**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. MacIsaac, 2008 NSPC 71

**Date:** December 3, 2008
**Docket:** 1862645/1862646
**Registry:** Halifax

Her Majesty the Queen

v.

Scott Trevor MacIsaac

**Judge:** The Honourable Judge Michael B. Sherar

**Decision:** December 3, 2008 in Halifax, Nova Scotia

**Charge:** On or about the 31st day of December 2007 at or near Halifax, Nova Scotia, DID unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(b) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(a) of the Criminal Code.

**Counsel:** Ms. Kim McOnie, for the Crown
Ms. Blain Nitchike, for the Defence

**By the Court**:

[1] On the early evening of December 31, 2007, Scott MacIsaac was operating a blue Toyota Corolla motor vehicle in the vicinity of the Halifax Metro Centre located in downtown Halifax, Nova Scotia. Constable Jason McKinnon first noted Mr. MacIsaac's vehicle proceeding north on Brunswick Street. At the intersection of Brunswick and Rainnie Drive, the vehicle encountered a red light and, according to Constable McKinnon, Mr. MacIsaac jerked the Toyota over to the left turn lane. The operator, and sole occupant of the Corolla, was not wearing a seatbelt and the vehicle had a burnt out taillight. The vehicle proceeded onto Rainnie Drive through a flashing green light. The officer engaged his police vehicle equipment to effect a traffic stop. Mr. MacIsaac continued to drive some 300 feet down Gottingen Street, ultimately stopping in front of the Halifax Police Station at civic number 1975.

[2] Upon approaching Mr. MacIsaac, the officer requested his license and insurance documentation. Constable McKinnon noted a faint smell of liquor from Mr. MacIsaac's breath and also recalls that Mr. MacIsaac was nervous, had loss of finger dexterity, but was co-operative.

[3] The traffic stop occurred at 2036 hours. Within two minutes, Constable McKinnon became concerned that Mr. MacIsaac might be impaired in his ability to operate a motor vehicle. Mr. MacIsaac was asked to exit his vehicle and accompany the officer to the police vehicle. In the process, Mr. MacIsaac slightly stumbled once.

[4] Constable McKinnon did not have an approved roadside screening device in his police vehicle. The officer can't recall whether he made a demand of Mr. McIsaac to provide a sample of his breath for analysis by a roadside screening device before or after he requested that such a screening device be dispatched to his location. On cross-examination, the officer did not recall when he requested the screening device, or whether he inquired how long it would take for the machine to arrive. Though in reviewing his notes, Constable McKinnon believed he was aware that a Constable Murphy was the nearest officer in possession of a screening device. Regardless, shortly after the request Constable Murphy arrived with the necessary machine. By 2040 hours, according to Constable McKinnon, he had demanded of Mr. MacIsaac that he provide a sample of his breath pursuant to **s.254(2)**.

[5] Constable McKinnon estimated that once the machine arrived, it took 30 seconds to a minute to set up the device. He was satisfied that it was working properly. At 2048 hours, he administered the test and the machine "immediately" registered a fail.

[6] At 2049 hours, the officer advised Mr. MacIsaac that he was under arrest for impaired driving and he provided him with information on his Rights under the **Charter of Rights and Freedoms**, including the Right to seek and instruct counsel, as well as the Police Caution. At 2050 hours, Constable McKinnon read the Breathalyzer Demand, so-called, to Mr. MacIsaac pursuant to **s.254(3)** of the **Criminal Code.**

[7] Shortly thereafter, the officer determined there was no equipment at the Halifax Police Station that would enable a proper analysis to be made of Mr. MacIsaac's breath. Accordingly, Mr. MacIsaac was transported to the Dartmouth Police Station by 2113 hours. When offered an opportunity to contact legal counsel, Mr. MacIsaac declined to speak to local counsel but wanted to contact his girlfriend who was an insurance lawyer. After a private phone call, Mr. MacIsaac provided two samples of his breath for analysis at 2125 hours and 2142 hours, respectively. Ultimately, Mr. MacIsaac was released from police custody at 2243 hours after posting bail.

[8] In questioning, Constable McKinnon advised that while he did not go into the Halifax Police Station either to give the detained person an opportunity to speak to legal counsel, or to obtain a roadside screening device, the officer did, in fact, take a drive to the booking entrance of the police station after making the Breathalyzer demand. That trip took one minute to accomplish. The officer then received information that lead him to believe that there was no breath technician available at the Halifax Police Station to carry out a breathalyzer analysis. The officer then drove Mr. MacIsaac over to the Dartmouth Police Station, arriving there some 20 minutes later.

[9] The Court concludes that the officer did not consider that there was any obligation on his part to consider whether Mr. MacIsaac ought to be afforded an opportunity to speak to legal counsel until he was arrested and charged with impaired driving, contrary to **s.253(a)** and after having completed a roadside screening test. The Court further concludes that the officer did not consider, following the demand for a roadside screening device and considering the actual, or contemplated, delay in obtaining the roadside screening device, whether there was a reasonable opportunity for the detained person, Mr. MacIsaac, to seek and instruct legal counsel.

[10] The following exchange took place between the Court and the officer.

Q. Why didn't you take Mr. MacIsaac inside to the police station to either administer an SLII or let him have an opportunity to speak to counsel?
A. Again, it was a time sensitive matter. I thought the best decision was to take him direct to Dartmouth where he would have an opportunity to call a lawyer before proceeding any further.
Q. Before all that, I know it is a complicated case and you are going to two police departments, but when you stopped him outside the police station you made your inquiry and you formed a suspicion, ... Is that correct?
A. ....yes.
Q. ... and that he had alcohol in his person and was operating a motor vehicle. You knew you didn't have an SLII, an approved roadside screening device. Is that correct?
A. That is correct.
Q. So why didn't you just take him right into the 1975 [Gottingen Street] Halifax Regional Police Headquarters where he could either...you could administer the SLII, and/or he could have an opportunity to speak to counsel?
A. I felt that, after being advised over the air that an SLII would come quickly, that could occur just as quickly. I can't respond to why I didn't take him in for him to contact counsel.
Q. What would lead you to believe that everything would occur in less than a minute because we know, from your testimony, that it only took you a minute to go to the police department?
A. Correct.
....
I guess I was in a traffic stop mode and it was irrelevant to me that we...that the police station was right next to me.
....
Q. In hindsight, would you have done anything differently?
A. I'm not sure, perhaps. Maybe I might have; I'm not sure.

[11] The officer and the Crown concede that if the evidence of the roadside screening device results is excluded from evidence, that there are no other reasonable and probable grounds for Constable McKinnon to make a demand on Mr. MacIsaac, pursuant to **s.254(3)**.

[12] In testimony, the officer candidly admitted that Mr. MacIssac's speech was good; he had a fair balance and his walking was fair, except a single stumble

as he walked from his own vehicle to the police vehicle. While speaking to Mr. MacIssac, the officer noted that he responded consistently and the officer was never concerned with Mr. MacIssac's cognitive ability. Other than Mr. MacIsaac making a jerking turn into the left turn lane at the intersection, there was no other erratic driving by Mr. MacIsaac according to Constable McKinnon.

[13] The officer agreed that he did not advise Mr. MacIssac of any right to consult legal counsel until he arrested Mr. MacIsaac for impaired driving. He felt that there was no need to so advise the accused while he was previously detained. While the officer believed there might be a roadside screening device inside the sergeant's office located in the Halifax Police Station, he did not consider going into the Halifax Police Station for any such device, nor did he consider going immediately into the police station to allow Mr. MacIsaac to speak to legal counsel prior to the arrival or other availability of a roadside screening device. The Court finds that access to the Halifax Police Headquarters could have been effected within a few moments of the roadside detention of Mr. MacIsaac by Constable McKinnon.

[14] Mr. MacIsaac testified that he had been at a restaurant at 8:30 p.m. on the evening in question and had consumed one pint of beer between the hours of 7:00 p.m. and 8:30 p.m. He also stated earlier in the day he had consumed one beer at noon and a second beer at 3:30 p.m. that day, for a total consumption of three beer over eight hours.

[15] He acknowledged that while he was in a good state of mind following his dinner with relatives, he was nervous when stopped by the police officer.

[16] Mr. MacIsaac was charged with offences under **s.253(a) and (b)** of the **Criminal Code.**

[17] Prior to trial of the charges on September 22, 2008, counsel for the defendant gave notice that they were inter alia seeking the exclusion of the Breathalyzer test results under s.**24(2)** of the **Charter of Rights and Freedoms** as relief from a alleged breach of Mr. MacIsaac's **s.10(a)** and **s.10(b) Charter Rights.**

[18] **Section 10** of the **Charter of Rights and Freedoms** indicates:

> Everyone has the right on arrest or detention:
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right. ...

[19] **Section 1** of the **Charter** further indicates:

1. The Canadian Charter of rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[20] **Section 254(2)** of the **Criminal Code** states in part:

> Where a peace officer reasonably suspects that a person who ... has the care or control of a motor vehicle ... whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[21] In R. v. Smith [1994] N.S.J. No 485, N.S.C.A., at paragraph 19:

> The Supreme Court of Canada held in R. v. Thomson (1989) 63 C.R. (3d) 1, that an ALERT demand which complies with s.254(2) of the Criminal code is within the "reasonable limits prescribed by law" in s.1 of the Charter, and therefore constitutes an exception to the rights guaranteed by s.10(b) to retain and instruct counsel without delay and to be informed of that right.

[22] Additionally, the onus of proving a Charter violation or infringement lies on the party purporting the infringement; here, it is upon the defence. It is common ground that both the roadside screening results and the breathalyzer analysis results are not real evidence, but evidence emanating from and conscripted from an accused person.

[23] In R. v. Collins [1987] 1 S.C.R. 265 @ p.284:

> The use of self incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded.

[24] In R. v. Woods, 197 C.C.C. (3d) 353, Mr. Justice Fish, speaking for the unanimous **Supreme Court of Canada**, indicated that the forthwith requirement of **s.254(2)** necessitated a prompt demand by a peace officer and immediate compliance with that demand by the operator of the motor vehicle.

[25] Previously in the decision, Mr. Justice Fish reviewed the constitutional reationale as to why time was of the essence in these situations: see paragraphs 28 to 32.

¶ 29 The "forthwith" requirement of s.254(2) of the Criminal Code is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the Charter. In interpreting the "forthwith" requirement, this Court must bear in mind not only Parliament's choice of language, but also Parliament's intention to strike a balance in the Criminal code between the public interest in eradicating driver impairment and the need to safeguard individual Charter rights.

¶ 30 As earlier explained, Parliament enacted a two-step legislative scheme in s.254(2) and (3) of the Criminal Code to combat the menace of impaired driving. At the first stage, s.254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an approved screening device. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted. They necessarily interfere with rights and freedoms guaranteed by the charter, but only in a manner that is reasonable necessary to protect the public's interest in keeping impaired drivers off the road.

¶ 31 At that second stage of the statutory scheme, where the Charter requirements must be respected and enforced, s.254(3) allows peace officers who have the requisite reasonable and probable grounds to demand breath samples for a more conclusive breathalyzer analysis. Breathalyzers determine precisely the alcohol concentration in a person's blood and thus permit peace officers to ascertain whether the alcohol level of the detained driver exceeds the limit prescribed by law.

¶ 32 Thomsen [1988] 1 S.C.R. 640 was one of the early cases that dealt with constitutional concerns regarding roadside detention of motorists. The Court held that the absence of an opportunity to retain counsel violated s. 10(b) of the Charter, but was justified under s.1 of the Charter as a reasonable limit prescribed by law. <u>The "forthwith" requirement of s.254(2) is in a sense a corollary of the fact that there is no opportunity for contact with counsel prior to compliance with the ASD demand</u>.
emphasis added

[26] In R. v. Dallago [2001] O.J. No.5683 Mr. Justice Beaman of the Ontario Court of Justice excluded the results of a roadside screening device where there had been a 13 minutes delay between the officer formulating a suspicion that the defendant was driving while his ability to do so was impaired by alcohol and the demand being given.

[27] At paragraph 23:

> The central concern is whether there is a justifiable reason for it and if so what are the circumstances surrounding it that are at issue, not where in the process the demand is made.

[28] Further at paragraph 25:

> The court must examine how the events surrounding the police/driver interaction actively unfolded to determine whether then there has been any opportunity prior to the sample being taken for the defendant to consult counsel ...

[29] In that case there was, as indicted, a 13 minute delay in making the demand form the time the officer suspected the defendant had been operating a motor vehicle while impaired by alcohol and the time the demand had been given. The officer did not contemplate giving the accused an opportunity to consult counsel during that time. It was also determined it would have been open to the officer to drive the defendant directly to a police station within five to ten minutes where he could have consulted counsel.

[30] His Lordship concluded:

> At para 30:
>
> I find that there was in fact a realistic opportunity for the applicant to consult counsel prior to the administering of the breath test. As the demand made was not "forthwith" the applicant's s.10(b) rights were not limited by s.254(2). This would mean that the breath demand fell outside of s.254(2) rendering it to be an invalid demand. The subsequent arrest based upon improperly obtained information, was also invalid. It follows that any evidence gathered thereafter was illegally obtained.

[31] R. v. King [2003] O.J. No. 2634 which dealt with a 16 minute delay between the formulation of a suspicion by a peace officer and the making of a demand. The Court held that a peace officer who stops a driver under provincial highway legislation will be afforded a reasonable opportunity to make a demand under s.254(2).

> At para 21:
> As long as the delay between the stopping and the demand is, in fact, required and is, in fact, used to advance the investigation leading to the officer being able to conclude whether a reasonable suspicion exists or not. ...
> The Crown must be able to demonstrate that each portion of the delay was reasonably required to advance the investigation of reasonable suspicion.
> At para 26:
> ... failure to establish this will be fatal to a successful prosecution for such offence ...

[32] In the present case, the investigating officer stopped the defendant, who was operating an automobile on the city streets of Halifax, at 2036 hours on December 31, 2007. While requesting documents of the defendant driver, the officer smelt an odour of alcohol emanating from the defendant and formed a suspicion that the defendant had ingested alcohol. After the officer had formed the requisite suspicion under **s.254(2)**; he did not carry out any other investigation nor were there any exigent circumstances present that would necessitate the delay in making the demand under **s.254(2)** to the defendant other than forthwith.

[33] The officer did not have the necessary roadside screening device presently with him and he had to make a radio request through the police dispatch for such an approved roadside screening device to be sent to him. He did not exactly know how long it would take for the machine to arrive but, in fairness, thought it would arrive soon. It was not until 2040 hours that the officer demanded that the defendant provide a sample of his breath for analysis, pursuant to **s.254(2)**. Still later, by 2048 hours, the SLII roadside screening test was carried out. The test was not carried out for some 12 minutes (the time between the traffic stop and the testing) or, at the very least, some 10 minutes (the latest time by which the officer had formed his suspicion and the time of the test.)

[34] It would have only taken one minute to walk the defendant into the police station to provide him with legal counsel. That time period was significantly less than any actual or reasonably anticipated time period that would expire before the arrival of the roadside screening device to the scene of the traffic stop.

[35] In this case, there was a reasonable opportunity for the defendant to seek legal counsel prior to having to provide a sample of his breath into the roadside screening device.

[36] It is clear, with respect, that the investigating officer never contemplated whether there was a reasonable opportunity for the defendant to seek legal counsel prior to the taking of the roadside screening device. In fact, it appears the officer believed that the defendant was only entitled to seek and instruct counsel after he was requested to provide a sample of his breath, pursuant to **s.254(3)**.

> S.254(3) SAMPLE OF BREATH OR BLOOD WHERE REASONABLE BELIEF OF COMMISSION OF OFFENCE — Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
>
> (a) such samples of the person's breath as in the opinion of a qualified technician, or ... are necessary to enable proper analysis to be made in order to determine the concentration , if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.
>
> emphasis added

[37] The officer was not in a position to require that the defendant, Mr. MacIsaac, to comply pursuant to **s.254(2)** of the **Criminal Code**, before he had a realistic opportunity to consult counsel. The officer and the defendant were parked literally at the doorstep of the Halifax Police Department wherein it is common ground, that Mr. MacIsaac would have had an opportunity to contact and consult legal counsel prior to being presented with the roadside screening device.

[38] The defendant has shown on a balance of probabilities that his right to retain and instruct legal counsel under **s.10(b)** and to be informed of that right had been violated on the evening in question.

[39] As in R. v. Domenico Bartolacci unreported decision of this Court dated September 9, 2008, this court would distinguish the case of R v. Tsavos [2005] N.S.J. 325. **The Summary Appeal Court**, in that case, determined that an arresting office need not provide a detainee with an opportunity to contact legal counsel - even though the detention occurred very near the same Halifax Police Headquarters - since the officer was continuing his investigation through the

carrying out of physical sobriety tests, rather than awaiting the arrival of an approved screening device. In the **Tsavos** scenario, the investigation was still ongoing, whereas in the case at bar the officer had already formed his suspicion and the investigation was not being further advanced.

[40] Since the results of the SLII roadside screening device were obtainable through a violation of the accused's **s.10(b)** rights, the question then arises what remedy is the defendant entitled to.

[41] **Section 24(2)** of the **Charter** states:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in proceedings would bring the administration of justice into disrepute.

[42] In R. v. Bartle [1994] 3 S.C.R. 173 Chief Justice Lamer, as he then was, stated:

> In my view, the Crown should bear the legal burden (the burden of persuasion) of establishing on the evidence, that s.24(2) applicant would not have acted any differently had his s.10(b) rights have been fully respected, and that as a consequence, the evidence would have been obtained irrespective of the s.10(b) breach.

[43] Evidence will be conscriptive when an accused person is compelled to incriminate oneself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. See R. v. Stillman [1997] 1 S.C.R. 607.

[44] In summary, **the Supreme Court of Canada** in Stillman made the following analysis:

> 1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
>
> 2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair

trial would necessarily bring the administration of justice into disrepute.

3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the breach and the effect of exclusion on the repute of the administration of justice will have to be considered.

[45] The evidence here of the results of the approved screening device were conscripted evidence provided by the defendant for his self-incrimination through the violation of his fundamental rights and freedoms. The evidence could not have been otherwise obtained except through his conscripted participation.

[46] It logically follows that if the evidence of the result of the approved screening device, the SLII, is excluded, then the officer did not have reasonable and probable grounds to make a breathalyzer demand, pursuant to **s.254(3)**.

[47] In R. v. Collins (1987) 33 C.C.C. (3d) 1 **the Supreme Court of Canada**, in an early **Charter** decision analyzing **s.24(2)** of the **Charter**, concluded that in order to exclude evidence, the admission of it must be such that it could bring the administration of justice into disrepute. One must consider (a) fairness of the trial, (b) seriousness of the **Charter** breach, and © effect of the exclusion of the evidence on the repute of the administration of justice.

[48] The receipt of self-conscripted evidence obtained through a **Charter** violation, as in this case, would render the trial unfair. The citizen's right to seek and instruct counsel is one of the most fundamental protections a citizen has when confronted by the power of the state. Impeding access to counsel when a right to counsel is mandated is a serious violation of the **Charter**. In this Court's opinion, the exclusion of the evidence of the approved screening device results and consequently the breath analysis results would not negatively affect the administration of justice in a free and democratic society.

[49] Accordingly, the results of the demands made pursuant to **s.254(2)** and **s.254(3)** are excluded from the trial proper.

[50] Since there is no admissible evidence against the accused on the charge contrary to **s.253(b)**, an acquittal will be entered.

[51] There remains the charge pursuant to **s.253(a).**

[52] Mr. MacIsaac also stands charged under **s.253(a)** of the **Criminal Code** which states:

> 253. OPERATION WHILE IMPAIRED — Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, aircraft or railway equipment, whether it is in motion or not.
>
> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or ...

[53] In R. v. Stellato [1993] O.J. No.18 (**Ontario Court of Appeal**) upheld by the **Supreme Court of Canada** in R. v. Stellato [1994] S.C.J. No.51

> Justice Labrosse stated:
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> The court noted in Smith that if Parliament had intended to proscribe any impairment, however slight, it could have done so. On the other hand, if Parliament had intended to proscribe impaired driving only where accompanied by a marked departure for the norm, it also could have done so. With all due respect to those who hold a contrary view, it is my opinion that the interpretation of s.253(a) which was advanced in Winlaw, Bruhjell and Campbell is the correct one. Specifically, I agree with Mitchell J.A. in Campbell that the Criminal Code does not prescribe any special test for determining impairment. In the words of Mitchell J.A., impairment is an issue of fact which the trial judge must decide on the evidence and the standard of proof is neither more nor less than that required for any other element of a criminal offence: courts should not apply tests which imply a tolerance that does not exist in law.
>
> In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. 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 form slight to great, the offence has been mad e out.

[54] In the present case, the defendant, Mr. MacIsaac, took the stand and testified that prior to operating his motor vehicle he had, in fact, ingested some alcohol.

[55] In her able submission, counsel for the defendant succinctly reviewed the observations of the investigating officer, Constable McKinnon, as follows.

[56] The only evidence from Constable McKinnon as to Mr. MacIsaac's manner of driving was that at the last minute, he "jerked over" into the left turn lane and, upon doing so, he "kinda" over-steered a bit. These indicia can easily be explained by other reasons including a last minute decision to take a different route, and possible careless driving.

[57] Moreover, Constable McKinnon testified that Mr. MacIsaac's driving was not erratic and that he may not have pulled Mr. MacIsaac over if it were not for the burnt out taillight or failure to wear a seatbelt.

[58] The only indicia of impairment that Constable McKinnon noticed about Mr. MacIsaac were a faint and then strong odour of liquor, glossy eyes, and "some loss" of finger dexterity. While Mr. MacIsaac was said to have been looking over to the right passenger side and appeared nervous, these are not indicia of impairment. Additionally, Constable McKinnon said that he noticed a slight stumble by Mr. MacIsaac on his way to the police car; however, on cross-examination, the officer admitted that he did not write that down in his notes.

[59] In contrast, Constable McKinnon testified that Mr. MacIsaac was cooperative and not rude. His driving was not erratic. His clothes were orderly. His attitude was carefree, cooperative and polite. His speech was good. His balance and walk were fair. There was nothing unusual to note about him. His speech was not slurred. He understood the conversation and answered all questions appropriately, and his cognitive ability did not seem to be impaired. Moreover, Constable McKinnon was never asked if he formed an opinion about Mr. MacIsaac's ability to drive and when he was asked whether up until the "fail" reading he had insufficient grounds to determine whether Mr. MacIsaac was impaired to drive a motor vehicle, he responded: "I wouldn't have used the SL2 you're correct, yes, if I felt that I had the grounds up to that point."

[60] In the case of R. v. Parker ]2007] O.J. No.502, the Court dismissed the impaired charge in similar factual circumstances. There, the only indicia of impairment noted were dilated pupils, strong odour of alcohol, and glassy, bloodshot eyes. In that case, the accused's speech was good, his balance and walking were fair and his attitude was polite and cooperative. The Court, having already excluded the evidence due to a **Charter** violation, held that it could not consider the screening device "fail" result as evidence at trial, nor infer that there is any necessary relationship between a particular blood alcohol concentration and the impairment of one's ability to operate a motor vehicle. The Court concluded that the Crown's evidence fell short of proving beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.

[61] The decision in R. v. Stellato supra was considered by the **Alberta Court of Appeal** in R. v. Andrews [1996] A.J. No.8, Justice Conrad stated at paragraph two:

> The issue on this appeal relates to the distinction between the degree of impairment of the ability to operate a motor vehicle necessary to found a conviction and the degree of deviation from normal conduct necessary to prove that ability is impaired.

[62] Furthermore at paragraph 7:

> The courts must not fail to recognize the fine but crucial distinction between "slight impairment" generally, and "slight impairment of one's ability to operate a motor vehicle". Every time a person has a drink, his or her ability to drive is not necessarily impaired. It may well be that one drink would impair one's ability to do brain surgery, or one's ability to thread a needle. The question is not whether the individual's functional ability is impaired to any degree. The question is whether the person's ability to drive is impaired to any degree by alcohol or a drug. In considering this question, judges must be careful not to assume that, where a person's functional ability is affect in some respects by consumption of alcohol, his or her ability to drive is also automatically impaired.
>
> Paragraph 29:
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> In my view the following general principles emerge in an impaired driving charge:
>
> (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
> (2) there must be impairment of the ability to drive of the individual;
> (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or drug;
> (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

> Paragraphs 30 and 31:
> .... is not only the degree of lack of sobriety that is in issue, but whether the consumption impacts to any degree on the ability to drive.
> The test of weighing circumstantial evidence of conduct in support of an inference of impairment of ability to drive has not changed to mean that equal weight should be attributed to conduct which indicates a marked departure from normal conduct and conduct which indicates a slight deviation form normal conduct. That would have the practical effect of lowering the standard of proof of the offence. It is not deviation from normal conduct, slight or otherwise, that is in issue. What is in issue is the ability to drive. Where circumstantial evidence alone or equivocal evidence is relied on to prove impairment of that ability, and the totality of that evidence indicates only a slight deviation from normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment of the ability to drive, slight or otherwise.
>
> emphasis added

[63] From the evidence before the Court, it is clear Mr. MacIsaac had ingested alcohol at a time that he had care or control of his motor vehicle. What remains to be proven beyond a reasonable doubt is whether the amount of alcohol he had ingested impaired his ability to operate his motor vehicle at the time that he was under observation by Constable McKinnon.

[64] The observations already referred to by this Court as to the manner of driving, the demeanour and conduct of the driver and the minimal admissible indicia of physical impairment, lead this Court to conclude that there was, if any, only a "slight deviation from normal conduct" present.

[65] Accordingly, this Court is not convinced beyond a reasonable doubt that the ability of the defendant, Mr. MacIsaac, to operate a motor vehicle was impaired by alcohol either slightly or otherwise.

[66] Acquittal entered on the charge pursuant to **s.253(a)** of the **Criminal Code.**

Order accordingly,

Dated at Halifax on the 3rd day of December, 2008.

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Michael B. Sherar
Provincial Court Judge