“90 Day driving prohibition overturned by Court after Court agreed breath test results appeared unreliable.” [COMMENTS BY RICHARD NEARY]

S____ v. British Columbia (Superintendent
of Motor Vehicles)

IN THE MATTER OF an Application for Judicial Review
Between
R J S____, Petitioner, and
The Superintendent of Motor Vehicles and The Attorney
General of British Columbia, Respondents

[2006] B.C.J. No. 3238

2006 BCSC 1861

45 M.V.R. (5th) 24

154 A.C.W.S. (3d) 515

71 W.C.B. (2d) 828

2006 CarswellBC 3098

Victoria Registry No. 06 4084

British Columbia Supreme Court
Victoria, British Columbia

Masuhara J.

Heard: November 30, 2006.
Judgment: December 14, 2006.

(33 paras.)

Counsel:

Counsel for the Petitioner: Richard Neary

Counsel for the Respondents: S M____

MASUHARA J.:—

Introduction:

1 The petitioner seeks a judicial review of a decision of a delegate of the Superintendent of Motor Vehicles (the "adjudicator") confirming an administrative driving prohibition.

2 The relief sought is a declaration that the decision of the adjudicator was patently unreasonable; a declaration that the petitioner did not receive a fair hearing before the adjudicator; an order quashing the decision of the adjudicator; and an order prohibiting the imposition of a further administrative driving prohibition in this case, or in the alternative an order directing the Superintendent to revoke the petitioner's driving prohibition.

The Issues:

3 There are two main issues relating to the petitioner's application.

1. Whether the adjudicator's decision was patently unreasonable.

2. Whether the petitioner was deprived of a fair hearing.

I will deal with the issues in this same order.

Was the adjudicator's decision patently unreasonable?

4 The standard of review to be applied is that of whether the decision was patently unreasonable.

5 There has been considerable judicial commentary of the test in respect to administrative driving prohibitions. What is clear is that the test accords the highest level of deference to the decision-maker under review. The court can only intervene where there is no evidence to rationally support the findings made by the decision-maker. By extension, this means that the decision-maker's decision need not be correct, but must be supported by the available evidence. A reviewing court may only intervene where the decision-maker's inferences or findings of fact cannot be supported on the evidence.

6 The role of the court is to review the evidence and the reasons as a whole and not to minutely dissect the reasons in search of an error, or to assess the reasons in a vacuum. Some leeway is to be given to the language used by the adjudicator recognizing that she or he is not a lawyer or a judge. It is sufficient if the reasoning process is apparent from the decision, and there is an evidentiary basis for the findings. There is no duty on a decision-maker to give reasons for preferring or rejecting any evidence.

7 There are three points the petitioner makes in support of his assertion that the adjudicator's decision was patently unreasonable. They are:

It was patently unreasonable to confirm the prohibition where there is an unexplained difference in the results of the breath test tickets;

The adjudicator failed to consider the "alcohol expert's" conclusions that (1) it was impossible to conclude whether any of the breath test results were accurate; and (2) it was impossible to conclude whether the BAC of the petitioner exceeded 80 mg/100ml as a result of technician or instrument error;

The adjudicator's "path of reasoning" in relation to the characteristics of the breath test tickets was patently unreasonable.

The standard to be applied by an adjudicator is that of a balance of probabilities.

8 Having in mind the principles on the standard for this review that I have stated above, and the statement by Newbury J.A., in Taylor v. British Columbia (Superintendent of Motor Vehicles), [2004] B.C.J. No. 2613, 2004 BCCA 641 at para. 12:

It is enough for purposes of this case to note that the "patently unreasonable" standard is not always simply a matter of deciding whether there is "any" evidence to support the tribunal's decision. The standard also involves a consideration of the rationality of the decision or whether the evidence, "viewed reasonably, is capable of supporting the conclusion": (Toronto v. Ontario Secondary School Teacher's Federation, [1997] S.C.J. No. 27, at para. 45)

I conclude for the reasons below that the decision of the adjudicator was patently unreasonable. I do not find that the evidence when viewed reasonably is capable of supporting the adjudicator's decision.

9 The petitioner referred to the following facts in support of his position. They are not in any material way disputed by the respondent:

The adjudicator had no certificate of analysis.

The only items directly pertaining to the blood alcohol level of the petitioner were three BAC Datamaster C breath test tickets.

Of the three breath tickets produced, one indicated that at 1:01 on May 16, 2006 the petitioner produced a suitable sample with an outcome of 0 mg of alcohol per 100 ml of blood. In the bottom right hand corner of this ticket it indicates that this ticket is "2 of 4". Ticket "1 of 4" was not included in the materials submitted by the investigating officer in this case.

Two further breath tickets were produced marked as "3 of 4" and "4 of 4". These tickets indicate that suitable samples were received at 1:29 and 1:51 on May 16, 2006, with the outcome of each being a reading of 120 mg of alcohol per 100 ml of blood.

Nowhere in the materials submitted by the investigating officer is the discrepancy between the results, namely the 0 reading and the 120 readings, in this case explained or addressed.

The petitioner tendered an expert report of Audry Jakus, a "qualified analyst" who reviewed all of the materials submitted by the investigating officer. It was her opinion was that it is impossible to conclude which of the breath test readings, if any, are correct. The report states:

It is my scientific opinion that it is not possible to conclude which of the above breathtest readings are correct, if any, based upon the above test outcomes and breathtest tickets supplied ... Secondly, it is not possible to determine that the BAC of this person exceeded 80 mg/100 mL, due to error by the qualified technician and/or the instrument.

The petitioner notes the adjudicator's remarks in her decision from the first paragraph on page 4:

While Mr. Neary speculates that the proper procedures were not followed in your case and/or that the machine was not working properly that morning, I have no evidence before me to substantiate that.

10 The adjudicator noted the report of Ms. Jakus and stated that:

> Ms. Jakus discusses how individuals are instructed to provide breath samples and how the BAC Datamaster C accepts them. She goes on to explain that the instrument will automatically accept a breath sample if four specific criteria are met with respect to air flow. Ms. Jakus then opines that in this particular case it appears that three suitable samples were obtained from you and that there is no explanation by the Technician about the breath samples but she does acknowledge that "... no Certificate of Qualified Technician Who Took Samples of Breath (was submitted), as more than two breath samples were taken in theses circumstances.

11 Against this background, the petitioner submits that the adjudicator failed to consider relevant evidence on a crucial issue. As a result, her decision was patently unreasonable. In support, the petitioner refers to Geronazzo v. British Columbia (Worker's Compensation Board), [2006] B.C.J. No. 1647, 2006 BCSC 1086, and Martin v. Canada (Attorney General), [2005] F.C.J. No. 752, 2005 FCA 156.

12 The evidence not considered is the failure of the adjudicator to consider Ms. Jakus' evidence and, in particular, the conclusion from her report as quoted immediately above.

13 While the adjudicator's decision acknowledges the report of Ms. Jakus, it does not resolve a critical aspect of the evidence raised by the report; that is, the reliability of the readings she preferred indicating that the alcohol in Mr. S____'s blood was 120 mgs over the zero reading ticket. The basis of her reasoning that there was no evidence to substantiate proper procedures were not followed and/or that the machine was not working properly. The reasoning on this point is that "it appears that the proper procedures were followed that morning as indicated by the checks and information provided on the breath tickets. I am also mindful that the breath tickets were prepared and signed by a Constable who is a technician qualified to conduct such blood alcohol examinations." This is not helpful when it was clearly apparent that the same conditions existed for the zero reading ticket. Complicating the case is the absence of any explanation for why ticket number 1 was not produced.

14 In my view, these factors serve to undermine the rationality of the adjudicator's decision. I do not see how the adjudicator could have chosen one reading over the other when confronted by a "valid" reading on the face of all three tickets, a finding by the adjudicator that there were no procedural problems with the production of any of the tickets, no explanation as how it can be that such a condition can occur and in the face of a another sample which was taken, not produced, and not accounted for in any way. The very aspects of reliability upon which the adjudicator preferred the 120 mg tickets were also present in the zero reading ticket. While there is secondary evidence of impairment of Mr. S____, this evidence is not determinative, the adjudicator specifically noted that she "did not put a lot of weight on the fact that [Mr. S____] failed the ASD" and in the circumstances of this case does not assist in the adjudicator's selection of one reading over another.

15 I note that the instant case is similar to the facts in Holtzhauer v. Superintendent of Motor Vehicles, (30 November 2001), Victoria 01-5193 (B.C.S.C.). There, the court also considered three "valid" tests, including one valid zero reading and two valid positive readings. Although Mr. Justice Hutchinson had already disposed of the case on other grounds, he asserted that the fact that the zero reading had gone unexplained, and the presence of an alcohol analyst's report suggesting machine error, meant that the adjudicator's prohibition order "could be said to be patently unreasonable."

16 The Crown correctly argues that the cases of Higgins v. British Columbia (Superintendent of Motor Vehicles), [2002] B.C.J. No. 545, 2002 BCSC 391, and Wall v. British Columbia (Superintendent of Motor Vehicles), [2002] B.C.J. No. 1914, 2002 BCSC 1237, stand for the proposition that a single valid reading may support an adjudicator's prohibition order even in the face of contrary evidence.

17 However, the facts at hand may be distinguished from those in Higgins and Wall. In Higgins, there was no contrary evidence at all. In Wall, the main evidence before the adjudicator was two blood alcohol readings. The first reading was found to be invalid because it was clear from the information on the breathalyser ticket that the alcohol solution used for the test had expired. The second test was also called into question by the petitioner's expert, who asserted that the second test had likely used expired solution as well. This argument was rejected by Mr. Justice Melnick, who concluded that a proper solution was used for the second test. Although he gave no reasons for this finding, it may be inferred that the ticket for the second reading indicated that the alcohol solution had not expired.

18 Here, the countervailing evidence is far more compelling. First, there are three "valid" tests that yield two results, one reading 0 mg/mL and two reading 120 mg/mL. Although the results are clearly polar opposites, both parties agree that all three tests are "valid." Second, there was no evidence in front of the adjudicator to explain these results, which are so patently opposed to one another. Third, there was no evidence to explain what happened to the first reading ticket "1 of 4" as identified in the Jakus report. Ordinarily that might not be significant, but here, in the absence of an explanation for two contrary test results, it casts further suspicion on whether the tests were conducted properly. Finally, the petitioner's alcohol analyst detailed the four requirements for a "valid" breath sample. This evidence was not contradicted by the adjudicator. The adjudicator appears to have viewed the process as a contest between the readings and ignored the prospect that they could be all wrong as an outcome suggested in the Jakus report.

19 Given all of the above, I find that the decision was patently unreasonable.

Was the petitioner deprived of a fair hearing?

20 The petitioner submits that the adjudicator breached a duty of fairness by "injecting her own evidence" into her findings without giving the petitioner the opportunity to respond. The petitioner says that through this action of the adjudicator he was deprived of the ability to challenge the application of the evidence that was not disclosed which constitutes a substantial wrong which requires a new hearing. He says that hearing fairness includes the right to be apprised of any information or evidence on which the adjudicator intended to rely in making a decision. The cases that the petitioner relies upon are: Dennis v. British Columbia (Superintendent of Motor Vehicles), [2000] B.C.J. No. 2447, 2000 BCCA 653; Breakey v. British Columbia (Superintendent of Motor Vehicles), [2000] B.C.J. No. 2803, 2000 BCSC 1815; Buhlers v. British Columbia (Superintendent of Motor Vehicles), [2004] B.C.J. No. 1802, 2004 BCSC 1156; and Painter v. British Columbia (Superintendent of Motor Vehicles), [2006] B.C.J. No. 1545, 2006 BCSC 1012.

21 The specific injections of evidence that the petitioner says that create the unfairness are found in the adjudicator's observations regarding the breath tickets at the fourth paragraph of page 2 of the decision:

> The internal standard test were verified by the instrument and were within the acceptable range of 90 mg% and 110 mg%"; and

> The standard alcohol solution used had not exceeded its expiry date and that the simulator temperature indicates that it is within the acceptable range.

22 The petitioner submits that the adjudicator's references to the internal standard test and the simulator temperature being "within the acceptable range" and moreover that with respect to the former stating "within the acceptable range of 90 mg% and 110 mg%", revealed that the adjudicator was relying on her own evidence or information. This was done without notice to the petitioner who was thus deprived of the opportunity to challenge the application of that evidence.

23 A review of the ticket indicates the following notation with respect to the above:

SIMULATOR TEMPERATURE:	33.8c-34.2c: Y
INTERNAL STANDARD	VERIFIED

24 The petitioner relies particularly upon the aforementioned Painter judgment of Madam Justice Gill. In that case, the court held that the adjudicator had applied her own knowledge that test results were rounded down to the nearest 10 mg%; that ASD devices are usually calibrated to record a fail at 100 mg%, and that it is accepted by the forensic science community that alcohol is eliminated from the human body at a relatively constant rate of 15 mg% per hour; in making her finding that the petitioner's blood alcohol concentration exceeded 80 mg of alcohol per 100 ml of blood within three hours of operating or having care or control of a motor vehicle. In the proceedings it was acknowledged that there was no evidence before the adjudicator regarding these three areas, nor was their evidence about the adjudicator's experience or training. Gill J. found that the aforesaid personal knowledge formed an essential part of the adjudicator's ultimate decision. She noted that the petitioner had provided evidence regarding his activities and alcohol consumption during the evening in question and tendered expert evidence about his blood alcohol level. This was rejected by the adjudicator in preference for facts not in evidence in reaching the ultimate determination.

25 In my view, the situation in Painter differs from the instant. In that case, the adjudicator made use of special knowledge about the calibration of the ASD, the margin of error within test results and that they are rounded down to the nearest 10 mg% all of which went into a finding of what the reading must have been.

26 In this case, the petitioner had the tickets, knew that they would be used as evidence against him. He in fact hired an expert who did not question this aspect of the tickets. It is apparent that the adjudicator was not using her own knowledge as evidence but rather she was using her knowledge to recognize what certain output printed on the ticket produced by the BAC meant in relation to the operation of the BAC device itself. By this, I do not mean that she was interpreting or extrapolating data. Rather, she was recognizing what a specific entry on the ticket meant in regard to the key reading of interest, namely the blood alcohol reading.

27 Her use of knowledge regarding the internal standard test and the temperature simulator were no more than the knowledge that she would use in recognizing that where the ticket states: "SUBJECT SAMPLE 120" it means that the BAC is indicating that petitioner had a blood alcohol concentration of 120 millilitres at the time he provided the sample and exceeds the specified level of 80 milligrams of alcohol per 100 millilitres of blood in set out in the Motor Vehicle Act.

28 Here, the adjudicator did not use her specialized knowledge to bridge any gaps in the evidence, an action which the courts have disapproved in both Dennis and Breakey. The circumstances of this case on this point are much more akin to Jones v. British Columbia (Superintendent of Motor Vehicles), [2001] B.C.J. No. 1738, 2001 BCSC 1168, and Wanless v. British Columbia (Superintendent of Motor Vehicles), [2000] B.C.J. No. 1542, 2000 BCSC 1152, than the cases relied upon by the petitioner.

29 Accordingly, I find that there was no breach of fairness.

Remedy:

30 Where an adjudicator's decision has been found to be patently unreasonable, the usual remedy is for the court to remit the matter back to the adjudicator for a re-hearing. That is what I propose to do here.

31 The petitioner has argued that the circumstances of this case would justify a more robust order, including one in the nature of mandamus directing the Superintendent to revoke the driving prohibition. I disagree. The petitioner has directed me to authority that allows for such orders, they are normally reserved for cases that have dragged on for an excessively long time or where there is no chance that a prohibition order could be confirmed.

32 Neither condition holds here. Although this is, according to the petitioner, the fourth time he has retained counsel to argue his position, one more re-hearing would not bring the reputation of this administrative process into disrepute. Such a re-hearing will likely hinge on a focussed issue. For this same reason, it cannot be said that a prohibition order is an impossible outcome of the re-hearing.

33 I order that the adjudicator's decision of September 6, 2006 be quashed, and the matter remitted to the adjudicator for re-hearing.

MASUHARA J.