

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**CHRISTOPHER BOURKE**

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**REASONS FOR DECISION**  
**of the**  
**HONOURABLE JUDGE GARTH MALAKOE**

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Heard at: Yellowknife, Northwest Territories  
December 13, 2012, May 15, 2013, September 20,  
2013

Date of Decision: October 25, 2013

Counsel for the Crown: K. Lakusta

Counsel for the Accused: G. Wool

[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] Christopher Bourke is charged that he operated a motor vehicle while his ability to drive was impaired by alcohol and while the alcohol level in his blood was over 80 mg. of alcohol per 100 ml. of blood (“mg%”).

[2] At the trial, the Court heard from three Crown witnesses: Cst. Darcy Driscoll, Cst. Mark Lynch and Heather Dinn. Ms. Dinn is a forensic toxicologist qualified as an expert to give an opinion which involves taking an individual’s known blood alcohol concentration (BAC) at a point in time and extrapolating backwards to determine what the BAC would have been at an earlier time.

[3] The accused was stopped by the RCMP at approximately 05h00 while he was operating a motor vehicle on the ice road between Dettah and Yellowknife, NT. After a short pursuit on foot, Cst. Driscoll detained Mr. Bourke and made certain observations including an odour of alcohol; poor coordination and balance; and slurring of speech.

[4] Breath samples were obtained at 07h13 and 07h33. The breathalyzer reading for each sample was 150 mg%.

[5] Given these readings at 07h13 and 07h33, the expert states that Mr. Bourke’s BAC at 05h00 would have been between 172 to 194 mg%

## **A.2 Issues**

[6] With respect to the impaired driving charge, the defence submits that the indicia of impairment observed by the RCMP are insufficient to prove that Mr. Bourke was driving a motor vehicle while his ability to do so was impaired by alcohol. With respect to both the impaired driving charge and the driving while over 80 charge, the defence submits that Mr. Bourke's BAC at the time of driving as determined by the expert cannot be relied upon because:

- (a) The Crown has not disproved the possibility that Mr. Bourke drank a quantity of alcohol in the short time before he was stopped such that his BAC was less than 80 mg% while driving but increased afterwards as the alcohol was absorbed into his bloodstream; and
- (b) The conclusion of the expert as to the quantity of alcohol that Mr. Bourke would have had to drink in the 30 minutes prior to being stopped in order for his BAC to be below 80 mg% at the time of driving is based on the assumption that Mr. Bourke weighs 80.5 kg. There was no evidence presented during the trial which establishes how much Mr. Bourke weighs. Failing the proof of this assumption, the expert opinion that Mr. Bourke's BAC at the time of driving was between 172 and 194 mg% cannot be accepted.

## **B. OVERVIEW OF THE FACTS**

[7] Between 04h38 and 04h56 on January 21, 2012, the RCMP received three telephone complaints from an anonymous female caller about a suspicious dark coloured vehicle in the Dettah area. During the last telephone call, the caller said that the vehicle was on the Dettah ice road, which runs between the village of Dettah and the city of Yellowknife.

[8] Cst. Driscoll drove on the Dettah ice road to investigate and came upon a dark coloured vehicle approaching. Its headlights were on and it was moving very slowly. Cst. Driscoll activated his emergency lights and did a U-turn. The vehicle signalled, pulled over and Cst. Driscoll observed two people in the car.

[9] Shortly after the vehicle stopped, the male in the passenger seat got out and started walking towards the police vehicle. Then a male exited the driver's side and headed toward the front of the stopped vehicle. Cst. Driscoll yelled for him to stop and the male, who was later identified as the accused, Christopher Bourke, started running into the open ice area off to the side of the ice road.

[10] Cst. Driscoll drove the police truck alongside Mr. Bourke; got out of the police vehicle and ran after the driver. As he ran after Mr. Bourke, Cst. Driscoll gave him a push from behind and Mr. Bourke fell to the ground. Cst. Driscoll got on top of him; told Mr. Bourke that he was detained and handcuffed his hands behind his back

[11] Cst. Driscoll talked to Mr. Bourke but there was no response. At this point, for the first time, Cst. Driscoll detected a strong odour of alcohol emanating from Mr. Bourke. Five to ten seconds after being on the ground, Mr. Bourke started to shake uncontrollably; sticking his tongue out. Cst. Driscoll tried to call an ambulance but was unsuccessful in getting one to come. Mr. Bourke stopped shaking after approximately 30 seconds.

[12] Cst. Leblanc and Cst. Driscoll both assisted Mr. Bourke in walking to the police vehicle. Mr. Bourke was unsteady on his feet, off balance, and not walking in a straight line. There was an odour of liquor coming from him.

[13] Cst. Driscoll placed Mr. Bourke under arrest for impaired operation of a motor vehicle and put him in the back of the police vehicle. Ten to fifteen minutes passed between the time that Mr. Bourke was initially stopped and the time when he was put in the police vehicle.

[14] Cst. Driscoll took photographs of the stopped vehicle and did a quick search of it. He located an open half full bottle of beer. He did not see any other alcohol containers in the vehicle.

[15] During the drive to the detachment, Cst. Driscoll could smell a strong odour of liquor and noted that Mr. Bourke was slurring his speech. Cst. Driscoll determined that Mr. Bourke was an unlicensed driver. At the detachment, Mr. Bourke was not walking steady and continued to emanate a strong odour of alcohol.

[16] When Cst. Lynch arrived at the detachment to operate the breathalyzer, he noted that the solution had expired and that it was necessary to change the solution. As a result of this delay, the first sample of Mr. Bourke's breath was not taken until 07h13, which is over two hours after Mr. Bourke's vehicle was first stopped. The breathalyzer result for each of the two samples taken at 07h13 and 07h33 was 150 mg%.

## C. ANALYSIS AND APPLICATION OF THE LAW

### C.1 Over 80 Charge

[17] Mr. Bourke was given a breath demand pursuant to section 254 of the *Criminal Code*:

254 (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

- (a) to provide, as soon as practicable,
  - (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood

[18] Since the first breath sample was taken more than two hours after Mr. Bourke was observed to be driving, the Crown is unable to rely upon the presumption of identity contained in section 258(1)(c) of the *Criminal Code* which states that the BAC as determined by the breathalyzer is deemed to be the BAC of the accused at the time of driving.

258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

- (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
  - (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
  - (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
  - (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses

[19] Although the Court cannot presume that the BAC readings from the breathalyzer would be the same as Mr. Bourke's BAC at the time of driving, the

Court can accept the Certificate of Analysis as establishing what his BAC was at 07h13 and 07h33. This is because s.258(1)(g) states:

- (g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating
    - (i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard identified in the certificate, that is suitable for use with an approved instrument,
    - (ii) the results of the analyses so made, and
    - (iii) if the samples were taken by the technician,
      - (B) the time when and place where each sample and any specimen described in clause (A) was taken, and
      - (C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,
- is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

[20] The Crown has tendered, with the consent of defence, a copy of the Certificate of Analysis dated January 21, 2012 and signed by Mark Andrew Lynch.

[21] The Crown relies upon the expert evidence of Heather Dinn to establish that the BAC of Christopher Bourke at the time of driving was over 80 mg%. In providing her expert opinion, Ms. Dinn made a number of assumptions. Two of the assumptions are as follows:

- (a) The male subject weights 80.5 kg; and
- (b) No alcohol was consumed in the 30 minutes prior to the time of the incident.

[22] The defence submits that neither of these two assumptions has been proven and that therefore, the Court cannot accept the expert's opinion as to the BAC of Mr. Bourke at the time of driving.

[23] In determining the BAC of Mr. Bourke at 05h00, Ms. Dinn stated that her calculations were independent of gender and body weight. She went on to opine that *if* Mr. Bourke had consumed alcohol in the 30 minutes prior to the time of his driving, the amount of alcohol that he would have had to consume to allow his BAC to be 80 mg% or less at the time of driving *was affected by his weight* and the assumption of a body weight of 80.5 kg was used for that calculation.

[24] The defence submits that there is evidence that Mr. Bourke could have been bolus drinking just prior to being stopped (the drinking of a large quantity of alcohol immediately or shortly before driving is often referred to as “bolus drinking”). In this regard, he points to the second photograph of Exhibit 1 which shows an open bottle of Black Bull 10% beer lying on the floor in front of the driver’s seat. The defence further submits that there is a burden on the Crown to establish that Mr. Bourke did not drink sufficient alcohol in the 30 minutes before 05h00 to allow his BAC to have been 80 mg% or less at the time of driving. The expert’s opinion was that Mr. Bourke would have had to drink a certain quantity in the 30 minutes prior to 05h00 in order for his BAC to be 80 mg% at 05h00. The defence submits that since the computation of this quantity was based on the assumption of a body weight which has not been proven to be Mr. Bourke’s body weight, the quantity cannot be accepted by the Court.

[25] If an expert gives an opinion regarding a material issue before the Court, the assumptions upon which the opinion are based have to be proven. The law in this regard was stated by the Ontario Court of Appeal in *R. v. Grosse*, [1996] O.J. 1840:

**10** On the facts of the case before us, what Wilson J. referred to as the fourth proposition from *R. v. Abbey*, [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394 applies. That fourth proposition was summarized by Wilson J. at p. 893 S.C.R., p. 128 C.C.C.:

Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist.

In this case the lack of bolus drinking was part of the foundation for the opinion. If the evidence to support that assumption did not exist then the opinion would have to be discarded. We note that the Alberta Court of Appeal has come to a similar conclusion in *R. v. Dean* (1992), 37 M.V.R. (2d) 238, 2 Alta. L.R. (3d) 153. Accordingly, in the circumstances of this case, the Crown was required to prove the lack of bolus drinking.

[26] The expert witness, Ms. Dinn, acknowledged that if Mr. Bourke drank a sufficient amount of alcohol prior to being stopped at 05h00, this could result in a BAC of 80 mg% at 05h00 and yet still result in a measured BAC of 150 mg% at 07h13. The amount that Mr. Bourke would have to consume (assuming that he weighed 80.5 kg (plus or minus 5 kg)) is as follows:

- (a) 5.4 to 6.7 oz of 40% v/v liquor or,
- (b) 3.6 to 4.5 bottles (341 mL) of 5% v/v beer or,
- (c) 21.7 to 27.0 oz of 10% v/v beer, or
- (d) 18.1 to 22.4 oz of 12% v/v wine.

[27] There is evidence before the Court that Mr. Bourke had ready access to a large bottle of 10% v/v beer while he was driving the vehicle. Nothing much more can be said about what Mr. Bourke was doing prior to being stopped at 05h00. There is no direct evidence as to whether or not he was drinking prior to the stop or how long he had been driving. The driving of the dark vehicle had attracted the attention of the woman in Dettah who had called the police three times beginning at 04h38. Even assuming that the woman was describing the same vehicle in which Mr. Bourke was eventually stopped, there is no way of determining whether or not he had been driving it for the whole length of time since 04h38.

[28] In *R. v. Grosse, supra.* at paragraph 11, the Court states that it is a matter of common sense that it is unlikely that a driver will consume a large quantity of alcohol before driving.

[29] The conundrum that this Court finds itself in is that the expert has stated that Mr. Bourke could have drunk a quantity of alcohol in the 30 minutes before 05h00 such that his BAC at 05h00 was 80 mg% or less and still have a measured reading of 150 mg% at 07h13. Yet, the specific quantity of alcohol that the expert identifies cannot be relied upon by this Court because there is no basis in the evidence for the assumption that Mr. Bourke weighs 80.5 kg  $\pm$  5 kg. In other words, the Court has no reliable evidence as to what the required quantity of alcohol would be.

[30] In deciding whether the Crown has excluded the possibility of bolus drinking beyond a reasonable doubt, the Court can consider such factors as the following, which are taken from the Ontario Court of Appeal case of *R. v. Paszcszenko*, 2010 ONCA 615 at para. 38:

- (a) Absence or presence of liquor containers in the vehicle;
- (b) Signs of intoxication at the time of driving;
- (c) Change in indicia of alcohol consumption during the period between his arrest and the administration of the breathalyzer tests.

[31] As it relates to the situation involving Christopher Bourke, as stated earlier, there is evidence that Mr. Bourke had access to alcohol while he was driving.

[32] The expert witness stated in her report that an individual with a BAC in the range of 150 to 300 mg% would be expected to show a marked decrease in balance and coordination when compared to normal. In cross examination, she stated that “If you are talking about ice and snow and trying to run, those are difficult conditions to begin with and therefore I would expect alcohol and its depressive



effect on the brain and how the brain controls muscles would just exacerbate those conditions and you should see some difficulty.” Yet, when Cst. Driscoll observed Mr. Bourke running, he stated that there was “no swaying, stumbling or staggering” even though the snow was 3 or 4 inches in depth.

[33] Hence, there were no observed signs of intoxication at the time of driving.

[34] It was not until after Cst. Driscoll pushed Mr. Bourke to the ground; handcuffed him and after Mr. Bourke finished shaking that what could be considered signs of impairment were observed. These signs could have been the observable manifestations of the alcohol having been absorbed into the blood. Based on the testimony of Cst. Driscoll, they appear to be, as described in *Paszczenko*, a change in the indicia of alcohol consumption.

[35] In my view, for these reasons, the Crown has not disproved the real possibility that Mr. Bourke consumed a quantity of alcohol in the 30 minutes prior to being stopped at 05h00 such that the alcohol had not yet been absorbed into his blood stream by 05h00 and so that his BAC could have been 80 mg% or less at 05h00 yet have been measured at 150 mg% at 07h13.

## **C.2 Driving While Impaired Charge**

[36] The Crown cites the following as indicia that Mr. Bourke’s ability to operate a motor vehicle was impaired by alcohol:

- (a) Mr. Bourke’s decision to get out of the vehicle and start running from the RCMP exhibited poor judgment, consistent with someone whose judgment was impaired by alcohol.
- (b) When Mr. Bourke was stopped by Cst. Driscoll after the foot chase, the officer noticed a strong odour of alcohol.
- (c) When Mr. Bourke got up off the ice, he exhibited decreased coordination; he was unsteady on his feet and showed a lack of balance.
- (d) When in the police vehicle, Mr. Bourke continued to smell of alcohol and he was slurring his speech.
- (e) At the detachment, Mr. Bourke was unsteady on his feet and emanated the odour of alcohol.
- (f) The expert opined that Mr. Bourke’s BAC at the time of driving was between 172 and 194 mg%. She also stated that at 100 mg%, all

individuals, regardless of tolerance are impaired in their ability to safely operate a motor vehicle.

[37] Defence makes the following response:

- (a) There were no observations by Cst. Driscoll of anything unusual about Mr. Bourke's driving. There was no swerving or fishtailing. When the officer activated his emergency lights, Mr. Bourke pulled his vehicle to the right and used his right turn signal. His speed and actions were appropriate.
- (b) When Mr. Bourke was running, Cst. Driscoll did not observe any swaying, stumbling or staggering.
- (c) Mr. Bourke's decision to run from the vehicle may have been due to him being an unlicensed driver.
- (d) With respect to Christopher Bourke's slurring of speech, the officer only remembers Christopher Bourke saying his name. He cannot remember what other words were used. It would be difficult to ascertain whether someone was slurring his words if all he said was, "Christopher Bourke". Also, when Mr. Bourke was on the ground shaking, he had his tongue out. He could have bitten it resulting in difficulty speaking.
- (e) When Mr. Bourke was walking to the police vehicle, he was being held by two police officers with his hands handcuffed behind his back. They were on ice or snow. His manner of walking could have been determined by how the officers were walking and how they were physically maneuvering him and whether they were each pulling in the same direction.
- (f) Although Cst. Driscoll identified the odour of alcohol emanating from Mr. Bourke, he, at no time, said the alcohol was coming from Mr. Bourke's mouth. The evidence is that Mr. Bourke was in a vehicle with open liquor which was near the driver's seat. Mr. Bourke could have had alcohol on his clothes. In any case, he could have drunk the alcohol while driving and just before being stopped.
- (g) The expert's opinion of a BAC between 172 mg<sup>0</sup>% and 194 mg<sup>0</sup>% at the time of driving is based on the assumption that there was no bolus drinking. For the reasons considered earlier, the Crown has not disproved bolus drinking and at the time of driving, Mr. Bourke's

BAC could have been 80 mg% or less (and hence also below 100 mg%).

[38] In determining whether the Crown has proven that Mr. Bourke was operating a motor vehicle while his ability to operate was impaired by alcohol, I am guided by the principles enunciated by the Alberta Court of Appeal at para. 29 in *R. v. Andrews*, [1996] A.J. No. 8:

- (1) 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;
- (2) there must be impairment of the ability to drive of the individual;
- (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
- (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and 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.

[39] This Court is being presented with two legal scenarios which purport to correspond to the evidence before the Court. The first is the scenario which the Crown urges the Court to accept. The Crown submits that Christopher Bourke was impaired at the time of driving. The signs of impairment noted by Cst. Driscoll were such a marked departure from the norm that the Court can infer that Mr. Bourke's ability to operate a motor vehicle was impaired by alcohol.

[40] The defence urges the Court to accept a second scenario. It is this. The open bottle of 10% beer is evidence that Mr. Bourke could have been bolus drinking during the 30 minutes before he was stopped. His manner of driving and his manner of running are consistent with someone whose ability to operate a motor vehicle was not impaired at the time of the vehicle stop. The signs of impairment observed by Cst. Driscoll after he had chased down Mr. Bourke are ambiguous for the reasons stated above, but even if accepted as signs of intoxication, they show a progression over time of an increasing level of intoxication which is consistent with bolus drinking and the results of the alcohol being absorbed into the blood stream.

[41] The first signs of impairment observed by Cst. Driscoll came after he had pushed Christopher Bourke to the ground and started to handcuff him. Up until that point in time, Cst. Driscoll observed nothing in Mr. Bourke's driving or his running to indicate that Mr. Bourke was impaired by alcohol (except perhaps the

decision to run from the police). At the point of handcuffing, Cst. Driscoll detected a strong odour of alcohol coming from Mr. Bourke. The other observations of impairment came after this point in time.

[42] For the reasons suggested by defence and listed above, I am not satisfied that the signs of impairment observed by Cst. Driscoll up to the arrival at the detachment indicate such a marked departure from the norm that I can infer that Mr. Bourke's ability to drive a motor vehicle was impaired. I do note, however, that at the detachment Mr. Bourke was described as "not walking steady". In the context of the earlier observations and the absence of any explanation, I am of the view that the evidence of Mr. Bourke's impairment at the detachment is sufficient to find that his ability to drive at that point was impaired.

[43] At the time of driving, i.e., at 05h00, there is no evidence of impairment. That signs of impairment are observed later is consistent with bolus drinking. In order for me to find Christopher Bourke guilty under section 253(1)(a) of the *Criminal Code*, I must find that his ability to operate the motor vehicle was impaired by alcohol *at the time he was operating it*. For the reasons stated earlier, there is a real possibility that Mr. Bourke drank a quantity of alcohol in the 30 minutes prior to being stopped so that at the moment of being stopped and during the period of time while he was driving prior to being stopped, the alcohol was not yet in his blood stream and his ability to operate the motor vehicle was not impaired by alcohol.

#### **D. CONCLUSION**

[44] Christopher Bourke is acquitted of the two charges under sections 253(1)(a) and 253(1)(b) of the *Criminal Code*.

Garth Malakoe  
J.T.C.

Dated at Yellowknife, Northwest  
Territories, this 25<sup>th</sup> day of  
October, 2013.

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