IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Buchanan, 2005 NSPC 61

Date: 20051219
Docket: 1493876/1493877
Registry: Amherst

Between:

Her Majesty the Queen

v.

Ronald Ivan Buchanan

DECISION

Judge:	The Honourable Judge Carole A. Beaton
Heard:	19 December 2005 in Amherst, Nova Scotia
Written decision:	26 January 2006
Counsel:	Mr. Bruce Baxter, for the crown Mr. Joel Pink, for the defence

BEATON, PCJ, orally:

[1] This matter came before the court on October 26th for trial. Mr. Buchanan is charged with two offences contrary to section 253 of the *Criminal Code*, specifically 253(b) and 253(a). Following trial, the matter was adjourned at the request of counsel for written submissions to be filed with the court, and I have prepared a decision.

FACTS

[2] Having reviewed all of the evidence, I am satisfied that the facts in this matter can be summarized as follows: The defendant Mr. Buchanan was the driver of a truck involved in a single vehicle accident on highway number 2 at Moose River, Cumberland County on the evening of October 27th, 2004. At approximately 9:35 p.m. Mr. Ronald Canning came upon Mr. Buchanan sitting in his vehicle, which was considerably damaged, and requesting assistance from Mr. Canning to contact 911. Mr. Canning noted that the defendant exhibited slurred speech and was acting a bit incoherent and dazed. Mr. Canning did not detect an odour of alcohol during his conversation with the defendant.

[3] Constable Jennifer Clarke attended at the accident scene at 10:02 p.m. and spoke to the defendant for approximately ten minutes, during which time she noted that his speech was slurred, his gait was poor, and he exhibited a strong smell of alcohol emanating from his breath. Mr. Buchanan confirmed to the officer that he was the driver of the vehicle and Constable Clarke formulated reasonable and probable grounds to demand a breath sample pursuant to section 254 of the *Criminal Code*. Mr. Buchanan was transported to hospital and the officer remained at the scene until the defendant's vehicle was removed. Subsequently Constable Clarke attended at the Parrsboro hospital and at 11:06 p.m. made a blood demand to the defendant. The defendant had been immobilized by the use of foam head blocks which could not be removed until an x-ray was completed. The presence of those head blocks delayed the ability of Constable Clarke to make a phone available to the defendant to permit him to exercise his right to counsel. As a result the officer followed the defendant, who was taken by ambulance to the Cumberland Regional Health Care Centre in Amherst to undergo an x-ray. At 2:03 a.m., following the x-ray and the removal of head blocks, the defendant was given an opportunity to speak with counsel which he exercised on two separate occasions. He then provided blood samples at 2:25 and 2:26 a.m.

[4] Immediately following the taking of the blood samples, Constable Clarke served Mr. Buchanan with a certificate of qualified technician (crown exhibit 2, defence exhibit 5), and a certificate of qualified medical practitioner (crown exhibit 3, defence exhibit 6). On January 5th, 2005 she served upon Mr. Buchanan a certificate of an analyst (crown exhibit 4).

[5] The blood samples were subsequently analyzed by Mr. Jean Claude Landry, a forensic toxicologist who was, with the consent of the defence, qualified to give opinion evidence as a designated qualified analyst on the effects of alcohol on the human body and the consumption, absorption and elimination of alcohol. Mr. Landry analyzed the samples taken from Mr. Buchanan (exhibit 7) and recorded his results in the certificate of analyst as 140 milligrams of alcohol in 100 millilitres of blood.

[6] The burden of proof in this matter rests with the crown to establish the elements of the offence to a standard of proof beyond a reasonable doubt. The presumption of innocence attaches to Mr. Buchanan, and remains until the court has had an opportunity to listen to, consider and assess all of the evidence, taken as a whole, and come to a determination on the question as to whether the crown has met the burden.

[7] I am satisfied, based on all of the evidence, that the so-called jurisdictional elements have been proven. That is to say, that if the offences occurred, they occurred on the 27th of October 2004 at Moose River, Cumberland County, Nova Scotia, and they involved Mr. Buchanan as the driver of the vehicle which was the subject of the single motor vehicle accident. That identification of Mr. Buchanan as the driver is established in particular, I note, through the *viva voce* evidence of Constable Clarke and the contents of exhibit 1, being the statement of Mr. Canning.

[8] Mr. Buchanan, in his own defence, did not call any evidence, nor is he bound to do so. His counsel has raised four distinct issues in maintaining that the crown has failed to meet the requisite burden in this matter, and that on the whole of the evidence before me there has been raised, in relation to each count, a reasonable doubt.

ISSUE NO. 1 - ADMISSIBILITY OF THE CERTIFICATE OF A QUALIFIED TECHNICIAN AND THE CERTIFICATE OF A QUALIFIED MEDICAL PRACTITIONER

[9] The defence asserts that the notice portion on the bottom of both exhibit 5 and exhibit 6 are not clear and legible and that there is no, or insufficient evidence, before the court to establish beyond a reasonable doubt that Mr. Buchanan understood what Constable Clarke told him when the certificate was served, and the legal implications of those certificates. Therefore, argues the defence, the samples received by the analyst were not samples properly taken.

[10] Section 258(7) provides:

> No certificate shall be received in evidence pursuant to paragraphs (1)(e)(f)(g)(h) or (i) unless the party intending to produce it has, before the trial, given to the other party reasonable notice of his intention and a copy of the certificate.

[11] The information contained on exhibits 5 and 6 as to the identification of the person taking the sample, the reasons for the taking of the sample and the circumstances under which it was taken, along with the date and the signature of the author of the certificate are all clearly legible.

[12] Regarding exhibit number 5, the certificate of a qualified technician, an examination of the bottom of that document, underneath the hard line separating the signature of the qualified technician from the remainder of the page, reveals that it contains an illegible series of characters, followed by a paragraph stating:

> To: Ronald Buchanan of Southampton, NS. Take notice that, pursuant to subparagraph 258(1)(h)(iii) and subsection 258(7) of the *Criminal Code* the prosecution intends to produce in evidence a certificate, a copy of which appears above. Dated this 28th day of October A.D. 2004.

Below that is a signature by an individual identified as “signature of person serving this notice for the prosecution”. It is plain and evident on the face of the document

that regardless of what the illegible portion may contain, nonetheless the legible words put the defendant on notice of the intention of the prosecution to produce that document in evidence.

[13] As to exhibit number 6, the certificate of a qualified medical practitioner, an examination of the bottom portion of that certificate, underneath the hard line separating the certificate of the "qualified medical practitioner" from the remainder of the page, is a section entitled "notice of intention to produce certificate" and it reads:

> To: Ron Buchanan of Southampton, NS. Take notice that, pursuant to subparagraph 258(1)(h)(ii) and subsection 258(7) of the *Criminal Code* the prosecution...

Then there is an illegible portion, and then the document continues:

> ...of which appears above. Dated this 28th day of October A.D. 2004.

Below that portion is a signature by an individual identified as "signature of person serving this notice for the prosecution". The title "notice of intention to produce certificate" is clearly legible, as is the name of Mr. Buchanan, his address and the date and the signature of the person serving the notice. The legible portion of the notice references the person to take note pursuant to particular portions of the *Criminal Code* and the remainder of the notification, with the exception of the words "of which appears above" is illegible. This is in essence the reverse of the deficiency argued with respect to exhibit 5, but nonetheless I am entirely satisfied that the legible portions of exhibit 6 put Mr. Buchanan on notice of an intention to produce a certificate pursuant to section 258(2)(h)(ii) and section 258(7). Again, it is plain and evident on the face of the document, regardless of the illegible portions of it, that the defendant was put on notice.

[14] I consider as well the evidence before the court as to what Mr. Buchanan's circumstances were at the time the certificates were served on him on October 28. Constable Clarke gave evidence that she served both documents (exhibits 5 and 6) on Mr. Buchanan while in attendance with him at the Cumberland Regional Health Care Centre. She testified those were the only two documents served on the defendant at that time and she agreed with defence counsel as to those portions of

both documents that were illegible. On re-direct, the witness confirmed that she served the documents personally on Mr. Buchanan and advised that she told him at the time that she signed the documents and served them upon him that the documents would be produced in court. Constable Clarke was asked whether Mr. Buchanan "appeared to take that in" and she answered in the affirmative. Even if I am to accept the defence's assertion that there must be evidence before the court to allow it to conclude that Mr. Buchanan understood what was being said to him by Constable Clarke, the whole of the evidence before the court on that point supports that Mr. Buchanan appeared to understand what Constable Clarke told him. While the evidence is not any more specific than that, I consider it in the context of all of the evidence before the court as to the nature and quality of Mr. Buchanan's behaviour and responses on that evening, including the following:

The evidence of Constable Clarke that the defendant appeared to understand the Charter, caution and police warning she read to him, and the fact that he did exercise his right to counsel once advised.

The evidence of Constable Clarke that Mr. Buchanan appeared to understand the blood demand she read to him and the fact that he did ultimately comply with that demand.

The evidence of Constable Clarke that Mr. Buchanan acknowledged to her at the scene that he was the driver of the vehicle.

The evidence of Constable Clarke that Mr. Buchanan was pleasant and co-operative throughout her dealings with him.

The evidence of Mr. Canning that he had conversation with Mr. Buchanan at the scene of the accident which resulted in Mr. Buchanan asking him to call 911 and confirming to Mr. Canning that he was "all right" as they engaged in conversation for two to three minutes.

[15] The whole of the evidence before the court establishes that Mr. Buchanan, despite having been the operator of the vehicle involved in an accident (as he admitted to Constable Clarke and as contained in exhibit 1), was nonetheless communicative with and responding to various individuals with whom he came in contact over a period in excess of four hours. I am not persuaded, on the evidence

that is before the court, that Mr. Buchanan failed to understand what the police officer was telling him at the time the certificates were produced upon him.

[16] Clearly section 258(7) requires the notice provided to the accused pursuant to section 258 be reasonable. As noted by the Alberta Court of Appeal in *R. v. Gazica* 168 C.C.C. (3d) 346 at paragraph 7:

> The test consistently applied is "whether the notice has been reasonable in the circumstances": *R. v. Goerz* (1971), 5 C.C.C. (2d) 92 (Alta. S.C.) at 94. The notice "must be reasonable in time and substance and must not be misleading, confusing or otherwise prejudicial...No particular form of notice is required": *R. v. Good* (1983), 6 C.C.C. (3d) 105 (Alta. C.A.) at 108.

[17] I am satisfied with respect to the nature of those legible portions of exhibits 5 and 6 coupled with the evidence as to what Mr. Buchanan was told and under what circumstances that the notice provided to him in respect of exhibits 5 and 6 was reasonable and that he understood the same.

ISSUE NO. 2 - HAS THE CROWN PROVED THAT THE POLICE COLLECTED THE BLOOD SAMPLE IN AN "APPROVED CONTAINER"?

[18] Mr. Landry testified that he received from Constable Clarke correspondence and a blood collection kit containing two sealed vials, which was stored in a walk-in refrigerator at the R.C.M.P. lab in Halifax. On the stopper seal was the name of the accused from whom the analyst believed the sample had been collected. The analyst took notes and photographs of the package and the exhibits and on November 18th, 2004 conducted an analysis of sample number two in triplicate, averaging the results in favour of the defendant, and finding a concentration of 140 milligrams per 100 millilitres of blood. Mr. Landry testified that the vials were past the expiry date which the manufacturer placed upon them in relation to the vacuum capacity of the tube and its ability to draw a full sample. The analyst further testified that at November 2004 the "approved container" (as per regulation) was Vaccutainer ® XF947. The samples of Mr. Buchanan's blood as received from Constable Clarke were contained in Vaccutainer TM XF947. Mr. Landry further testified that in February 2005 the regulations were amended to include various other containers.

[19] In the case *R. v. Boudreau* (2004) 231 N.S.R. (2d) 217, an oral decision of this court, the court considered the argument that Vaccutainer TM XF947 was not "an approved container" because the *Criminal Code* regulations allowed for Vaccutainer ® XF947.

[20] At paragraph 17, page 8 of that decision I noted:

> The defence challenges that the container was not an approved container on the basis that the container which Ms. Campbell received from Constable Reid was a container that was marked with one series of trademark symbols which were different from the trademark symbols described in the definition of an approved container. Ms. Campbell's evidence was that the Vaccutainer label which contained the blood sample, which she analyzed, was marked as Vaccutainer XF947 and it had the presence of the trademark designation TM. Ms. Campbell's evidence was that this did not cause her any concern in terms of her preparation to conduct the analysis, nor the analysis procedure and process itself. But the fact that the symbol which appeared on the Vaccutainer label, the TM, was different than the R with the circle around it, ®, that she would normally see to denote a trademark or ownership, the fact did cause her to prepare a slightly different certificate of an analyst...

[21] And continuing at paragraph 18:

> Defence asserts that this imperfection, if you will, in the container that was being used by Ms. Campbell is of such a nature and sufficiency to cause the court to reject the evidence because the container being used was not within the definition of an approved container.

[22] At paragraph 19 the court cited with approval from the decision in *R. v. Moody* [1995] N.S.J. 114, and determined:

> ...I think if the principle of the *Moody* case were to be applied here, which I obviously am doing, I would have to say, given Justice Cacchione's findings, that the presence of the symbol TM in the absence of the symbol ® would be matters of surplusage which would describe the ownership or the legal methodology of ownership, if I can use that phrase. I don't profess to know a great deal about trademarks but I would say that those symbols ascribe a particular set of criteria, I assume, about the ownership or certain standards about the ownership and they are related strictly to that, the legal ownership of the Vaccutainer. They have little, if anything, it would seem to me, to do with whether the Vaccutainer device is the prescribed device.

[23] And continuing at paragraphs 22 and 23 I found as follows:

> What we have before us is a Vaccutainer XF947 which is the prescribed vessel according to the definition and I don't see how the presence or absence of any trademark notation or the presence of a different trademark notation could affect the validity of the use of that particular vessel. So I am not satisfied that the defence assertion is justified and I find that the vessel which was used was the appropriate vessel even though the words TM appeared on it instead of the ®.
>
> If I am incorrect in that analysis, I then rely on the decision in *R. v. Reutov* [1992] A.J. 292 as provided by the crown. I note that analysis is made by Judge Nemirsky in that decision at page 4 wherein the court stated:
>
> > Clearly the use of other than an approved container would preclude the crown's reliance upon the presumption under section 258(1)(d) of the *Criminal Code* but for

> reasons previously stated, the crown cannot in any event in this case rely on that presumption. The question of presumption aside, then, are the results of the analysis of a sample of blood collected in a non-approved container admissible in evidence, provided it can be shown that the sample has not been contaminated or tampered with. I have no doubt that they are. An examination of what here happened shows that after taking a sample, Dr. Lindsay affixed the taped seal on the container and then initialed the seal. The sample was refrigerated at the R.C.M.P. detachment at LacLaBiche and was in due course transported to the forensic lab in Edmonton. The analyst who received and analyzed the sample kept the sample refrigerated, found the taped seal apparently intact, and was of the opinion that no decomposition has occurred. Further, she testified that following her receiving it, the sample was not contaminated by alcohol. Nothing in the evidence suggests to me that there was any improper handling of the sample. Accordingly, I find the results of the analysis to be admissible, notwithstanding that the container used was not an approved container.

[24] I see no distinction whatsoever between the facts and argument in *Boudreau* and those before me in the present case. Applying the same reasoning as set out in *Boudreau* I am satisfied that the vessel used to collect the blood sample of Mr. Buchanan, being a container marked Vaccutainer TM XF947 is the prescribed vessel. If I am incorrect in that analysis, then I rely in the alternative on the analysis as conducted in *Reutov*. The evidence before this court clearly establishes that Constable Clarke observed the samples of blood taken by the technician and

the certificate signed by the qualified medical practitioner. She packaged and sealed the samples with the help of that technician, she stored them in a locked fridge, she transported the samples to the detachment in Parrsboro and then forwarded them to the lab in Halifax by courier. Once there, Mr. Landry retrieved the samples from a walk-in refrigerator locker which contained the blood collection kit consisting of two sealed vials. On the stopper seal was the name of the accused from whom the sample was collected. Mr. Landry identified exhibit 7 and recognized his initials and the date he had received the exhibit and his markings as contained on the vials. He testified that in this case the markings on the vials did not match specifically the *Criminal Code* provisions and accordingly he issued a certificate that did not reference a "sealed approved container" (as a result of which the crown would lose the presumption regarding sealed approved containers).

[25] Based upon the evidence of Constable Clarke as to the taking and transportation of the sample, the evidence of Mr. Landry as to the receipt and analysis of the sample, and on the contents of exhibits 2 and 3 there is no evidence before me to suggest that the sample received for analysis was not intact or that it was in any way contaminated or improperly handled. I am satisfied that the container received by Mr. Landry constitutes an approved container, and further, and in the alternative, that the results of the analysis are admissible in any event on the basis that the container and its contents were not compromised in any way <u>if</u> the container was not an approved container.

ISSUE NO. 3 - HAS THE CROWN ESTABLISHED THE EVIDENTIARY BASIS FOR THE ALCOHOL ANALYST'S ASSUMPTIONS?

[26] The alcohol analyst Mr. Landry testified that he made certain assumptions in conducting the analysis of Mr. Buchanan's blood sample, including that the defendant did not consume alcohol in either (a) one half hour prior to the accident, or (b) following the accident.

[27] Mr. Ronald Canning testified that he arrived at the scene of the accident at approximately 9:30 p.m. Mr. Canning spoke to the defendant as he sat inside his vehicle, and the defendant asked Mr. Canning to call 911. Mr. Canning attempted to do so but could not obtain cell phone receiption and so he drove approximately one-quarter mile down the road to do so. He could recall looking at his cell phone and noting the time as 9:35 or 9:40 p.m. when he made the call. He then returned to the scene and remained for another five to ten minutes. If Mr. Canning made the

call at 9:35 or 9:40, that would have him departing from the accident scene somewhere between 9:40 and 9:50 p.m. Mr. Canning was unable to say whether the defendant had consumed anything while Mr. Canning went to make the cell phone call and Mr. Canning was gone from the scene for "a few minutes" to make that call. Constable Clarke testified that she received dispatch to the scene at 9:43 p.m. and arrived at 10:02 p.m. She was with the defendant until he departed the scene at 10:12 p.m. and during that time the defendant did not ingest anything by mouth. There is no evidence before the court as to whether Mr. Buchanan consumed anything from the time he departed the scene with the ambulance personnel and the time Constable Clarke met with Mr. Buchanan again at the Parrsboro hospital at 10:46 p.m.

[28] There is no evidence before the court with respect to whether the defendant did or did not consume alcohol in the half hour prior to the accident. Further, there is no evidence before the court as to whether the defendant consumed alcohol at any period from the time of the accident to the time of the taking of the sample, other than the evidence of Constable Clarke that between 10:02 and 10:12 p.m. Mr. Canning did not ingest anything by mouth. The defence maintains that the crown has a burden to establish to the requisite standard of proof that the accused did not have any alcohol during five separate and distinct time periods identified in the evidence, totalling approximately 176 minutes, and occurring between 9:35 p.m. and 2:03 a.m., initially while Mr. Canning departed the scene temporarily and primarily during times when Mr. Buchanan was in the care of various medical personnel. The defence maintains that in the absence of such evidence the expert analyst called by the crown cannot rely upon the two assumptions as to alcohol consumption in the half hour prior to the accident and alcohol consumption from the time of the accident until the taking of the sample. The defence asserts that in the absence of proof beyond a reasonable doubt as to the assumptions upon which the analyst relies, the court cannot place any weight upon the readings extrapolated back by the alcohol analyst in his evidence.

[29] By contrast, the crown argues that the burden of proof does not require the crown to negative "every speculative possibility" raised by the defence. The crown maintains were it not speculative to suggest the possibility of consumption of alcohol by the defendant in the half hour prior to the accident, any potential doubt would be eliminated by the evidence of the alcohol analyst that extrapolation of the readings at the time the sample was taken back to the time of driving would give a range between 187 and 234 milligrams percent and consumption in the half

hour prior to the accident might increase that range by 5 to 10 milligrams percent, which would not affect the burden on the crown to establish a blood alcohol count in excess of .08. I agree. Secondly, the crown maintains that while there is nothing in the evidence to suggest that alcohol could have been consumed between the time of the accident and the taking of the sample and that such a suggestion is purely speculative, nonetheless even if there was evidence of consumption there is no evidence from the alcohol analyst as to the impact of such consumption and there were no questions put to the expert on that point.

[30] In summary the evidence of the analyst was the following:

On direct the analyst Mr. Landry testified that in order to have the readings he had calculated, but with knowledge of consumption in the half hour prior to the accident, an individual of the defendant's weight would have to consume a minimum of 9.5 ounces of 40% hard liquor or 6.3, 300 millilitre 5% beer in order to elevate blood alcohol to the 140 range some 4.7 hours after the time of the accident.

On cross examination Mr. Landry testified that his opinion would be affected if there was no evidence that the defendant did or did not consume alcohol between the time of the accident and the taking of the sample, because the analyst would be unable to rely on the assumption that no alcohol had been consumed at the relevant time frame.

On re-direct Mr. Landry agreed that the effect on his opinion, if there had been evidence of alcohol consumption, would be such that it would change the numbers of his calculations but would not take the results of the blood alcohol concentration below the .08 mark.

[31] If the crown is to rely on the assumptions made by the analyst in extrapolating back the reading received to the time of the accident, then the crown must prove the assumption upon which the analyst relies. It is not for the defendant to disprove such assumptions. Having said that, any doubt must be a reasonable doubt and "not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice, rather it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.": per *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at page 13.

[32] There is no evidence that Mr. Buchanan did or did not drink prior to the accident but that must be considered in light of the evidence that is before me from Mr. Landry as to what volume of alcohol Mr. Buchanan would have to have consumed in that time frame in order to register the blood alcohol concentration analyzed by Mr. Landry. It may be speculative to accept that such a level of pre-accident consumption could have occurred. However, the absence of any evidence whatsoever as to what Mr. Buchanan may or may not have consumed during the ambulance ride from the accident scene to Parrsboro and later from Parrsboro to Amherst and while in hospital for several hours in Amherst, is problematic in my view. I can only consider evidence that is before me; my role is not to ponder or speculate upon why certain evidence was not called. There is not only insufficient evidence on the point, there is no evidence at all. In the absence of <u>any</u> evidence as to whether or not alcohol was ingested by Mr. Buchanan during transportation for medical attention and while under care of medical personnel, I am left with a reasonable doubt as to whether the analyst can properly assume, in extrapolating the reading at the time of the taking of the sample back to the time of the accident, that there was no alcohol consumed by the defendant. Accordingly, on the first count, I find the defendant not guilty.

ISSUE NO. 4 - HAS THE CROWN ESTABLISHED IMPAIRMENT IN RELATION TO THE CHARGE CONTRARY TO SECTION 253(A)?

[33] Clearly, on all of the evidence, Mr. Buchanan was the operator of the vehicle. Crown and defence are agreed in their submissions that the answers the defendant provided in his statement to the officer are illuminating (see exhibit 1), but for differing reasons. In his statement, Mr. Buchanan explained that the reason for the accident was that he “got surprised by the bridge, over corrected and lost control of the truck”. The defence maintains that there is no evidence of speed and that the court cannot infer impairment because of the occurrence of an accident. The crown emphasizes that Mr. Buchanan acknowledged in his statement that he was familiar with the road where the accident occurred, having traveled it at least once per week. So, on that point, the evidence is equivocal - being equally as consistent with one explanation as the other.

[34] The crown relies on *R. v. Stellato* 78 C.C.C. (3d) 380, an Ontario Court of Appeal decision which reminds this court that the crown only need prove impairment of any degree, from slight to great, as opposed to a marked departure from the normal.

[35] The evidence of Constable Clarke was that Mr. Buchanan was exhibiting slurred speech and his gait was poor such that at one point he was holding onto the side of his vehicle. She noted "a strong smell of alcohol" from the defendant's breath when she spoke to him between 10:02 and 10:12 p.m. Once on scene at the Parrsboro hospital she spoke to Mr. Buchanan in a small room and noted a "quite strong" smell of alcohol coming from his breath as she spoke to him. At 1:16 a.m. at the Cumberland Regional Health Care Centre Constable Clarke noted again a "strong smell of alcohol". In cross examination Constable Clarke agreed that individuals injured in accidents can show signs of impairment and yet not be impaired. She agreed that people could slur their speech as a result of a head injury as opposed to impairment. She herself had never related slurred speech to a head injury but she had observed people exhibit unsteadiness as a result of injury as opposed to impairment.

[36] Mr. Ronald Canning testified that Mr. Buchanan was acting "a bit incoherent and dazed, like someone who just rolled a vehicle". He noted Mr. Buchanan's speech was slurred but it was not difficult to understand Mr. Buchanan. Mr. Buchanan did not appear to Mr. Canning to be in pain and he had examined the top of Mr. Buchanan's head because of a laceration but he did not note the smell of alcohol although he was never directly in front of Mr. Buchanan's face. In his evidence Mr. Canning spontaneously offered that he "told Bev the guy was either in a state of shock or had a bit too much to drink". In cross examination he confirmed that he had spoken to Mr. Buchanan for two to three minutes but never looked directly into his eyes although he was close to him.

[37] Mr. Landry, the expert alcohol analyst, confirmed that other than the odour of alcohol the symptoms displayed by Mr. Buchanan could be as consistent with injury as with the presence of alcohol. Mr. Canning noted certain indicia which could be as consistent with injury as with impairment. Constable Clarke made the same or similar observations to those of Mr. Canning which again could be consistent with injury or impairment. In relation to all of those indicia except odour of alcohol, as exhibited by Mr. Buchanan, and his manner of driving, the evidence is equivocal on the question of impairment. The court must consider all of the evidence, taken as a whole, and there is also the matter of an additional symptom observed by Constable Clarke - the strong odour of alcohol, which she noted when she spoke to Mr. Buchanan at the scene, which she also noted approximately 55 minutes later when she made a blood demand, and which she

also noted over two hours later while Mr. Buchanan awaited an x-ray. The fact that Mr. Canning did not make such an observation does not, in and of itself, render the observations of Constable Clarke unrealistic, unreliable or lacking in credibility. I accept the evidence of Constable Clarke as to the odour of alcohol that she noted, the degree or strength of the odour of alcohol that she noted, and the time frame over which she made her observations. I am satisfied on all of the evidence taken as a whole, including the evidence of Mr. Buchanan's gait, his speech, his coherency, his manner of driving and the presence of a strong odour of alcohol over a prolonged period, that the defendant was impaired by alcohol. It is the presence of the odour of alcohol, combined with all of the other indicia that could potentially in and of themselves point to impairment, that leads the court to conclude beyond a reasonable doubt that Mr. Buchanan was impaired by alcohol.

[38] Accordingly a conviction will enter on the second count.

PCJ