated it was probably 8 o'clock by then.

[40] He testified that he had a cup of tea prior to dinner, and that he had not had anything alcoholic to drink that day until he sat down to dinner. He indicated that he had three cans of Kokanee beer with dinner, which beer was kept in Gary Cummings' room. He indicated that Mr. Cummings had purchased the beer on Monday evening of that

week, July 5th, when they had decided to go to Carmacks to purchase alcohol and food, and he thought they had all gone to Carmacks at that time. He saw Mr. Cummings, Mr. Vella and Mr. Baggott drinking that evening, and while he did not see the others drinking, he was under the impression that they were. He thought one of the others had a pack of beer and that Mr. Cloutier had a bottle of Crown Royale.

[41] Mr. Maxwell-Smith testified that he drank the three beers over the course of an hour, and that he and Mr. Cummings were sitting outside, but the others in the scaffolding crew would join them at times and talk to them. He indicated that some of the crew wanted to go into Carmacks to get alcohol and food, but two of them were not keen on the idea, including Mr. Maxwell-Smith. He indicated that it was 9 o'clock by that time and it was an hour drive to Carmacks and another hour back, with work early the next morning. He did not want a late night but after what he described as a lengthy discussion on the matter, the majority wanted to go, and so they did. He indicated that Mr. Baggott had signed the rental agreement for the van and he generally drove the van although others on the crew did drive it. Mr. Baggott indicated that he had too much to drink and that he would not drive. He testified that Mr. Vella was quite obviously intoxicated. Mr. Maxwell-Smith testified that "*I wanted to get there and back as quickly as possible, and as I was in a sober state, it was most responsible of me to drive*".

[42] Mr. Maxwell-Smith testified that he did not recall what time they left. The road was clear and he was driving highway speed. He indicated that after driving for a short period, he overtook a vehicle that was in front of him and was probably speeding at that time. He indicated that at the time, he was against the journey and he wanted to get there as soon as possible so they would get back and be ready for work the next morning. He and Mr. Cummings were in the front seat, discussing the five year

anniversary of the London bombings. He indicated that Mr. Baggott and Mr. Vella were in the middle seat, and were arguing over Mr. Baggott's choice of music, with them engaging in horseplay and behaving like kids.

[43] He indicated that he was aware of the signage for the road construction but had never seen any physical signs of construction, such as equipment, or men working, when he had been through the area about 3 times previously. He had not driven that stretch of road previously. As he went down an incline, he could see the approaching gravel section of the road and a comment was made that the gravel was coming up. He indicated that there was quite a bump when he went from the pavement to the gravel section. He testified that he had slowed down once he had arrived at the gravel section and was driving normally. At one point Mr. Vella was almost out of his seat to get the ipod from Mr. Baggott and Mr. Maxwell-Smith indicated that he said "*what are you, 5*?" and he had turned his head briefly to the side. When he looked at the road again, it had begun to curve to the left and he had drifted somewhat when he had taken his eye off the road for a split second. He indicated that he was not turned sufficiently to stay on the worn tracks and he went ever so slightly into the very soft shoulder. He took his foot off the accelerator, gripped the wheel quite hard and tried to correct it but the back end had started to drift. He testified that he initially was successful and did redirect the van but soon he had overcorrected and went into the oncoming lane. He had his foot off the accelerator and tried to redirect it but it started to broadside. The van left the highway and went into a ditch, with an approximate 6 foot drop off. The front end of the van dropped and the front passenger side dug into the mud, causing it to flip over, but he did not know how many times it rolled. It stopped, landing on its wheels with the engine still

running. He put the van into neutral and turned the ignition off. He saw that Mr. Cummings had a gash on his head, but indicated that he was fine.

[44] Shortly after getting out of the vehicle, it was obvious that one person was missing. Mr. Baggott found Mr. Vella, as the top of his torso was under the vehicle where the engine was. Mr. Maxwell-Smith dragged Mr. Vella out from under the vehicle by his feet, checked his vital signs and proceeded to administer CPR. Mr. Vella was not responsive, although initially there were signs he was trying to make noises. He checked his airways and found initially they were blocked, and tried to clear them with his fingers. He indicated he had taken many first aid and rescue courses. Cst. Whiles was the first person of any authority to arrive on the scene and he began to assist, doing mouth to mouth on Mr. Vella. Mr. Maxwell-Smith indicated that there was a lot of body fluid and a strong smell of alcohol from Mr. Vella, who had a lot of blood from lacerations to his forehead and various scrapes and bruises about his person. He did not see him vomit but said there was an overwhelming smell of vomit from Mr. Vella.

[45] He indicated that when the two nurses from Pelly Crossing showed up, he advised them of the signs he had noted and almost immediately they pronounced him dead. He indicated that he burst into tears and was quite angry that he had tried for so long to assist Mr. Vella, with help from Mr. Cloutier, but that the nurses had just pronounced him dead almost immediately on their arrival. He said he was trying to console the others and put them first, as he was not worried about himself.

[46] He indicated that Mr. Baggott had said "*I can't do this, I've got kids*" and he made the assumption that the situation had elevated with Mr. Vella being declared dead. Before that, he indicated that he was toying with the idea but had not spoken to Mr.

Baggott about the idea or ever suggested to Mr. Baggott that he should say he was the driver. Mr. Maxwell-Smith testified that he "*was shocked, although he did not know how he could be more shocked, that Mr. Baggott was thinking about insurance and that the boss would be annoyed."* He indicated that it was totally irrelevant to him and he said "*it was my responsibility, whatever".*

[47] Mr. Baggott then spoke to Cst. Waldner and then indicated to Mr. Maxwell-Smith that the officers wanted to talk to him. He testified that when he was asked if he was the driver, he indicated he had been. When asked why Mr. Baggott had lied about driving, he indicated that he thought he was doing a good deed but once the situation elevated, he could not carry on with the pretence. When asked if he had been drinking, he advised he had been and that he had three beer. He agreed to do the roadside test and was advised that he had blown a fail. He was then arrested and read his rights and taken to the detachment in Pelly Crossing. He testified that he had consumed three beer with dinner, not 4, not 2, but 3. He did not feel intoxicated in any way and testified that he has been intoxicated and knows what it feels like. When asked on direct examination as to what he believed caused the accident, he testified that there were so many different explanations out there, it was a gravel road, he looked away for a split second, tried to correct it and was unable to do so. He indicated that he had two years to think about it. He acknowledged that he gave a statement to the police the night of the accident, and indicated that he was in shock and extremely depressed and saddened by the events when he did so.

[48] Mr. Maxwell-Smith acknowledged that he received a ticket for driving with excessive speed as a result of this accident, and that he had paid it after being advised by his lawyer that paying the ticket was <u>not</u> an admission that he was speeding. Despite

how illogical that was, he persisted in that contention. When cross-examined on the fact that Cst. Whiles had asked him numerous times what had happened, and that not once had he mentioned that he was distracted by Mr. Baggott and Mr. Vella's horseplay or dispute over the music and the ipod, he testified that he never thought about it. He indicated that he was in an extreme depressive state and that if he had been asked his name, he would have found it difficult to reply. He indicated that he vaguely remembered giving the statement to the police.

[49] When questioned about the number of beer that he had drank that evening, he indicated that he was sure two years later as he testified at the trial, that it was three beer. When asked why he would have told the police the night of the accident on one occasion that it was 3 or 4 beer, he indicated that he had said that night he was not 100% sure and that he had been in shock, but he was sure when testifying at the trial that it had been 3 beer he had consumed.

[50] Mr. Maxwell-Smith acknowledged that at the time and to the present time he takes medication for depression. Mr. Baggott had been called that night and took his medication, a t-shirt and socks to the detachment for him. He indicated that he took the medication for depression which he had suffered for a long time, and that alcoholism was also an issue for him. He then clarified that it had increased substantially after the accident and not prior. He did not explain that contradiction. He acknowledged that the medication he took for depression indicated on the prescription that he should not consume alcohol when taking it, but indicated that he had drank before with the medication and had never had any adverse effects from doing so. He indicated that he has drank since he was the legal age in Britain, at 18, and that he consumes alcohol on a regular basis, indicating that he drank no more than anyone else.

[51] Mr. Maxwell-Smith was cross-examined extensively on his decision to drive the van the night of the accident. He testified that he was in a sober state and that it was his responsibility to drive. He indicated that he was the supervisor of the crew and that everyone else had consumed more alcohol than he had. He testified that Mr. Scully was not impaired, but that he did not have a driver's license. Mr. Scully had earlier testified that he had not been drinking at all that night. Mr. Maxwell-Smith testified that he did not feel impaired and when asked if he was suggesting that he was sober, he responded by saying that he did not know the dictionary definition of what sober is, somewhat of a strange response, given his own earlier use of the term. He indicated that Mr. Vella clearly could not have driven and that Mr. Collier had been drinking Crown Royale and there was no indication that he was prepared or fit to drive.

[52] Mr. Maxwell-Smith acknowledged that he held a class 7 British Columbia driver's license, which was described as a beginner's or learner's license, and was subject to a number of restrictions. He acknowledged that he was ticketed for driving with more than two passengers in the van, and that he paid that ticket, again, on the advice of a lawyer that it would not be an admission of committing the offence to do so. He acknowledged that his license had a restriction that he was not allowed to have any alcohol in his body when driving, but responded by saying that he did not feel impaired or intoxicated. When asked why he had driven the van that night, given his license restrictions and circumstances, he testified that it was his wish to stay home but they were going to go anyway, and, as the supervisor, he felt it was his duty to drive them if they went. He indicated that if anyone else drove the van, it was possibly more dangerous. He also indicated that he had an English driver's license, but that it didn't allow him to drive in Canada as he had not changed it over.

[53] He testified that it was not a conscious decision to drive. Again, he did not expand on that, which seemed in contrast to his assertion he was the only one capable of driving that night. Finally, he was asked if he had considered keeping the keys and telling the others they were too drunk and were not going. His response was to ask the Crown if he had ever tried to stop five guys from going on a journey, and indicated that no, he had not tried to do so. Mr. Maxwell-Smith indicated that the main purpose of the trip to Carmacks that night was not to purchase beer, despite having indicated several times in his statement to the police that it was. He indicated that it was one purpose, but not the main purpose, although no other was indicated to the police in his statement.

[54] As indicated earlier, Mr. Maxwell-Smith gave a video and audio taped statement to Cst. Whiles shortly after he had taken the breath tests. The typed version of that statement was entered as an exhibit by consent and was taken between 1:03 a.m. and 2:00 a.m. on July 9th, 2010. When asked what time he had dinner that evening, he thought it might have been around eight p.m. but indicated that he had no way to keep track of time because he was not used to twenty-four hour sunlight. He then indicated that he had a can of Kokanee beer during dinner and that after dinner, they all sat down and relaxed, each had a beer and they just chatted, and that went on for two, three hours. Later in the statement when asked how long it was from supper till they had left in the van and Mr. Maxwell-Smith indicated that he didn't know, "*two, two and a half hours, something like that."* It should be noted that Mr. Maxwell-Smith's times cannot be relied upon. In his direct evidence, he indicated he finished work at 6, got washed, checked and sent emails and various other things for an hour and then had supper at 8, which would leave a gap of about an hour in between. In his statement, he said he had dinner at 8 and then following dinner they sat and chatted for two or three hours, which

would be sometime after 10 or 11 p.m. However, by 10 p.m., Cst. Whiles had been informed of the accident after Mr. Terpstra had driven back to Pelly Crossing from the accident scene.

[55] Mr. Maxwell-Smith was asked when he had his last drink and indicated that it was perhaps a half an hour before they left. At no point in his statement did he indicate that he was opposed to going to Carmacks, but simply indicated that Ryan (Mr. Baggott) had too much to drink, so he drove, *"clearly thinking that I was okay to drive".*

Application to the Law to the Facts:

Issue 1: Did the concentration of alcohol in the blood of Christopher Maxwell-Smith exceed eighty milligrams of alcohol in one hundred millilitres of blood at the time of the driving, contrary to Section 253(1)(b) *CCC* :

[56] Although many issues or potential issues were canvassed during the course of the trial, in the summations by both Crown and defence counsel, the issues that were advanced for this Court to consider were what impact the expert evidence from Dr. Wallener should have on the evidence regarding the extrapolation of the breath readings; whether it could be determined with accuracy and precision what alcohol Mr. Maxwell-Smith had in his blood at the time of the accident; whether on the evidence in this case it could be determined beyond a reasonable doubt that Mr. Maxwell-Smith's ability to operate a motor vehicle was impaired, and whether the Crown had established beyond a reasonable doubt that being over 80 and/or having his ability to operate a motor vehicle impaired by alcohol was the causation of the accident.

[57] At trial, it was not disputed that Mr. Maxwell-Smith was the driver of the van at the time of the accident. Not only did the three individuals from the van all testify that Mr. Maxwell-Smith was the driver of the van at the time of the accident, but Mr.

Maxwell-Smith confirmed that was the case in his own testimony. Although Mr. Baggott initially told the police at the scene that he was the driver, within moments of Cst. Waldner arriving on the scene (which was within a few moments of Mr. Vella being pronounced dead), police were advised that it was in fact Mr. Maxwell-Smith who was the driver, and their investigation proceeded from there.

[58] At the outset of the trial, it was acknowledged by both counsel that any statements made by Mr. Maxwell-Smith to the police were made freely and voluntarily, without further proof of that being required, and in particular that included a lengthy video and audio taped statement that he provided to the police the night of the accident. There were no allegations of any breaches of Mr. Maxwell-Smith's *Charter* rights in this matter.

[59] At the end of the evidence, and prior to submissions, defence counsel, in response to a question I had posed about one of the cases he had filed, indicated that he would not be raising any issues with respect to the grounds for the approved screening device or breathalyzer demands made to Mr. Maxwell-Smith.

[60] On that basis, I will not go into any detail on these areas. Suffice it to say that I am satisfied beyond any reasonable doubt that on July 8th, 2010, Christopher Maxwell-Smith was the driver of a Kia Sedona van that left the North Klondike Highway at kilometre 446, approximately 17 kilometres outside Pelly Crossing, Yukon. Upon being advised that he was the driver of the vehicle involved in the single vehicle accident, together with the information that Cst. Waldner provided to him, as well as the fact that Cst. Whiles himself smelled alcohol coming from the breath of Mr. Maxwell-Smith, Cst. Whiles had the basis on which to form a reasonable suspicion that he had alcohol in his

blood. I am therefore satisfied that the demand by Cst. Whiles to Mr. Maxwell-Smith for the approved screening device was properly made. Mr. Maxwell-Smith blew a fail on the ASD, and according to the testimony during the trial, the ASD is calibrated to record a fail if the concentration of alcohol in the subject's breath is over 100 mg of alcohol in 100 ml of blood. At that point, I am satisfied that Cst. Whiles had reasonable and probable grounds to make the demand for the breathalyzer.

[61] While many questions were posed during the trial regarding the effect of mouth alcohol, this was not raised in summation as having had any effect in this matter. Mr. Maxwell-Smith testified that while he did not see Mr. Vella vomit, he could smell it. He performed mouth to mouth resuscitation on Mr. Vella without using a mask. Cst. Whiles then performed mouth to mouth on Mr. Vella and then Mr. Cloutier did so, while Mr. Maxwell-Smith performed CPR. Although some of the witnesses indicated that there was a strong odour of alcohol from Mr. Vella (Cst. Whiles and Mr. Maxwell-Smith indicated that) others indicated they could not smell any alcohol from him (Mr. Cloutier). Although the blood on Mr. Maxwell-Smith was attributed to be from Mr. Vella, there was no suggestion that the smell of alcohol from Mr. Maxwell-Smith's breath that both police officers smelt at the scene came from him attending to Mr. Vella. In fact, when questioned by the police, Mr. Maxwell-Smith admitted that he had been drinking and that he had three beer. There was no suggestion that the fact that Mr. Vella had apparently vomited before Mr. Maxwell-Smith had performed mouth to mouth resuscitation on him would have adversely affected the results of the approved screening device later administered to him. In fact, several people performed mouth to mouth resuscitation on Mr. Vella after Mr. Maxwell-Smith, so some time had passed before he blew in the approved screening device.

[62] With respect to the breath tests administered at the police detachment, Cst. Waldner acknowledged he had to change the solution in the BAC Datamaster C before he could conduct the tests on Mr. Maxwell-Smith. He explained the procedure he followed that night. He acknowledged that he wrote down the wrong expiry date on the breath ticket, as the solution was good for two weeks from when it was put in the machine. That was the date he should have put on the ticket, but instead he wrote the expiry date for the bottle of solution. While he was preparing the Datamaster, he left Mr. Maxwell-Smith in a separate room, and as a result, he did not observe him for the 20 minutes prior to administering the first test.

[63] One of the areas that Ms. Mendes was qualified as an expert in was the theory, operation and basic maintenance of the BAC Datamaster C, Intoximeter EC/IR II and the AlcoSensor IV DWF instruments. She indicated that she has instructed on over 40 BAC Datamaster C courses and that the technicians are always instructed to watch the subject for 15 minutes prior to each test to ensure that the person does not have any mouth alcohol which could affect the readings. She indicated that the BAC Datamaster C is designed to pick up any mouth alcohol and to provide a status message that it is an invalid sample in such a situation, but the officer should also observe the subject for the 15 minutes prior to the test, as the machine cannot be relied on 100% to detect the mouth alcohol. Ms Mendes testified that the observation period is to ensure that there is nothing to contaminate or affect the test, and to ensure that the subject does not take any alcohol externally or regurgitate. She noted that if a person burps or belches, it is only an issue if they bring up food or liquid, by vomiting in their mouth, as a dry burp or belch would not put any alcohol into the mouth.

[64] Ms. Mendes noted that the officer had conducted the appropriate observation period between the first and the second tests. She testified that if there had been mouth alcohol present to affect the first result, she would have expected to see a sharp spike in the results and would not expect to see the results of the two tests to agree as they did in this case. She also noted that by the time of the tests, it was in excess of two hours from the time of the accident, and that the majority of alcohol would have been absorbed and not be in the stomach to be regurgitated by then. As a result, she testified that the failure to observe the subject prior to the first test did not appear to have affected the results. Mr. Maxwell-Smith testified after Ms. Mendes, and at no time did he suggest that he burped, belched or vomited or in any way could have had any mouth alcohol which would have affected the results of the first or even the second test on the BAC Datamaster C. I am satisfied beyond any reasonable doubt that although many questions were asked with respect to the issue of mouth alcohol, in this particular case there is no evidence it was present or was in any way a factor or in any way affected the results obtained on the BAC Datamaster C.

[65] No one knew exactly what time the accident occurred. Mr. Terpstra's vehicle was passed just after he left Pelly Crossing and he estimated that soon after that, perhaps five to seven minutes later, he came upon the accident scene. After offering to help and finding that the cell phone did not work in the area, he returned to Pelly Crossing where he saw Cst. Whiles' police car and advised him of the accident. Cst. Whiles indicated that he was approached by Mr. Terpstra at approximately 10 p.m., that it was 17 kilometres to the accident scene, and would take approximately 12 minutes to drive the distance at the speed limit, not that it is likely anyone followed it that night. Cst. Waldner indicated that he was off duty that night and he got a call from dispatch around

10 p.m. to assist at the accident scene. The only person in the van who recalled any specific times was Mr. Scully. He indicated that someone had asked what time it was when they were deciding to go to Carmacks, that Mr. Vella had replied it was 9:37, that they had all gotten into the van within five minutes of that, and would have left Pelly Crossing around 9:42 or 9:43, which would have put the accident a few minutes later.

[66] From the evidence in this matter, I am satisfied that the accident occurred at approximately 9:45 p.m. It may have been a few minutes earlier or a few minutes later, and by a few, I mean five to ten minutes. However, the Crown proceeded from the outset of the trial on the basis that the accident was at approximately 9:45 p.m. Since the first reading on the BAC Datamaster C was at 11:48 p.m., or 23:48h on the 24 hour clock, the Crown was thereby precluded from being able to rely on the presumption set out in section 258(1)(c) of the *Criminal Code*, since the first sample was not taken within two hours of the driving, but was approximately two hours and three minutes after the driving. It should be noted that the Crown made no effort to rely on the presumption in section 258(1)(c) *CCC* or the certificate of the qualified technician to establish the offence contrary to section 253(1)(b) of the *Criminal Code*. As a result, the Crown had to call expert evidence in its efforts to establish what the concentration of alcohol in Mr. Maxwell-Smith's blood was at the time of driving at 9:45 p.m.

[67] Verna Mendes is a forensic toxicology specialist, and is employed at the Forensic Science and Identification Services, Vancouver, British Columbia. She was qualified as an expert, and qualified to give opinion evidence in respect of the six areas as set out on page one of her curriculum vitae, entered as Exhibit C-9. Ms. Mendes reviewed the steps followed by Cst. Whiles in administering the approved screening device, and confirmed that recording a "fail" on the ASD was indicative of a reading of over 100

mg%. She then reviewed the steps followed by Cst. Waldner and the documents produced when he administered the BAC Datamaster C to Mr. Maxwell-Smith. I have earlier noted her evidence with respect to the clerical errors and the failure of Cst. Waldner to observe Mr. Maxwell-Smith prior to the first test. Ms. Mendes did not find that there was any evidence to conclude that the readings of 120 mg% obtained at 23:48 on July 8th, 2010 and of 110 mg% obtained at 00:10 on July 9th, 2010 were not accurate reflections of the concentration of alcohol in Mr. Maxwell-Smith's blood at those times. In fact, it must be noted that the expert called by the defence, Dr. Wallener, testified that she took no issue with those readings, and assumed they were accurate if the BAC Datamaster C was operating properly.

[68] Ms. Mendes testified that using the result of 110 mg% at 0010h on July 9th, 2010, she had calculated that the blood alcohol concentration of a person at 21:45h on July 8th, 2010 was determined to be between 134 to 158 mg%. Such a calculation is performed by adding the elimination rates of 10 to 20 mg% per hour to the measured BAC and is independent of gender and body weight. This method of calculation is known as back extrapolation. She indicated that this was based on two assumptions, with the first assumption being that an elimination rate of 10 to 20 mg% per hour was the appropriate rate to use. She noted that studies have shown that 90 % of the drinking population fall within the elimination rate of 10 to 20 mg% per hour. She noted that if she used a higher rate of elimination, then the subject's readings would be even higher. That first assumption was not challenged by Dr. Wallener, who testified as an expert for the defence. In fact, in her report, Dr. Wallener stated at page 3:

> "There have been many papers published in the scientific literature discussing the appropriate slope value, or rate of elimination, to use in back-calculations of BAC. The slope used by the Forensic Laboratory and reported by Ms. Mendes is 10-20 mg%/hr. This conservative estimate

> generally works in favour of defendants, is appropriate in the vast majority of cases and is well-supported in the scientific literature."

[69] The second assumption that Ms. Mendes used in performing the back extrapolation was that no alcohol was consumed in the 30 minutes prior to the time of incident and no alcohol was consumed between the time of the incident and the time the samples were collected. Ms. Mendes testified that if alcohol were consumed during either of those times, the calculated BAC would be too high by an amount proportional to the amount of alcohol consumed. She also testified that if the time of the incident was 15 minutes earlier or later than 21:45h, that this would affect the calculated BAC at the time of the incident by no more than 5 mg% and would not change the subsequent opinion in this matter. It was this second assumption that was challenged by Dr. Wallener, the expert witness called by the defence.

[70] According to the testimony of Ms. Mendes, 30 minutes is the average time for a subject to reach peak blood alcohol concentration after consuming the last drink. She testified that general consensus is that it can be between 20 to 40 minutes to reach peak BAC, and so the assumption is based on an average of 30 minutes. Ms. Mendes referred to numerous studies that have been conducted in this area, and also responded to the report prepared for the defence by Dr. Wallener, which challenged some of those studies. She testified that this method of back extrapolation and the assumptions that underlie it have been used for decades in Canada and around the world. When the Crown asked Dr. Wallener about that, she acknowledged that back extrapolation of the BAC is an accepted and appropriate methodology. Her challenge to it is the use of 30 minutes as the assumed time to reach peak BAC.

[71] Ms. Mendes' education and experience are set out in detail in her CV, which was admitted as Exhibit C-9. In addition to her academic training, she successfully completed an extensive period of in-house training with the RCMP forensic lab. She is designated as an analyst pursuant to section 254(1) *CCC* by the Attorney General of British Columbia, as well as by the other Canadian provinces and all three territories. She is a member of the Alcohol Test Committee, a subcommittee for the Canadian Society of Forensic Science whose role it is to provide guidance for standards and producers in breath testing and to publish procedures for use of such breath testing equipment in the field. She has instructed on over forty BAC Datamaster C courses as to the theory, operation and basic maintenance of the instrument, as well as instructed on the Intox EC//IR II course. She testified that she has "dosed" over five hundred individuals on the various courses she has been involved with and has been able to witness first hand the results of various tests administered at specific intervals to such individuals.

[72] Dr. Mariah Wallener was qualified as an expert by the defence, and qualified to give opinion evidence in the area of metabolism and distribution of alcohol and the statistical calculation of back extrapolation of blood alcohol concentrations. Her CV and report were entered as Exhibit D-1. She received a Doctor of Philosophy, Pharmacology from UBC in 2000 and a post doctoral fellowship, Heart and Vascular Research Centre, Case Western Reserve University, Cleveland, Ohio, from 2000 to 2002, and then was a visiting research scholar there from 2003-2004. Since 2004 she has been an adjunct professor, Department of Anaesthesiology, Pharmacology and Therapeutics, Faculty of Medicine, U.B.C., in addition to work with several consulting businesses. The report prepared by Dr. Wallener and her testimony during the trial

challenged the validity of the second assumption on which the back extrapolation was based, and offered the opinion that the time between the last drink and the time of the motor vehicle accident was too brief to be assured that Mr. Maxwell-Smith was past the absorptive phase, thus rendering the back-calculation technique invalid. In her report, Dr. Wallener indicated at page 2:

> "BAC is plotted on a graph of concentration vs. time and can be described by a curve that consists of a rising phase, a peak and then a declining phase. The rising phase corresponds to absorption, when alcohol moves from the digestive system into the systemic circulation. The declining phase corresponds to elimination, when alcohol is removed from the blood via metabolism and excretion. However, these are not temporally discrete processes. Elimination begins some time after absorption begins and for a period of time the two processes occur in tandem, until such time as all alcohol has been absorbed. The peak of the BAC curve represents the point at which rates of absorption and elimination are equivalent such that there is no net increase or decrease in BAC at that point in time."

[73] Ms. Mendes commented that the graph used by Dr. Wallener to illustrate such lacked information regarding the drinking pattern and how long after the last drink they reached their maximum peak.

[74] Dr. Wallener indicated that the time to reach the peak of the BAC curve is referred to as t_{max}, which is typically measured from the time of the last drink to the peak of the curve. She indicated that back-extrapolations should not be performed to times earlier than t_{max} and may be invalid for a period of time later than t_{max} until absorption is complete. Ms. Mendes disagreed with the suggestion that absorption needed to be complete. Dr. Wallener referred to a number of studies and concluded that there is no consensus in the literature that a t_{max} of 30 minutes represents a reasonable estimate of the population variable. Ms. Mendes disputed that assertion and indicated that there was a wide body of literature which showed that 30 minutes was an appropriate time. She did agree with Dr. Wallener that it was a mean, and did not

represent the high or the low point. Both witnesses referred to a study by Shajani and Dinn where 16 subjects drank over a period of 4 hours and were tested at regular intervals after each drink and at the end of the drinking session. They performed back extrapolation rates, using different elimination rates (10 and 20 mg%/hr) to times that were equal to mean t_{max} in their subjects of 35 minutes. Nine of the sixteen were within the range, 6/16 were underestimated, meaning the actual reading was higher than the extrapolated amount, and 1/16 was overestimated, which Ms. Mendes said could be explained by the fact that that subject drank kahlua and milk. Ms. Mendes testified that if the theoretical value of the last drink was subtracted from the range, then in every case back extrapolation would underestimate the actual BAC. In respect of this case, she testified that 22 mg% could be subtracted to allow for the possibility that not all of the last beer consumed had been absorbed by the time of the accident. That would result in a back extrapolation of 112 mg% to 136 mg%.

[75] In her report and her testimony, Dr. Wallener detailed the importance of a measurement method to be both accurate and precise to be considered valid. Ms. Mendes testified that breath tests underestimate the BAC and provide readings 15 mg% less than those provided by blood samples. She noted that the BAC Datamaster C automatically rounds off the reading, such that an actual reading of 138 is reported as 130, and that the BAC Datamaster C always underreports the true blood alcohol concentration. She noted that the graph found on page 8 of Dr. Wallener's report related to time periods from the start of drinking, not the end of drinking.

[76] Dr. Wallener acknowledged that she has not performed back extrapolations and that she had not studied ethanol pharmakinetics. She acknowledged that there was nothing wrong with back extrapolation itself but indicated that if the incident was shortly

after the time of the last drink, then the method was not valid. She indicated that the method was fine as long as it could be determined that the subject was on the elimination curve. Dr. Wallener was asked about the report prepared by Ms. Mendes, and she testified that she had no opinion on the readings, as she assumed they were accurate. She was asked what the readings would have been for a person in the fact situation in this case or for a person consuming one beer, and she indicated that she did not know, as she was not an expert in clinical measurement. She indicated that there were tables for that, but she did not have them and could not provide that calculation. She testified that she took no issue with the testimony of Ms. Mendes that the person with the readings indicated on the BAC Datamaster C would have had to consume at least 8 beer to obtain those readings. In her opinion, there was no equation that could be used to back extrapolate the readings in a case such as this where the time of the incident was close to the time of the last drink. Dr. Wallener emphasized reaching the point of complete absorption before a back extrapolation could be used. Ms. Mendes testified that the studies and the literature, as well as her own experience indicated that complete absorption was not required. One of the studies Dr. Wallener referred to was by Jones, and Ms. Mendes acknowledged he was one of the most respected authorities in this area. She indicated that he had also stated that within five minutes of consuming the last beverage, 83% have already reached the maximum blood alcohol, and that within 45 minutes 91% have reached maximum blood alcohol concentration. Ms. Mendes detailed her experiences with the over 500 cases where she had dosed subjects, and testified that the general consensus is that it takes 20 to 40 minutes after consuming the last drink to reach peak blood alcohol concentration, and so the average of 30 minutes is used as the basis for the assumption in this regard.

[77] It is fair to say that just because something has been used for years, that does not make it right. Things change, science evolves, and our knowledge and understanding follows suit. On the other hand, it must be noted that breathalyzer cases are often thoroughly contested trials, and it is quite common to have expert evidence called in such cases, for both the Crown and for the defence. As noted, back extrapolation has been used for decades in this country, and apparently in many other countries around the world. Until the recent amendments to the *Criminal Code*, which eliminated the so-called Carter defence, and the so-called straddle cases, expert evidence was often called to give opinions on the effect of particular drinking patterns, so this is not an area of the law that has not been thoroughly and extensively litigated at every level of court in this country. Dr. Wallener's opinion stands alone on this issue. Dr. Wallener was asked if there were any other studies or scientific papers to support her opinion and she indicated that there were not and she was only just aware of it when she had looked at the subject. She was asked if she was aware this methodology was being used around the country and in other countries, and had been for years, and she indicated that she was surprised it had not been challenged before, given her readings on the subject.

[78] Expert opinion evidence is admitted to assist the trier of fact to come to a correct conclusion in relation to matters which are beyond their experience or where access to important information will be lost without the assistance of an expert (*R. v. D.D.*, [2000] 2 S.C.R. 275, 2000 SCC 43, at para 57). In this case, there are two highly educated and qualified individuals who have testified as experts regarding blood alcohol concentration. Their education and qualifications are quite different, as is their actual work experience.

[79] Dr. Wallener has completed a review of the literature and provided her opinion on the basis of that review. Her practical experience is quite unrelated to the area of back extrapolation and in fact, she indicated that she has not performed such. Her testimony was very technical, as it discussed the various studies and her assessment of those findings. She has no practical experience in dosing or testing the actual BAC of subjects to support or contradict those studies. She acknowledged that there were not any other studies or scientific papers to support her opinion and acknowledged that she stands alone in her opinion that absorption must be complete before a back extrapolation can be conducted of the BAC and that the assumption that no alcohol was consumed in the 30 minutes prior to the time of the incident renders the back extrapolation invalid.

[80] Dr. Wallener testified that she took no issue with back extrapolation as a methodology, but that her only issue with it was the length of t_{max} used and felt that did not give sufficient time for the complete absorption of the alcohol into the blood following the end of drinking. She specifically indicated that she did not challenge the results of the BAC Datamaster C obtained in this case, nor that she took any issue with Ms. Mendes evidence that for Mr. Maxwell-Smith to have provided breath samples of 120 mg% at 23:48 on July 8th, 2010 and 110 mg% at 00:10 on July 9th, 2010, that he would have had to consume eight beer between 8 and 9 p.m.

[81] Ms. Mendes testified that the drinking pattern provided by Mr. Maxwell-Smith in his statement of consuming three or four beer between 8 pm and 9 pm on July 8th, 2010 would not have provided the readings obtained on the BAC Datamaster C of 120 mg% at 23:48h on July 8th and of 110 mg% at 00:10h on July 9th, 2010. Anyone in the criminal justice system who has sat through more than a couple breathalyzer cases

involving an expert knows that 3 or 4 beer in an hour will not result in a reading of 120mg% two hours later. Cst. Whiles suggested as much to Mr. Maxwell-Smith during his statement and questioned the accuracy of the information he was providing about what he had drank that night. For what the actual result would be, however, we do need the expert evidence to do the calculation. Ms. Mendes indicated that consuming 4 beers between 8 and 9 p.m. would have a BAC of 89, but that did not account for any elimination and so it was necessary to subtract 10 to 20 mg% off. She testified that consuming 4 beers in an hour would produce a reading of between 54 and 71mg% at the time of driving and at 11:48, the time of the first test in this matter, a reading of between 14 and 52 mg%. Dr. Wallener testified that she did not know what results would be obtained if a person had three beer in an hour, or one beer and she later indicated that there were charts to make such calculations, but that she did not do such calculations.

[82] Ms. Mendes' practical experience must be considered. Not only has she reviewed the literature and the studies conducted in this area, but she has significant practical experience which, she has testified, supports the propositions that she has made in this case. She has testified and been qualified as an expert in over 30 cases in various levels of court in the province of British Columbia. While she works at the Forensic Science and Identification Services and prepares reports for the RCMP, that fact alone does not affect or devalue her opinion as an expert, for she is subject to the same standards of review as to qualifications, methodology or quality of her work and opinions as if she were in private practice or self-employed. In fact, given the nature of her work, I am satisfied that the methodology that Ms. Mendes has used has considered the importance of giving the subject the benefit of any assumptions to ensure that if

there are errors in that opinion, those errors result in under calculating the blood alcohol concentration at the time of the accident, or incident, and do not result in an over calculation of it. Ms. Mendes gave her evidence in a clear and straightforward manner, which, while technical, was easy to follow and understand. She responded succinctly to cross-examination and gave reasons and authorities to support the position she took or the assertions she made. She readily acknowledged the important issues in this matter and was able to explain or justify the basis on which she proceeded.

[83] I do not accept the opinion evidence of Dr. Wallener that Ms. Mendes second assumption renders the back extrapolation in this case invalid. While she is well versed in the theoretical studies and papers in this area, she has not done back extrapolations and does not have the benefit of the practical experience that Ms. Mendes has in this area. She has acknowledged that her opinion stands alone in this area, and while she was amazed that others had not come to the conclusions that she had, the fact remains that although breathalyzer cases and in particular back extrapolations are highly litigated matters, her opinion does stand alone in this regard to date.

[84] I accept the opinion evidence given by Ms. Mendes in this matter on the basis that her practical experience supports the theories and assumptions that she has applied in providing her opinion and report in this matter. She has had the opportunity to see first hand the results of the testing conducted on the 500 subjects that she "dosed" and to use that actual experience to support her opinion that 30 minutes is an appropriate time to base the second assumption on, as well as the actual impact of changing the times in that assumption. I accept her opinion as I am satisfied that it is well supported by the scientific studies and articles referred to in this matter and

confirmed by the practical application from the hundreds of persons with whom she has been involved in their testing. I am satisfied that her opinion is a cautious one, giving the benefit of any underlying assumptions to the subject, in this case, Mr. Maxwell-Smith.

[85] In his statement to the police the night of the accident, Mr. Maxwell-Smith indicated that he had his last drink about a half hour before they left Pelly Crossing. He did not change that assertion at trial. It was approximately another 10 minutes before the accident, given that it occurred 17 kilometres outside Pelly Crossing. There is no evidence whatsoever that Mr. Maxwell-Smith consumed any alcohol after the accident. I am therefore satisfied that there was at least thirty minutes from the time of Mr. Maxwell-Smith's last drink to the time of the accident. The assumptions on which Ms. Mendes' opinion for the back extrapolation is based have, therefore, been established.

[86] I accept the expert opinion of Ms. Mendes that using the result of 110 mg% at 00:10h on July 9th, 2010, that the blood alcohol concentration of Mr. Maxwell-Smith at 21:45h on July 8th, 2010 was determined to be between 134 to 158 mg%. I accept her opinion that if the time of the incident was 15 minutes earlier or later than 21:45h, that this would affect the calculated BAC at the time of the incident by no more than 5 mg%.

[87] Ms. Mendes also testified that for a 90 kg male to have had a BAC of 80 mg% at 21:45h and subsequently produce a measured BAC of 110 mg% at 00:10h, this individual would have had to consume the following minimum amounts in the 30 minutes prior to the time of the incident or after the time of the incident and before the samples were collected, namely: 3.6 to 5.2 ounces of 40% v/v liquor; or 2.4 to 3.5 bottles (341 ml) of 5% v/v beer; or 11.9 to 17.3 oz of 12% v/v wine.

[88] She indicated that this is a theoretical minimum and in a real drinking situation, the actual amount required to increase the BAC could be up to twice the calculated amount. She testified that if the individual was 5 kg lighter or heavier than the 90 kg assumed, there would be no significant change in the calculated amount. Cst. Whiles testified that Mr. Maxwell-Smith advised him the night of the accident that he weighed 90 kg. There is no evidence that Mr. Maxwell-Smith consumed any alcohol at all, much less the quantities noted above, in the thirty minutes prior to the accident. According to Mr. Maxwell-Smith's statement to the police, and which, it must be noted, was not disputed in this aspect by Mr. Maxwell-Smith during his testimony, he finished his last drink 30 minutes prior to driving, or even as early as 9 p.m. that night, which would have been approximately 45 minutes prior to the accident. As such, there is no evidence before me to suggest that Mr. Maxwell Smith, who indicated he was a 90 kg male, had a reading of only 80 mg% at 9:45 p.m. or 21:45h or that he consumed any alcohol after that point, which then resulted in the reading of 110 mg% at 0010h.

[89] I am therefore satisfied beyond a reasonable doubt that the concentration of alcohol in the blood of Christopher Maxwell-Smith exceeded eighty milligrams of alcohol in one hundred millilitres of blood at the time of the driving at approximately 9:45 p.m. on July 8th, 2010, and that he did thereby commit an offence pursuant to section 253(1)(b) of the *Criminal Code*.

Issue 2. If the concentration of alcohol in the blood of Christopher Maxwell-Smith exceeded eighty milligrams of alcohol in one hundred millilitres of blood at the time of driving, did Christopher Maxwell-Smith cause the accident that caused the death of Valentino Vella?

[90] I must now consider the provisions of Section 255(3.1) of the *Criminal Code* which provides:

> 255(3.1) Everyone who, while committing an offence under paragraph 253(1)(b), causes an accident resulting in the death of another person, is guilty of an indictable offence and liable to imprisonment for life.

[91] This section is worded quite differently than section 255(3) of the *Criminal Code*, which deals with impaired driving. Section 255(3) *CCC* does not contain any reference to an accident.

[92] An agreed statement of facts (Exhibit C-1) was filed with the Court setting out the findings of Dr. Carol Lee regarding the autopsy she conducted on Valentino John Vella. It indicated that the cause of his death was multiple blunt force injuries of head, torso and extremities. An agreed statement of facts (Exhibit C-2) was filed with the Court, setting out the findings of Sharon Hanley, the Chief Coroner for the Yukon Territory at the time. She determined that the immediate cause of Mr. Vella's death was multiple blunt force injuries due to or as a consequence of a motor vehicle accident at kilometre 446, North Klondike Highway, Yukon Territory on July 8th, 2010. On the basis of that evidence, I am satisfied beyond a reasonable doubt that the accident on July 8th, 2010 resulted in the death of Valentino Vella. The remaining question is whether Mr. Maxwell-Smith caused the accident in this matter while committing an offence under paragraph 253(1)(b) *CCC*.

[93] This was a single vehicle accident. At page 4 of Staff Sgt Thalhofer's report, under the heading of Analysis and Interpretation, he concluded as follows:

> "Based on the evidence and damage to the vehicle, it was determined that this vehicle was southbound on the roadway. As it entered a counter clockwise curve the vehicle moved onto the west shoulder. The driver made a steering manoeuvre to the left which caused the vehicle to move towards the northbound lane. The driver then made a steering manoeuvre to the right causing the vehicle to rotate in a clockwise direction. The vehicle had rotated approximately 45 degrees as it entered the west ditch with the driver side leading. As it traveled into the ditch the driver's side

> tires likely deflated causing the rims to gouge into the dirt surface resulting in the vehicle tripping and overturning around its horizontal centre of mass. The vehicle's next point of contact with the ground was the top edge of the passenger side roof. This caused the roof to crush. The vehicle continued to roll striking two trees on the passenger side (one at the front left corner and one just to the rear of the B pillar). The vehicle continued to roll striking a large tree on the driver's side at the bottom of the B pillar on the driver's side. This caused the vehicle to rotate 180 degrees in a clockwise direction coming to a final rest position on its wheels facing in an easterly direction."

[94] Staff Sgt. Thalhofer then determined that the collision was caused by driver inattention and excessive speed for the area. The only physical evidence to support seat belt usage was for the right front passenger. The vehicle occupants had indicated that the deceased was the only one not wearing a seat belt. The speed of the vehicle as determined by the marks on the roadway was 101 km/h at the point where it left the roadway. The posted speed sign in that area was 70 km/h. A mechanical inspection of the vehicle indicated that there were no issues in that regard.

[95] On cross-examination, Mr. Maxwell-Smith indicated that the cause of the accident was the gravel road, combined with distraction and a split second lack of attention which caused him to go into the much softer shoulder. He acknowledged that he knew the area was under construction and acknowledged that there were eight (8) warning signs, which is why he slowed down, he said. He then indicated that he could not recall if he saw those signs that evening. He confirmed that visibility was good, that there was almost 24 hours of sunlight at that time of the year, and that there had been no obstruction of the road signs.

[96] When asked if speed was a factor, he indicated that it was to a smaller extent, and suggested that he was probably going slightly over the posted speed limit, maybe 100 to 105 kph. The typed version of the video and audio taped statement that Mr.

Maxwell-Smith gave to the police the night of the accident was provided to him and he was cross-examined on many aspects of it. In that statement, he told Cst. Whiles that he was going 120 km/h. At trial, he testified that was true, probably when he passed Mr. Terpstra's vehicle. At page 20 of that statement, he told the police he was doing 120 when he hit the gravel, but on cross-examination at trial, he indicated that was not the truth, he had been under duress at the time he gave the statement. Since the statement was admitted as being voluntarily given, with all of the appropriate *Charter* rights and police warnings having been provided to Mr. Maxwell-Smith, I am satisfied that his reference to duress is to the situation itself and not to any duress being imposed on him by the police that would affect the admissibility of the statement.

[97] Although called as Crown witnesses, the other three members of the scaffolding crew who testified at the trial indicated through their demeanour and the nature of their evidence that they were more closely aligned with the accused's position than wanting to assist the Crown. Mr. Cloutier was very hesitant in answering even what appeared to be the simplest of questions. There were long pauses between the questions and his responses. He testified it was quiet in the vehicle and that no one was drinking in it. He described Mr. Maxwell-Smith's driving as normal, and that it felt as though they were traveling at a normal speed. He recalled passing one vehicle, and said he recalled it, as it was the only car they saw. He testified that he had no concerns about Mr. Maxwell-Smith driving, and was not concerned that he might be impaired. Mr. Cloutier testified that when they got to the long stretch of gravel, he thought that when Mr. Maxwell-Smith slowed down, he swerved onto the shoulder and this caused the vehicle to roll.

[98] Mr. Baggott offered the unsolicited comment that Mr. Maxwell-Smith was an "*absolute hero in that moment*" referring to when he was providing first aid to Mr. Vella

after the accident. Let me make it very clear that Mr. Maxwell-Smith's actions in immediately providing Mr. Vella with first aid treatment and CPR after the accident and doing everything within his ability at that point to render aid to Mr. Vella are beyond reproach. He did all he could after the accident for Mr. Vella. It is Mr. Maxwell-Smith's actions before the accident which are under review. It was Mr. Baggott's use of the term "*absolute hero*" and the tone of his voice when he said it that made it seem noteworthy and somewhat inappropriate for the circumstances.

[99] When cross-examined on the statement he had given to the police and the differences between it and his testimony at trial, Mr. Baggott's response was that he had just been trying to be helpful to the police and didn't know why he had said some of those things. He did acknowledge that he believed that Mr. Maxwell-Smith was traveling approximately 120 km/h and that he did tell him to be careful and slow down as they were approaching the gravelled portion of the road.

[100] Similarly, Mr. Scully had no concerns about Mr. Maxwell-Smith driving the vehicle until, as he indicated, they left the road heading to the ditch. He indicated that the speed seemed high and that although he did not see the speedometer, he thought it might have been around 120 km/h. He recalled passing a vehicle. Mr. Scully testified that they had only been driving for 7 or 8 minutes when they were approaching a slight bend in the road to the left. There were loose chippings and Mr. Maxwell-Smith had slowed down, but went into a skid and before he knew it they had gone into the ditch, a 5-6 foot drop from the road and spun around a number of times before they crashed.

[101] Mr. Maxwell-Smith acknowledged that he received a ticket for driving with excessive speed as a result of this accident, and that he had paid it after being advised

by his lawyer that paying the ticket was not an admission that he was speeding. When cross-examined on the fact that Cst. Whiles had asked him numerous times what had happened, and that not once had he mentioned that he was distracted by Mr. Baggott and Mr. Vella's horseplay or dispute over the music and the ipod, he testified that he never thought about it then. He indicated that he was in an extreme depressive state and that if he had been asked his name, he would have found it difficult to reply. He indicated that he vaguely remembered giving the police the statement. I did not have the opportunity to see or hear Mr. Maxwell-Smith's video and audio taped statement. What was entered at trial by consent of counsel was a typed version of that statement. That typed statement does indicate that Mr. Maxwell-Smith sighed, sniffed and blew his nose throughout the statement, which was consistent with Cst. Whiles description that Mr. Maxwell-Smith was upset and emotional following the accident and I do not in any way discount that. However, a review of the typed statement would indicate that not only was Mr. Maxwell-Smith capable of giving his name, but he was able to respond without any apparent difficulty to the questions posed to him, and to recount the events leading up to the accident in a logical and reasonably clear manner. I have no doubt he was upset, but I do not accept that he did not know what he was doing or saying when he gave his statement to the police, as he has suggested at trial.

[102] Mr. Maxwell-Smith's description of the accident when giving his statement the night of the accident was as follows:

> "... driving, you know. Not. Excessive. Speed. Um I guess. Probably when I hit the gravel, I was doing one twenty. Something like that which is. Clearly (noise) excessive. Uhh, and [inhales] And I didn't [sighs] Aw, just. You know. [noise] I didn't . Brake, I didn't wanna brake. We hit the corner and I uh, I didn't want to brake to. Put us into a slide... [sighs] Uh, we started going into a slide. I tried to correct it. I clearly overcorrected. And the vehicle rolled. And the next thing I remember. [noise] is. Looking next

> to, Gary was sitting next to me. Gary had a, a gash on his head. And I checked if he was alright, and then next thing I got out. And, and checked to see. [inhales] if everyone else was [noise] alright."

[103] Later in his statement, Mr. Maxwell-Smith indicated that he is a fairly confident driver, that there were a couple vehicles going extremely slowly that he overtook, not dangerously, on clear straight stretches of road, and that while confident in his ability, he was not overconfident. The three passengers in the van all testified that they only passed one car that night, which they remembered, because it was the only one they saw. Mr. Maxwell-Smith was asked in his statement how he was driving before the gravel and responded that he was not gunning it but that he was going fairly fast, but that where the crash had occurred, they had already been on the gravel for a little bit and stated:

> "... it wasn't. Like I don't know whether. [noise] We. Hit a deeper patch of gravel or something. Which-... um. Made the vehicle jerk or slide or, or something.., And then. Ci-ih. We, um. Ss - not jackknifed, uh, uh. Skidded.... Like drifted. As it.. Were, And I felt the wheel go so I tried to correct it.... And the second I corrected it, it. it was gone too far.... And it, I overcorrected and then that was it."

[104] Near the end of his statement, Mr. Maxwell-Smith was asked what was going on in the vehicle before the accident and he indicated that they were listening to music, that he thought it was Van Halen, and when asked if they were talking or telling jokes, he indicated that it was average kind of banter. When asked if anything was going on between Ryan (Baggott) and Eoin (Scully) he indicated that *"they were both pretty quiet this evening, as I said Eoin has his difficulty with his brother and Ryan didn't"* That certainly is in contrast to his testimony at trial regarding the interaction between Ryan Baggott and Mr. Vella, which he said prompted him to turn his head to look at them and ask them if they were five year olds, just before the crash.

[105] I have also considered the evidence of Ms. Mendes with respect to the effects that alcohol has on the ability to drive, and as set out in her report, filed as an exhibit in this matter.

[106] When I examine all of the evidence in this case, the only conclusion that I can come to is that Mr. Maxwell-Smith caused the accident that resulted in the death of Mr. Vella. This was a single vehicle accident. No animals ran across the road unexpectedly in front of Mr. Maxwell-Smith, requiring him to take evasive action. No other vehicles were in the area or in any way interfered with his vehicle. There were no mechanical defects in the vehicle. Weather was not a factor. The road hazards were clearly marked, with eight posted signs, and posted over a distance of 2.6 kilometres, indicating a reduction in the maximum speed in the area to 70 km/h, warning of construction, and warning of loose gravel. While he may have slowed down from the approximately 120 km/h that he told the police he was going, (and which I accept as being more reliable than the testimony he gave at trial on this aspect), according to Sgt Thalhofer, he was going 101 km/h when he left the road way, 31 kilometres over the posted 70 km/h limit. Since he was side slipping at that point, his speed was being reduced by that action as he left the roadway. Clearly, he did not pay attention to the warning signs, despite the number of them and the distance over which they were posted. He did not pay attention to the warning from Mr. Baggott to be careful on the gravel. If, as he said at the trial, he turned his head to look back at Mr. Vella and Mr. Baggott, considering the speed he was going and the construction zone that he was in, that was a most unwise move to make. He acknowledged that he overcorrected the vehicle and consciously chose not to apply the brakes. Much was made of the fact that there were several other accidents on that stretch of road that year. It apparently was under construction for most of the

summer. None of those accidents were indicated to be at this exact same location, and without specific information on each of those accidents, or what the cause of each was determined to be, they are of little assistance to me in this matter.

[107] I am satisfied from all of the evidence in this matter that Mr. Maxwell-Smith was traveling at a speed excessive for the conditions of the road, ignored the many warning signs regarding the construction zone, and whether he was distracted by Mr. Baggott and Mr. Vella - or simply wasn't paying attention to his driving, he went off the traveled portion of the road, and his subsequent efforts to correct that were unsuccessful, as he overcorrected on two occasions, resulting in the vehicle leaving the roadway, hitting the ditch and rolling several times. I am satisfied beyond a reasonable doubt that it was the actions of Christopher Maxwell-Smith that caused the accident. He did all of this driving, after consuming alcohol, and the concentration of alcohol in his blood at the time exceeded 80 milligrams of alcohol in 100 millilitres of blood.

[108] Having regard to all of the evidence in this matter, and the various findings I have made in this matter, I am therefore satisfied beyond a reasonable doubt that in respect of Count #2 on the Information, that Christopher Maxwell-Smith, on the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in his blood exceed eighty milligrams of alcohol in one hundred millilitres of blood, did, while operating a motor vehicle, cause an accident resulting in death to Valentino Vella, contrary to Sections 253(1)(b) and 255(3.1) of the *Criminal Code*, and I therefore find him guilty of that offence.

Impaired Driving:

Issue 3: Was Christopher Maxwell-Smith's ability to operate a motor vehicle impaired by alcohol or a drug?

[109] In the case of *R. v. Campbell* (1991), 87 Nfld & P.E.I.R. 269, the Prince Edward Island Court of Appeal considered the test for impairment. Justice Mitchell, speaking for the Court, rejected the requirement for a marked departure from normal behaviour and at page 320 of that decision, he stated:

> "The Criminal Code does not prescribe any special test for determining impairment. It is an issue of fact, which the trial judge must decide on the evidence. The standard of proof is neither more, nor less, than that required for any other element of a criminal offence. Before he can convict, a trial judge must receive sufficient evidence to satisfy himself beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol. It is not an offence to drive a motor vehicle after having consumed some alcohol as long as it has not impaired the ability to drive; however, a person who drives while his or her ability to do so is impaired by alcohol is guilty of an offence, regardless of whether his ability to drive is greatly or only slightly impaired. Courts must therefore take care when determining the issue not to apply tests which assume or imply a tolerance that does not exist in law. Trial judges constantly have to keep in mind that it is an offence to operate a motor vehicle while the ability to do so is impaired by alcohol. If there is sufficient evidence before the Court to prove that the accused's ability to drive was even slightly impaired by alcohol, the judge must find him guilty".

[110] In the case of *R. v. Stellato*, (1993), 12 O.R. (3d) 90, Justice Labrosse, speaking on behalf of the Ontario Court of Appeal on the issue of the test for impairment, quoted the above passage and stated:

> "Specifically, I agree with Mitchell J.A. in **Campbell** that the Criminal Code does not prescribe any special test for determining impairment. In the words of Mitchell J.A., impairment is an issue of fact which the trial judge must decide on the evidence and the standard of proof is neither more nor less than that required for any other element of a criminal offence: courts should not apply tests which imply a tolerance that does not exist in law.
>
> In all criminal cases, the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as

> to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out".

[111] An appeal to the Supreme Court of Canada in *Stellato, supra*, was dismissed, with Chief Justice Lamer indicating that the appeal failed for the reasons given by Justice Labrosse.

[112] In *R. v. Rhyason*, 2006 ABCA 367 the Court stated at paragraphs 30 and 37:

> "[30] As regards impairment, the test is whether there was some impairment of the ability to drive, and that impairment was caused by the consumption of alcohol. Proof of the impairment of the ability to drive can take the form of behaviour that deviates from normal behaviour: **Andrews** at para. 29. …
> …
> [37] There is extensive authority to the effect that the circumstances of an accident can be taken into account, along with other evidence, in determining whether the ability to drive was impaired by alcohol. See e.g.: **R. v. Harding** 1998 CanLII 1641 (NS CA), (1998), 166 N.S.R. (2d) 235 (N.S. C.A.); **R. v. Mercer**, 2000 NFCA 34 (CanLII), 2000 NFCA 34, 189 Nfld. & P.E.I.R. 174; **R. v. Goudreault** 2004 CanLII 34503 (ON CA), (2004), 191 O.A.C. 72, [2004] O.J. No. 4307 at para. 14. There was enough evidence for the trial judge to find as a fact that the appellant's ability to drive was impaired by alcohol."

[113] In *R. v. A.L.E.,* 2009 SKCA 65, the Court of Appeal referred to the case of *R. v. Power*, [1994] 1 S.C.R. 601, where the Supreme Court of Canada considered the nature and quality of evidence that was likely required to sustain a conviction in a case dealing with impaired driving causing death. At trial, the breathalyzer evidence had been ruled inadmissible. The Supreme Court of Canada determined that the evidence should not have been excluded and that a new trial should be ordered. In doing so, the majority reviewed the evidence that had been given at the preliminary inquiry in that matter, by an expert in absorption and elimination of alcohol from the blood, which related the level of impairment to the readings from the breath tests, much as we have

in the present case. The Saskatchewan Court of Appeal referred to a number of passages from the case of *Power, supra*, including the following:

> "From this, one can conclude that had the Crown presented further evidence at trial, after the trial judge had ruled the breathalyzer evidence inadmissible, the value of the expert's evidence would have been significantly reduced and would not necessarily have assisted the Crown in proving that the respondent's ability to drive was in fact impaired. Most likely, the Crown would have been unable to prove its case beyond a reasonable doubt. The breathalyzer evidence was crucial to the Crown's case in that it would have allowed the Crown to present expert evidence that would have proved without a doubt that the respondent's ability to drive was impaired, an element which is crucial in cases of impaired driving causing death or bodily harm. In the present case, this evidence could not realistically be adduced in such a convincing way by any other means.
>
> Furthermore, this evidence was of the outmost importance because it seemed that the respondent was raising alternative causes for the accident; i.e., the wet and slippery road conditions and the car's condition."

[114] In *A.L.E., supra*, the Saskatchewan Court of Appeal noted many similarities to the evidence in its case and that of *Power, supra*.

[115] Ms. Mendes testified in detail about the effects of alcohol, which are summarized by the following excerpt from her report (Exhibit C-10) at page 2, paragraph 4, where she stated:

> 4. "Alcohol is a central nervous system depressant, meaning it slows down brain activity. The intensity of the effect is directly proportional to the concentration of alcohol in the blood. The first functions that are affected are the complex processes, such as divided attention tasks, followed by more basic processes such as the coordination of body movement...
>
> b) A BAC in the range of 50 to150 mg% is associated with impairment and intoxication. Symptoms may include decreased inhibitions, increased self-confidence, bloodshot watery eyes, flushed face, odour of liquor on the breath, deterioration of some visual skills, problems with balance and coordination and slight speech defects. The performance of physical tasks would be poorer than normal due to a decrease in attention, judgement, concentration and overall loss of fine motor control and coordination.

> ...
>
> 5. The symptoms displayed could be affected by the tolerance of the individual. If an individual is accustomed to the effects of alcohol due to repeated exposure to high BAC's, they may require a higher BAC to display the above symptoms.
>
> 6. Some individuals are impaired in their ability to safely operate a motor vehicle at a BAC of 50 mg% or lower. As the BAC rises, a larger proportion of the population becomes impaired such that, at 100 mg%, all individuals, regardless of tolerance are impaired in their ability to safely operate a motor vehicle.
>
> 7. Driving is a complex divided attention task, meaning that an individual must split their attention between multiple tasks while operating a motor vehicle. A driver must maintain the vehicle in a lane at an appropriate speed while being vigilant for potential hazards, other vehicles, pedestrians and traffic signals and signs. Alcohol affects both the motor skills and the ability to use sensory information when operating a motor vehicle."

[116] In this case, the police officers both noted, at the accident scene, that there was an odour of alcohol coming from Mr. Maxwell-Smith's breath. Cst. Waldner testified that there was a large odour of beverage alcohol coming from his breath and in the room throughout the time he was conducting the breath tests, which was over two hours after the accident and over two and a half hours from the time Mr. Maxwell-Smith indicated he had his last drink. Cst. Waldner testified that the smell of alcohol from the phone room at the detachment was overwhelming after he had been in it for twenty minutes, which would have been before the first test, and approximately two hours after the driving. Both officers indicated he had red eyes, but noted that he had been crying. They did not notice any difficulties with his co-ordination, balance, or speech, which they described as "fair", "fairly normal" or "nothing unusual" and indicated that he appeared to understand what was being asked of him. He was cooperative with the officers. While the odour of alcohol, in and of itself, is only indicative of consumption of alcohol, the fact that the odour of alcohol was described in terms of a "large odour" and an

"overwhelming odour" of alcohol coming from the phone room after he had been in it for twenty minutes, and the fact that it was over two hours after the accident, and at least two and a half hours after Mr. Maxwell-Smith said he had his last drink, is significant.

[117] Mr. Cloutier, Mr. Baggott and Mr. Scully testified that they had no concerns with his driving and were not concerned that he was impaired. They either indicated that they did not see Mr. Maxwell-Smith drinking at all, that they saw him with a beer but not drinking it, or that he had one beer. While the defence's assertion that none of them saw him drinking the eight or ten beer that Ms. Mendes testified would have been required to produce the readings subsequently obtained on the BAC Datamaster C, that must be evaluated in the context that not one of them testified that they saw or believed he had drank three beer, which is what he claimed to have consumed. Mr. Scully testified that he saw Mr. Maxwell-Smith have his first beer at 8:30 or 8:45 p.m., but did not indicate how he could know that, given that he said he had been off on his own for several hours prior to that time. Only Mr. Baggott acknowledged that he was under the influence of alcohol, and believed that he should not be operating a vehicle. The others indicated no such difficulty. However the testimony of Mr. Maxwell-Smith was that none of them were capable of driving, Mr. Scully, because he did not have a license, but the others because of the amount they had consumed. As such, I must conclude that their testimony in respect of the amount of alcohol that Mr. Maxwell-Smith consumed is neither helpful nor reliable.

[118] Mr. Scully and Mr. Baggott testified that Mr. Maxwell-Smith was doing approximately 120 km/h, although he slowed as they got to the gravelled portion of the road, None of them testified that they saw Mr. Maxwell-Smith turn around to look at Mr. Baggott or Mr. Vella nor did any of them in any way provide any reason or indication of

why the vehicle drifted over to the edge of the road off the traveled portion and onto the softer shoulder. None of them attributed anything that was going on in the vehicle as being a cause of the accident or contributing to it in any way. That must be considered in light of my earlier comments that it was clear from listening to the evidence they gave and the manner in which they gave it, that their allegiance was with Mr. Maxwell-Smith.

[119] The testimony of Mr. Terpstra was to the effect that he was sufficiently concerned with the speed with which the Kia van passed him, that he made what turned out to be a prophetic comment to his wife as to the possibility that he would see that vehicle again, off the road, which he did only a few minutes later, following the crash.

[120] Mr. Maxwell-Smith's testimony at trial was that he was opposed to the trip and wanted to get to Carmacks as quickly as possible so they could get back and get ready for work the following day. He expressed none of that in his statement to the police that night. He did not make any reference in his statement to being distracted and turning his head quickly to look at Mr. Baggott or Mr. Vella as they were engaged in their horseplay, and yet he was asked on a number of occasions about the accident. When asked about the medication he takes, he testified that he took the medication for depression which he had suffered for a long time, and added, unsolicited, that alcoholism was also an issue for him. He then quickly clarified that it had increased substantially after the accident and not prior, itself a contradictory statement. From Mr. Maxwell-Smith's own testimony, he acknowledged that he consumes alcohol on a regular basis, and has since he was legal drinking age. As noted by Ms. Mendes, the symptoms displayed can be affected by tolerance of the individual, and those accustomed to the effects of alcohol may require a higher BAC to display the symptoms she testified are often seen for those with a BAC of 50 to 150 mg%.

[121] Mr. Maxwell-Smith testified that it was his duty and responsibility to drive the van to Carmacks as he was the supervisor, or on another occasion he indicated that the others had consumed more alcohol than he, and so it was least dangerous for him to drive. He later contradicted that by saying that the decision to drive was not a conscious one. None of the others in the van recalled any debate about going to Carmacks or who would be the driver. Only Mr. Baggott stated that he had said he was not able to drive, but none of the others recalled that. Mr. Maxwell-Smith acknowledged that his Class 7 (or learners license) prohibited him from operating a motor vehicle with more than two passengers and prohibited him from having any alcohol at all in his body.

[122] Ms. Mendes calculated that Mr. Maxwell-Smith's BAC was between 134 mg% to 158 mg% at 9:45 p.m. She further testified that if she was to completely exclude the last beer he had drank, then she would have reduced that BAC by 22 mg%, resulting in a reading of 112 mg% to 136 mg%. That would still be in excess of the legal limit of 80 mg% and still well above the point of 100 mg%, the point at which Ms. Mendes testified that all individuals, regardless of tolerance, are impaired in their ability to safely operate a motor vehicle.

[123] The issue is not whether a person is intoxicated. The issue for me to determine is whether Mr. Maxwell-Smith's ability to operate a motor vehicle was impaired by alcohol or a drug. I should note here that, although he was taking prescribed medication at the time of the accident, Ms. Mendes testified that such medication should not have had any adverse effect on his ability to drive in the circumstances of this case, and I accept that evidence.

[124] As noted in *Stellato, supra*, “If the evidence of impairment establishes any degree of impairment, ranging from slight to great, the offence is made out.”

[125] I have considered all of the evidence in this matter and in particular the smell of alcohol coming from the accused’s breath, including the observations of Cst. Waldner in that regard while he was conducting the breath tests; the clear lack of judgment exercised by Mr. Maxwell-Smith in deciding to drive in contravention of several restrictions on his license, and in direct contrast to his expressed responsibilities as a supervisor for the group he was driving; the manner of driving, including the excessive speed, the disregard for the eight posted warning signs that he did not recall if he even saw that night, and the manner in which he drifted to the shoulder of the road and overcorrected; the results of the extrapolation indicating his BAC would have been in well in excess of 100 mg% at the time of the driving; and as well the expert opinion that the ability of all individuals to operate a motor vehicle are impaired at a BAC of over 100 mg%. In considering all of that evidence and the relevant case law, I am satisfied beyond a reasonable doubt that Mr. Maxwell-Smith’s ability to operate a motor vehicle was impaired by alcohol or a drug on July 8th, 2010.

Issue 4: If Christopher Maxwell-Smith’s ability to operate a motor vehicle was impaired by alcohol or a drug, did that impairment cause the death of Valentino Vella?

[126] To prove impaired driving causing death, the Crown has to show, beyond a reasonable doubt, that Mr. Maxwell-Smith’s ability to operate the Kia van was impaired by alcohol and that his impairment caused the accident that killed Valentino Vella. An impaired driver who is involved in a fatal accident is not automatically guilty of impaired

driving causing death. The Crown must prove that the impairment was a significant, contributing cause of the accident.

[127] As noted in the case of *R. v. Cabral,* 2001 MBCA 10 at paragraph 13:

> "Some fault on the part of the driver must be found, aside from the fact of impairment alone."

[128] Criminal responsibility is not established unless it is proven beyond a reasonable doubt that the impairment was a significant, contributing cause of the death (*R. v. Nette,* 2001 SCC 78; *R. v. Fisher*, (1992), 7 B.C.A.C. 264). Absent other explanations for an accident, causation can be established from evidence that includes the circumstances of the accident itself. *R. v. Rhyason*, *supra*, at paragraphs 39 - 40 (Alta. C.A.).

[129] Where a reasonable doubt is raised that a driver's impairment was the significant, contributing cause of the fatal accident, the result will be an acquittal *(*see, for example: *R. v. Cabral*, 2001 MBCA 10*; R. v. Ewart*, (1989), 100 A.R. 118 (C.A.)

[130] As noted in *R. v. A.L.E., supra*, at paragraph 52:

> "[52] These cases emphasize that the burden remains always upon the Crown to establish each element of the offence beyond a reasonable doubt. I turn to consider the kind of evidence that has been considered sufficient to raise a reasonable doubt. There is no onus on an accused to prove there was a innocent explanation for the accident. The accused must simply cast reasonable doubt on the Crown's case. This can be accomplished by offering evidence that raises the prospect of an innocent explanation that goes beyond mere conjecture or speculation. This is explained in detail in R. v. White, para 37 the Court stated:
>
> > '... the trial judge correctly identified the proper test as being the de minimus test. However, in my view, he in fact applied the test which would be applicable to a sober driver. In suggesting that the improper movements of the respondent's vehicle leading up to the accident were consistent with the fatigue, confusion or excessive speed or inattention rather than impairment or rather than those factors caused by impairment, he was engaging in speculation which as a

> matter of law was not warranted on the basis of the facts found on the undisputed evidence. When a driver who has been found to be impaired loses control of the vehicle with no innocent explanation other than conjecture not grounded in evidence, the causative link between the impaired driving and a death flowing from the resulting collision emerges in my opinion beyond a reasonable doubt. [Emphasis added]'"

[131] In *R. v. Healey,* 2012 BCCA 24, Sanders, J.A., writing for the Court of Appeal stated at paragraphs 18 and 19:

> "[18] In considering whether a verdict is unreasonable we must ask whether the admissible evidence, taken as a whole, provides a sound foundation for a guilty verdict. Notwithstanding the able submissions of Mr. Healey's counsel, there was in my view a body of evidence sufficient to support a conviction: the unexplained drifting of Mr. Healey's vehicle, in broad daylight in good conditions, onto the gravel shoulder and his over-correction in response; the evidence of the "fresh" odour of alcohol emanating from Mr. Healey which clearly established his recent consumption of alcohol; the presence of both empty and partially empty bottles in the vehicle and on the roadway, at least one of which was tied to Mr. Healey by his fingerprints; and observations of common indicia of impairment – slurring, glassy eyes and a flushed face. Individually some of those features may be explained but that is not the test. In Dao, Mr. Justice Chiasson succinctly observed, in the context of circumstantial evidence:
>
> > '[16] ... The question is not whether there were other possible explanations for individual circumstances, but whether taking the evidence as a whole, it led to the only reasonable conclusion Mr. Dao committed the crimes alleged.'
>
> [19] The question is whether the evidence taken as a whole, provides a sound basis for conviction. Here, in addition to the physical symptoms exhibited by Mr. Healey, there was objective evidence to support impairment, specifically the nature of the accident, the fresh strong smell of alcohol suggesting that Mr. Healey had recently consumed a significant quantity of alcohol, and the evidence of liquor bottles, including those found in the truck. I consider that it was open to the judge, on this evidence, to conclude that the only rational conclusion was that Mr. Healey was impaired by alcohol when the truck he was driving collided with the truck driven by Mr. Smith. I would not accede to this ground of appeal."

[132] In *R. v. Andrews*, 1996 ABCA 23 (leave to appeal to the Supreme Court of Canada dismissed without reasons), Conrad, J.A. for the majority stated at para. 23:

> "23. Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by Sissons C.J.D.C. in McKenzie, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired. In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in Stellato, the conduct observed must satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol. McKenzie does not state a rule of law. It suggests a reasonable, common sense approach to the assessment of evidence necessary for proof. This was pointed out long ago by Kerans A.C.D.C.J. (as he then was) in R. v. Conlon (1978), 12 A.R. 267 at pp.268-9:
>
> > 'It was never the intention of McKenzie to say that impairment means marked impairment but rather to say that there must be a doubt when you are relying on physical signs alone and those signs are ambiguous.'"

[133] In the case of *R. v. Rhyason*, *supra*, the Court stated at paragraphs 39 and 40:

> "[39] In applying the test for causation, the trial judge took account of a number of factors. These included the good road conditions, the absence of any visibility obstructions for a driver traveling in the direction the appellant had traveled, the absence of marks to suggest braking, and the pedestrian's placement in the middle of the intersection when he was struck. He concluded that there was no evidence that the pedestrian himself showed signs of impairment when he crossed the street, was distracted by using a cell-phone, or darted into the crosswalk. He noted that there was no reason why the appellant should not have seen the pedestrian. In fact, the evidence was that the appellant did not see the pedestrian or did not see him in time to yield. From all this evidence the trial judge was convinced beyond a reasonable doubt that the appellant's impairment contributed more than de minimus to the pedestrian's death.
>
> [40] The appellant's argument about tautological reasoning cannot be sustained. It ignores that fact that the offence itself is impaired driving causing death. Where, as here, there is evidence to support a conviction beyond the fact of the accident, and no evidence to suggest a reason for

> the accident other than impairment, it is not an error to take account of the circumstances of the accident to establish both impairment and causation. Again, there is considerable authority for the proposition that, absent other explanations for the accident, causation can be established from evidence that includes the circumstances of the accident itself, see e.g., **R. v. Larocque**, (1988), 5 M.V.R. (2d) 221 (Ont. C.A.), 1988 CarswellOnt 22; **R. v. White** 1994 CanLII 4004 (NS CA), (1994), 130 N.S.R. (2d) 143, 28 C.R. (4th) 160 at 173 (N.S. C.A)**; R. v. Laprise** 1996 CanLII 6000 (QC CA)**,** (1996), 113 C.C.C. (3d) 87 at 93-4 (Que. C.A.). Here the evidence provided no other explanation for the accident (such as an animal crossing the road or the driver suffering a momentary lapse because he was playing with the car radio.) In particular cases, such evidence could raise a reasonable doubt about whether the driver's impairment was more that a de minimus cause of the accident. Absent such other explanations, the trial judge's conclusion about causation was not in error."

[134] Paragraphs 44, 45, 47 and 52 of the case of *R. v. A.L.E.,* supra, refer again to the issue of causation.

[135] As noted, the fact that there was a fatality is not the issue. There has to be a connection to show that Mr. Maxwell-Smith's ability to operate the van was impaired by alcohol and that the impairment caused the accident that killed Mr. Vella.

[136] I am satisfied that the evidence in this matter does establish, beyond a reasonable doubt, that Mr. Maxwell-Smith's ability to operate a motor vehicle was impaired by alcohol or a drug and that it was that impairment of his ability to operate a motor vehicle which did cause the accident that resulted in the death of Mr Vella. The weather conditions were not a factor in this matter. There is no indication that there were any mechanical problems with the van. The road construction was clearly and well marked with eight warning signs, which were posted a sufficient distance in advance of the construction to give the motoring public ample time to heed them and adjust the manner of driving accordingly. Mr. Maxwell Smith, while acknowledging that he knew the signs were there, could not recall if he saw them the night of the accident. He

certainly did not heed them, as reflected by the speed he was doing when the van left the road, which speed would have been reduced somewhat at that point by the van's movements on the road just prior to leaving it. He acknowledged Mr. Baggott's warning about the gravel on the road.

[137] Mr. Maxwell-Smith should not have been operating the van in the first place, given the restrictions on his learner's license, which restricted the number of passengers he could have in a vehicle he was driving and which prohibited him from having any alcohol at all in his body, much less the three beers he claimed he consumed. Mr. Maxwell-Smith acknowledged that he was responsible for this scaffolding crew and getting the project completed, but yet he ignored restrictions on his license, and decided that he would be the one who would drive the vehicle for a journey he indicated that he did not want to make. All of those actions certainly showed his judgment was clearly affected and impaired by the alcohol he had consumed.

[138] There was nothing in the evidence to indicate that Mr. Maxwell-Smith was a person who took risks or was casual about the responsibilities he had with his work. Although he had a learner's license from British Columbia, he testified that he was fully licensed to drive in England, but had not had that license switched over in Canada. Furthermore, he testified that while he was a confident driver, he was not over confident. As such, there was no suggestion that it was inexperience as an operator of a motor vehicle that was a factor in this matter.

[139] Furthermore when I consider the speeds at which he drove on the road and in the conditions that I have previously referred to, the fact he ignored, although he said he was aware of them, the eight warning signs as he approached the construction area, as

well as the warning he acknowledged from Mr. Baggott with respect to the gravelled portion, and even though he had slowed down somewhat, the excessive speed he was still operating the vehicle at when he was on that gravelled portion of the road, all of that evidence satisfies me that it was the impairment of his ability to operate that vehicle that did cause the accident which led to the death of Mr. Vella.

[140] It may not have been the only contributing factor to the accident, but certainly, I am satisfied beyond a reasonable doubt, that the impairment of his ability to operate a motor vehicle did cause the death of Valentino Vella, and using the words from *R. v. Nette*, supra, I am satisfied that the impairment of Mr. Maxwell-Smith's ability to operate a motor vehicle was a significant, contributing cause of the death of Mr. Vella.

[141] I am, therefore, satisfied beyond a reasonable doubt, that in respect of count #1 on the Information, that on the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, that Christopher Maxwell-Smith did operate a motor vehicle and thereby caused the death of Valentino Vella, contrary to Section 255(3) of the *Criminal Code*, and I find him guilty of that charge.

Issue 5: If the concentration of alcohol in the blood of Christopher Maxwell-Smith exceeded eighty milligrams of alcohol in one hundred millilitres of blood at the time of the driving, did Christopher Maxwell-Smith cause the accident that caused bodily harm to Gary Cummings?

Issue 6: If Christopher Maxwell-Smith's ability to operate a motor vehicle was impaired by alcohol or a drug, did that impairment cause bodily harm to Gary Cummings?

[142] Finally, I will deal with the two offences involving the issue of bodily harm. The Crown must establish beyond a reasonable doubt that Gary Cummings suffered bodily harm as a result of the accident.

> "*Bodily harm*" is defined in section 2 of the *Criminal Code* as follows:
>
> "Bodily harm" means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

[143] Gary Cummings did not testify at the trial. Cst. Waldner testified that he had been served with a subpoena for an earlier trial date, but he could not be located or served for this trial. Cst. Waldner detailed the efforts he had made to try to reach Mr. Cummings, calling his phone number, and trying to reach him through his work. The only contact he was able to make was with a person who was indicated to be Mr. Cummings' wife, who advised that he had been deported back to England. She did not have any number to reach him by, as he called her, which may have been indicative of the state of the relationship, or his interest in being contacted, or both. While it is hearsay, it is relevant only to show that the police made efforts to have Mr. Cummings testify at the trial, but without success.

[144] The nurse did not recall who he had treated that night. A number of people saw Mr. Cummings with a gash on his head. Mr. Scully indicated that Mr. Cummings had blood gushing from the side of his head, but it did not seem serious. Mr. Baggott went to the side of the road after the accident, where Mr. Cummings was sitting, and thought he had a concussion, as he kept asking Mr. Baggott if they had been in an accident. He could see spidering marks on his head, which he attributed to the deployment of the air bag and a cut on the back of his arm. He thought Mr. Cummings received six stitches

for it. Mr. Maxwell-Smith saw that Mr. Cummings had a gash on his head, but indicated he was fine. Cst. Whiles testified that Mr. Cummings had lacerations on his face, that it didn't require immediate attention but that he did go to the Health Centre. One of the scaffolding crew indicated that after a few days back on the job, that Mr. Cummings could not continue to work because of his injuries, and that he drove him to Whitehorse as a result.

[145] The Crown did the best he could with what he had. However, I have to be satisfied beyond a reasonable doubt that Mr. Cummings suffered bodily harm in this matter, and the evidence on this issue does not satisfy me beyond a reasonable doubt that Gary Cummings suffered bodily harm as a result of the accident, as that term is defined in the *Criminal Code*.

[146] The Crown must establish each of the elements of each offence beyond a reasonable doubt. As they have not done so, I find Christopher Maxwell-Smith not guilty of the charges that in respect of Count #3: on the 8th day of July, 2010, at or near Pelly Crossing Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle and thereby cause bodily harm to Gary Cummings, contrary to Section 255(2) of the *Criminal Code*; and in respect of Count #4: on the 8th day of July, 2010, at or near Pelly Crossing Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in his blood exceed eighty milligrams of alcohol in one hundred millilitres of blood did while operating a motor vehicle cause an accident resulting in bodily harm to Gary Cummings, contrary to Section 255(2.1) of the *Criminal Code*.

[147] In conclusion, for the reasons indicated, I have found the accused Christopher Maxwell-Smith guilty of counts one and two, and not guilty on counts three and four of the four count Information.

_____

ORR T.C.J.