

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Donovan, 2009 NSPC 8

Date: 20090309

Docket: 1635245/246

Registry: Sydney

Between:

Her Majesty the Queen

v.

Justin Patrick Donovan

Judge: The Honourable Judge D.J. Ryan

Written decision: March 9, 2009

Charge: s. 255(2) cc, 255(3)cc, 249(2) cc, 249(3) cc

Counsel: Ms. Diane McGrath, for the Crown
Mr. William Burchell, for the Defence

By the Court:

[1] In coming to the decision in this case I have had the benefit of direction from previous decisions setting out considerations I must keep in mind. It is important that the Accused or families and friends of all the parties involved in this tragic happening are aware that a judge doesn't just capriciously come to a decision on the basis of his or her preferences, feelings or opinions. We are guided and directed as to how to go about reaching the conclusions we reach.

[2] The Supreme Court of Canada has given us such direction, the Appeal Court of Nova Scotia has done likewise and there are ample cases decided across Canada wherein directions are followed and of assistance to us. These being criminal charges there exists a certain basic premise fundamental to any criminal case: the presumption of innocence. In order for the Crown to succeed in any prosecution it must present evidence sufficient to prove beyond a reasonable doubt that an accused committed the offence of which he or she is charged. That burden never shifts to the accused person.

[3] The Supreme Court of Canada in the case of R. v. Lifchus, [1997] 3 S.C.R. 320 attempted to summarize what a jury (and by extension a judge) should and should not be cognizant of when considering the issue of reasonable doubt and in coming to a decision. I can do no better than repeat the direction of Cory, J. In the Lifchus decision (at para 39):

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression “beyond a reasonable doubt” mean?

The term “beyond a reasonable doubt” has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt. (emphasis mine)

THE CHARGES:

[4] Mr. Donovan is charged with offences under two distinct sections of the Criminal Code, namely s. 255(2) and (3) and s. 249(3) and (4), four separate charges in all.

S. 255 Charges:

The charges under s. 255 read as follows:

“That Justin Patrick Newman Donovan on or about the 22nd day of January 2006 at or near Paquet’s Lake, Cabot Trail, Cape Breton Highland National Park, Victoria County, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did operate a 1996 Ford 150 truck and thereby cause the death of Beverley Fraser contrary to S. 253(3) of the Criminal Code”;

and furthermore on the same date and place “did while his ability to operate a motor vehicle was impaired by alcohol did operate a 1996 ford 150 truck and thereby cause bodily harm to Colin Fraser, contrary to s. 255(2) of the Criminal Code.”

For the Crown to successfully obtain a conviction on either of those two charges under s. 255 it is necessary that the Court be satisfied beyond a reasonable doubt of a number of facts:

- a) That Mr. Donovan on the date and place alleged was operating the specified motor vehicle;
- b) That at the time his ability to so operate that motor vehicle was impaired by alcohol; and

c) As a result of such impaired operation of that motor vehicle he caused the death of Beverley Fraser s. 255(3) or caused bodily harm to Colin Fraser s. 255(2).

[5] Both Crown and Defence counsel have recognized that proof of impairment by alcohol is an essential “*sine qua non*” and have provided the court with a number of authorities for consideration to advance their respective positions.

THE LAW:

[6] The starting point for such consideration is set out in the Ontario case of R. v. Stellato 78 C.C.C. (3d) 380. That decision was subsequently upheld on Appeal to the Supreme Court of Canada [1994] 2 S.C.R. 478 wherein Lamer C.J. adopted the reasons given by Labrosse J.A. in the Ontario Court of Appeal.

[7] Justice Labrosse had given consideration to the issue as to whether a “marked departure” from what is usually considered “normal” driving was necessary for a conviction to be entered under s. 249 (now s. 255) of the Code. In rejecting such a position he adopted the reasoning of the Prince Edward Island

Court of Appeal in R. v. Campbell 87 NFLD and P.E.I.R. 269 at p. 320 of that decision Mitchell, J.A. wrote:

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

Labosse, JA laid it out very succinctly when he said at p. 384:

Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

Impairment is an issue of fact which must be determined on the totality of the evidence. In making such a determination Hill, J. in R v Elvikis [1997] O.J. No. 234

gave consideration to the same issue being considered by this court. If the evidence is so frail as to leave the trial judge with reasonable doubt, the accused is entitled to an acquittal. Yet circumstantial evidence presented by the Crown will have some probative value depending on its nature and strength. The court must take great care not to view various items of circumstantial nature in isolation, but the total package of all the evidence needs to be considered in making a finding as to whether the Crown has met the requisite burden of proof. Hill, J goes on to make the following observations, with which one would be hard pressed to disagree:

The more minimal the driving misconduct, the fewer the existing classic signs of impairment, and, the better the achievements of the accused in any physical testing situation, the more difficult it may be for the trial court to conclude that the ability of the accused to operate a motor vehicle was impaired by alcohol at the time of the said operation.

If the evidence of impairment is sufficiently credible and probative as to establish any degree of impairment ranging from slight to great, the offence has been made out. In my view, this is the *ratio* of the judgement in R. v. Stellato *supra*. The decision does not, however, stand for the proposition that the production of any evidence consistent with impairment, however minimal, requires the court to find the prosecution has discharged its persuasive burden of proving impaired operation of a motor vehicle. Such an approach impermissibly depresses the burden upon the Crown.

THE FACTS:

[8] The facts as put forth here by the Crown were provided through Constable Rodney MacDonald and Constable Ryan Lewis both RCMP officers stationed at Ingonish, Nova Scotia, by Sergeant Gerald MacDonald, RCMP Accident Reconstructionist, by Doctor Thomas Curry, Chief of Emergency Medicine at the Cape Breton Regional Hospital in Sydney, Nova Scotia, by Christie Hawley, Shauna Donovan, Alicia Lillington, Colin Fraser, Earl Chaisson and Angela MacKinnon, all of whom reside in the northern area of Victoria County and were at the accident scene at Paquet's Lake or the Neil's Harbour Legion on the night in question and by Graham Fitzgerald of Neil's Harbour, Nova Scotia, a licensed motor vehicle mechanic who examined the truck subsequent to the accident. No evidence was called by the Defence.

[9] On the early morning (approximately 1:30 a.m.) of January 22, 2006, a motor vehicle accident occurred at Paquet's Lake, Victoria County, Nova Scotia. A Ford 150 truck owned and driven by the accused left the highway (the Cabot Trail), rolled over, across a ditch and came to a stop on it's roof. As a result of the accident one of the passengers, Beverly Fraser, died from injuries she sustained and two others, Colin

Fraser (husband of Beverly Fraser) and Justin Donovan (the accused/driver) suffered injuries.

[10] Constable Rodney MacDonald was patrolling in the vicinity of Paquet's Lane, Victoria County, Nova Scotia, when he was waived over by a young lady (later identified as Angela MacKinnon) advising him that a motor vehicle had left the road and pointing to the area of the ditch where he could see taillights of a vehicle. He ran to the scene and saw the vehicle upside down with the rear taillights facing toward the highway. A man was holding onto the side of the vehicle, bleeding profusely from the area in his head. Other civilians were already on the scene. He examined the inside of the vehicle and observed a man (Colin Fraser) pinned and a female (Beverly Fraser) trapped between the roof of the vehicle (a truck) and the top of the back seat. Mr. Donovan was bleeding profusely from the facial area, so much so that Cst. MacDonald at that point did not recognize him. The injury caused Cst. MacDonald great concern as Mr. Donovan in Cst. MacDonald's words was "just pouring blood" (pg 13) and the rear portion of the vehicle, fender and tailgate, were "absolutely smeared, just covered in blood" (pg 13). Cst. MacDonald made a determination Mr. Donovan was the driver because he felt Mr. Donovan's injuries were consistent with the truck damage, Mr. Fraser was still restrained inside the truck by his seatbelt

(passenger side) and Mrs. Fraser was in the middle “cockpit” of the vehicle. He said it was a very difficult situation with some of Mrs. Fraser’s distraught sisters having arrived, and a very strong smell of gas permeating the scene.

[11] Mr. Donovan was leaning against the vehicle, unsteady on his feet, holding the side of the vehicle. Because of the remoteness of the area, and considering perhaps only one ambulance would be coming within a short time and fearing that Mr. Donovan was going to bleed to death, he asked Earl Chaisson to immediately drive Mr. Donovan to the area hospital at Neil’s Harbour. With the help of Mr. Chaisson he assisted Mr. Donovan from the area of the truck to Mr. Chaisson’s vehicle on the side of the highway. At some point prior to Mr. Donovan being removed from the scene, Cst. MacDonald enlisted a civilian Angela MacKinnon to assist Mr. Donovan by applying pressure bandages to the contusions on Mr. Donovan’s head. He was then removed to the hospital by Mr. Chaisson.

[12] Cst. MacDonald then turned his attention to the two persons still trapped in the truck. Later (approximately 2:45 a.m.) after the local physician (Dr. Murray) determined that Ms. Fraser had passed away and EHS personnel were attending to Mr. Fraser, Cst. MacDonald directed his attention to what he had on his hands. It was a

clear, cold night and the roadway was perfect. He recalled the unsteady balance of Mr. Donovan and his holding his balance up on the truck. He also said he took into account a comment of Angela MacKinnon that she couldn't stop the bleeding "because of the alcohol he consumed" (pg 25). He had already determined the truck to be registered to Mr. Donovan and was satisfied Mr. Donovan was the driver. Feeling that there was no reason for the accident to have occurred "other than the possibility he had been drinking" (pg 25) Cst. MacDonald contacted RCMP Cst. Ryan Lewis who by then was in the Neil's Harbour area and directed Cst. Lewis to find Justin Donovan and "do a blood demand" (pg 26). Asked by Crown counsel the information supplied to Cst. Lewis in forming a basis for such a demand Constable MacDonald stated (pg 26):

At the time I know I just, Constable Provencher was with me in the vehicle and we just told Constable Lewis that we felt confident that Justin had been driving, and that we felt confident enough that there had been alcohol involved with the accident and that we needed a blood demand, we needed a blood sample from him.

He felt that a blood demand was more appropriate as Mr. Donovan was in no shape to go to the RCMP Station in Ingonish for a sample of his breath to be taken.

[13] Constable Ryan Lewis had earlier been called out to the accident. He was at the scene for approximately forty-five minutes to an hour when he accompanied some of Mrs. Fraser's relatives to the hospital in Neil's Harbour. He never saw Mr. Donovan at either the accident scene or the hospital in Neil's Harbour. Constable Lewis said he was contacted by Cst. MacDonald via cell phone while in the vicinity of Neil's Harbour. His instructions from Cst. MacDonald were to proceed to the Cape Breton Regional Hospital in Sydney and to make a demand for a blood sample from Mr. Donovan. He said that Cst. MacDonald advised him that he (MacDonald) believed Mr. Donovan was the driver of the accident vehicle, that he had found a beer bottle "...maybe, I think he said" (pg 74) in the area. This information was pretty much the extent of the conversation between himself and Cst. MacDonald.

[14] Constable Lewis then drove to Sydney in a snow storm arriving at the Regional Hospital at approximately 5:57 a.m.. He testified he went directly to the emergency area where he came upon Mr. Donovan, a nurse and Dr. Thomas Curry. After a few moments of observation he inquired of Dr. Curry if it was "OK" to read Mr. Donovan a blood demand. On direct testimony there is no indication of Dr. Curry's reply but it appears clear from cross examination that Dr. Curry replied in the affirmative. Cst. Lewis then advised Mr. Donovan of his Charter Rights and after receiving responses

from Mr. Donovan regarding his understanding what was happening, Mr. Donovan indicated he did not wish to avail himself of his right to counsel. Cst. Lewis then read Mr. Donovan a demand to provide him with samples of his blood as required under the provisions of the Criminal Code. Again Mr. Donovan replied, this time in the affirmative, after which Dr. Curry took two samples of blood from Mr. Donovan and turned them over to Cst. Lewis. The constable's only comment (on direct examination) as to Mr. Donovan's condition regarding sobriety was to the effect he felt Mr. Donovan was "partly coherent , he wasn't speaking like you or I, but...he was just in a car accident" (pg 85).

[15] Despite vigorous cross examination, Cst. Lewis was adamant he had advised Mr. Donovan of his Charter Rights and made a proper request for a blood sample as required by the Criminal Code. He acknowledged deficiencies in his notes in that regard, he acknowledged making a supplementary occurrence report the following day in which right to counsel is not noted. He acknowledged making a second supplementary occurrence report some three months later (April 26, 2006) where he then referred to advising Mr. Donovan of his right to counsel which he then said was immediately followed up by a "breath" demand. He again acknowledged that the latter was incorrect and he should have written a "blood" demand. He also

acknowledged subsequently sending an e-mail to Dr. Curry on June 8, 2006, asking him to provide a statement of his recollections regarding Charter Rights and Breathalyzer (sic) demand which Cst. Lewis made to Mr. Donovan on January 22, 2006. Dr. Curry's reply (tendered as an exhibit) was to the effect that his recollection as to the exact specifics were vague but that he recalled Cst. Lewis requesting of Mr. Donovan permission to obtain a blood sample for the purpose of determining blood alcohol level; and after getting consent from his patient he took the appropriate samples and gave them to Cst. Lewis.

[16] On the *Voir Dire* hearing I was satisfied that Cst. Lewis did in fact provide Mr. Donovan with his Charter rights as required and that Mr. Donovan chose not to exercise them. I was also satisfied that Cst. Lewis did provide Mr. Donovan with a demand for blood samples. However, I was not satisfied that there was a proper basis for making such a demand and as a result there was a clear infringement of Mr. Donovan's s. 8 Charter Rights. A ruling was then made pursuant to s. 24 of the Charter that the only proper remedy in these circumstance was to exclude from evidence any results of those blood tests.

[17] Dr. Thomas Curry was the emergency attending physician when Mr. Donovan was brought in. He described Mr. Donovan's injuries as consisting of some minor head injuries, lacerations and possible abdominal or chest injuries. He was alert, able to communicate, quite appropriate as to his actions and was well orientated as to time and place. His notes and the hospital chart were tendered as part of the Crown case. Nowhere in Dr. Curry's direct testimony or in those notes or charts as prepared by the attending nurses is there any indication as to indicia of alcohol consumption by Mr. Donovan i.e. smell, blood shot or watery eyes, slurred speech etc..He did acknowledge he took blood samples from Mr. Donovan at the request of Cst. Lewis and after obtaining Mr. Donovan's consent.

[18] All the rest of the Crown witnesses gave testimony as to what they saw transpiring at the Neil's Harbour Legion, or subsequent to leaving the Legion either on the highway, at the accident scene or in transporting Mr. Donovan to hospital at Neil's Harbour.

[19] Christie Hawley testified she was at the Legion that evening and was not drinking. She saw Mr. Donovan there and her reason for noting his presence was that she saw him fall. She couldn't say why as she could not see him from the waist down.

She didn't know what, if anything, he fell over. There was a big crowd there. She did not see Mr. Donovan drinking nor did she see him staggering. She said she simply saw him fall and noted nothing of him after that event.

[20] Shauna Donovan testified that she too was at the Neil's Harbour Legion that evening with about 25 of her friends. She knew Mr. Donovan only as an acquaintance. She had been at a ladies dart tournament earlier in the day at the Legion arriving at 10 a.m. and leaving at approximately 7:30 - 8:00 p.m.. She acknowledges consuming two beer during the afternoon. She returned to the Legion between 9 - 9:30 p.m.. She did not drink any more after she first left the Legion. She wasn't feeling well so she only drank a soft drink.

She testified she first observed Mr. Donovan later on (11 p.m.). She had been dancing, as was Mr. Donovan. She noticed him as he walked off the dance floor in front of her. She said he just staggered and fell sideways and with the help of a few people he had no trouble getting up. They just sat him at the table and she kept on going. She didn't see any obstructions on the floor as he was walking off the floor. She said she saw him with a glass in his hand as he was sitting at the table just after he fell. She never saw him walking after that. On cross examination she admitted to being a part time bartender at the Legion. She acknowledged people were in front of

Mr. Donovan as he walked off the dance floor and he was doing fine. Nothing about his walk attracted her attention at that point. He went between two tables, fell and his head hit the wall. She further acknowledged losing sight of him and could only see him from the waist up. Asked if he could have tripped over a chair she replied there were no chairs there - they were all pushed into the tables. Asked again by Defence counsel if he didn't trip over a chair she replied "I don't think so" (pg 160) and that she was pretty sure. She had no idea what he was drinking from the glass and observed that mixed drinks were served in glasses. She also testified that to her knowledge he wasn't drinking beer.

[21] Alicia Lillington testified she, along with her husband and friends, were at the Neil's Harbour Legion dance the night in question. She had consumed three or four beer the whole day. She said she observed Mr. Donovan around 11:30 p.m. with Charles Nolan and Matthew MacLeod. Of the three she only spoke to Matthew MacLeod, asking him if he wanted to stay at her house that night. She did so because she saw Mr. MacLeod arrive with Mr. Donovan and had seen Mr. Donovan drinking beer. She had no idea how much beer saying only that she had seen him..."with a beer in his hand" (pg 170). Asked how many times she so noted Mr. Donovan her reply

was to the effect that it was “probably” all the time he was there. She said he looked drunk. She had seen him stagger coming off the dance floor, stumble into a chair and fall. The tables were in rows and he went from side to side and fell over the chairs. She also observed him talking to people and leaning against the wall. Again she said he appeared to her to be drunk. She also stated that when with help he got up from the floor after falling he “walked” to the other side of the Legion. Questioned by Crown counsel as to how he “walked” she replied he was staggering.

[22] On cross examination she said she had watched Mr. Donovan for approximately one hour - not all the time though. She noted his presence when he'd walk by and had a bottle of beer in his hand. She testified on direct examination and cross examination that she observed Mr. Donovan fall “into” the chairs but acknowledged also on cross examination that in her earlier statement to police she expressed his actions as “falling over” the chairs. She made no reference to Mr. Donovan being helped to his feet and also that he walked - not staggered to the other side of the Legion after he fell. She further acknowledged earlier telling police in a statement that “no one” was intoxicated upon coming into the Legion. She said she never observed Mr. Donovan drinking from the beer bottle, she never spoke to him, did not listen to him speak or make observations as to the condition of his eyes. In

regard to Mr. Donovan's condition she summarized her observations of Mr. Donovan as seeing someone (Mr. Donovan) with a beer bottle in hand who staggered, tripped over chairs, fell onto his back, got up, and walked to the far end of the Legion. On that basis she felt he seemed impaired - again mostly because she saw him with a beer bottle in his hands, he staggered and tripped over chairs, got up and walked to the other end of the hall. In response to Defence questions if it was on that basis she determined he was "drunk" her reply was "he seemed impaired, yes" (pg 185). She did acknowledge that she too tripped on things in her lifetime when not paying attention - including times when she may have been intoxicated - which, from her evidence, I understood not to have happened very often.

[23] Colin Fraser, the husband of the deceased, was next to testify. This was a particularly tragic incident for Mr. Fraser in that his wife of twenty-five years and the mother of his five children died as a result of injuries suffered in this accident. It was quite apparent that Mr. Fraser was still suffering the void of this terrible loss.

He testified to being at the Legion that night having gotten a drive from a friend. He had about four beer and three drinks of rum prior (9-10 pm) arriving at the Legion where he said he consumed eight more beer between 10 p.m. and 1:30 a.m.. He said his wife had been at the dart tournament most of that day and at the dance and she was

feeling “pretty good” - intoxicated. His plan was to get a drive home with Joanne Curtis, the person who drove him there but she already left by the time he was ready to leave. He did see Mr. Donovan there. He was not sure if he asked Mr. Donovan for a drive home and denied seeing Mr. Donovan in his vehicle and jumping in with him. Rather he and his wife simply got into Mr. Donovan’s vehicle even before Mr. Donovan. Mr. Donovan seemed fine to Mr. Fraser and recalled seeing him with a beer - never seeing him actually drink (a comment he was to make on at least three separate occasions in his testimony). He also indicated there was nothing he observed of Mr. Donovan in the Legion or at the truck that would lead him to feel Mr. Donovan was impaired. He qualified that on direct testimony by saying he was pretty drunk himself and probably wouldn’t have noticed.

Mr. Fraser’s recollection was that he and his wife go into Mr. Donovan’s truck before Mr. Donovan. His recollection of events thereafter (on both direct testimony and cross examination) are not very detailed. He recalled the Donovan vehicle passing that of Mr. Earl Chaisson “about one hundred yards from the Co-Op” (pg 198) and that Mr. Donovan was going fairly fast. He couldn’t relate any speed after that because he and his wife fell asleep after passing Mr. Chaisson. His next recollection was of awakening when Mr. Donovan’s front tire went onto the shoulder of the road. His head hit the door and he felt they were going too fast. It was a low shoulder and when

Mr. Donovan cut the truck back he felt the truck lifting and grabbed his wife because he knew the truck was going to “flip”.

There were no other vehicles present at that time. The next thing he knew the truck was on its roof and one arm was around his wife and one arm was pinned underneath the cab of the truck. It took almost 45 minutes before he was extricated from the truck. His wife was later removed and taken by ambulance to hospital in Neil’s Harbour. His injuries consisted of broken ribs, soft tissue damage to his back, muscle tissue torn from his shoulder and a shattered shoulder. He spend four or five days in hospital and is still recovering from those injuries. Tragically his wife Beverly Fraser died as a result of the injuries she suffered. Again he stated he expressed no concern of Mr. Donovan’s ability to drive, not having seen him drink, yet acknowledging he himself was pretty drunk and probably would not have noticed.

Mr. Fraser said that Mr. Donovan was at the table he shared with his party and yet never at any time did he see Mr. Donovan actually drink. Mr. Fraser on cross examination again recalled Mr. Donovan passing a vehicle and confirmed that in his statement to the RCMP that he estimated the speed of the Donovan vehicle at 50 kilometres per hour. No one was drinking in the truck and both he and his wife, Beverly Fraser, quickly fell asleep. He did admit that in his earlier statement he gave to the RCMP his recollection of the road was that there was some black ice, spotty and

with some snow on the road, yet qualifying that with the observation he said so because it was so cold that night. On further questioning by Defence counsel he felt that the speed of the Donovan vehicle was 50 miles per hour i.e. 85 kilometres per hour and that the area speed zone was 80 kilometres per hour where the accident occurred. He also admitted to the RCMP that he felt the reason the Donovan vehicle left the road was because Mr. Donovan went off the edge of the road, tried to pull it back and then lost control of the truck. This Statement given by Mr. Fraser was apparently a second Statement given later and he acknowledges that in the first Statement he never did make mention of a passing of Mr. Chaisson by Mr. Donovan. Mr. Fraser also testified that in a Statement to the RCMP (it is not clear from the evidence if from the first statement or the second statement) that at the time of the accident the speed of the Donovan vehicle was 50 miles per hour (i.e 80 kilometres per hour), he had just awoken “from a stupor” and the accident happened very fast. He felt comfortable enough with Mr. Donovan’s driving that he fell asleep. He had not seen Mr. Donovan drink anything such that he felt he shouldn’t be driving.

[24] Angela MacKinnon, age 21 at the time of the trial next gave testimony for the Crown. Her testimony both on direct and cross examination was essentially the same. She testified she knew the parties i.e. Mr. And Mrs. Fraser and Mr. Donovan only as acquaintances. She too was at the Legion on the night in question, getting there around 10 - 10:30 p.m. and having had two drinks, one around at 8:00 p.m. (before going to the Legion) and the second after arriving. She was there approximately forty-five minutes before she noticed Mr. Donovan. He had been at a table behind her. She said she saw him trying to sit at a table, lose his footing or trip on a chair “however way it happened” (pg 259) and landed on the floor. He got up with some assistance. She didn’t have much recollection of Mr. Donovan at the Legion thereafter, never spoke to him there, doesn’t recall him walking around the Legion and had no memories of him drinking anything. Ms. MacKinnon left the Legion with Mr. Earl Chaisson in Mr. Chaisson’s truck. Within two minutes they were passed by Mr. Donovan’s truck “doing a good speed ourselves and the truck just flew past us” (pg 262). She guessed the speed zone there to be 50 kilometres per hour and there was a no passing zone in that location. Later they came upon the same truck at Paquet’s Lake, saw the lights in the woods and realized it was overturned.

Ms. MacKinnon approached the truck and saw Mr. Donovan sitting outside and leaning against the truck. He had a big cut on his face and there was blood everywhere. She remarked that the only thing she really took notice of was Mr. Donovan's head injury. Colin and Beverly Fraser were in the truck and she could hear screams coming from the truck. She went to the road, flagging down one vehicle to go get help and the second vehicle she flagged down was that of Cst. Rodney MacDonald of the RCMP. Prior to flagging those vehicles she tried to assist Mr. Donovan who was incoherent, stumbling and losing his footing. She couldn't help him in standing.

Cst. Rodney MacDonald gave Ms. MacKinnon a first aid kit, which contents she tried to use to staunch the bleeding of Mr. Donovan's head. She observed his eyes (closing) and she kept trying to get him to open his eyes "to stay with me"(pg 267). Other than asking her how Mr. And Mrs. Fraser were doing he didn't have much else to say. In the approximately 15 - 30 minutes she was with Mr. Donovan all she could smell was gasoline.

[25] Mr. Earl Chaisson of Aspy Bay in Victoria County described himself as an acquaintance of Mr. Donovan and Mr. And Mrs. Fraser. He too was at the Neil's Harbour Legion arriving at around 9:30 p.m.. While there he said he had two drinks -

singles, with no apparent effect. He saw Mr. Donovan arrive around 10:30 p.m. and saw him off and on throughout the evening. He said he was “feeling pretty good” (pg 232). Questioned by Crown counsel in that regard he said he could have been drunk on alcohol or drugs - he didn’t know. He felt “he wasn’t really steady on his feet” (pg 232). He also stated that Mr. Donovan appeared to be having a good time as was everybody else there. He did not see Mr. Donovan with a drink in hand and he never spoke to him. Around 1:30 a.m. he left the Legion with Donald MacIsaac, Nora MacKinnon, Angela MacKinnon and Laura Lee Fitzgerald. Mr. Chaisson was driving his own truck. As he was proceeding up highway towards Neil’s Harbour, Mr. Donovan’s Ford truck passed his vehicle between the Parish rectory and the senior’s home on a little straight stretch. Mr. Chaisson said the Donovan vehicle was “flying.” He himself was travelling at approximately 40 kilometres per hour in what he felt was a speed zone of 40 - 50 kilometres per hour. The straight stretch was probably three hundred feet long at best following which was a sharp curve. The Donovan vehicle passed him “like I was stopped” (pg 234). He said it was a no passing zone in that area as it wasn’t very long. He recalled thinking if the same vehicle was going by way of Sugarloaf, he’d be picking him up before the night was over - he wouldn’t be staying on the road. The road conditions were perfect, bare and dry.

Mr. Chaisson testified he next saw that same vehicle at the accident scene in Paquet's Lake, down in the woods. He could see that the truck had rolled over. He immediately made his way down, across a little brook to the truck. Mr. Donovan was at the back of the truck just sitting on a snowbank. He was incoherent and bleeding yet he also testified Mr. Donovan was telling him there were two more people still in the truck. He could hear Mr. Fraser screaming and could see Mrs. Fraser's leg. He tried to get Mr. Fraser out but couldn't because his head was pinned. He couldn't see Mrs. Fraser on the other side. Knowing that at least Mr. Fraser was alive he tried to get him out but couldn't. Mr. Chaisson and Cst. MacDonald got Mr. Donovan away from the truck and up to the area of his (Mr. Chaisson's) truck. He could not smell anything emanating from Mr. Donovan and at the request of Cst. MacDonald he drove Mr. Donovan to hospital in Neil's Harbour.

[26] On cross examination he acknowledged Mr. Donovan was bleeding quite heavily, from the side of his face and ear area. He and Cst. MacDonald dragged and "kind of" helped Mr. Donovan to the Chaisson vehicle in which he was driven to hospital. Mr. Chaisson said he stayed with Mr. Donovan even as the doctor(s) worked on him. He testified that Mr. Donovan never really spoke to him very much as he was

taking him to the hospital. In reply to a question by Defence counsel he admitted he had never seen Mr. Donovan drinking and was in his opinion no worse than anyone else at the dance. In regard to the speed at the time of the passing by Mr. Donovan he estimated that he (Mr. Chaisson) was himself travelling between 35 - 40 kilometres per hour - and that the speed zone there was around 50 kilometres per hour. Further on cross examination he responded to Defence counsel's query that he would just "poke" along by answering in the affirmative "yeah." He was in no hurry. There was some further discussion regarding distances and road conditions and in the latter regard he conceded there was no paved shoulder to the road in the accident area "but its not wide no" (pg 253). Reflecting back to the accident scene he recalled the lights of the truck being on, and took no notice of the wheels spinning and probably weren't.

[27] Graham Fitzgerald is a licensed mechanic who was asked by Cst. MacDonald of the RCMP to examine the Donovan vehicle a few days (January 26, 2006) after the accident. The purpose of doing so was to attempt to determine if there was something mechanically wrong with the vehicle which might assist in determining the cause of the accident. He said he didn't find any problems. Everything checked out "OK." He noticed the speedometer was held at 130 kilometres per hour and wrote

that in his notes. In reply to Crown counsel if that meant anything in particular to him, he said that it did not.

[28] Sgt. Gerard MacDonald of the RCMP testified on behalf of the Crown having been qualified by the Court as an expert in accident reconstruction and able to give opinion evidence as to how motor vehicle accidents might occur. Sgt. MacDonald arrived on the accident scene almost three hours after the accident occurred. After speaking to RCMP officers on the scene, making observations of the highway, the shoulder of the highway and any markings left by the accident vehicle, he made measurements and took photos of the scene. It was his opinion the truck left the road at an angle with the rear of the truck swinging. It rolled over, first on the passenger side, ending up on its roof. He was unable to determine the speed of the truck when it left the road. He was of the opinion that because of the absence of tire marks there was no brake application prior to going into the ditch. There also appears to have been steering input into the truck for it to go sideways because it did not drive straight into the ditch. Most importantly, Sgt. MacDonald testified both on direct and cross examination that because of lack of evidence as to speed there were a number of factors which either of themselves or in combination could have caused the accident, including:

- driver inattention
- driver distraction
- speed, if there was speed involved
- a medical condition
- falling asleep
- intoxication

From the observations he made of the roadway and the shoulder of the roadway he saw nothing to cause him concern. In his words:

“...it was a fairly straight piece of road where the vehicle went off, it went off sliding so there was some input into the steering for some reason or other, and then he just rolled.” (Pg 331)

[29] If the Crown is to prove beyond a reasonable doubt the allegations under s. 255(3) and s. 255(2) of the Criminal Code it must prove Mr. Donovan’s ability to operate a motor vehicle was impaired by alcohol and must also prove that impairment was “a significant, contributing cause of the accident” as stated by my colleague Derrick, J. in R. v Brogan, 2008 NSPC 42 at p. 51.

[30] As to the facts presented in this case I am satisfied that the Crown has established the requisite burden of proof as to these matters:

- a) that in the early morning of January 22, 2006, Mr. Donovan, the Accused was operating his 1996 Ford F-150 truck at Paquet’s Lake, Victoria County, Nova Scotia;

- b) that the truck left the highway (the Cabot Trail) rolled over and came to rest on its roof;
- c) that the only persons in the truck at the time of the accident were: Mr. Donovan, the driver, Mr. Colin Fraser and Mrs. Beverly Fraser who were both front seat passengers;
- d) that as a result of that motor vehicle accident Mrs. Beverly Fraser received severe injuries and trauma and died of those injuries within a short period of time subsequent to the accident. Mr. Colin Fraser received severe injuries and trauma which required hospitalization and a significant recovery period and still suffers from the consequences of those injuries.

Those findings were made without difficulty and as a result of the trial evidence of Mr. Fraser, Mr. Chaisson, Angela MacKinnon and Cst. Rodney MacDonald. The only finding upon which the Court relied upon only one witness account was as to the fact that Mr. Donovan was the driver of the truck. Though a number of people saw the Donovan truck pass that of Mr. Chaisson prior to the accident, only Mr. Fraser put Mr. Donovan behind the wheel. Others identified the passing truck as being that of Mr. Donovan and I think it is fair to say assumed Mr. Donovan to be the driver. Mr. Fraser acknowledge to having consumed a considerable amount of alcoholic beverages that evening to the point of his own admission he was “pretty drunk”, yet he related the facts clearly including the passing manoeuver as was related by Mr. Chaisson and Ms. MacKinnon. He spoke as to estimates of speed, of falling asleep and awakening as the

wheels of the truck left the pavement. I have no hesitation in accepting his testimony that Mr. Donovan was the driver.

[31] Which leaves the court with the determination of the two remaining and essential elements of the Crown allegations in s. 255(3) and s. 255(2):

- was Mr. Donovan's ability to operate the truck at that time impaired by alcohol?

- if there was such impairment was that impairment a significant contributing cause of the accident that caused the injuries as a result of which Mrs. Fraser succumbed and those suffered by Mr. Donovan?

The determination of those issues must, of course, be driven by the facts put forth on behalf of the Crown.

[32] The Crown would have, and strongly argues that Mr. Donovan's impairment that evening is evident through the evidence of the various crown witnesses who observed him at the Legion in Neil's Harbour, from the evidence of his driving and its results, and from the evidence of Cst. Rodney MacDonald. Reduced to the basics that evidence indicates that Mr. Donovan was at the Legion, in the opinion of some of them

he was drinking, he fell on one occasion, he drove the truck at what some felt was an inappropriate speed and made an inappropriate pass. He eventually put the vehicle off the road - which in itself would be in their mind a confirmation of his impairment in the operation of the truck.

[33] As to his drinking that evening Christie Hawley said she did not at anytime see him drinking though she did see him fall. Another witness, Shauna Donovan said she saw him with a drink in his hand, did not know what might be in the glass saying she had no idea but that mixed drinks were served in glasses. She did say she never observed Mr. Donovan drinking any beer. She too saw Mr. Donovan fall.

[34] Alicia Lillington gave much greater detail of her recollection of events. She said she saw Mr. Donovan with a beer in his hand and when questioned by the Crown in that regard as to how often she replied that it was “probably all the time he was there” (pg 170). She said he looked drunk. Asked why she arrived at that conclusion, she said she saw him on one occasion when coming off the dance floor. He staggered, stumbled into a chair and fell (in the first instance) and then went on to say when questioned further that he went from side to side and then fell over the chairs. She said she saw him talking to people and he was leaning against the wall talking and

offered that he appeared to her to be drunk. Asked to describe what happened after he fell, Ms. Lillington said he got up, someone helped him and he walked to the other side of the Legion. Pressed by the Crown she described his walking as staggering.

On cross examination she said she observed Mr. Donovan a few tables away and he was drinking, he had a bottle in his hand, a bottle of beer. She never saw him with a glass. She acknowledged giving a Statement to police in which she described the incident as Mr. Donovan falling over the chairs. She also acknowledged her Statement had no reference to Mr. Donovan getting help to get up and that she never mentioned staggering in the statement - rather Mr. Donovan walked to the other side of Legion. She further acknowledged saying in her Statement that nobody was intoxicated when they came into the Legion. Ms. Lillington further acknowledged on cross examination that at no time could she say she saw Mr. Donovan drink from the beer bottle, she did not talk to him, did not listen to him talk to anyone else, did not make any observation as to his eyes. When finally pressed by Defence counsel she conceded that her observation of Mr. Donovan was to the effect that she saw him with a beer bottle in his hand, he staggered and tripped over chairs, got up and walked to the far end of the Legion. On that basis she said he seemed “impaired” (pg 185). She

also allowed as to how in past moments of inattention she too recalled tripping and falling over things.

[35] Colin Fraser having acknowledge he had consumed approximately three drinks of rum and twelve beer after 9:00 p.m. that evening was well intoxicated himself. He said Mr. Donovan was at his table and recalled seeing Mr. Donovan with one beer in his hand and spoke to Mr. Donovan. He also said that he didn't see Mr. Donovan drink and figured he was able to drive, but because of his own level of intoxication "probably" (pg 203) wouldn't have noticed. When questioned by Defence counsel that he (Mr. Fraser) "only seen him (Mr. Donovan) drinking one beer" (pg 210) , Mr. Fraser corrected counsel twice by stating "I didn't see him drinking" (pg 210), and again shortly after: "No I didn't see him drink" (pg 212). He followed that up by agreeing with Defence counsel that he observed nothing in the Legion, nor outside afterward that would make him feel Mr. Donovan was impaired.

[36] The remaining Crown witness to speak of Mr. Donovan's impairment was Cst. Rodney MacDonald and he did so only in relation to Mr. Donovan's physical appearance and mobility at the accident scene. He testified that at no time did he note any alcohol/liquor smell from Mr. Donovan. He referred to Mr. Donovan at the

accident scene as “leaning” up against the side of the truck and then as “holding” onto the side of the truck. He was very unsteady on his feet. Mr. Donovan was suffering from an obvious injury to the head area, bleeding profusely to the point that Cst. MacDonald thought Mr. Donovan was going to bleed to death (pg 16). Cst. MacDonald commented that Mr. Donovan was unsure on his feet, yet he was not alone in that regard as the Constable also said that one of the people assisting Mr. Donovan also lost his balance (pg 16) indicating to me that terrain may also have been a factor. Cst. MacDonald referred to a remark by Angela MacKinnon of her inability to staunch Mr. Donovan’s bleeding because of the alcohol he allegedly consumed. Yet in her own testimony she acknowledge she had no recollection of him drinking anything. Thus her comment to Cst. MacDonald can only be viewed at most as merely an assumption on her part.

[37] There was a blood sample taken from Mr Donovan at the Cape Breton Regional Hospital, but as indicated out in another part of this decision, the results were not tendered in evidence as this court ruled that Mr. Donovan’s s. 8 Charter Rights were infringed and as a result the only proper remedy under s. 24 of the Charter was exclusion of those blood test results from the evidence.

[38] A final factor this court takes into consideration in the assessment as to whether the Crown has proved impairment beyond a reasonable doubt is the absence of any reference to alcohol in any of the evidence presented by or from the medical health providers who attended to Mr. Donovan in the hospital in Neil's Harbour or transporting him via ambulance to the Cape Breton Regional Hospital in Sydney or at that hospital. Surely if alcohol played a prominent or any role in Mr. Donovan's condition observation of that would have been made, if for no other reason that alcohol consumption would have to be a consideration in treatment provided.

[39] The evidence before me regarding impairment does not in my opinion come to the level as establishing beyond a reasonable doubt that Mr. Donovan was impaired by alcohol. There is much evidence of Mr. Donovan being at the Neil's Harbour Legion, some saying he had a beer bottle in hand, one saying he had a glass in hand - yet no one saw him drinking from either. Some saw him falling - yet it is never clear as to whether he fell onto the chairs as a result of impairment or whether he tripped over the chairs as he walked his way to his seat. Some said he staggered - yet they also acknowledged though in earlier statements to the RCMP they never mentioned him staggering. Also the words stagger and walking seemed to be used interchangeably in describing Mr. Donovan's actions.

[40] Ms. Lillington in her direct testimony is the most emphatic in speaking to Mr. Donovan being impaired including saying she had seen Mr. Donovan drinking yet on cross examination she was less emphatic and admitted that she hadn't seen "it", "to his mouth no, I probably didn't" (pg 184). She said she was so concerned of Mr. Donovan's condition that she invited Matthew MacLeod, who appeared to her to be accompanying Mr. Donovan, to come home with her and her husband and spend the night there. When confronted on cross examination that Mr. MacLeod told police in his statement that he never saw Mr. Donovan after arriving at the Legion and indeed never went inside Ms. Lillington replied that he indeed was in the Legion and that she couldn't speak for him. The court never heard from Mr. MacLeod himself.

[41] In reviewing and weighing the evidence it would not be proper to use a piecemeal examination of that evidence. All of the evidence goes into the "mix" and the Court must examine it within the total context of the events as they occurred and were related to the Court. For the Crown to succeed that evidence must rise to the level such that the Court is satisfied beyond a reasonable doubt.

[42] Various facts are set forth by the Crown that are argued to be consistent with impairment. Some are notably absent. The smell of alcohol - obviously it was not noted at the accident scene because as was stated by witnesses, the overpowering smell was that of gasoline. Yet away from the scene, be it in Mr. Chaisson's truck, or at the hospital, there was no one who smelled alcohol emanating from Mr. Donovan. There was nothing in the hospital reports or the evidence of Dr. Curry mentioning alcohol or the smell of alcohol emanating from Mr. Donovan. Unsteadiness of Mr. Donovan - there is conflicting evidence from parties at the Legion in that regard as to whether Mr. Donovan fell onto the chairs or tripped over the chairs. The only constant in that he ended up on the floor. There was also conflicting evidence from the witnesses as they described his movement from place to place - sometimes they said staggered, sometimes they said walked. Some acknowledged that their description changed from the time of initial statements (walked) to evidence given in Court (staggered). In some cases the words were used interchangeably. Cst. MacDonald's evidence as to Mr. Donovan's condition is equally consistent with a person who may have been impaired and also with one who was just in a serious motor vehicle accident and obviously suffered an injury to his head or facial area and losing copious amount of blood. One would hardly be surprised to see a person stagger and seek support in those circumstances. Mr. Donovan's speech - some witnesses acknowledged never speaking

to or hearing Mr. Donovan speak. At the scene of the accident he certainly seemed able (despite his injuries) to communicate there were two more injured people in the truck. Mr. Chaisson in driving him to the hospital said he was quite incoherent but still inquiring of those two people. Other than that he didn't speak very much. Again one has to keep in mind that at this point Mr. Donovan has just received what appeared to be a serious injury to his facial/head area. Dr. Curry also related that at the Cape Breton Regional Hospital Mr. Donovan was alert, able to communicate and quite appropriate and well orientated to time and place - and a bit sleepy. That was also noted to be his condition by the nurse who charted Mr. Donovan's signs. Finally that was also the observation made by Cst. Lewis when he observed him and felt confident enough in those observations to advise Mr. Donovan of his Charter rights and to make a blood demand upon him.

[43] The evidence presented by the Crown certainly leads one to be suspicious as to Mr. Donovan's condition. At the Legion on that evening ingestion of alcohol by the persons attending was common. It would not be unreasonable that if Mr. Donovan was seen with glass in hand (one witness) and beer bottle in hand (other witness) he would be drinking the contents of those containers. That could be one logical conclusion. Also, the witnesses who admitted drinking themselves said that they

consumed no more than one or two drinks and felt their level of sobriety was not impaired. Based on the evidence they provided about their consumption and its effects it could equally be argued that Mr. Donovan was no more, no less.

[44] The law (as set out earlier in this decision) has now well evolved when it comes to determination by the Court as to the existence of proof beyond a reasonable doubt. Keeping in mind then those directions and having carefully reviewed all of the evidence put before me by the Crown (the Defence having called none). I am left in doubt as to Mr. Donovan's impairment by alcohol. I am not satisfied the Crown has proved beyond a reasonable doubt that Mr. Donovan's ability to operate a motor vehicle was impaired by alcohol.

[45] The evidence of his alcohol consumption is problematic and never determined, though suspicious. The evidence of his deportment could be equally explained by clumsiness (his fall), or later by the consequences of the accident (a head injury). The lack of any observations by anyone, including trained medical personnel as to the presence of alcohol is a significant factor in raising doubt. The evidence collectively paints a picture that at its weakest presents a level of proof to a possibility and at its very best to a probability. Given the high level of proof required (and not met here)

I find Mr. Donovan not guilty of the two charges under s. 255(3) and s. 255(2) of the Criminal Code.

ADDENDUM (March 9, 2009)

RE: S. 249(3) AND S. 249(4) CC

[46] Mr. Donovan is also charged with the Crown alleging that on the same night and from those same events he operated that vehicle in a manner that was dangerous to the public and thus caused the death of Mrs. Fraser and bodily injury to Mr. Fraser.

[47] The Crown and Defence agreed at the conclusion of the Trial of the two charges under s. 255 (supra) to adjourn the charges under s. 249 pending receipt of the Court's decision(s) in the charges under s. 255. It would then decide as to whether the Crown would proceed by way of evidence being called "*ab initio*", or by having the evidence already heard by the Court being applied to the s. 249 charges with the Crown and the Defence reserving the right to call further evidence in regard to those charges, or by the Crown simply tendering that evidence and closing its case - leaving it then to the Defence to decide if it wished to call any evidence.

[48] Upon the court giving its decision as it did on the s. 255 charges, a recess was taken, after which the Crown indicated it was offering no evidence on the 249(2)(3) charges. Those charges were therefore dismissed for want of prosecution.

Dated at Sydney, Nova Scotia, this 9th day of March, 2009.

DAVID J. RYAN, J.P.C.