Date: 2002October23
Docket: 2002NSPC032

IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: R. v. Burton, 2002 NSPC 32]

HER MAJESTY THE QUEEN

- versus -

TROY DANIEL BURTON

DECISION

HEARD: At Baddeck, Nova Scotia, before the Honourable Judge A. Peter Ross, on March 1, 2002, March 15, 2002, May 3, 2002, May 17, 2002, May 24, 2002 and August 9, 2002

DECISION: Orally: October 11, 2002
Written: October 23, 2002

COUNSEL: Mr. Darcy MacPherson, for the Prosecution
Mr. Alan Nicholson, for the Defendant

INTRODUCTION

[2] The defendant, Troy Burton, is charged under s. 253(b) of the **Criminal Code** with operating a motor vehicle when his blood alcohol level exceeded the prescribed limit. He is also charged with impaired driving under s. 253 (a).

[3] Mr. Burton lost control of his vehicle as he rounded a curve at the top of a hill near the Fire Hall at Cape North, Victoria County, Nova Scotia. Witnesses put the time at shortly after 8:00 a.m.. He was the lone occupant.

[4] Kirk Lawrence viewed the driving from the rear. The sound of squealing tires drew his attention to the vehicle. He saw it lose control at the top of the hill. He described the car as being half on the road and half on the shoulder. Although he then lost sight of the vehicle, he heard it go down over the bank a second or two later.

[5] Ms. Podanovich had a side view of the driving through the breakfast window of her house. She heard the noise of the vehicle and saw it put up dust as it went over the bank on the opposite side of the road.

[6] Yvonne Daisley had a front view of the oncoming vehicle through her windshield. She first heard the vehicle accelerating towards her. When she saw Mr. Burton's vehicle it was sideways, with its back end in the gravel. She took evasive action and saw the vehicle go over the embankment. She thought the car had been accelerating prior to going sideways. She figured that the driver had hit the gravel on the shoulder of the road and then tried to "correct it".

[7] There is no indication from any of these eye witnesses of poor road or weather conditions, or any unusual hazards, that might contribute to an accident of this sort. There is no evidence of mechanical defects or failures in the defendant's vehicle.

[8] A paramedic with EMS Nova Scotia, Greg Lawrence, happened to be nearby. His daughter had just boarded the school bus at its usual stop about 100 metres from the accident. He thus put the time as 8:05. He went to the scene immediately and found Mr. Burton unconscious. He extracted Mr. Burton from the driver's seat, put him on a board, and placed him in the ambulance for transportation to the local hospital in Neil's Harbour. Owing to the acidic dust from the airbags, he was unable to make any observations regarding the smell of alcohol at the scene. Mr. Burton was transported by

helicopter to hospital in Halifax somewhat later that morning. Mr. Lawrence was with Mr. Burton for most of the intervening time.

[9] According to the uncontradicted evidence of the defendant's uncle, William Burton, evidence which I accept, the defendant had been to William Burton's house at South Ridge Road at approximately 7:30. He wanted his uncle to drive him down to the gas station. The defendant had two pints of Labatt's Blue beer with him. William Burton declined an offer to have one, but the defendant managed to drink them both between 7:30 and 8:00. In the opinion of William Burton, the defendant was "impaired". He considered taking his keys but thought it would not be necessary if the defendant, as his comments suggested, had run out of gas. He said the defendant staggered, and twice fell, before leaving, by himself, in his vehicle.

[10] Word of this accident got to Sergeant Pembroke of the Ingonish Detachment of the RCMP. He went to the scene and after conversation with various people instructed one of his constables, Flanagan, to attend at the hospital and investigate a possible impaired driving. He instructed Constable Flanagan that the blood demand should take a "back seat" to medical treatment. During a second telephone conversation they arrived at an agreement to pursue a blood demand.

[11] Constable Flanagan arrived at the hospital at 8:54. He spoke to staff and observed Mr. Burton lying on a gurney. He watched as Mr. Burton was taken to x-ray and otherwise treated by Dr. Buffett and other hospital staff . He did not approach Mr. Burton directly until shortly before 9:49, the time that the blood demand was actually read. He was satisfied, having spoken to Dr. Buffett, that a blood sample could be taken safely. There was some brief conversation with Mr. Burton. He detected the smell of liquor from Mr. Burton's breath. A blood demand was given and eventually acceded to, preceded by the usual Charter rights to counsel. The sample, once drawn, made its way to the RCMP Forensic Lab in Halifax, where an analysis revealed a blood alcohol level of 92 milligrams of alcohol in 100 millilitres of blood. Pursuant to s. 258(5) the sample was also tested for the presence of drugs. Bromazepam was found at a concentration of .32 micrograms per millilitre of blood, and lesser amounts of two related chemicals.

[12] I will return to the conversation between Mr. Burton and Constable Flanagan, and make further mention of events at the hospital, later in these reasons.

PROOF OF BLOOD ALCOHOL LEVEL

[13] The Crown tendered a Certificate of Qualified Medical Practitioner and certificate of an analyst and also presented *viva voce* expert evidence from Elizabeth Dittmar. She addressed questions of absorption, elimination and extrapolation. Her evidence, and the combined effect of s. 258(1)(h) and (i) of the Criminal Code establish that the defendant's blood alcohol level at the time of driving was at a minimum 86 milligrams per 100 millilitres of blood, and quite likely the 92 that the certificate reads. Her calculation of a possible blood alcohol range of 60 to 80 was given in response to a hypothetical question in cross, but the assumptions were *not* borne out by later evidence. Specifically, there is no reason to think that Mr. Burton "chugged" both bottles of beer in the final five minutes of his visit at the uncle's. Rather, the evidence tends to show that the drinking took place throughout that one-half hour period.

[14] Mr. Archibald, a toxicologist at the RCMP Forensic Laboratory in Halifax, gave expert opinion evidence that concentrations of Bromazepam found here are twice the average therapeutic level. His evidence establishes that this amount would have a significant impairing effect on one's ability to operate a motor vehicle - an effect, moreover, which would be cumulative to the effect of alcohol.

VALIDITY OF THE BLOOD DEMAND

[15] Owing to Mr. Burton's physical condition, Constable Flanagan made a demand for blood samples under s. 254(3). The necessary assurances were given and the usual medical pre-conditions met. At issue, however, is whether the peace officer had reasonable and probable grounds to make the demand. I find from the evidence that the grounds relied upon may be broken down into the following components.

[16] First, Constable Flanagan knew from Sergeant Pembroke that Mr. Burton had been in a single car accident in which his vehicle had hit the shoulder and left the road. Further, the Constable testified that "he also informed that someone, two people had let him know that the defendant was either high or intoxicated". Hearsay, of course, may be used to formulate grounds.

[17] Second, Constable Flanagan said that "I smelled Mr. Burton and got the mild odour of liquor off of him". Elsewhere in his evidence he said "I could smell the liquor on his breath or coming from his head". While the medical technician, Mr. Lawrence, did not note the smell of liquor from the

defendant, despite the fact that he was close to him for a significant period of time afterwards, Mr. Lawrence gave reasons why he may not detect such an odour. In any event the accuracy of the police officer's observations and contradictory evidence of other witnesses is not a factor here, so long as I accept, as I do, that the officer's belief was real and reasonable.

[18] Possessed with the foregoing information, Constable Flanagan said that he explained to the defendant that he had "reasonable and probable grounds to believe that he had been drinking". He further testified "I was going to read the blood demand to him. At that point the defendant said that he only had three beer - 'I only had three beer, I swear to God', were his words". After a *voir dire* I ruled the foregoing utterance admissible, though not in proof of the assertion per se. It thus forms a third component of the officer's belief.

[19] Defence has argued that only the first two of the foregoing three factors ought to be assessed in deciding whether the grounds were sufficient. While I do not agree with this submission, I note that in a previous decision of this Court, upheld on appeal, I concluded that the occurrence of a single vehicle accident, with no apparent explanation, coupled with a smell of alcoholic beverage from the breath of the driver, constitutes sufficient grounds to make a breathalyzer demand[1]. This alone would dispose of the issue. However, I think the grounds here are stronger still. While Constable Flanagan had apparently decided to make the demand *before* hearing the utterance about the "three beer", the fact remains that he heard this utterance before the demand was actually given. When asked what effect that statement had with respect to his grounds, he answered "I supposed that reinforced it". It was thus a third and substantiating element of his reasonable and probable belief as of the time the demand was made.

[20] In sum, the information in possession of the police officer gave him an honest and reasonable understanding of facts sufficient to constitute proper grounds for a blood demand. It is thus not necessary to consider whether the taking of the sample constitutes a violation of Mr. Burton's s. 8 or s. 9 **Charter** rights.

[21] I believe it is settled law that in cases such as this, where police visit a suspected drinking driver confined by injuries to hospital, that there is no

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[1] R. v. Musgrave [1996] N.S.J. No. 200 (Q.L.)

"detention" until the demand is made.[2] This leads to a consideration of the next issue.

THE ACCUSED's UNDERSTANDING OF THE DEMAND and s. 10 CHARTER RIGHTS

[22] The more difficult issues in this trial concern Mr. Burton's mental state during the time the police officer assumed some control over his situation, imposed upon him the obligations arising from s. 254(3) and (5) of the Criminal Code, and read him his s. 10 Charter rights.

THE LEGAL FRAMEWORK

[23] The Supreme Court[3] makes clear that consent plays no part in s. 254. As the law is presently written the Crown need not prove an accused's "consent" to properly take blood samples**.** The test, rather, is "compliance" which is equated roughly to a failure to object.

[24] Upon detention, Mr. Burton had the right under s. 10(a) of the Charter to be informed promptly of the reasons therefor and under s. 10(b) to retain and instruct counsel without delay and to be informed of that right. It seems obvious that if his thinking was clear enough to appreciated the 10(b) advice it would be sufficient to comprehend the 10(a) aspect. Considering, therefore, the duties of the police under s. 10(b) I proceed from the summary contained in R. v. Bartle[4]. I extract the following portion of the judgement of Lamer, C.J.C. beginning at paragraph 17.

> (b) The Duties Under Section 10(b)
> This Court has said on numerous previous occasions that s. 10(b) of the Charter imposes the following duties on state authorities who arrest or detain a person:
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> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

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[2] R. v. Kay [1990] B.C.J. No. 210 (B.C.C.A.)

[3] R. v. Knox, 109 C.C.C. (3d) 481 (SCC)

[4] (1994) 33 C.R. (4d) 1 (SCC)

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again except in cases or urgency or danger). (See for example, Manninnen, at pp. 1241-42; R. v. Evans [1991] 1 S.C.R. 869, at p. 890 and Brydges at pp. 203-4). The first duty is an informational one which is directly in issue here. The second and third duties are more in the nature of implementation duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel.

Importantly the right to counsel under s. 10(b) is not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duty on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: R. v. Tremblay [1978] 2 S.C.R. 435 at p. 439, and R. v. Black [1989] 2 S.C.R. 138 at pp. 154-55. Furthermore, the rights guaranteed by s. 10(b) may be waived by the detainee although the standard for waiver will be high, especially in circumstances where the alleged waiver has been implicit. Clarkson, at pp. 394-96; Manninen, at p. 1244; Black, at pp. 156-57; Brydges, at p. 204; and Evans, at pp. 983-94
Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible" manner: R. v. Dubois, [1990] R.J.O. 681 (C.A.), (1990), 54 C.C.C. (3d) 166 at pp. 697 and 196 respectively. Unless they are clearly and fully informed of their rights at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence: Herbert. Moreover, in light of the rule that, absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution, it is important that the standard caution given to detainees be as instructive and clear as possible: R. v. Baig [1987] 2 S.C.R. 537, at p. 540, and Evans, at p. 891.

Indeed the pivotal function of the initial information component under s. 10(b) has already been recognized by this Court. For instance, in Evans, McLachlin, J., for the majority stated at p. 891 that a "person who does not understand his or her right cannot be expected to assert it". In that case, it was held that in circumstances which suggest that a particular detainee may not understand the information being communicated to him or her by state authorities, a mere

> recitation of the right to counsel will not suffice. Authorities will have to take additional steps to ensure that the detainee comprehends his or her s. 10(b) rights. Likewise, this Court has stressed on previous occasions that, before an accused can be said to have waived his or her right to counsel, he or she must be possessed of sufficient information to allow him or her to make an informed choice as regards exercising the right: R. v. Smith (Norman MacPherson), [1991] 1 S.C.R. 7114, at pp. 724-29, and Brydges, at p. 205.

[25] Bartle was considered by the Newfoundland Court of Appeal in a case rather similar to the one at hand. In R. v. Kennedy[5] the Court found error in the "trial Judge's focussing exclusively upon the detainee's understanding of the substance of the communication rather than on whether the communicator acquitted her duty to inform Mr. Kennedy in comprehensible terms of the essential substance of his right to counsel". The Court further went on to state[6]:

> The detainee's right, therefore, is to be properly informed. There is no absolute protection against a lack of appreciation of the information conveyed. The fulfilment of the informational component of the right to counsel does not hinge on whether the detainee understood the communication but whether the essential elements of the right were adequately communicated. It is not, therefore, so much a question of whether the message was comprehended, but whether it was comprehensible. By focussing entirely upon Mr. Kennedy's understanding of the communication of his right, the trial judge made an error of law in his interpretation of the import of s. 10(b) of the Charter.
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> This is not to say that the detainee's comprehension may not be a factor in assessing whether the police or other public authority has discharged its informational obligation. Thus, if there are indications that the person under detention has not sufficiently understood or appreciated his or her right to counsel when conveyed to him or her, the duty will entail such steps as are necessary to facilitate adequate comprehension. In the absence of signs of lack of such comprehension, however, adequate communication will satisfy the requirements.

[26] The Newfoundland Court of Appeal is concerned about imposing an impossible burden upon police where there are "no detectable signs of misapprehension". However, underscoring again that the analysis is not entirely one-sided, the Court later suggests that in a proper case the Court

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[5] (1995) 103 C.C.C. (3d) 161 at p. 181

[6] Kennedy, supra at p. 181

may "impute constructive knowledge of any defect in comprehension"[7]. This would require the Court to consider not only what the police knew but what they ought to have known. As far as it goes this seems fair enough. If it is not simply a question of whether the message was comprehended but whether it was comprehensible, it has the fairness of symmetry, at least, to say that it is not simply a question of whether an inability to understand was detected, but whether it was detectable.

[27] In some situations it is not obvious whether the analysis should proceed to a consideration of proof of waiver. In R. v. Baig[8] the Court stated that there was no need to determine whether, under the circumstances of that case, the accused's conduct amounted to a waiver of his right to counsel. The Court adopted the following statement of the law.[9]

> Absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it.

[28] Given the foregoing statement in R. v. Baig, it may be going further than is necessary here to consider whether there is proof of a valid waiver. However, I think it is the better and proper course that I do so. It is difficult to make a neat separation of the issues. Perhaps it is best not to try. As MacLachlin, J. stated in R .v. Smith[10],

> ...these cases establish that, regardless of whether the focus is on the sufficiency of the initial 10(b) advice or on the waiver, what is required is that the accused understands generally the jeopardy in which he or she finds himself and appreciate the consequences of deciding for or against counsel.

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[7] Kennedy, supra, at p. 182

[8] [1987] S.C.J. No. 77 (Q.L.)

[9] From R. v. Anderson (1984) 10 C.C.C. (3d) 417 (Ont. C.A.) at p. 431

[10] [1991] 1 S.C.R. 714 at par. 26

[29] I also agree with the general proposition advanced in R. v. Demont[11] that special care must be taken by persons in authority who attempt to obtain samples of blood for non-medical purposes from a person in a hospital who has sustained any injury which might reasonably be expected to affect adversely that person's ability to comprehend the consequences of complying with such a demand.

APPLICATION OF THE LAW TO THE FACTS - EVENTS AT THE HOSPITAL

[30] I have read and considered various cases where police gave right to counsel or a demand for samples to an accused in hospital after a motor vehicle accident. While the reading of such cases is helpful, it also underscores the importance of the facts in the particular case.[12]

[31] According to Mr. Burton, his last memory from September the 8th, 2000 is getting gas at MacKinnon's garage. His next recollection is from the ICU at the Cape Breton Regional Hospital. He thus professes amnesia not only from the moment he was injured but of the events immediately preceding the accident, including his ascending the hill and rounding the curve just prior to leaving the road. This profession of amnesia thus eliminates Mr. Burton as a potential source of evidence not only as to what took place in the hospital regarding his right to counsel but also as to his driving just prior to the accident. Clearly such evidence has the potential to be contrived, convenient and self-serving. This concern was heightened when Mr. Burton, in cross-examination, seemed to recall hitting the shoulder of the road and losing control, when earlier in direct he claimed to have no memory after getting gas. However, even if I accept his claim of amnesia as truthful, it is not clear how this proves an inability to understand at the hospital. While it may be tempting to jump from amnesia to a conclusion that he was unable to understand the events subsequently forgotten, there is no medical evidence in this case to support such a conclusion. I am thus discounting the weight of Mr. Burton's evidence considerably. As it relates to his ability to comprehend events at the hospital.

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[11] [1992] N.S.J. No. 541 (Q.L.) (NSSC)

[12] See for example, R. v. McAvena (1987) 34 C.C.C. (3d) 461 (Sask. C.A.); R. v. O'Donnell (1991) 66 C.C.C. (3d) 56 (N.B.C.A.); R. v. Sanderson [1999] S.J. No. 564 (Q.L.); R. v. MacDonald [1999] M.J. No. 124 (Q.L.); and R.v. Kennedy, supra.

[32] The first person to attend to Mr. Burton after his vehicle left the road was Greg Lawrence, the paramedic. He said that Mr. Burton was unconscious with "classic signs of a head trauma". He said Mr. Burton "did not know what his environment was around him". Mr. Burton was given oxygen and became "semi-conscious" once he was in the back of the ambulance. Mr. Lawrence stated that he stayed in the emergency room with Mr. Burton until he was loaded on the helicopter at which point he said Mr. Burton was "still disoriented". He described Mr. Burton as being at times "combative" which he said was consistent with head injury. Although Mr. Lawrence was apparently present when Constable Flanagan dealt with Mr. Burton, and during other exchanges between Mr. Burton and medical personnel, he was not questioned about Mr. Burton's participation in these conversations. There is no other evidence from medical personnel in this case. There is no expert opinion evidence on Mr. Burton's cognitive abilities at the relevant times.

[33] Mr. Burton's father attended the hospital and testified in his son's defence. He described him as "passing out and coming to". Regarding any attempted conversations he said "if you asked him anything, all he would do is curse and swear and holler". Angus Burton evidently expressed these concerns to the police officer and the doctor. He testified that his son would repeat the last thing he heard.

[34] Crown counsel asked Constable Flanagan whether he had "any concerns when you made the demand that he might not understand it". Constable Flanagan stated "no I didn't....after the conversation with Dr. Buffett". This must not be a route by which the Crown adduces hearsay evidence from Dr. Buffett as to Mr. Burton's understanding. It is, in any event, a question about understanding the demand, not the right to counsel. Further, looking at other responses, there is some concern that the police officer may have conflated advice from the doctor regarding possible endangerment to health with advice as to ability to comprehend and comply.

[35] I think that an appreciation of the right to counsel involves a higher degree of "cognitive processing", if I may call it that, than does an appreciation of the blood demand itself. To locate the distinction within the facts of this case, one might infer from the fact that Mr. Burton stuck out his arm for the police officer that he was complying with the blood demand and thus understood it. However, more than this would be required to find that Mr. Burton appreciated the right to counsel. The inquiry concerns not only what

the state authorities did based on reasonable belief. It entails an assessment by the Court of the detainee's ability to comprehend.

[36] Despite the foregoing, I have concluded that Mr. Burton possessed a sufficient understanding of each of the following: (a) the reason for the police officer's attendance at the hospital, (b) the demand which was made on him, (c) the opportunity which was being given to him to consult with a lawyer and (d) that what was being sought, the blood samples, related to impaired driving and would put him in legal jeopardy. My conclusion derives not so much from the police officer's view that Mr. Burton understood what was going on; rather, it comes from an evaluation of things that Mr. Burton said and did during the relevant time period.

[37] While his degree of alertness may have been fluctuating, and his emotions unstable, Mr. Burton nevertheless displayed an understanding of his situation through words and actions spanning a significant period of time. First, early in his encounter with Constable Flanagan, when he learned that he was going to receive a blood demand, Mr. Burton said "I only had three beer, I swear to God". While this does not come in as proof of alcohol consumption, it nevertheless displays an understanding of what Constable Flanagan had said to him. It shows an appropriate concern for how much he had been drinking. It is given as though in an attempt to deflect Constable Flanagan from his proposed course of action. Second, a short time later, after the Charter rights and demand were given, Mr. Burton asked Constable Flanagan "How am I going to speak to a lawyer?". Again, this is an appropriate and valid question, showing an understanding of his predicament, and what speaking to counsel would entail. When told that a phone would be brought into the room for his use, he then declined the call and agreed to give the samples. Once again, this is indicative of a person mentally engaged in a conversation and responding appropriately. Third, once Dr. Buffett was recruited to procure the blood samples, Mr. Burton said he did not want them taken. When advised of this, Constable Flanagan returned to the room and spoke to Mr. Burton again. When he advised Mr. Burton that refusal of the demand was an offence carrying the same penalty as impaired driving, Mr. Burton became emotional and, saying that he would give the samples, stuck out his arm. This again shows an awareness of what was expected of him, of the difficult predicament that he was in, and the incriminating nature of the evidence that would be revealed from the blood sample.

[38] Unlike the police in certain other cases, Constable Flanagan did not attempt to deal with Mr. Burton immediately upon entry to the hospital. Rather, the officer waited a considerable time until all medical procedures had been completed, before undertaking a blood demand and right to counsel.

[39] I thus conclude that Mr. Burton was afforded his s. 10(v) Charter rights at a time when he was capable of appreciating and understanding the rights and that Mr. Burton gave an informed waiver as that is understood from R. v. Clarkson[13] and subsequent cases. As was stated in Smith[14], supra, I am satisfied that

> ...in all the circumstances revealed by the evidence the accused generally understood the sort of jeopardy he faced when he made the decision to dispense with counsel.

CERTIFICATE OF ANALYST/PRESUMPTION OF BLOOD LEVELS AT TIME OF DRIVING

[40] With the foregoing conclusion, there is no Charter basis on which to exclude the Certificate of Analyst, which, on the evidence in this case serves to prove that Mr. Burton's blood alcohol level was 92 milligrams of alcohol in 100 millilitres in blood. While there was some questioning of expert witnesses regarding the applicability of the presumption in s. 258(1)(d), this argument was not developed by counsel in submissions. Nevertheless, I have considered the evidence on this point. In particular, I take from the evidence of William Burton that any consumption of alcohol by the defendant Troy Burton occurred over the one-half hour period that they were together. There being no "evidence to the contrary" Mr. Burton's blood alcohol level is presumed to be 92 at the time, shortly after 8:00 a.m., when he drove his car off the road. While there is some ambiguity and minor inconsistency over times, these are either clarified by other evidence or put to rest by acknowledgements from defence counsel.

[41] Accordingly, Mr. Burton is found guilty of the offence under s. 253(b). As noted earlier, the *vive voce* evidence indicates a minimum blood alcohol

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[13] [1986] 1 S.C.R. 383

[14] At para. 28

level of 86. Whether one follows the documentary or the testimonial path, the result is still a finding of "over 80".

IMPAIRED DRIVING - s. 253(a)

[42] S. 253(5) provides that blood samples taken pursuant to a demand may be tested for the presence of drugs. Such was done in this case, and expert toxicology evidence given as to the levels and toxicological effects of such. Impairment by drugs, or alcohol, or a combination thereof, can constitute impairment under s. 253(a). Although there is no evidence what drugs or medications Mr. Burton may have received in hospital, the toxicologist described the amount of Bromazepam in Mr. Burton's system as being in the "toxic" range. I thus agree with Crown's submission that even if the drug had been administered as a medication (a possibility which finds no support in the evidence) it is highly unlikely that it would be administered at toxic levels. The evidence in this case would thus lead to a finding of guilty on the 253(a) charge. However, given the finding already made on the 253(b) offence, a stay of proceedings is entered on the impaired driving charge.

[43] As a footnote, I might say that even had I agreed with the defence submissions and found a breach of the s. 10(b) right, and had gone on to exclude the certificate under s. 24(2), there would remain considerable evidence of impaired driving in this case. It would be found in part from the evidence of the defendant's uncle, William Burton. A short time before the accident, the defendant arrived at William Burton's home asking for a car to get some gas. William Burton said "I was going to take the keys off him but I figured he doesn't have any gas so there's no point in my bothering to do that". This evidences his opinion that the accused was too impaired to drive. He said the accused staggered. He said he fell down twice: once on the way into the house at which time he struck his head, and a second time inside when he fell off a chair. He knew the accused well. Laymen may give an opinion about intoxication[15] His familiarity with the accused gives this opinion added weight. Further, the accused brought two bottles of beer into the house and drank them while he was there. From the evidence of Ms. Dittmar, it is reasonable to conclude that this would add significantly to the degree of intoxication which he already displayed. To this would be added a

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[15] R. v. Graat, 31 C.R. (3d) 289 (S.C.C.)

> consideration of the circumstances of the accident itself, occurring as it did on a fine day, on a stretch of road which would have been familiar to the defendant, when other traffic on the road had no difficulty navigating, with no evidence of any untoward hazards.

Dated at Sydney, Nova Scotia, this 23rd day of October, A.D., 2002

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A. Peter Ross, J.P.C.