Date: 2011 02 23
File: T2-CR-2010-000265

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SANDRA LYNN LESTER

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at:	Hay River and Yellowknife, Northwest Territories October 8, December 1 and December 10, 2010
Date of Decision:	February 23, 2011
Counsel for the Crown:	Blair MacPherson
Counsel for the Accused:	Caroline Wawzonek

[s. 253(1)(a) and s. 253(1)(b) of the *Criminal Code*]

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A. BACKGROUND AND ISSUES

A.1 Introduction

[1] Sandra Lester is charged that she operated a motor vehicle while her ability to drive was impaired by alcohol and when the alcohol level in her blood was over 80 mg. of alcohol per 100 ml. of blood.

[2] In a summary form, the issues with respect to the ñover 80 chargeò are:

(a) Was the breath demand given ñas soon as practicableò as required by section 254(3) of the *Criminal Code*?

(b) Were the breath samples taken ñas soon as practicableò as required by section 258(1)(c) of the *Criminal Code*? and

(c) Was the accusedôs right to counsel under section 10(b) of the *Charter* breached and if it was, should the evidence of the breath samples be excluded?

[3] With respect to the impaired charge, the issue is whether there were sufficient signs of impairment to establish, beyond a reasonable doubt, that the accusedôs ability to operate a motor vehicle was impaired by alcohol.

A.2 Facts

[4] While on patrol on March 13, 2010 at 00:40, Cst. Gallant of the RCMP noticed a flash of the back lights on a green truck in the parking lot of the Greyhound bus depot on the main road into Hay River. He stopped to investigate and found the accused and another woman. The accused was exiting the driverôs side of the truck and her friend was standing near the passenger side. They said they were waiting for their friends to come in off the frozen lake. As a result of his observations and the admission of the women that they had been drinking earlier, Cst. Gallant formed the opinion that the two women were intoxicated. As he was leaving, Cst. Gallant told them to take a cab or have a friend come and pick them. The two women walked away from the truck to a building on the property. According to the officer, they understood and appeared compliant with his request.

[5] Approximately 25 minutes later, Cst. Gallant spotted the accused driving the green truck southbound on the main road. The officer was travelling northbound as he met and passed the truck. He turned his police vehicle around and activated his emergency flashers. The truck turned off the main road onto a side street. After making one further turn, the truck stopped. Ms. Lester immediately got out of the truck and started walking towards the officerôs vehicle. She was arrested, handcuffed and eventually taken to the RCMP detachment where she was given a breathalyzer exam. Her readings were 130 and 120 mg. of alcohol / 100 ml. of blood.

A.3 The Trial

[6] The trial of this matter commenced on October 8, 2010. Prior to the trial, the accused had filed a Notice of Application to exclude evidence arising from an alleged breach of the accusedôs section 10(b) (ñright to counselò) *Charter* right. At the commencement of the trial, counsel for the accused advised that she wished to also give notice of an alleged breach of the accusedôs section 8 *Charter* right based on the failure of the section 254(3) breath demand to be made as soon as practicable. Crown did not object to the timing of this notice.

[7] The trial proceeded by way of a blended *voire dire* on the admissibility of the certificate of analysis with respect to the breath samples and whether the Crown could rely on the presumption of identity contained in section 258(1)(c) of the *Criminal Code*. Cst. Gallant testified. The accused, Sandra Lester, testified. At the completion of their testimony, the trial was adjourned. When the Court reconvened, Crown and defence advised the Court that no further evidence would be called. Counsel agreed that whether or not the certificate of analysis was excluded, the

evidence in the *voire dire* could be applied to the trial. The Crown stated that it would not call further evidence if I did not allow the presumption of identity.

B. ANALYSIS

B.1 "As soon as practicable"

[8] At issue in this trial is the application of the phrase ñas soon as practicableò; in particular, its use in sections 254(3) and 258(1)(c) of the *Criminal Code*.

[9] In order to make a lawful breath demand under section 254(3) of the *Criminal Code,* a peace officer must satisfy the criteria set out in the section. In the absence of the legislative authority allowing for the taking of a breath sample, such action would be considered a breach of the accusedôs section 8 *Charter* right, i.e., the accusedôs right to be secure against unreasonable search or seizure. Accordingly, if one or more of the prerequisites for a valid breath demand are not met, then there is a *prima facie* breach of section 8 of the *Charter.*

[10] The prerequisites in section 254(3) are as follows:

(a) The peace officer must have reasonable grounds to believe that the accused is committing, or has committed within the preceding three hours, an offence under section 253 as a result of the consumption of alcohol; and

(b) The peace officer must make a breath demand as soon as practicable after forming the belief.

[11] With respect to section 258(1)(c), the breath samples given by an accused represent a measurement of the amount of alcohol in his or her blood at the time the breath sample is analyzed by the machine. There is a period of time between when the accused was operating the motor vehicle and when the breath sample was taken and analyzed. There is a presumption that the blood alcohol concentrations are the same at each of these two points in time provided certain criteria are met. The Crown can rely on this ñpresumption of identityò provided the criteria in section 258(1)(c) are satisfied:

(a) Each of the two breath samples has to be taken as soon as practicable after the time when the offence was alleged to have been committed;

(b) The first sample must be taken within two hours of the time when the offence was alleged to have been committed; and

(c) The two samples must be taken at least 15 minutes apart.

[12] If these criteria are not satisfied, then the Crown cannot rely on the presumption of identity. Without the presumption, the Crown would have to call expert evidence to relate the blood alcohol level at the time when the accused was operating or had care and control of the motor vehicle to the blood alcohol level at the time the samples were taken.

[13] With respect to the facts of the case involving Sandra Lester, there are two time periods which need to be examined:

(a) The elapsed time between when Cst. Gallant formed the belief that Sandra Lester was operating her motor vehicle while impaired and when he read her the breath demand (the ñs.254(3) time to breath demandò); and

(b) The elapsed time between when Cst. Gallant stopped the truck and when Ms. Lester gave the first breath sample (the ñs.258(1)(c) time to breath sampleò).

[14] In the course of his testimony, Cst. Gallant described the events between the stopping of the accusedôs truck and taking the accused to the detachment as indicated on the following timeline. A time in bold face type, indicates a time from Cst. Gallantôs notes. A time in italics indicates an approximate time based on the context of his testimony or his estimate of time in relation to another event.

Time	**Elapsed Time**	**Event**
01:03	0	Cst. Gallant stops truck on Studley Drive 200 meters from Birch Road. Police vehicle is 10 to 15 meters behind accusedôs truck. Accused gets out. Stumbles into side of truck. Walks toward police vehicle.
		Cst. Gallant tells accused that she is under arrest for impaired operation of a motor vehicle while standing between her truck and police car. Places handcuffs on her. She struggles and manages to get free of one handcuff. It is replaced on her.
		Cst. Gallant places accused in police car and with door still open gives her right to counsel and police warning from memory. Does not remember reaction of accused.
		Cst. Gallant closes the door on the police vehicle and goes to deal with the passenger in the truck.

Time	Elapsed Time	Event
01:05	2	Cst. Gallant asks passenger her name (Kim McGregor) and writes time and name in his notebook.
		Cst. Gallant speaks to passenger about why accused did not pull over and provides Kim McGregor with number of cab company and she calls cab company.
		Cst. Gallant returns to police vehicle and makes quick notes about the initial vehicle stop and accused starts asking for her cell phone (asks for it 10 to 15 times before they leave to detachment).
01:10	7	Cst. Gallant reads accused right to counsel and police warning from police-issued card. In response to the question, ñDo you want to call a lawyer?ò the accused responds, ñNo, I know Iôve done something wrong. We werenôt even driving.ò
		Cst. Gallant deals with telecoms trying to arrange for tow truck. Telecoms tried three different tow truck companies. Officer then decides to put 4 way flashers on and leave truck. Constable unsure whether dealing with telecoms is before or after breath demand.
01:15	12	Cst. Gallant reads the breath demand to the accused.
		Cst. Gallant searches the truck for accusedôs cell phone. Also located money and 375 ml. bottle of Bacardi white rum.
01:34	31	Cst. Gallant and accused depart scene for Hay River RCMP detachment.
01:39	36	Cst. Gallant and accused arrive at Hay River RCMP detachment.
01:41	38	Beginning of observation period.
02:02	59	First sample taken by Cst. Sharpe.
02:21	78	Second sample taken by Cst. Sharpe.

[15] Based on this timeline the s.254(3) time to breath demand is the time from 01:03 to 01:15 (12 minutes) and the s.258(1)(c) time to breath sample is the time from 01:03 to 02:02 (59 minutes).

[16] The accused submits that s.254(3) breath demand was not given as soon as practicable and the breath sample was not taken as soon as practicable as required under s.258(1)(c).

[17] With respect to the section 254(3) breath demand, the defence argues that there is a gap of over 5 minutes between when Cst. Gallant returns to the truck and reads the breath demand to the accused. It is submitted that the constable is unable to sufficiently account for what he was doing during that time and therefore the demand was not given as soon as practicable. With respect to the s.258(1)(c) time to breath

sample, the defence alleges that the gap of 29 minutes between when the breath demand is read (01:15) to when the accused arrives at the detachment (01:39) is not sufficiently accounted for and therefore the breath sample was not taken as soon as practicable.

[18] The phrase ñas soon as practicableò has been judicially considered in a number of cases. It does not mean ñas soon as possibleò. The peace officerôs actions in moving to the desired outcome (in one case, the giving of the breath demand; in the other case, the taking of the breath samples) are to be examined to determine if they are reasonable in the circumstances. The ñreasonablenessò is evaluated within the overriding context that steps which are unrelated to movement to the desired outcome are to be avoided and can be an indication that the desired outcome was not attained ñas soon as practicableò.

[19] In *R. v. Chorney* (2008), 70 M.V.R. (5th) 286, Judge Allen of the Provincial Court of Alberta, after reviewing existing case law regarding the meaning of ñas soon as practicableò in the context of section 254(3) stated:

> [37] The determination whether the demand is made ñas soon as practicableò is fact driven. ñAs soon as practicableò does not mean ñas soon as possibleò; rather the phrase means ñwithin a reasonably prompt time in the circumstancesò. In meeting that standard the whole chain of events is considered and the Crown is not required to account for every minute the accused is in custody. The touchstone in determining whether the sample was taken ñas soon as practicableò is ñwhether the police were acting reasonablyò. Subjective and objective matters are explored in meeting the standard. In some circumstances, some explanation may be needed for apparent delay. This evidence can be in the form of direct testimony or from inferences to be drawn from the evidence presented.
>
> [38] In most circumstances, the police read the section 254(3) demand almost concurrently when they arrest detainees, or shortly after providing detainees with *Charter* advice related to counsel, or a caution related to silence. This is the preferable practice.

[20] The officer does not have to account for every minute during the time period. Rather, the s.254(3) time to breath demand and s.258(1)(c) time to breath sample are examined for their overall reasonableness. If these times appear to be excessive in the circumstances or if there are unaccountable gaps in the time periods, then the reasonableness of the actions must be scrutinized.

[21] Although the peace officer does not have to account for every minute during the time period, there must be some evidence of what was done. The Court may infer what was done during a time period based on evidence of the peace officer or others. The Court cannot find that the ñas soon as practicableò standard was met if there is a complete absence of evidence as to what was done.

[22] In the context of section 258(1)(c), the Ontario Court of Appeal in *R. v. Vanderbruggen* (2006), 206 C.C.C. (3d) 489 (Ont. C.A.) stated:

> [12] . . . the phrase means nothing more than that the tests were taken within a reasonably prompt time under the circumstances.
>
> [13] In deciding whether the tests were taken as soon as practicable, the trial judge should look at the whole chain of events bearing in mind that the *Criminal Code* permits an outside limit of two hours from the time of the offence to the taking of the first test. The ñas soon as practicableò requirement must be applied with reason. In particular, while the Crown is obligated to demonstrate that ï in all the circumstances ï the breath samples were taken within a reasonably prompt time, there is no requirement that the Crown provide a detailed explanation of what occurred during every minute that the accused is in custody.

[23] The Court must balance the requirement that actions are to taken as soon as practicable with the requirement that the officer must be able to testify as to his actions in the future. An officerôs notes will have to be sufficiently detailed to allow him to testify as to key events and times but the officer cannot unreasonably impede the progress of giving the breath demand or taking breath samples, by spending too much time on note taking.

[24] This issue of the duty of the officer was dealt with in *R. v. Huot (No. 3)* (2001), 209 Sask. R. 171 (Sask. Prov. Ct.):

> [11] It is apparent that the issue of whether breath samples were taken as soon as practicable, requires the peace officer to keep reasonable track of the times of the key matters as they occurred during the course of the investigation. Otherwise, the Court is unable to put the consideration of any apparent delay in its proper context.

[25] On the other hand, as Judge Fradsham said in *R. v. McAllister*, [2009] A.J. No. 113 (Alta. P.C.), it is ñnot appropriate for the officer to place his interest in making notes above the direction in s.258(1)(c).ò

[26] Counsel for the Crown and accused have provided me with a number of cases with respect to the interpretation of ñas soon as practicableò in the context of section 254(3) and section 258(1)(c). These cases are useful for the legal framework that they provide but each case requires a thorough examination of the facts as does the case before this Court.

[27] Let me first deal with the issue regarding the timing of the breath demand. The defence argues that the officer failed to record the exact time when he stopped the truck and consequently, the Court is forced to guess the time. I find that this time can be inferred with reasonable accuracy. This inference is based on the officerôs estimate of the time between stopping the truck and when he wrote down ñ1:05ò in his notes as he took the passengerôs name. The officer described the stop as taking

place ñshortly beforeò and ñprobably a minute, a minute or twoò before he wrote 1:05 in his notebook.

[28] The officer testified that he was concerned when the accused ñflungò the door open and got out of the truck. The officer was alone at night. He did not know what the passenger was going to do. It is reasonable that as a result of this concern, he would have acted quickly to control the situation. He testified that he arrested the accused, placed her in handcuffs, re-positioned one of the cuffs, stated the reason for arrest and her right to counsel and police caution, placed her in the backseat of the police vehicle and returned to deal with the passenger in a ñminute or twoò. Even the accused testified that, ñ[Cst. Gallant] kind of slammed the door and took off running towards my truck.ò

[29] Five minutes elapsed between writing down the name of the passenger (01:05) and reading the right to counsel and police caution (01:10). During that time, the officer dealt with the passenger and provided her with the number of a cab company. He returned to the police vehicle and made some quick notes about the stop. The officer and accused both testified that she had slipped out of the handcuffs and she began asking about her cell phone around this time.

[30] The officer is clear that he read the breath demand at 01:15. He is unsure if he called about arranging a tow truck before or after the breath demand. The defence argues that the breath demand should have been read to the accused immediately after the right to counsel and police caution. According to the accused, the officer, by making arrangements for the tow truck, embarked on actions which meant the breath demand was not made ñas soon as practicable.ò

[31] I agree that it would be preferable for the officer to have read the breath demand right after the right to counsel and police caution. He may have. He was being quite candid when he said that he could not remember for sure when he started making the arrangements for the tow truck. Even if he started making arrangements for the tow truck after he read the right to counsel and police caution and before the breath demand, I do not find the 5 minute delay between the start of the right to counsel and police warning and the breath demand to be objectionable.

[32] I doubt very much that telecoms would have been able to make calls to three towing companies and get back to the officer within that period of time. All, or at least a substantial portion, of the interaction involving the arrangements for a tow truck would have occurred after the breath demand was read. The accusedôs testimony is not useful in establishing this timing because she denies that either the right to counsel or police caution or reason for arrest was given to her. She did say,

however, that ñ[Cst. Gallant] just sat there and played with the radio for quite a whileò which confirms that some time was taken in trying to confirm the availability of a tow truck.

[33] In summary, I find that the breath demand pursuant to section 254(3) was given ñas soon as practicableò.

[34] The second issue with respect to timing is whether or not the breath samples were taken as soon as practicable. The Crown argues that the 59 minute delay between the stopping of the truck and the first breath sample is reasonable and no further scrutiny is required to make a finding that the breath samples were taken as soon as practicable.

[35] The defence argues that there is a gap in time from the making of the breath demand (01:15) and arrival at the detachment (01:39) which is not sufficiently accounted for and therefore the Court cannot make the determination that the breath demand was made as soon as practicable.

[36] The method in which the Court should address this determination and which is consistent with the authorities, is aptly stated in *R. v. Carriere*, [2010] S.J. No. 499 (Sask. Prov. Ct.):

> [58] ñAs soon as practicableò is a standard which must be applied with reason. It does not mean as soon as possible, but as soon as can reasonably be expected. The Crown is obligated to demonstrate, in all the circumstances, that the breath samples were taken within a reasonably prompt time. There is no requirement that the Crown account for what happened every minute that the accused was in custody prior to the tests being taken, but as long as the delay can be explained to the satisfaction of the trial judge, the Crown is entitled to rely on the presumption in section 258(1)(c). This requires that there be some evidence from which the Court can infer an acceptable reason for the delay. A significant delay which is completely unexplained provides no evidentiary basis upon which to find the delay is reasonable.

[37] Is there sufficient evidence of what the officer was doing during those 24 minutes that the Court can infer that he was acting reasonably given the direction to take the breath samples ñas soon as practicableò?

[38] The evidence regarding this time period comes from both the officer and the accused. As a starting point of this analysis, neither witness describes any action which could be pointed at as being unnecessary for the processing of Ms. Lester. For example, the officer did not stop for coffee.

[39] From the analysis indicated in paragraph 32 above, at least part of this time period would have been spent waiting for the arrangements for the tow truck to be

made and interacting with telecoms. Once the decision was made to not have Ms. Lesterôs vehicle towed, the officer had to search the vehicle. It was during this time that he located the cell phone, money and bottle of rum. The officer approximated that it took five minutes to get to the detachment after leaving the location where the truck was stopped.

[40] Having decided that the time period after reading the breath demand was spent dealing with the issue of whether or not the vehicle should be towed; searching the vehicle and then driving to the detachment, it must be asked whether the officer should have decided to abandon the idea of towing Ms. Lesterôs truck earlier or sought the assistance of another police officer to either wait with the truck or take Ms. Lester to the detachment.

[41] The accused testified that when she stopped her vehicle, she did not park far off the travelled portion of the road for fear of getting stuck in the soft ditch caused by the ñfreeze thawò of March. The vehicle, if left where it was parked, posed a hazard to traffic on the road. It was reasonable for the officer to take steps to have it towed. Given the initial stop at approximately 01:03 and the departure of the scene at approximately 1:34, I do not find that the officer acted unreasonably in seeking to have the vehicle towed or in not seeking the assistance of another officer.

[42] The time period between 01:34 and the taking of the first breath sample at 02:02 is unremarkable and sufficiently explained.

[43] I find that the breath samples were taken as soon as practicable as required under section 258(1)(c) of the *Criminal Code* and therefore the presumption of identity exists in this case.

B.2 Section 10(b) *Charter*

[44] The accused argues that there was a violation of her right to counsel as guaranteed by section 10(b) of the *Charter*. In particular, the accused requested that the officer retrieve her cell phone from the truck. Counsel for the accused submits that had the accused been provided with the cell phone, she would have exercised her right to counsel.

[45] In my view, the guiding cases with respect to this issue are: *R. v. Sinclair*, [2010] S.C.J. No. 35; *R. v. Prosper,* [1994] 3 S.C.R. 236*; R. v. Bartle,* [1994] 3 S.C.R. 173*; R. v. Manninen,* [1987] 1 S.C.R. 1233*; R. v. Tremblay*, [1987] 2 S.C.R. 435; and *R. v. Luong,* 2000 ABCA 31.

[46] The Alberta Court of Appeal in *R. v. Luong* sets out a useful framework for analysis by the trial judge:

> **12** For the assistance of trial judges charged with the onerous task of adjudicating such issues, we offer the following guidance:
>
> (1) The onus is upon the person asserting a violation of his or her *Charter* right to establish that the right as guaranteed by the *Charter* has been infringed or denied.
>
> (2) Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.
>
> (3) The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.
>
> (4) The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.
>
> (5) The first implementational duty is ñto provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)ò. *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.) at 301.
>
> (6) The second implementational duty is ñto refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)ò. *R. v. Bartle, supra*, at 301.
>
> (7) A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
>
> (8) If the trial judge concludes that the first implementational duty was breached, an infringement is made out.
>
> (9) If the trial judge is persuaded that the first implementational duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the exercise of his rights. *R. v. Smith*, (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.
>
> (10) If the detainee, who has invoked the right to counsel, is found not to have been reasonably diligent in exercising it, the implementational duties either do not arise in the first place or will be suspended. *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565 (S.C.C.) at 568; *R. v. Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C.) at 135; *R. v. Black* (1989), 50 C.C.C. (3d) 1 (S.C.C.) at 13; *R. v. Smith, supra,* at 314; *R. v. Bartle*, *supra,* at 301 and *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.) at 375-381 and 400-401. In such circumstances, no infringement is made out.
>
> (11) Once a detainee asserts his or her right to counsel and is duly diligent in exercising it, (having been afforded a reasonable opportunity to exercise it), if the detainee indicates

> that he or she has changed his or her mind and no longer wants legal advice, the Crown is required to prove a valid waiver of the right to counsel. In such a case, state authorities have an additional informational obligation to ñtell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunityò (sometimes referred to as a ñ*Prosper* warningò). *R. v. Prosper*, *supra*, at 378-79. Absent such a warning, an infringement is made out.

[47] Cst. Gallant testified that at 01:03 or 01:04 a.m., the green truck driven by the accused stopped and Ms. Lester immediately got out of the vehicle and started to walk towards the police car. Cst. Gallant got out of the police vehicle and walked to Ms. Lester and said ñWhat are you doing, Sandra?ò The accused started to tell him that she was travelling to either her shop or her husbandôs shop. The constable smelled liquor on her breath.

[48] Cst. Gallant immediately arrested the accused for impaired operation of a motor vehicle and told her the reason for her arrest. She turned around and he placed her in handcuffs. She struggled and got free of one handcuff and he replaced it on her.

[49] Cst. Gallant brought her to the back seat of the police vehicle and told her that ñshe had the right to retain and instruct counsel in private without delay, that she may call any lawyer she wants, and should she not be able to afford a lawyer, that Legal Aid could be appointed to her.ò He also gave her the police warning. The constable then closed the door of the police vehicle and went to deal with the passenger in the truck.

[50] Cst. Gallant did not ask the accused if she understood what she had been told; nor does he remember what her reaction, if any, was. The constable testified that he was not a hundred percent sure, but he did not believe that she asked to speak to counsel at this point.

[51] When Cst. Gallant returned to the police vehicle, the accused immediately started requesting her cell phone. At 01:10 a.m., be believes that he again told her the reason for her arrest. He did not ask her if she understood the reason for her arrest. He then read the right to counsel and police warning verbatim from a card. After the constable read the right to counsel to the accused, he asked her ñDo you understand?ò She responded, ñyes.ò When the constable asked ñDo you want to call a lawyer?ò she responded, ñNo, I know Iôve done something wrong. We werenôt even driving.ò

[52] The accused was never given her right to counsel or asked if she wanted to speak to a lawyer at any time during the remainder of the interaction with the RCMP that morning.

[53] Cst. Gallant testified that the accused wanted him to get her cell phone before they departed the scene, because she realized that her truck was going to be towed. He retrieved $400 cash from the truck along with the cell phone which was given to her when she was released from custody.

[54] When the accused testified, she does not recall the constable telling her why she was under arrest or having been told or read the right to counsel or the police warning. She testified that she asked for her cell phone four to five times and was told by the police officer to be quiet since she had asked for her cell phone 20 times. The officer then asked her if she wanted a lawyer. According to Ms. Lester, she said either, ñwell, you wonôt give me my cell phone so thereôs nothing I can do about thatò or ñif you give me my cell phone I can phone one.ò Cst. Gallant was adamant that the accused did not say that she wanted her cell phone to call a lawyer or words to that effect.

[55] Ms. Lester testified that she wanted her BlackBerry so she could access her Yahoo account and telephone a lawyer in Edmonton.

[56] If the accused expressed her desire to use her cell phone to phone a lawyer or if it was apparent by her actions or words that she wanted her cell phone to phone a lawyer, then Cst. Gallant would have been required to address this response by the accused.

[57] As a finding of fact, I do not accept that Ms. Lester expressed her desire, either through words or actions, to use her cell phone to phone a lawyer. The reasons for this finding are as follows:

(a) The accused does not remember being told of the reasons for her arrest, her right to counsel, the police warning or the breath demand. She does not remember being asked, ñDo you understand?ò I accept the constableôs testimony that he gave the right to counsel and police warning by memory and later from the cards. The officer also read her the breath demand. The failure by the accused to recall anything said by the officer causes me to doubt her ability to recall accurately the events of that morning.

(b) The accused said that she only asked for a lawyer once and that was in response to the question by the officer, ñDo you want to call a lawyer?ò

The accused originally testified that when the officer asked if she wanted a lawyer, her response was ñyou wonôt give me my cell phone so thereôs nothing I can do about that.ò Later, she testified that she replied, ñwell, if you give me my cell phone I can phone one.ò Her own uncertainty about what she said causes to me to doubt if she said anything at all.

(c) The accused stated she gave the response noted above as a result of being asked if she wanted a lawyer. The officer testified that he gave the accused her right to counsel twice. Once, by memory, while putting her in the police vehicle and once later on, verbatim from the cards, when they were both seated in the police vehicle. The requests for the cell phone by the accused came only after she was seated in the police vehicle and the officer had come back from the truck after dealing with the passenger. So her response (ñyou wonôt give me my cell phone so thereôs nothing I can do about thatò) could have only been made, if made at all, after she was denied access to her cell phone. She only started asking for her cell phone *after* being given the first right to counsel. So, by her testimony, her response must have been to the second right to counsel and not to the first right to counsel. The officer had written that after the second right to counsel, the response to the question, ñDo you want to call a lawyer?ò was ñNo, I know Iôve done something wrong. We werenôt even driving.ò Although the officer admitted under cross-examination that he did not remember what, if anything, was said in response to the first right to counsel, he is adamant that there was no request for a lawyer after the second right to counsel. I accept the officerôs testimony on this point.

(d) Cst. Gallant testified that when he first came across the accused at the Greyhound bus depot parking lot, he estimated her level of intoxication at a 7 out of 10 and he ñadvised them to get a cab or to find a friend to come pick them up should they wish to drive again.ò The accused testified that she phoned for a taxi to get her and her friend from the Greyhound bus depot parking lot, but the taxi company did not answer. She said that the constable had said, ñif I was you girls I would suggest you took a cab.ò By making the attempt to phone a cab, the accused was acknowledging her agreement with the officerôs assessment that she should not be driving.

(e) Cst. Gallant describes the accused as ñwanting to get her cell phone out of her truckò and ñto me it just seemed like she just wanted to have her cell phone before we left and went back to the detachmentò and

ñwanting me to get her cell phone and make sure that I get her cell phone before we depart the scene and that sort of thing because I think she realized that her truck was going to be towed.ò The accused states that ñI asked him four to five times for my cell phone.ò Neither Cst. Gallant nor Sandra Lester testified that the accused said that she wanted to ñuseò the cell phone. The officer was certain that she was asking for the cell phone because it was in the truck and she did not want it left there when they went to the detachment. Common sense dictates that the officer, after being asked by the accused twenty times for her phone, would by what was said know if she wanted to use the phone to make a phone call or whether she simply did not want something valuable left in the truck.

(f) The accused testified that the reason that she drove after being warned not to was because she had used her portable breath testing machine and it gave a reading under .05 at midnight. Because of this reading, she thought it was ñsafeò to drive. She testified, ñI didnôt think I was going to blow over, so no, I didnôt think I was going to be charged with anything.ò It follows that the accused was confident that she would not blow over .08 and therefore, would not request to speak to a lawyer.

(g) When the accused testified, she presented as a confident and assertive businessperson. The description of her repeatedly requesting her cell phone and requesting to be driven to her friendôs place to make inquiries about the friends on the lake are consistent with this. I find that she would be an individual who would assert her right to counsel if she wished to exercise it.

[58] Even if Ms. Lester did not express her desire, through words or actions, to use her cell phone to phone a lawyer, was the response by Ms. Lester given to Cst. Gallant asking, ñDo you want to call a lawyer?ò an indication that Ms. Lester did not understand her reason for arrest or her right to counsel? According to Cst. Gallant, Ms. Lester responded, ñNo, I know Iôve done something wrong. We werenôt even driving.ò

[59] Had Ms. Lester simply said, ñNo, I know Iôve done something wrongò, there would be no issue. The additional words, ñWe werenôt even drivingò, seem to be a *non sequitur*. Are they indicative that she misunderstood her reason for arrest or her right to counsel? In my view, there is evidence that Ms. Lester understood both her reason for arrest and her right to counsel.

[60] I accept that the officer told Ms. Lester that she was under arrest for impaired driving when he intercepted her walking from her truck to the police vehicle. He was not sure whether or not he again gave her the reasons for arrest later on when he read the right to counsel and the breath demand from the cards.

[61] Although the officer did not ask Ms. Lester if she understood why she was under arrest, I find that she was aware of why she was under arrest for the following reasons:

(a) The officer had told her not to drive approximately 25 minutes earlier because of her level of intoxication;

(b) The officer told her that she was under arrest for impaired driving at least once;

(c) Ms. Lester testified that she ñworked on the assumption that it was going to be a breathalyzer or whatever they called itò; and

(d) Ms. Lester testified that she had bought the portable analysis device so that she would be safe to drive and that she had tested her breath around midnight. She was clearly aware of the issue of drinking and impaired driving.

[62] The onus is on the accused to establish that her right to counsel has been infringed or denied. Her words to Cst. Gallant are clear. She did not want to call a lawyer. Cst. Gallant adequately fulfilled the informational duty of the right to counsel and the accused understood why she was arrested.

[63] It would have been preferable if the officer had provided the accused with her right to counsel again once they had arrived at the detachment. There is no downside to this additional step and it would have dealt with any lack of clarity in the accused response.

[64] In my view, the informational duty required under the accusedôs right to counsel was performed by Cst. Gallant. For the reasons indicated above, I do not accept the accusedôs testimony that she asserted her right to counsel. Consequently, it is not necessary to determine whether the officer satisfied the implementational duties.

B.3 Driving while Impaired

[65] When Cst. Gallant met the accused at the parking lot of the Greyhound bus depot, he observed her for about 5 minutes. She was unsteady on her feet and swaying back and forth. He said that he was aware from listening to her that she had a speech impediment but that she also had very slurred speech. He also felt that her manner of repeating what she said was typical of how intoxicated people spoke. Based on these signs, he came to the conclusion that she was ñquite intoxicatedò and rated her level of intoxication at 7 out of 10.

[66] When he saw her driving approximately 25 minutes later and turned his police vehicle to follow her, he made certain observations about her driving. She made a ñhard right turnò off the main road and ñpunched the gas going down Birch road at a high rate of speedò. When she went through the dip in the road, the ñsuspension had come up, and when she came down it kind of jerked to side to side briefly. I thought she was going to lose control.ò

[67] As soon as the accused stopped her vehicle, she got out of it. The officer observed her to stagger once to the side of the vehicle but cannot remember if she had problems with walking after the stagger. When Cst. Gallant walked up to the accused, he could immediately smell liquor on her breath. He felt that her level of impairment was the same as he had observed at the parking lot.

[68] Later on, at the detachment, Cst. Gallant did not notice that the accused had any difficulty in walking into the building. The officer noticed that she had a flushed face and odour of alcohol on her breath, but never noticed glossy eyes.

[69] The issue is whether or not the Crown has proved beyond a reasonable doubt that the accusedôs ability to operate a motor vehicle was impaired by alcohol. Consumption of alcohol alone is not enough to prove that the ability is impaired. There must be evidence presented about the way the accused acted, spoke, moved or appeared which would cause the Court to infer that the ability to drive was impaired.

[70] The odour of alcohol on the accusedôs breath and a flushed face are signs of alcohol consumption, but not necessarily impairment. With respect to impairment of physical functions, slurring of speech and stumbling while walking are significant. On the other hand, I have some doubt that the officer was able to distinguish between the slurring and the speech impediment as easily as he states. The speech impediment was not noted in his initial notes. When the constable initially observed the accused at the parking lot, she was swaying back and forth. Later on, her walking was unremarkable, except for the one stumble against the side of her truck.

[71] The accusedôs driving was suspicious. The sharp right turn, the punching of the gas and the speeding through the dip would attract attention but are not necessarily signs of impaired driving.

[72] The accusedôs ability to remove the handcuffs and then hand them to the officer does not seem consistent with a person whose physical functions are impaired.

[73] In determining whether or not the accusedôs ability to drive was impaired by alcohol, I am mindful of the principles set out by Justice Conrad at pages 404 and 405 in *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 (Alberta C.A.):

> (a) The onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
>
> (b) There must be impairment of the ability to drive of the individual;
>
> (c) That the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
>
> (d) That the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
>
> (e) Proof can take many forms. Where it is necessary to prove impairment of ability to drive by observations of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[74] In *R. v. Landis* (1997), 161 Sask. R. 305 (Sask. Q.B.), the Court made the following statement with respect to the types of evidence required to establish impairment:

> [16] An opinion as to impairment be it by the trial judge or a non-expert, must meet an objective standard of ñan ordinary citizenò or a ñreasonable personò in order to avoid the uncertainties associated with subjective standards, particularly when based on inferences. To that end a list of tests and observations has been developed for use by peace officers and courts in determining whether an accusedôs mental faculties and physical motor skills were impaired by alcohol to the degree of impairing the accusedôs ability to drive a motor vehicle. Those observations and tests include: (1) evidence of improper or abnormal driving by the accused; (2) presence of bloodshot or watery eyes; (3) presence of a flushed face; (4) odour of an alcohol beverage; (5) slurred speech; (6) lack of co-ordination and inability to perform physical tests; (7) lack of comprehension; and (8) inappropriate behaviour.
>
> [17] In my view, a trial judge must carefully review all of the reported tests and observations which inferentially support or negate any impairment of the accusedôs mental and physical capabilities, and then be satisfied beyond a reasonable doubt that the reasonable inferences

> to be drawn therefrom establish that the accusedôs ability was impaired to the degree prescribed by sections 253 and 255 of the *Criminal Code*. A piecemeal approach supporting or negating impairment is not permissible. See *R. v. Hall*, [1994] S.J. No. 527 at page 66.

[75] In my view, although there were signs of alcohol consumption, there were insufficient signs of the impairment of the accusedôs mental faculties and physical motor skills to establish beyond a reasonable doubt that the accusedôs ability to drive was impaired by alcohol.

C. CONCLUSION

[76] For the reasons stated above, I make the following findings:

(a) The breath demand made pursuant to section 254(3) was made as soon as practicable;

(b) The breath samples were taken as soon as practicable as required by section 258(1)(c);

(c) The accusedôs right to counsel as guaranteed by section 10(b) of the *Charter* was not breached.

[77] Because of my conclusions as set on in subparagraphs (a) and (c) above, there is no need to enter into an analysis of whether or not the breath samples and the certificate of analysis should be excluded.

[78] The certificate of analysis is admissible at trial and therefore, the accused is guilty of the offence of driving over 80 pursuant to section 253(1)(b) of the *Criminal Code.* For the reasons stated above, the accused is acquitted with respect to count 1 on the Information, being the offence of driving while impaired pursuant to section 253(1)(a) of the *Criminal Code.*

Garth Malakoe
J.T.C.

Dated at Yellowknife, Northwest Territories, this 23rd day of February, 2011.

Date: 2011 02 23
File: T2-CR-2010-000265

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SANDRA LYNN LESTER

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE
