*R. v. Burke, [2017] O.J. No. 5786*

Ontario Judgments

Ontario Court of Justice

L.C. Pringle J.

Heard: August 24, 2017.

Judgment: August 24, 2017.

Released: September 11, 2017.

**[2017] O.J. No. 5786**

Her Majesty the Queen, and Paul Burke

(76 paras.)

## Counsel

No counsel mentioned.

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**Reasons for Judgement**

**L.C. PRINGLE J.**

**1. Introduction and Overview**

**1** Paul Burke is charged with driving with over 80 mg of alcohol in his blood on April 27, 2015. After a minor collision with another car in the underground parking garage of his building sometime around midnight, one of the parties in the other car called the police. The police smelled alcohol on Mr. Burke's breath and demanded that he provide a roadside breath sample into an approved screening device. Mr. Burke's result on the approved screening device was a "fail", and he was arrested and taken to 32 division for breath samples. At 32 division, he registered a truncated reading of 130 mg of alcohol in 100 ml of blood on the approved instrument at 1.55 a.m.; and 130 again at 2.19 a.m.

**2** The Crown called the driver of the other motor vehicle, Mr. Liu; the arresting officer, Cst. Lobsinger; the breath technician Cst. McConnell; and a forensic toxicologist from the Centre of Forensic Sciences, Dr. Marie Elliot.

**3** Mr. Burke elected to testify on his own behalf on the Charter hearing. He also testified in relation to the trial proper, and called a further witness to testify to his alcohol consumption that night.

**4** I'm not sure how this simple event that occurred over 2 years ago turned into such a complex hearing that required 4 dates to get the case completed, and 2 Crowns to take carriage of the prosecution on different dates. I am told by Mr. Engle that he is the second lawyer on the file for Mr. Burke.

**5** It's not disputed that Mr. Burke hit Mr. Liu's car that night when he reversed back from the gate in the underground parking garage, nor is it disputed that Mr. Burke had been drinking.

**6** However, the Defence vigorously disputes that the Crown can prove that Mr. Burke's blood alcohol content was "over 80". On Mr. Burke's behalf, Mr. Engel raises a number of issues, submitting that:

1. the demand for a sample on the approved screening device in the underground garage was not made "forthwith" after the officer formed a reasonable suspicion that Mr. Burke had alcohol in his system as required by s.254(2), therefore resulting in Charter breaches under s.8 and 10(b);
2. the Crown has failed to demonstrate objective reasonable and probable grounds for the arrest arising out of the failed test on the approved screening device, thereby resulting in a breach of s.8 of the Charter;
3. the demand for samples on the approved instrument was made belatedly some 14-16 minutes after Mr. Burke's arrest and was not therefore "as soon as practicable" as required by s.254(3), resulting in a Charter breach under s.8;
4. the samples of breath on the approved instrument at the station were not taken within the two hour window of opportunity set out in s.258(1)(c), thereby depriving the Crown of the benefit of the presumption of identity;
5. the samples of breath taken on the approved instrument at the station were not taken "as soon as practicable" as required by s.258(1)(c), thereby depriving the Crown of the benefit of the presumption of identity; and,
6. if the Crown has lost the benefit of the presumption of identity, the Defence is entitled to rely on a *"Carter"* defence, and the evidence regarding Mr. Burke's consumption should leave the court with a reasonable doubt that the approved instrument was reliable in this case.

**7** In the end result, the Defence submits that the evidence of the breath samples should be excluded from evidence pursuant to s.24(2) of the Charter, and/or, the Crown has failed to prove beyond a reasonable doubt that Mr. Burke's readings were over 80.

**8** I have determined that most of the arguments must be dismissed. However, I do agree with the Defence that the Crown has failed to establish that Mr. Burke's samples were taken within the 2 hour window of opportunity and that they were taken as soon as practicable. Accordingly, the Crown has lost the benefit of the presumption of identity and Mr. Burke is entitled to rely on a *Carter* defence. In the end result, I find that I am left with a reasonable doubt by the *Carter* evidence, and Mr. Burke is entitled to be found not guilty on this basis.

**9** Let me explain my reasons briefly.

**2. Demand on the approved screening device "forthwith"**

**10** Section 254(2) requires that once an officer has reasonable grounds to suspect that a person has alcohol in his body and was operating a motor vehicle within the preceding 3 hours, he may demand that the person provide a sample of his breath "forthwith" into an approved screening device.

**11** In *R. v. Quansah, [2012] O.J. No. 779* the Ontario Court of Appeal explained:

> "Forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response by refusing or providing a sample must be no more than is reasonable necessary to enable the officer to discharge his or her duty as contemplated by s.254(2).

**12** In this case, Cst. Lobsinger arrived at the underground parking garage where the incident took place at 12.29 a.m. At that point he had information that there had been a collision in the underground, and the caller believed the driver of the black Accura SUV had been drinking.

**13** Cst. Lobsinger walked over to a male outside a black Pontiac SUV (who turned out to be Mr. Burke), while his partner Cst. Lai walked over to a male and female beside the other car that was nearby. Cst. Lobsinger testified that he believed the black Pontiac SUV matched the description given by the caller. Cst. Lobsinger asked Mr. Burke if it was his car, and when Mr. Burke said yes, the officer asked him for his driver's licence. Cst. Lobsinger spent about 2-3 minutes with him (to 12.31 or 12.32 a.m.). He said Mr. Burke seemed confused as to why police were there, and the officer said he smelled a strong odour of an alcoholic beverage coming from Mr. Burke's breath.

**14** About 2-3 minutes later, Cst. Lai walked over to Cst. Lobsinger and Mr. Burke, (12.33 to 12.35 a.m.). Cst. Lai said Mr. Burke was the driver of the car involved in the collision, and Cst. Lobsinger testified that he then formed his grounds to make a breath demand on the approved screening device. In other words, he said he then believed Mr. Burke was the driver of the car in the collision, and since he had smelled the odour of alcohol coming from his breath, he suspected that Mr. Burke had been operating the vehicle with alcohol in his body.

**15** In cross-examination, Mr. Engel pressed Cst. Lobsinger to admit that he formed his grounds before Cst. Lai came over. However, Cst. Lobsinger explained that from his perspective, the fact that Mr. Burke was the owner of the car did not mean that he was necessarily the driver of the car. While Mr. Burke could have been involved in the collision, Cst. Lobsinger said he wasn't sure he was the driver until Cst. Lai confirmed it for him.

**16** Cst. Lobsinger then told Mr. Burke that he was going to demand a breath sample on a roadside device from Mr. Burke, and he escorted him to the scout car. He got out the approved screening device, turned it on, let the device run its self-tests, and saw the "ready" screen. Cst. Lobsinger then did a test on the device with his own breath at 12.38 a.m. which gave a result of zero, and at 12.39 a.m. the officer read Mr. Burke

the formal demand to provide a sample of his breath. The officer administered the test at 12.40 and Mr. Burke registered a "fail" at 12.42.

**17** Mr. Engel submits that it's nonsense that Cst. Lobsinger didn't form the suspicion till Cst. Lai came over, and pointed out that Mr. Burke was standing by the car that matched the description of the one given by the caller, Mr. Burke said it was his car, and Cst. Lobsinger smelled alcohol. Therefore Mr. Engel says that it's obvious Cst. Lobsinger formed his suspicion at 12.30, and should have made his demand immediately.

**18** I can't agree. While it's true that other officers might have formed their suspicion earlier, I accept Cst. Lobsinger's testimony that he didn't do so until Cst. Lai came over. In my view, there was nothing unreasonable about the officer's assessment of the situation, or the fact that he was careful not to jump to conclusions that Mr. Burke was involved in the collision.

**19** While Mr. Engel further submitted that the informal demand for Mr. Burke was not made promptly to his client once Cst. Lobsinger's suspicion was formed, Mr. Burke himself testified that once Cst. Lai came over, he was told the officers were going to "give him the roadside" and administer a breath test. Mr. Burke said he knew the reason he was walking over to the scout car was for a breath test, and agreed it was quite apparent to him what was going on.

**20** In all the circumstances, I find the demand was made promptly on forming the requisite suspicion, and the sample was provided "forthwith". I find no Charter breach.

**3. Objective reasonable and probable grounds based on the operation of the approved screening device**

**21** The law requires that not only must an officer have a subjective belief that there are reasonable and probable grounds for arrest, but that in addition, those grounds must be objectively reasonable. This is an important protection for the rights and freedoms of the citizen, and a safeguard against an abuse of power by a police officer. Therefore, an officer must not only personally believe in the grounds for arrest, there must also be an objective basis upon which to conclude that his belief was reasonable.

**22** In this case Mr. Engel acknowledges that Cst. Lobsinger subjectively believed that the approved screening device was in proper working order and provided a reliable basis for believing Mr. Burke's "fail" meant that his blood alcohol content was over the legal limit. However, the Defence submits that the court should be concerned that since the officer didn't record the error messages, there is no objective basis upon which to consider the reasonableness of the officer's determination.

**23** The evidence on this point is that Cst. Lobsinger turned on the approved screening device, saw no damage on the device, let it run its self tests and saw the device come to the "ready" screen. He testified that if the device was outside the calibration or accuracy date, it would not receive a test. He did a self test resulting in a zero reading, and concluded that the device was in proper working order.

**24** The officer said that it took Mr. Burke three attempts before he provided a suitable sample. The officer agreed that an "error" message would have appeared on the device for the unsuccessful attempts, but he did not record the message or make a note of the specific problem. In examination in chief he recalled that Mr. Burke was not blowing for long enough.

**25** Cst. Lobsinger agreed that he should have made a note of the error messages, but said he just forgot. He further agreed that the Drager Alcotest 6810 operating procedures suggested that "if an error message other than "insufficient volume" or "blow interruption" is displayed, make a note of the message, turn off the device and have it transported to Traffic Services for maintenance". However, the officer testified that he had no issues with the machine.

**26** I find there is sufficient evidence on the record for me to assess the reasonableness of the officer's belief that the device was functioning properly. Notwithstanding that he had only been on the job for three months, Cst. Lobsinger was knowledgeable about the device that he was using and the readings that could be received. He described that the device was not damaged, it displayed a "ready" screen; that his self test accurately reflected a zero reading; and he recalled that the reason for Mr. Burke's unsuccessful attempts was that he was not blowing for long enough. There was no evidence to suggest that an error message arose such that the device needed maintenance.

**27** I am satisfied that Cst. Lobsinger's subjective belief that the device was functioning properly was objectively reasonable. There was no breach of s.8 of the Charter.

**4. Belated demand for samples on the approved instrument**

**28** Section 254(3) requires that the demand for breath samples under this section be made "as soon as practicable" after forming grounds to believe that an offence was committed. Here, Cst. Lobsinger forgot to make the demand until 14 minutes after the arrest.

**29** The evidence on this issue is that Mr. Burke was arrested at 12.42 a.m. and placed in the scout car. He was cautioned and read his rights to counsel at 12.45. Other officers arrived on scene, there was some discussion regarding waiting for a tow truck, and Cst. Lobsinger entered some information in the computer. The officers began to drive out of the underground parking area about 12.50, and got lost. They managed to exit the underground about 12.54. At 12.55 while they were en route to the police station, Cst. Lai asked Cst. Lobsinger if he had read the Approved Instrument demand to Mr. Burke, and Cst. Lobsinger realized that he had not. He said that he was aware of the requirement to read the demand, but when reading Mr. Burke all the other things on arrest, the demand simply slipped his mind.

**30** Cst. Lai pulled over the scout car at 12.55. Cst. Lai read Mr. Burke the demand at 12.56 a.m. Mr. Burke testified that after he was handcuffed, he assumed that he was being taken to the police station for tests, although he was not told this formally at the time. He said the reading of the demand at the side of the road after arrest was embarrassing to him, as the officer pulled over by a pub on a public street in his neighbourhood. He said there were cat calls by people watching it unfold and it was humiliating. Mr. Engel did not ask Cst. Lobsinger about any of this.

**31** At the station, the Qualified Breath Technician, Cst. McConnell, confirmed with Cst. Lobsinger that Mr. Burke had been given a breath demand. Cst. McConnell then told Mr. Burke, "ok sir, so you were given a breath demand. It's called (inaudible) demand. A demand puts on you that you provide samples of your breath directly into an approved instrument, okay? This is the approved instrument, it's the Intoxilyzer 8000C."

**32** Based on this evidence, I agree there was a breach of s.8 of the Charter. The requirement that the demand be made "as soon as practicable" is a statutory one. It is a constituent element of reasonableness that Cst. Lobsinger forgot.

**33** Cst. McConnell's interaction with Mr. Burke at the station did not amount to a separate demand based on his own grounds to believe that an offence had been committed as in *R. v. Guenter, 2016 ONCA 572*, application for leave to appeal dismissed *[2016] S.C.C.A. No. 433*. Rather, Cst. McConnell's interaction with Mr. Burke was an attempt to explain the nature of the demand made by Cst. Lobsinger.

**34** While there was a breach, I would not exclude the evidence in this case under s.24(2). The breach was not a serious one: Cst. Lobsinger understood his responsibilities but he simply forgot to read the demand to Mr. Burke in a timely way. The impact of the breach was not great on Mr. Burke, who understood why he was going to the police station in any event. While Mr. Burke testified that the reading of the demand on the street was embarrassing and unpleasant, I note that Cst. Lobsinger was never asked about any of this, and in the circumstances, I don't put much weight on Mr. Burke's evidence on this point. The breath samples are reliable evidence that are essential to the Crown's case, and I find that society's interest in an adjudication on the merits favours admission of the evidence. Balancing these factors, I am satisfied it would not bring the administration of justice into disrepute to admit the evidence.

**5. Were the samples on the approved instrument within the 2 hour window?**

**35** Section 258(1)(c) requires that in order to rely on the presumption of identity that Mr. Burke's blood alcohol content at the time of driving was identical to the readings on the approved instrument at the police station, the first sample has to have been have taken not later than two hours after the time of the offence.

**36** In this case, the Crown tried to hedge its bets. The Crown argued that the first sample *was* taken within the two hour window after driving, but in the alternative, called Dr. Elliot to establish Mr. Burke's blood alcohol content at the time of driving without the aid of s.258(1)(c).

**37** The first sample was taken at the police station at 1.55 a.m. To bring the case within the 2 hour window of opportunity, the Crown must show that the commission of the offence was at 11.55 p.m. or later.

**38** The evidence relating to the time of the offence was unclear. Mr. Liu said that the incident where Mr. Burke backed into his car in the parking garage was "around midnight", but said that he didn't know the exact time and wasn't paying attention to the time. Mr. Liu said that the police didn't arrive at the scene until about twenty to thirty minutes later.

**39** We know the police arrived at 12.29 a.m. They had no direct knowledge of when the driving took place.

**40** Cst. Lobsinger told Cst. McConnell that the time of the occurrence was 12.23 a.m.. However, in his submission to the Centre of Forensic Science, he advised Dr. Elliot that it was at or between approximately 11.30 p.m. and midnight.

**41** Mr. Burke testified that he believed he arrived at his building around 11.40 to 11.50 p.m.

**42** In light of the conflicting evidence, I find the time of the offence was unclear. Even on the Crown's evidence, one of Cst. Lobsinger's estimates as to the time of driving was between 11.30 p.m. and midnight.

**43** Therefore, I am unable to say that the first sample was within the 2 hour window. The Crown is not entitled to rely on the presumption of identity.

**6. Were the samples on the approved instrument taken "as soon as practicable"?**

**44** Pursuant to s.258(1)(c), a further requirement of the section in order for the Crown to rely on the presumption of identity is that the samples have been taken "as soon as practicable".

**45** The law on this issue is well known. In *R. v. Vanderbruggen, [2006] O.J. No. 1138*, Mr. Justice Rosenberg summarized the case law and held that "the touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably". The court directed that the trial judge take into account 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. It noted that there is no requirement that the Crown provide a detailed explanation of what occurred during every minute that the accused is in custody. In that case, the court found that there was no evidence that the police acted unreasonably, and noted that the record only showed that they were "attentive to their duties and to the need to administer the tests to the appellant as soon as practicable. There was no evidence that the officers gave unreasonable priority to any other task."

**46** The Defence complains here that some of the time that elapsed prior to the taking of the samples was unexplained and therefore cannot be shown to be reasonable. In particular, Mr. Engel points to about 8 minutes in the underground garage after Mr. Burke was arrested but before the officers departed for the station; 7 minutes spent outside the station before the door to the sally port opened; and 9 minutes in the booking hall before the officer in charge of the station appeared.

**47** I will briefly address each period of time.

**48** The underground garage: I am satisfied that the officers were attentive to their duties and acting reasonably in the underground garage after Mr. Burke was arrested at 12.42 a.m.. Cst. Lobsinger testified that Cst. Lai was updating other officers who arrived on the scene, and the video confirms discussions about "dealing with the tow". Cst. Lobsinger also explained that he was entering required information relating to the arrest into the versadex system on his computer. These were appropriate and reasonable duties that did not take overly long. The scout car left the scene at 12.50 a.m.

**49** Outside the station: The officers arrived at the station at 1 a.m. and Cst. Lobsinger testified that Cst. Lai called to let the booking officer know they were there outside. Cst. Lobsinger finished up the versadex report and sent it in within about two minutes of their arrival. After that, he said they just had to wait until the booker was ready. The door to the sally port opened at 1.07 a.m. If it took 2 minutes to complete the required versadex information, there was no explanation why the officers had to wait between 1.02 and 1.07 a.m. to be let into the station. This 5 minute waiting period remained unexplained on the evidence before me.

**50** In the booking hall: The officers and Mr. Burke entered the booking hall with Mr. Burke at 1.09 a.m. The video shows that there were some tasks carried out during this time, including reading the warning that Mr. Burke was under audio/visual observation. His money was discussed, his property was confirmed, and some address information was obtained. However, a period of time was spent simply waiting for the Officer in Charge of the station to arrive at 1.18 a.m. Cst. Lobsinger didn't know why the Officer in Charge wasn't available earlier, except to note that as the officer in charge of the entire station, Staff Sgt. Coulson would be busy. In assessing this time, I would attribute about 3 minutes to the few tasks that were reasonably carried out before Staff Sgt. Coulson came in. In the end result there is approximately 6 minutes of time spent just waiting, without any specific explanation beyond the general one that the officer in charge of the station would be busy.

**51** overall assessment: There are two periods of delay that are largely unexplained in this case: 5 minutes outside the station and 6 minutes in the booking hall. As indicated in *Vanderbruggen,* it is important to look at this 11 minutes in the context of the whole chain of events and assess whether the police acted reasonably and were attentive to their duties.

**52** Eleven minutes is not an inordinate amount of time. However, in making the overall assessment of "as soon as practicable" in this case, I take into account that:

* based on Cst. Lobsinger's own estimate to the CFS, the offence could have been committed as early as 11.30 p.m;
* as a result, the officers knew that time was of the essence by the time they arrived on scene at 12.29 a.m.;
* some amount of time was added to the process because Cst. Lobsinger forgot to make the demand to Mr. Burke after arrest, and Cst. Lai had to pull over to ensure this was done;
* in that sense, the officer was not attentive to his duty;
* the additional 11 minutes of waiting time was not specifically explained in this case;
* while it is no doubt true that in general police stations are busy, and the officer in charge is also busy, the Crown and/or police could easily address this requirement with more specific information about the circumstances of the particular situation.

**53** Looking at the whole chain of events, I am not satisfied that the Crown has shown the samples were taken as soon as practicable, and the Crown is not entitled to rely on the presumption of identity on this basis either.

## 7. The *Carter* defence: evidence to the contrary

**54** As a result of amendments to s.258 of the Criminal Code in 2008, reliance by on a "*Carter*" defence has been very significantly restricted. However, the parties agreed that if I were to find that the Crown was not able to rely on the presumption of identity in this case, (either because the samples were not within the 2 hour window, and/or because they were not taken as soon as practicable), a *Carter* defence is available: see *R. v. Alvarez-Restrepo,* 2015 ONCJ 798.

**55** The defence of "evidence to the contrary", sometimes known as a *Carter* defence, relies on the credibility of the defence evidence regarding the defendant's consumption of alcohol, which must be assessed in light of reasonable doubt. In *R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.): Finlayson J.A. stated at p 178:

> Clearly, since the breathalyzer instrument is intended to measure the quantity of alcohol in the person being tested, any evidence as to how much alcohol the person tested had in fact consumed is relevant evidence and *if accepted can raise a doubt as to the accuracy of the breathalyzer reading.* (my emphasis)

**56** In *R. v. Dubois* (1990), 62 C.C.C. (3d) 90 at p.92, Fish J.A. explained the interaction of "evidence to the contrary" and "reasonable doubt" in this way:

> ...a breathalyzer result cannot support a conviction under s.253 if there is contrary evidence which *raises a reasonable doubt* or *suggests a reasonable possibility of innocence* or *might reasonably be true.* (my emphasis)

**57** My colleague Justice Shandler noted in *Alvarez-Restrepo* at paras. 19-20:

> Although a *Carter* defence is available, it may well be difficult to raise a reasonable doubt absent evidence tending to cast doubt on the reliability of the breathalyzer results. This was noted by our Court of Appeal at the inception of the *Carter* defence. Those reservations were also noted by the Supreme Court of Canada who stated that the "success rate" of the accused's subjective recollection as to his alcohol consumption "is hard to justify in light of the scientific reliability of the instruments", provided that the instruments are operated and maintained properly. The reliability of breathalyzer tests was summarized in a 2006 report prepared for the Department of Justice by Brian T. Hodgson, a forensic toxicology consultant, also noted by the Supreme Court of Canada:
>
> > The scientific basis for evidential breath alcohol testing is well established. Experiments derived from a recognized scientific law in physics have proven the scientific validity of breath analysis to determine alcohol concentration in the blood. Instruments designed to measure breath alcohol content are based on technology that is capable of producing scientifically sound results. Like Canada, every country that embarks on evidential breath alcohol analysis subjects these instruments to a rigorous evaluation process. These processes determine whether the instruments meet the scientific standards for accuracy, precision, reliability and specificity.
>
> The Supreme Court also noted the many reports which have shown the testimony of accused persons regarding their alcohol consumption to be unreliable.

**58** In Mr. Burke's case, Dr. Marie Elliot was qualified to give opinion evidence in the area of the theory and operation of the approved instrument used in this case, the Intoxilyzer 8000C; the absorption, distribution and elimination of alcohol in the human body; and the effects of alcohol on the human body. It was conceded that she was also qualified to calculate the projected blood alcohol content of a subject based on certain factors provided to her, both by "reading back" the results at a particular time on the Intoxilyzer

8000C to the time of the incident; and by "projecting forward" a result based on a hypothetical pattern of consumption.

**59** She testified that based on a truncated Intoxilyzer 8000C reading of 130 mg of alcohol in 100 ml of blood at 1.55 a.m., Mr. Burke's projected blood alcohol content between 11.30 p.m. and 12.30 a.m. would be between 130 and 180 mg of alcohol in 100 ml of blood.

**60** Dr. Elliot also reviewed the test results of the Defendant's breath samples and stated that, in her opinion, the instrument appeared to have been properly calibrated and was in proper working order. In her letter of opinion she stated that in her experience, when a qualified technician operates the instrument properly, it provides reliable readings of the blood alcohol content at the time of testing, although she conceded in cross-examination that the instrument is not infallible.

**61** In cross-examination, Dr. Elliot was presented with a hypothetical based on the Defendant's drinking pattern that he later gave in evidence, that is: a 6 foot male, 200 lbs, mid-fifties, consumed three draft beers of Moosehead 5% alcohol of 18 oz each, commencing at 10.30 p.m. and concluding at 11.15 p.m. She stated that the blood alcohol content of that person between 11.30 and midnight would be between 60 and 80 mg of alcohol in 100 ml of blood. Between midnight and 12.30 a.m., that person's blood alcohol content would be between 50 and 80 mg of alcohol in 100 ml of blood, (i.e. under the legal limit in both scenarios).

**62** In order to have reached a reading of 130 mg of alcohol in 100 ml of blood at 1.55 a.m., she indicated that between 10.30 and 11.15 p.m., that person would had to have consumed between 5 1/2 and 6 1/2 glasses of 18 oz, Moosehead 5% beer.

**63** Mr. Burke testified and stated that he went to a pub to meet his friend David McCaskill at a pre-arranged meeting time of 10.30 p.m. He said that he had not been drinking at all earlier that day or evening. He arrived at 10.30 p.m. and was annoyed because Mr. McCaskill was late and didn't arrive until about 10.50 p.m. While waiting for Mr. McCaskill, Mr. Burke said he ordered a Moosehead 5% alcohol draft beer, 18 oz. When Mr. McCaskill arrived, Mr. Burke said they each ordered and drank another beer, and then another, before they left. Mr. Burke said he left around 11.20 or 11.25 as he was tired and he had an important meeting the next day.

**64** When he arrived at the underground parking of his building Mr. Burke said it was about 11.40 or 11.50 p.m., and he had a problem with his parking fob. As he tried to reverse from the gate due to the problems with his fob, he backed into Mr. Liu's car which was behind him. Later, when he was arrested, he called Mr. McCaskill. Mr. Burke knew that his friend was a lawyer and had practiced criminal law in the past.

**65** Mr. Burke stated that he was under a lot of stress as a result of termination of his employment with the CAS. He was involved in grieving the loss of his job with the help of his union, and he was also working on a human rights application for the same matter. He acknowledged that he some behaviour issues that he needed to deal with. He said he was not proud of his behaviour with Mr. Liu or the police, but he was confused why the police needed to be involved. He said his bad behaviour was attributable to stress and he did not believe it was influenced by the alcohol he drank.

**66** Mr. McCaskill testified and confirmed that he had a meeting scheduled with Mr. Burke for 10.30 that night, but said he arrived late as he had been at the gym. Mr. Burke had a beer in front of him that had about

1/4 to 1/3 left in it when McCaskill got there. It was about 10.45 or 10.50 p.m. Mr. McCaskill could tell that Mr. Burke wasn't happy that he was late. He knew that his friend was under pressure as a result of the difficult time he was having with his former employer, the CAS.

**67** Mr. McCaskill readily conceded that he didn't know what time Mr. Burke arrived at the bar, although he thought it was likely at the agreed upon time because his friend was generally pretty prompt. He didn't know if Mr. Burke had been drinking more than the beer he saw him with when he arrived, but said that Mr. Burke didn't seem "any the worse for wear" that evening. If he had been, Mr. McCaskill said that he would have suggested that Mr. Burke stay at his place, which he had done before. Mr. McCaskill said that based on the timing of the call he received from Mr. Burke after he was arrested, he assumed that Mr. Burke went straight home from the pub.

**68** The Crown does not dispute Mr. McCaskill's evidence because she points out that he had no knowledge of whether Mr. Burke was drinking before he went to the bar, or how much he had to drink at the bar before Mr. McCaskill arrived. Ms. Hebert submits that the strongest evidence of the amount that Mr. Burke had to drink is that of the Intoxilyzer 8000C, which according to Dr. Elliot, was in proper working order and is a reliable device. Ms. Hebert further submits that Mr. Burke's testimony about his alcohol consumption is inconsistent with the signs of intoxication he was displaying on the video.

**69** In sum, the Crown submits that Mr. Burke's evidence was not consistent with, and not believable in the face of the breath results and the totality of the Crown's evidence.

**70** I agree that Mr. Burke was displaying signs that might commonly be attributed to impairment by alcohol at the police station: for example, the video showed that he was loud and belligerent at times, but his demeanour fluctuated to be quiet or congenial at other times. However, that doesn't assist me in determining the *amount* of alcohol consumed by Mr. Burke. As Cst. McConnell indicated, different people exhibit different indicia of impairment at different levels of blood alcohol content.

**71** Moreover, I find I cannot put too much emphasis on Mr. Burke's behavior at the police station. As Mr. Burke admitted, he had some general behavioural issues that he knew he needed to address, and these were exacerbated by stress. Mr. McCaskill confirmed Mr. Burke was under a great deal of pressure at the time. Therefore, on the basis of the evidence before me, I don't find I'm able to make meaningful distinctions between behavior influenced by alcohol as opposed to behavior influenced by stress.

**72** It is true that the Intoxilyzer 8000C readings in this case provide strong evidence that Mr. Burke's blood alcohol content was over the legal limit . I accept Dr. Elliot's evidence that Mr. Burke's reading of 130 mg of alcohol in 100 ml of blood is consistent with having consumed 5 1/2 to 6 1/2 draft beer, 18 oz., between 10.30 and 11.15 p.m. On its own, Mr. Burke's evidence might well fail to leave a reasonable doubt in the totality of the evidence.

**73** However, in light of Mr. McCaskill's evidence, I find there is some corroboration of Mr. Burke's account, considering that:

* Mr. McCaskill had a reasonable basis to believe his friend would arrive at 10.30 p.m. because of their prearranged meeting and his observation that Mr. Burke was generally prompt;
* it seems very unlikely that Mr. Burke could have consumed 3 1/2 to 4 1/2 beer in the time before Mr. McCaskill arrived;
* while it's possible that Mr. Burke began drinking before then, Mr. Burke himself denied this;
* Mr. McCaskill had two beers with Mr. Burke, and did not think his friend seemed under the weather when they left.

**74** Dr. Elliot testified that on the basis of the drinking pattern testified to by Mr. Burke, (three draft beer, 18 oz between 10.30 and 11.30 p.m.), his blood alcohol content would have been *under* the legal limit.

**75** While there is reliable evidence that Mr. Burke had over 80 mg of alcohol in 100 ml of his blood according to the Crown's case, I find the combination of Mr. Burke and Mr. McCaskill's evidence suggests otherwise. In combination with Mr. McCaskill's evidence, I find I cannot reject Mr. Burke's testimony.

**76** Accordingly Applying the *Carter* analysis, I find I am left with a reasonable doubt. Mr. Burke is entitled to be found not guilty.

L.C. PRINGLE J.

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