PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R.v. MacDermott*, 2020 NSPC 33

Date: 20200730
Docket: 8239328
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Kevin MacDermott

Judge:	The Honourable Judge Theodore Tax,
Heard:	July 24, 2019; August 7, 2019; September 4, 2019; October 31, 2019; November 12, 2019 and February 7, 2020, in Dartmouth, Nova Scotia
Decision	July 30, 2020
Charge:	Section 253(1)(b) of the Criminal Code
Counsel:	Bryson McDonald, for the Nova Scotia Public Prosecution Service Wayne Bacchus, for the Defence Counsel

By the Court:

[1] Mr. Kevin MacDermott was charged with having care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol contrary to section 253(1)(a) of the **Criminal Code**. He was also charged with unlawfully having care or control of his motor vehicle after having consumed alcohol in such a quantity that the concentration thereof exceeded 80 mg of alcohol in 100 mL of blood contrary to section 253(1)(b) of the **Criminal Code**. Those offences were alleged to have occurred on or about June 23, 2018 in Dartmouth, Nova Scotia.

[2] The Crown proceeded by way of summary conviction and Mr. MacDermott entered not guilty pleas. The trial date was set for July 24, 2019, but prior to that time, Defence Counsel filed a notice of **Charter** application on behalf of his client alleging that there had been breaches of his section 7, 8, 9, 10(a) and 10(b) **Charter** rights. The remedy sought by the defence was the exclusion of the evidence obtained in violation of Mr. MacDermott's **Charter** rights, pursuant to section 24(2) **Charter.** Defence Counsel also relied upon the court's common law power to exclude evidence whose admission would adversely affect the fairness of the trial. It was agreed at the outset of the trial that there would be a blended **Charter** *voir dire* with the evidence in the trial proper.

[3] Trial evidence was heard on July 24, 2019. However, on that date, there was a dispute between the parties as to the impact of Bill C-46 on these charges which were laid before the amendments to the **Criminal Code** provisions relating to the impaired operation of a "conveyance" came into effect on December 18, 2018. Since this trial commenced after the new legislation was declared to be in effect, there was an issue between the Crown and the defence as to whether the new provisions applied, and if so, to what extent, to those people who had been charged under the prior provisions of the **Criminal Code**.

[4] During the trial, the Crown Attorney sought to introduce three documents as Exhibits in the trial. Defence Counsel objected to the introduction of those documents as Exhibits in the trial. As a result, the Court entered into a *voir dire* with respect to the admissibility of the three exhibits, namely, the Certificate of a Qualified Technician signed by Constable Grant Fiander on June 23, 2018, a Certificate of an Analyst signed by Clifton Ho, on July 21, 2016 and a Certificate

of an Analyst signed by Karen Chan on July 21, 2016. There was also a dispute with respect to the introduction of the "Subject Test" printout from an Intox EC/IR II, which was signed by Const. Fiander on June 23, 2018.

[5] Following the submissions on the *voir dire*, the Court concluded that the "Subject Test" printout, which had been signed by Const. Fiander would be marked and admitted as Exhibit 1 in the trial proper. The Court reserved its decision with respect to the issues of what laws apply to this case, whether the presumption of identity as codified in the former section 258(1)(c) of the **Code** applied in this case and if not, what is required to meet the new requirements of section 320.31 (the new presumption of accuracy).

[6] At the conclusion of the evidence on July 24, 2019, the Crown Attorney advised the Court that he had tendered all his evidence on the *voir dire* as well as on the trial proper. During the trial proper and blended *voir dire*, the Crown Attorney had called two witnesses, Const. Warren Steele and Const. Grant Fiander. Defence Counsel indicated that no decision would be made with respect to calling evidence until the court rendered its decision on the admissibility of the three Certificates which had been filed as Exhibits during the *voir dire*.

[7] The Court's decision on the *voir dire* with respect to the admissibility of certain documents as Exhibits in the trial was rendered on October 31, 2019. The Court concluded that the documents tendered by the Crown on the *voir dire* would be introduced and marked as Exhibits in the trial proper. The Court also concluded that the Crown may establish the requirements of section 320.31(1) of the **Code** in relation to "Evidentiary Matters" relating to the results of the analyses of breath samples being "conclusive proof" of the person's blood alcohol concentration at the time when the analyses are made, if the 3 requirements of that subsection were met.

[8] Following the Court's decision with respect to the *voir dire* on the admissibility of the contested documents, the Court adjourned for the trial continuance to November 12, 2019. On that date, Defence Counsel indicated that no evidence would be called by the defence on the blended **Charter** *voir dire*.

[9] The Court scheduled the closing submissions by counsel on the **Charter** application to be heard on February 7, 2020. The Crown Attorney noted that he had already provided a written brief on June 25, 2019 with respect to the **Charter** application made by defence, based upon the anticipated evidence to be heard during the trial. Since several other issues had emerged following the hearing of

the evidence on the blended **Charter** *voir dire*, the Court requested written briefs on the **Charter** application and the trial proper.

[10] Counsel made that their closing submissions on February 7, 2020. During his closing submissions, the Crown Attorney acknowledged that there was insufficient evidence before the Court to establish, beyond a reasonable doubt, that Mr. MacDermott had care or control of a motor vehicle while his ability to operate the motor vehicle was impaired by alcohol or drug, contrary to section 253(1)(a) of the **Criminal Code**. Defence Counsel made a motion for a directed verdict on that count, which was granted by the Court. As a result, on February 7, 2020, Mr. MacDermott was found not guilty of that charge.

[11] After hearing the submissions of counsel, the Court reserved its decision on the **Charter** issues raised by the defence as well as the determination of the over 80 charge contrary to section 253(1)(b) of the **Criminal Code**. Initially, the Court's decision was reserved until May 14, 2020. However, with the declaration of a Covid-19 pandemic and a provincial public health state of emergency being declared, the Court's decision was then scheduled for today's date.

Positions of the Parties:

[12] The Crown Attorney and Defence Counsel agreed, at the outset of this trial, that the evidence in the trial proper would be tendered in a blended or combined *voir dire* to determine substantive issues in the trial and the **Charter** issues raised by the defence.

[13] During his submissions, Defence Counsel confirmed that the defence had previously withdrawn its allegation that Mr. MacDermott's section 9 **Charter** right had been infringed. He also confirmed that they were now withdrawing any allegation of the breach of Mr. MacDermott's section 10(b) **Charter** rights.

[14] Defence Counsel submitted that Mr. MacDermott's section 7, 8 and 10(a) **Charter** rights were infringed during the initial investigation, by virtue of an ASD demand without the requisite reasonable suspicion and without a basis for an approved instrument demand. He also submits that Mr. MacDermott was compelled to provide information to the police officer pursuant to the provisions of the **Motor Vehicle Act** in violation of his section 7 **Charter** right to remain silent.

[15] In addition, Defence Counsel submits that the officer failed to notify Mr. MacDermott of the change in his jeopardy, immediately after the officer detected

an odour of alcohol on Mr. MacDermott's breath during the brief conversation with him. At that point, Defence Counsel submits that the officer failed to provide a police caution advising Mr. MacDermott of his right to remain silent in relation to questions to identify the driver of the truck, which had struck another vehicle on the street. It is the position of the defence that the appropriate remedy based upon the analysis in **R. v. Grant**, 2009 SCC 32 is to exclude all information gathered in violation of Mr. MacDermott's section 7 and 10(a) **Charter** rights.

[16] With respect to the allegations of a breach of section 8 of the **Charter**, Defence Counsel submits that the ASD demand was a warrantless search, which may have been authorized by law and the law itself being reasonable, but this search was not carried out in a reasonable manner: see **R. v. Collins** (1987), 33 CCC (3rd) (SCC). It is the position of the defence that the Crown did not elicit any evidence with respect to the identity of the driver of the truck or the time when the accident occurred. Defence Counsel submits that there was no evidence before the court from which the Court could reasonably infer when the collision with another vehicle occurred or whether Mr. MacDermott was identified as the driver of the suspect vehicle.

[17] In addition, it is the position of the defence that there are gaps in the evidence and as a result, the Court cannot reasonably infer that the police officer had a "reasonable suspicion" that Mr. MacDermott had operated a motor vehicle with alcohol in his body within the preceding three hours in order to make an ASD demand pursuant to section 254(2)(b) **Code**. He advances the same argument with respect to the demand to provide a breath sample into an Approved Instrument as he submits that the officer did not have reasonable grounds to believe that a section 253 **Code** offence had been committed within the preceding three hours to lawfully make a demand pursuant to section 254(3)(a)(i) **Code**. Defence Counsel submits that the breath demand being made without a "reasonable belief" was a violation of Mr. MacDermott's section 8 **Charter** rights and that the resulting exhibits and certificates should be excluded from the evidence pursuant to section 24(2) **Charter** and the **R. v. Grant** analysis.

[18] Finally, with respect to the trial proper in the event that the Court did not concur with his submissions relating to **Charter** violations or the recommended remedy, Defence Counsel submits that there is no admissible evidence to establish that Mr. MacDermott had care or control of his motor vehicle at any time on the date in question. Although the police officer stated when he heard and reacted to the dispatch call about an accident, there was no evidence to establish when Mr.

MacDermott is alleged to have committed an offence contrary to section 253 **Code**. In those circumstances, Defence Counsel submits that the Crown has not established all of the requirements to rely upon either one of the presumptions or so-called "evidentiary shortcuts" found in section 258(1)(a) or section 258(1)(c) **Code.**

[19] Defence Counsel submits that, without any evidence to establish when the accident occurred, the Crown has not established that Mr. MacDermott had care or control or operated the motor vehicle within two hours of the results of the breath tests on the approved instrument. In addition, he submits that the Crown has not called any expert extrapolation evidence in relation to the breath analyses to establish what the blood alcohol readings would have been if the Crown had not been relying upon the "evidentiary shortcut." Since the essential elements of the offence and the "evidentiary shortcut" or presumptions have not been established beyond a reasonable doubt, Mr. MacDermott should be found not guilty of the remaining charge.

[20] It is the position of the Crown that, with respect to the alleged breach of Mr. MacDermott's section 7 **Charter** rights, there was no obligation on the police to inform the driver of a motor vehicle of their right to silence during an impaired investigation. In **R v. Orbanski**, 2005 SCC 37, at paras. 48-49, the Crown Attorney notes that police were authorized to request information from a driver that could be used by the officer to form his or her reasonable suspicion which is the threshold to make a demand to provide a breath sample at the roadside into an ASD [approved screening device].

[21] The Crown Attorney submits that Mr. MacDermott identified himself as the driver of the truck which had backed into a parked car on the other side of Courtney Road. During that brief discussion, the officer detected an odour of alcohol from his breath and that Mr. MacDermott then stated that he had consumed "two beers." The Crown Attorney also notes that, during the trial, since he did not request a common-law *voir dire* with respect to Mr MacDermott's statements to a person in authority, the Crown only relies on those comments for the purpose of forming grounds to make an ASD demand and not for the proof of the truth of those statements. In those circumstances, the Crown Attorney therefore submits that there were no breach of Mr. MacDermott's section 7 **Charter** rights.

[22] With respect to the allegation of a breach of Mr. MacDermott's section 8 **Charter** rights, the Crown Attorney submits that, as a result of an accident being

reported to the police and being dispatched to the location at 7:35 PM on June 23, 2018, police officers arrived at the accident scene within a couple of minutes. While police officers were engaged in a **Motor Vehicle Act** investigation, Mr. MacDermott was standing beside his vehicle. In response to an officer's question, he stated he was okay, did not need medical attention and that he was the owner and the operator of a truck which had collided with the car parked on the other side of the street. While providing his licence, vehicle registration and insurance information to the police officer, the officer detected an odour of alcohol and asked Mr. MacDermott if he had consumed any alcohol. In response to the question, Mr. MacDermott stated that he had a couple of beers.

[23] The Crown Attorney acknowledges that the officer did not notice any slurred speech when Mr. MacDermott spoke, any swaying when he walked or bloodshot eyes. However, he submits that Mr. MacDermott's admission that he recently operated the motor vehicle which had been involved in an accident together with the odour of alcohol, provided the officer with "reasonable grounds to suspect" in order to make an ASD demand pursuant to section 254(2) **Code**. There is no requirement for an officer to observe that an accused person exhibited several indicia of impairment for an ASD demand at the roadside; the legislation simply requires that the officer had a "reasonable suspicion" that the person has alcohol in their body and has within the proceeding three hours operated a motor vehicle. The Crown Attorney submits that the recent operation of a motor vehicle together with the odour of alcohol and Mr. MacDermott's statement that he had alcohol in his body established the "reasonable suspicion" to make an ASD demand. Once the ASD analysis resulted in a "fail," he submits that the officer had the reasonable and probable grounds to make a breath demand pursuant to the section 254(3) **Code**.

[24] In those circumstances, the Crown Attorney submits that there was no breach of Mr. MacDermott's section 8 **Charter** right to be secure against unreasonable search or seizure. Although these were warrantless searches, they were authorized by law, the law itself has been held on many occasions to be reasonable and the searches by means of an ASD and an Approved Instrument were conducted in a reasonable manner.

[25] With respect to the final allegation of a breach of Mr. MacDermott's section 10(a) **Charter** right to be promptly informed of the reasons for his arrest or detention, the Crown Attorney submits that the accused was not detained during the **Motor Vehicle Act** accident investigation. In addition, since the Supreme Court of Canada stated in **Orbanski** that the right to counsel was suspended during

investigation and the roadside screening stage, the Crown Attorney submits that Mr. MacDermott's section 10(a) **Charter** right has not been violated. Following the "fail" result on the ASD, Const. Steele advised Mr. MacDermott that he was being arrested for impaired operation of a motor vehicle and then read the **Charter** rights information verbatim from a card. Mr. MacDermott responded that he understood and wished to contact a duty counsel and had the opportunity to do so before providing samples of his breath for analysis. In those circumstances, the Crown Attorney submits that there were no breaches of Mr. MacDermott's section 10(a) **Charter** rights.

[26] In conclusion with respect to the alleged **Charter** breaches, it is the position of the Crown that none of Mr. MacDermott's **Charter** protected rights were infringed during his interaction with the police and therefore the court need not embark upon the **R. v. Grant** section 24(2) **Charter** analysis.

[27] With respect to the balance of the issues raised by Defence Counsel in the trial proper, the Crown Attorney points out that, at the time of this incident, the witness indicated that the Halifax Regional Police only used one model of an ASD, which was a Drager Alcotest 7410 GLC. The Crown Attorney notes that this ASD was listed as one of the "Approved Screening Devices" in the *Regulations* made under the **Criminal Code** under the former section 254(2) **Code**.

[28] With respect to the issue of the identification of the driver of the truck being Mr. Kevin MacDermott, the Crown Attorney takes issue with the defendant's position that the statement was compelled and therefore inadmissible in identifying Mr. MacDermott as the driver based upon **R. v. White**, [1999] 2 SCR 417. In order to determine if a motorist was compelled to provide a statement pursuant to the **Motor Vehicle Act** for which immunity may arise, the Crown Attorney submits that the Court would have to be satisfied that the driver gave the report on the basis of an "honest and reasonably held belief that he or she was required by law to do so."

[29] The Crown Attorney also points out that in **R v. Spin**, 2014 NSCA 1, the statement to the police was excluded pursuant to the principles established in **White**, but in that case, Ms. White testified that she believed that she was required by law to give a statement to the officer pursuant to the provincial **Motor Vehicle Act**. In this case, Mr. MacDermott did not testify during the **Charter** *voir dire* or the trial proper, therefore, the Crown Attorney submits that there is no evidence to the contrary and the Crown's position is that Mr. MacDermott spoke freely to the

police on June 23, 2018, without any form or belief of compulsion. In those circumstances, the Crown Attorney submits that Mr. MacDermott's statement is admissible evidence, solely for the purpose of identifying himself as the driver of the truck which collided with a car parked on the other side of the street.

[30] Finally, with respect to the submissions of Defence Counsel that there was no admissible evidence to establish the time of the accident, which is needed to be able to establish one of the three statutory requirements to allow the Crown to rely upon the "evidentiary shortcut" in section 258(1)(c) which is a presumption of identity. If the three requirements of section 258(1)(c) **Code** are established, then the Crown can rely on the results of the analyses of the breath test as "conclusive proof" that the concentration of alcohol in the accused's blood both at the time when the analyses were made and that the time when the offence was alleged to have been committed are the same [or in other words "identical"].

[31] The key issue in dispute between the parties is in relation to whether there is evidence to establish **when** the section 253 **Code** offence is alleged to have occurred as the former provisions required that the samples of breath to be taken as soon as practicable after the time when the offence was alleged to have been committed **and** in the case of the first sample, not later than two hours after that time. The current legislation speaks of the breath analyses being done within two hours after ceasing to operate a conveyance, but either way, in order to rely on this presumption of identity as an evidentiary "shortcut," the Crown must establish that there is evidence from which the Court could conclude that all three requirements listed in section 258(1)(c) **Code** have been met.

[32] With respect to the dispute between the parties relating to the temporal elements of this offence, the Crown Attorney submits Const. Steele was in the vicinity of the area when he received dispatch radio information of a complaint of an accident on Courtney St. in Dartmouth at 7:35 PM on June 23, 2018 and arrived within a couple of minutes. The police cadet talked to the people standing around a car that had been damaged on the street. Const. Steele went across the street to speak to Mr. MacDermott who was standing beside his truck, in relation to the motor vehicle accident and his well-being. Based upon that evidence, and a common-sense inference, the Crown Attorney submits that the accident was a recent occurrence rather than one which had occurred hours before.

[33] Moreover, the Crown Attorney submits it is a common-sense inference that the complaint about the accident and dispatch call were likely made within a short

time of each other, based upon the fact that, when the police arrived on scene, they met with people standing around the damaged car and talked to Mr. MacDermott who was standing beside his truck, across the street. He also notes that the police officers arrived at Courtney Street within two minutes of the dispatch call and that the short time between call and investigation supports the inference of the recency of the incident and complaint, as it is unlikely that people would have still been standing around their vehicles for a lengthy period of time. Therefore, it is the position of the Crown that it is highly unlikely that the breath analyses were conducted outside the two hour window from the alleged offence or when Mr. MacDermott was alleged to have ceased to operate his motor vehicle.

Trial Evidence:

[34] During the trial, which as I mentioned previously was conducted as a blended *voir dire* on the **Charter** issues, the Crown called two witnesses – Const. Warren Steele and Const. Grant Fiander of the Halifax Regional Police. In addition, during the testimony of Const. Fiander, the Crown Attorney sought to file three exhibits. Since Defence Counsel objected to the introduction of those documents, a *voir dire* was held to determine whether they would be admissible as Exhibits in the trial. On October 31, 2019, the Court rendered its decision on the *voir dire* with respect to those documents and all documents sought to be tendered by the Crown were admitted as Exhibits in the trial.

[35] With respect to the documentary evidence filed by the Crown Attorney during the trial, on July 24, 2019, the Court concluded that the document entitled "Intox EC/IR II: Subject Test" for Mr. Kevin MacDermott on June 23, 2018 had come "from" an approved instrument and would be marked as Exhibit 1. On October 31, 2019, the Court concluded that the Certificate of a Qualified Technician dated June 23, 2018 and signed by Const. Grant Fiander, which was served upon Mr. MacDermott that same day by Const. Warren Steele would be filed as Exhibit 2 in the trial. The Court also concluded that the two Certificates of an Analyst (Alcohol Standard), one having been signed by Mr. Clifton Ho on July 21, 2016 and the other having been signed by Karen Chan on July 21, 2016 would be filed as Exhibit 3(a) and (b) respectively.

[36] Const. Warren Steele was on duty on the evening of June 23, 2018. At about 7:35 PM, he was in a patrol car a police cadet, when they heard a dispatch radio message that there had been a complaint in relation to a motor vehicle accident on Courtney Rd. in Dartmouth, NS. At that point, Const. Steele happened to be nearby

and they arrived at the scene of the accident at about 7:37 PM after hearing the dispatch communication. On arrival, he saw a Toyota Corolla car parked facing eastbound in front of 44 Courtney Rd. with a female standing outside that car and on the other side of the road, he saw a grey pickup truck parked in the driveway on the north side of the street, in front of 45 Courtney Rd.

[37] Const. Steele stated, by way of narrative, that the dispatch information had indicated that the complaint indicated that a pickup truck had backed up and hit their car on the street. Based on that information, Const. Steele stated in court that, on his arrival at the scene of the accident, his purpose was to ensure firstly that everyone was okay and did not need medical attention and then to conduct an accident investigation into what had occurred. Const. Steele went over to speak to the male who was standing beside the pickup truck in the driveway and Cadet Follows went over to speak to the female standing by the Toyota Corolla.

[38] During a very brief exchange between Const. Steele and the male person standing beside the pickup truck, the male person stated that he was okay and did not need any medical attention. He also identified himself as the driver of the truck and added that he had backed out of the driveway and had hit an unoccupied parked car on the road. Const. Steele stated that, after receiving that information and given the fact that he had arrived at that location to conduct an accident investigation, he asked for the male person's driver's license, the insurance documentation and vehicle registration for the truck.

[39] Upon receiving the driver's license and comparing the photo identification, Const. Steele confirmed that Mr. Kevin MacDermott was the person who had just stated that he had backed his truck up into the street and had hit the unoccupied vehicle. Const. Steele stated that Mr. MacDermott had walked around the car to the passenger side and then opened the glove box of the truck to obtain the insurance card and registration information for the Chevrolet pickup truck. During a brief conversation relating to the documents, Const. Steele was standing in close proximity to Mr. MacDermott and he detected an odour of alcohol coming from Mr. MacDermott's mouth. At that point, he asked Mr. MacDermott if he had consumed some alcohol and Mr. MacDermott stated that he had consumed "a couple of beers earlier in the evening."

[40] Upon making that statement, Defence Counsel objected to that statement being admitted for the truth of its contents. Counsel made submissions on the statement based upon their interpretation of the Supreme Court of Canada decision

in **Orbanski**. After those comments, the Crown Attorney agreed that the statement was not being introduced for the truth of its contents, but could be introduced, like hearsay, as a basis for the officer's reasonable suspicion that Mr. MacDermott had alcohol in his body at that point in time.

[41] After interacting with Mr. MacDermott for about three or four minutes and based upon the answer that he had consumed some beer and the fact that Const. Steele had detected an odour of alcohol on his breath, at 7:40 PM on June 23, 2018, the officer made a demand that Mr. MacDermott provide a suitable sample of his breath for analysis in an ASD. Const. Steele stated that he had a reasonable belief that Mr. MacDermott had alcohol in his body while he drove his vehicle, which had collided with the car on the street. He read the ASD demand verbatim from a card. Mr. MacDermott understood the demand and indicated that he would provide a sample of his breath.

[42] At 7:40 PM, when Const. Steele made the ASD demand, he did not have an ASD in his vehicle. As a result, over the radio, he requested that another officer bring an ASD to his location. Shortly thereafter, Const. Grant Fiander arrived on scene with an ASD. Const. Steele stated that the ASD which had been turned over to him was police operational number ARDC 0032, and the model was a Draeger Alcotest 7410 GLC. He also indicated that he had been trained as a qualified operator of an ASD since July 2010. Moreover, he also stated that the ASD device was within its calibration dates and added that another officer had done the calibration and that the police only deployed ASD's which were within the authorized calibration dates.

[43] Const. Fiander had arrived with the ASD within a minute or two of the request and Const. Steele turned it on, the device did its internal checks and indicated to him that it was ready to receive the breath sample. Const. Steele placed a new mouthpiece in the device, gave instructions to Mr. MacDermott how to provide a sample and Mr. MacDermott confirmed that he understood those instructions. Mr. MacDermott and Const. Steele were standing beside the police car when he provided a suitable sample for analysis. At 7:43 PM, the result of the analysis by the ASD, as indicated on the screen, was an "F" or "fail." Const. Steele stated that the "F" result indicated to him that the device had detected more than 80 mg of alcohol in 100 mL of blood in Mr MacDermott's body.

[44] Const. Steele had earlier stated that, during his brief conversation with Mr. MacDermott, the only thing that he had noticed was an odour of alcohol coming

from his breath. He confirmed that he did not see any other indicia of impairment, and in particular, he stated that Mr. MacDermott did not slur his words, there was no swaying while he was standing or walking and he did not see any bloodshot eyes. However, when he saw the result of the ASD demand being a "fail," he believed that Mr. MacDermott had recently operated a motor vehicle while impaired because he now had reasonable grounds to believe that Mr. MacDermott was over the legal limit to operate a motor vehicle.

[45] As a result of Mr. MacDermott's earlier statements and the ASD result, Const. Steele arrested him for impaired operation of a motor vehicle at 7:44 PM and then read verbatim, from a card, to inform him of his **Charter** rights and to provide a police caution. Mr. MacDermott confirmed that he understood those rights and having been advised of his right to contact a lawyer, Mr. MacDermott stated that he did wish to speak to a lawyer.

[46] Immediately thereafter, Mr. MacDermott was placed in the police car and at 7:47 PM on June 23, 2018, Const. Steele read a demand that Mr. MacDermott provide a suitable sample of his breath for analysis by an Approved Instrument and a demand that he accompany him to the police station located at 7 Mellor in Dartmouth, Nova Scotia to enable that analysis. Mr. MacDermott acknowledged that he understood the demand and at 7:49 PM, they left Courtney Road and proceeded directly to the police station.

[47] Const. Steele arrived at the police station about five minutes later and at 8:09 PM, he contacted the Legal Aid duty counsel and turned the phone over to Mr. MacDermott to have a private conversation with the lawyer. The call with the lawyer lasted about 10 minutes and then, Const. Steele asked Mr. MacDermott if he would be providing samples of his breath for analyses. Mr. MacDermott said that he would comply with that demand. Const. Steele then prepared the Approved Instrument for the breath tests and at about 8:25 PM, he turned Mr. MacDermott over to Const. Fiander in another room to administer the test.

[48] Const**.** Steele remained in that room while Const. Fiander administered the breath tests provided by Mr. MacDermott. He also remained in the room during the two breath tests as well as the observation period between the first breath test and the second breath test. Once Const. Steele received the results of the breath tests and the Certificate of the Qualified Technician [Exhibit 2] signed by Const. Fiander, he served that document with a Notice of Intention to Produce Certificate

pursuant to subsection 258(1)(g) and subsection 258(7) of the **Criminal Code** on Mr. MacDermott on June 23, 2018.

[49] On cross-examination, Const. Steele confirmed that 7:35 PM was the time that he received the dispatch call to go to the area, and confirmed that he was already in the area, but it was not a "priority 1" call to proceed there with lights and sirens activated. He also agreed with Defence Counsel that he really did not know how long the complaint call had been in the queue before dispatch relayed the information over the radio.

[50] Const. Steele also confirmed that, on his arrival at Courtney Rd. at about 7:37 PM on June 23, 2018, he recalled seeing Mr. MacDermott standing outside and beside his truck and acknowledged that he had not seen the collision himself to know when it had occurred. He also agreed that he did not know what Mr. MacDermott had done between the time of the accident and the police arrival. He did not agree with the suggestion that the complaint call may have been in the queue as much as 1 to 2 hours, but stated that it could have been as little as one minute or possibly up to one hour. The bottom line was that he agreed with Defence Counsel that he did not know the exact time when Mr. MacDermott's truck hit the car and that he had not observed him driving the vehicle.

[51] Const. Steele did not agree with the suggestion that he did not know who was the driver of the truck when it collided with the car and restated that it was Mr. MacDermott who was standing beside the truck when he arrived and that he had identified himself as the owner of the truck and that he had driven the truck. In addition, Mr. MacDermott had informed the police officer that he did not need any medical assistance when Const. Steele asked if he was okay after he stated that he was there to investigate a motor vehicle accident. Then, Const. Steele asked what had happened and that is when Mr. MacDermott provided the information that he was the driver.

[52] With respect to indicia of impairment, Const. Steele agreed with Defence Counsel that the only indication upon which he based his reasonable suspicion that Mr. MacDermott had alcohol in his body while he was driving, was the smell of alcohol on his breath. He acknowledged that Mr. MacDermott had told him that he had only consumed "two beers." He also agreed that there were no other indicia of impairment, he did not observe any slurred speech, no swaying while standing or walking and no bloodshot eyes.

[53] When asked questions about the ASD utilized by him that evening, Const. Steele said the device was police operational number ARDC 0032 which was an Alcotest 7210 GLC. He agreed with Defence Counsel that his notes of this incident did not specifically mention the model number, but Const. Steele added that the Alcotest 7210 GLC was made by the manufacturer, Draeger, and it was the only one in service with the Halifax Regional Police at that time.

[54] Const. Steele said that after Mr. MacDermott's breath sample in the ASD registered a "fail" he was satisfied that he had reasonable grounds to believe that Mr. MacDermott had operated a motor vehicle while his ability to do so was impaired by alcohol. He arrested him for that offence, and informed him of his **Charter** rights, the right to consult with a lawyer and the police caution.

[55] Const. Grant Fiander was the last witness called by the Crown. He indicated that he has been a police officer with the Halifax Regional Police since 2011 and has been "Gazetted" as a "Qualified Technician" for the purpose of section 254(1) **Code** since 2013. In addition, he confirmed that he has been trained on the use and function of the "Approved Instrument," namely, the Intox EC/IR II, which was utilized in the analyses of Mr. MacDermott's breath samples on June 23, 2018.

[56] Const. Fiander stated that he had been asked by Const. Steele to bring an ASD device to Courtney Road and he delivered one as requested. The manufacturer was Draeger, the operational number of the police department was ARDC 0032 and the particular device was an Alcotest 7410 GLC.

[57] Once Const. Steele delivered Mr. MacDermott to the Dartmouth police station, Const. Fiander took over custody of him to administer the breath tests as the Qualified Technician. He asked Mr. MacDermott if he was willing to provide samples of his breath and he said that he would do so. Mr. MacDermott provided the first suitable sample at 8:43 PM which was 150 mg of alcohol in 100 mL of blood. After waiting the required period of time between the first and 2nd sample, Mr. MacDermott provided the 2nd suitable sample for analysis at 9:10 PM which was 140 mg of alcohol in 100 mL of blood. Const. Steele added that during the observation periods before the first test and in between tests, Mr. MacDermott did not consume any foreign substances.

[58] Const. Fiander confirmed that the "Approved Instrument" used that evening was an Intox EC/IR II. Based upon the information related to him by Const. Steele, he understood that the samples were taken within 2 hours of the "incident."

[59] The Crown Attorney also asked Const. Fiander how the Approved Instrument worked and he described each step in the "subject test" document printed out for Mr. MacDermott on the evening of June 23, 2018. He described each step in the "subject test" including the system blank, observation times, the dry gas value at the level, the serial number of the instrument used, the test number done by that instrument and the date and time when the test was started and the other steps occurred. After that, he printed a copy Mr. MacDermott's "subject test" on a printer then signed and dated that document.

[60] The documents referred to by Const. Fiander became the subject of the *voir dire* with respect to their admissibility. The Court ruled on October 31, 2019 that all of the documents which had been filed by the Crown during the testimony of Const. Fiander would become Exhibits in the trial.

[61] On cross-examination, there were questions with respect to whether the printout was like a receipt from the "Approved Instrument" and Const. Fiander explained that a previous "Approved Instrument" did that, but the Intox EC/IR II is connected to a printer and the information went directly from the breathalyzer to the printer. He added that if there are insufficient samples, the breathalyzer will do a system blank to ensure that any residual alcohol is purged from the machine and then a blank test is done to ensure the value is "zero" before and after each attempt to provide a sample of breath.

[62] Finally, Const. Fiander confirmed that he never saw Mr. MacDermott drive a vehicle that evening and that his only dealing with him at the scene was to deliver an ASD to Const. Steele. He had no idea when the motor vehicle accident occurred and added that he was only there to assist Const. Steele.

ANALYSIS:

[63] At the outset of my analysis, it is important to note the general principles which apply in all criminal trials. First, in a criminal trial the burden is on the Crown to prove the charges against any accused beyond a reasonable doubt. Furthermore, Mr. MacDermott is presumed to be innocent of the charges before the court unless I conclude that the Crown has proved his guilt beyond a reasonable doubt. The effect of that presumption of innocence means that Mr. MacDermott does not have to testify, present any evidence or prove anything. The burden of proof is on the Crown and it never shifts to Mr. MacDermott.

[64] The Supreme Court of Canada has established in cases such as **R. v. Lifchus,** [1997] 1 SCR 320 and **R. v. Starr,** [2000] 2 SCR 144 that "reasonable doubt" does not require the Crown to prove the allegations to an absolute certainty. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.

[65] The Supreme Court of Canada has also pointed out in those decisions that a reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the evidence or the lack of evidence. Reasonable doubt may arise through the evidence presented by the Crown, if the court determines that the evidence was vague, inconsistent, improbable, or lacking in cogency so as to not constitute proof beyond a reasonable doubt. Of course, reasonable doubt can also arise from testimony of an accused or any other evidence tendered by the Defence from any other sources.

Was any evidence obtained in a manner which infringed Mr. MacDermott's Charter rights and if so, should that evidence be excluded pursuant to section 24(2) Charter?

[66] Since the defence has alleged certain violations of Mr. MacDermott's **Charter** rights, the Court is required to determine those **Charter** issues on the blended *voir dire*, before proceeding to analyze whether the Crown has established, beyond a reasonable doubt, all of the essential elements in relation to the over 80 charge contrary to section 253(1)(b) **Code** in the trial proper. If the Court was to conclude that evidence was obtained by the police in violation of one or more of Mr. MacDermott's **Charter** rights, then a determination would have to be made whether the admission of that evidence in the trial proper would bring the administration of justice into disrepute.

[67] In conducting a trial with a blended *voir dire* on the **Charter** issues, however, it is also important to remember that the accused has the onus to establish, on a balance of probabilities [the civil standard] that evidence was obtained in a manner that infringed or denied his **Charter** rights and freedoms and that admitting the evidence would bring the administration of justice into disrepute [section 24(2) of the **Charter**]. On the other hand, the onus remains on the Crown to establish, beyond a reasonable doubt, all of the essential elements of the over 80 charge contrary to section 253(1)(b) of the **Criminal Code**.

Section 7 Charter - Rights of Fundamental Justice:

[68] Defence Counsel has submitted that Mr. MacDermott's right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, were infringed during the initial investigation when he was compelled to identify himself as the driver of the truck involved in the accident. Furthermore, Defence Counsel submits that Mr. MacDermott's Section 7 **Charter** rights were breached by being questioned about alcohol consumption without being advised of a police caution and then without being notified of the change in jeopardy as well as a right to remain silent.

[69] While the Crown Attorney takes issue with the defence position based upon the Supreme Court of Canada decision in **R. v. Orbanski and Elias**, 2005 SCC 37, he does acknowledge that a compelled statement under the **Motor Vehicle Act** of Nova Scotia cannot be used for the truth of its contents in the trial: see **R. v. White**, [1999] 2 SCR 417.

[70] However, the Crown Attorney submits that the Supreme Court of Canada's decision in **Orbanski and Elias**, *supra* confirms that the screening of drivers necessarily requires a certain degree of interaction between police officers and motorists at the roadside and that questions about alcohol consumption may be used by the officer to form their reasonable grounds to suspect that a person has alcohol in their body for an ASD demand or the requisite reasonable and probable grounds necessary to request a breathalyzer test.

[71] Madam Justice Charron in writing a 7:2 majority decision of the Supreme Court of Canada in **Orbanski and Elias,** *supra*, at para. 48 addressed the section 7 **Charter** issue in the following manner:

> "48. Before turning to the facts of the case before us, let me address one additional argument made during this appeal. It was argued that asking questions about alcohol consumption falls outside the scope of reasonable police screening measures because it introduces an added element of self-incrimination. For this reason, Elias raised the additional question of whether his rights under section 7 of the **Charter** had been violated. The same argument was made and rejected in *Smith* by Doherty JA. I agree with his analysis of this issue. As he aptly pointed out, the different methods used to assess impairment at the roadside do not involve different degrees of self-incrimination because almost all the information relevant to assessing impairment during a regulatory police stop will come from the accused. Physical sobriety tests, roadside questioning regarding alcohol consumption, and roadside questioning in order to assess whether the driver's

> speech was slurred are all intended to use evidence emanating from the driver in order to assess the driver's level of impairment (*Smith,* at p.74). Compliance with the right against self-incrimination protected in section 7 is essentially achieved by the police informing a detainee of his or her rights under section 10(b) (*Smith,* at p. 80; *R. v Hebert*, [1990] 2 SCR 151 (SCC) at p.177). In effect, Elias' assertion that the roadside conduct of the police in this case violated his rights under section 7 is a reassertion of his rights under s.10(b). Nothing further would be gained by considering the driver's s. 7 rights."

[72] The majority of the Supreme Court of Canada concluded in **Orbanski and Elias** at para. 49 that: "the questions were relevant, involve minimal intrusion and did not go beyond what was necessary for the officer to carry out his duty to control traffic on the public roads in order to protect life and property. In my view, the police officers were authorized in each case to make such inquiries. "

[73] In **R. v. Ratelle**, (also referenced as **R. v. Smith)** 1996 CarswellOnt 318 (ONCA) Doherty JA held at para. 48 that a detained person has no absolute right to remain silent. The police are not absolutely prohibited from questioning a detained person and they need not advise the detainee that he has a right to remain silent. Justice Doherty went on to add that since the right to counsel under section 10(b) is suspended during an impaired investigation, then so does the right to remain silent. He concluded at para. 54 that the police are authorized to question a driver about alcohol consumption by statute, much like they are entitled to request a driver's operating license or insurance, and those questions do not involve a breach of section 7 of the **Charter**.

[74] In **Orbanski and Elias**, the Crown had conceded that as soon as the two accused were pulled over by the police to investigate the motorists for possible impairment, they were detained within the meaning of section 10(b) **Charter,** since the necessary degree of compulsion and coercion was present. The Crown also conceded that, in each instance, neither accused was provided with his right to counsel pursuant to 10(b) **Charter** during the period of detention at the roadside from the moment they were pulled over until the time of their arrest.

[75] However, the Supreme Court of Canada noted in **Orbanski and Elias,** *supra* at para. 59, as the Crown Attorney has noted in this case, that the impugned evidence was adduced at trial solely to confirm the police officers' ground for making a breathalyzer demand. Each driver was informed and given the opportunity to exercise his section 10(b) **Charter** right upon arrest and before he was requested to provide incriminating evidence through breath samples. Justice

Charron concluded that the abridgement of the section 10(b) right was strictly confined for the purpose of roadside screening and was constitutional.

[76] In the final analysis, the Supreme Court of Canada concluded that the infringements were justifiable pursuant to section 1 of the **Charter** and that the officers were entitled to ask each accused if he had been drinking since such questions were relevant, involved minimal intrusion and did not go beyond what was necessary for the officers to carry out their duty to control traffic on public roads in order to protect life and property. The limits on the right to counsel were reasonable and were prescribed by law, which was reasonable and demonstrably justified in a free and democratic society. Detecting and deterring impaired driving was an important objective. The limitation on the rights of the accused were prescribed by law and were justifiable under section 1 of the **Charter**.

[77] In this case, Const. Steele met with Mr. MacDermott as result of a complaint of a motor vehicle accident in the community. When he arrived at the scene of the accident, he was not engaged in anything other than obtaining information with respect to that motor vehicle accident. Mr. MacDermott was not detained by Const. Steele while investigating the circumstances of the motor vehicle accident when he informed the officer that he had been the driver of the truck involved in the accident. In this case, like the **Orbanski and Elias** case, Mr. MacDermott was informed of his right to contact counsel and was accorded an opportunity to consult with a lawyer before providing suitable samples of his breath for analysis.

[78] In the circumstances of this case, based upon the principles established in **Orbanski and Elias** as well as the **Ratelle (Smith)** case, I find that the questions concerning Mr. MacDermott's alcohol consumption, like the request to produce his driver's license, vehicle registration or confirmation of insurance, involved no breach of section 7 of the **Charter**. Having come to that conclusion, there is no need to determine whether the evidence obtained during that roadside questioning should be excluded under section 24(2) of the **Charter.**

Section 8 Charter - Did the Police Officer Have a Reasonable Suspicion to Demand a Breath Sample into an ASD - section 254(2)(b) Code?

[79] Section 254(2)(b) of the **Criminal Code,** which was in effect on June 23, 2018, permitted an officer to make a demand for a breath sample into an Approved Screening Device on the basis of a reasonable suspicion that the individual had alcohol in their body ***and*** has operated a motor vehicle within the proceeding three

hours. In the current legislation section 320.27(1)(b) of the **Code** operates to the same effect, however, instead of referring to having operated a "motor vehicle" in the preceding three hours, the current version refers to operating a "conveyance."

[80] Cases which have considered the "reasonable suspicion" threshold of the former version of the section apply equally to the new provisions and that standard can be described by the following principles:

(a) The reasonable suspicion test has a subjective and an objective element. Reasonable suspicion must be assessed against the totality of the evidence, which is sometimes described as a "constellation of objectively discernible facts." The hallmarks of the test are "common sense, flexibility and practical everyday experience:" See **R. v. Flight**, 2014 ABCA 185 at paras 35 to 37, which incorporated comments from the Supreme Court of Canada decision in **R. v. Chehil**, 2013 SCC 49.

(b) If there is an admission of consumption of alcohol, it is not necessary for the officer to clarify or quantify the amount or timing of that consumption. Admissions of consumption alone will generally be sufficient to ground an objectively reasonable suspicion of alcohol in the body. **Flight** *supra* at paras 49-50 and 59-61.

(c) An odour of alcohol alone would also be sufficient to found reasonable grounds to suspect the presence of alcohol in the body of a person, who has within the proceeding three hours operated or had care or control of a motor vehicle: see **R. v. Schouten**, 2016 ONCA 872 at para. 25.

(d) It is not necessary that a person show signs of impairment to found a basis for making a roadside breath demand. It is not necessary that the police officer suspects that the person is committing a crime, rather all that is required is that the police officer making the demand have reasonable grounds to suspect that a person has alcohol in their body: see **Schouten**, *supra*, at para. 26.

(e) The standard of "reasonable grounds to suspect" involves possibilities, not probabilities: see **Chehil**, *supra*, at para. 27.

[81] In this case, Const. Steele detected an odour of alcohol coming from Mr. MacDermott's breath and in addition, Mr. MacDermott also admitted to having consumed "two beers" prior to operating his motor vehicle. The police officer

obtained that information from Mr. MacDermott, at about 7:40 PM on June 23, 2018. The police officers had received a dispatch radio call related to a motor vehicle accident on Courtney Road at 7:35 PM and they arrived on scene within two minutes.

[82] Const. Steele confirmed that he had obviously not seen the accident, having arrived on scene after it had occurred, and agreed that the call relating to a motor vehicle accident was not a "priority one" call to immediately drive to that location with their siren or emergency lights activated. However, they did arrive on scene within a couple of minutes because they were already in the area of Courtney Rd. in Dartmouth.

[83] Although there was no specific evidence from Const. Steele or Const. Fiander as to the exact time when the accident occurred or Mr. MacDermott last operated his motor vehicle, Const. Steele stated that the call to dispatch by the complainant would have been related to police officers within minutes and certainly not more than one hour. In addition, it is reasonable to infer, based upon the evidence that Mr. MacDermott and people associated with the damaged vehicle parked on the street were standing nearby their vehicle, that the accident had occurred more recently than much earlier in the day.

[84] After detecting the odour of alcohol on Mr. MacDermott's breath, Const. Steele testified that he held a subjective belief or reasonable suspicion that Mr. MacDermott had alcohol in his body. Despite the acknowledgement that Const. Steele did not detect any other indicia of impairment which would have suggested the consumption of alcohol or perhaps impairment by drug, I find that the detection of the odour coming from the breath of Mr. MacDermott provided the reasonable suspicion that he had alcohol in his body.

[85] Since the "reasonable suspicion" standard involves possibilities and not necessarily probabilities and must be assessed against the totality of the evidence or the "constellation of objectively discernible facts" based upon common sense, flexibility and practical everyday experience, I have no doubt that Const. Steele honestly held a subjective belief that was objectively reasonable, that Mr. MacDermott had backed his truck into the other vehicle parked on the street, within the preceding three hours, while he had alcohol in his body.

[86] Therefore, although the ASD demand may have been a warrantless search and seizure and potentially in violation of section 8 of the **Charter**, I find that the search and seizure was reasonable in the circumstances as it was authorized by

law, the law itself was reasonable and the search and seizure was carried out in a reasonable manner. I find that there was no section 8 **Charter** violation with respect to the demand to provide a suitable sample of breath to enable the proper analysis to be made by means of an approved screening device.

[87] Although Defence Counsel also challenged the validity of the ASD "fail" result by virtue of the fact that he maintained the ASD used on the evening of June 23, 2018 was not an "Approved Screening Device" pursuant to the **Regulations**, I find that there is no merit to that contention. The fact that Const. Fiander stated that the ASD used that evening was manufactured by Drager and was an Alcotest 7410 GLC device, I find that the additional information of the name of the manufacturer did not create any confusion as I find that there is no doubt that he was referring to the Approved Screening Device listed in the **Regulations** as an Alcotest® 7410 GLC.

Section 8 Charter – Did the Police Officer have Reasonable Grounds to Demand a Breath Sample into An Approved Instrument – Section 254(3)(a) Code?

[88] Defence Counsel also submitted that there was a section 8 **Charter** violation and that Mr. MacDermott was subjected to an unreasonable search and seizure when he was compelled to provide suitable samples of his breath pursuant to subparagraph 254 (3)(a) of the **Code** for analysis by an Approved Instrument.

[89] The statutory basis for a peace officer making a breath demand is found in section 254(3)(a) of the **Criminal Code**, which requires a peace officer to have reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as result of the consumption of alcohol.

[90] In **R.v. Bernshaw**, [1995] 1 SCR 254, the majority of the Supreme Court of Canada noted that section 254(3) of the **Criminal Code** provides authority to a peace officer to demand that a person provide a sample of their breath for analysis. The Court stated at para. 48 that the existence of reasonable and probable grounds entails both an objective and a subjective component. The officer must subjectively have an honest belief that the suspect has committed an offence and objectively there must exist reasonable grounds for that belief. The Supreme Court of Canada added, at para. 49, that a fail on the ASD may be sufficient, in and of itself, to provide reasonable and probable grounds for a breathalyzer demand

[91] As was pointed out by Boswell J. in **R. v. Littler**, 2008 CanLii 44710 (Ont. S.C.J) at para.15, judicial scrutiny of reasonable grounds must recognize the context in which the obligation operates. Contextual factors include the reality that the police are involved in making quick, but informed, decisions on less than full, exact or perfect information; that they need to strike a reasonable balance between an individual's right to liberty and the societal interest in being protected against the seemingly ubiquitous menace of impaired driving; and the fact that reasonable grounds in the context of a breath demand is not an onerous threshold and it should not be inflated to the context of testing trial evidence.

[92] In **R. v. Jones**, [2006] O.J. No. 1381 (Ont. C.J) at para. 10, Trotter J. (as he then was) held that the police officer's reasonable grounds to believe may be determined by direct evidence available to the officer at that time or by reasonable inferences based upon circumstantial evidence.

[93] Furthermore, other information, including hearsay which was available to the officer at the time that the demand was made may be considered in determining whether the officer had a subjective belief and there was an objective basis for that belief. See, for example, **R. v. LeClaire**, 2005 NSCA 165 (CanLii) at para. 42.

[94] Here, Mr. MacDermott's "fail" result on the Approved Screening Device was sufficient basis to provide the reasonable and probable grounds to believe that an offence contrary to section 253 had been committed in the preceding three hours. However, in this case, Const. Steele also had three other objective indicia that there had been an offence under section 253 by virtue of the smell of alcohol coming from Mr. MacDermott's breath, his admission of having consumed two beer and the circumstances around the recent report of a motor vehicle accident. It is clear from the evidence of Const. Steele that he held an honest subjective belief that he had the reasonable and probable grounds to make a breathalyzer demand and that there were several objectively discernible facts.

[95] It is also clear from Const. Steele's evidence that he subjectively had an honest belief that Mr. MacDermott had committed an offence under section 253 within the preceding 3 hours while his abilities to operate a motor vehicle were impaired by alcohol. Certainly, for the reasons outlined above with respect to the ASD demand, I find that Const. Steele also subjectively believed and it is reasonable to infer from the totality of the evidence that the motor vehicle accident had occurred when Mr. MacDermott backed his truck up into a parked vehicle on Courtney Road within the preceding three hours.

[96] Like the ASD demand which I have concluded was not an unreasonable search or seizure in contravention of section 8 **Charter,** I have also concluded that there was no violation of section 8 of the **Charter** as a result of Const. Steele's demand that Mr. MacDermott provide suitable samples of his breath for analysis by an Approved Instrument.

Section 10(a) Charter – Reason for Arrest or Detention:

[97] In **R. v. Evans**, [1991] 1 SCR 869, the Supreme Court of Canada stated that the section 10(a) **Charter** right ensures that detained persons have sufficient information to determine the basis for their arrest or detention and to properly exercise the related right to obtain advice of counsel under section 10(b). The interpretation of the section must reflect the dual purposes of the right. Compliance with the requirements of section 10(a) requires an examination of context in terms of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used.

[98] For the reasons outlined earlier in this analysis with respect to the section 7 **Charter** rights, I find that there was no breach of Mr. MacDermott's section 10(a) right. First, the police officer arrived at the scene of the accident to conduct a **Motor Vehicle Act** investigation based on their power under the common law and the provincial statute to conduct those investigations and to also check for driver sobriety, if certain circumstances come to their attention.: See **R. v. Gardner**, 2018 ONCA 584, at paras 21 to 26.

[99] As I have concluded previously, Mr. MacDermott was not detained while Const. Steele was checking on the well-being of people following an accident and also conducting his **Motor Vehicle Act** investigation relating to the accident on Courtney Road. In those circumstances, there was no need or obligation to inform Mr. MacDermott of arrest or detention, because the officer was initially only speaking with Mr. MacDermott in relation to his role in the motor vehicle accident.

[100] During that conversation with Mr. MacDermott, I find that after Const. Steele formed the "reasonable suspicion" to demand that Mr. MacDermott provide a sample of his breath for analysis by an ASD and that the result of that test was a "fail." I also find, based upon the evidence, that Const. Steele honestly had a subjective belief based upon objectively discernible facts that Mr. MacDermott had recently operated or had care or control of a motor vehicle while his ability to do so was impaired by alcohol. At that moment, I find that Mr. MacDermott was

certainly informed of the reasons for his arrest for the charge contrary to section 253(1)(a) of the **Code**.

[101] In those circumstances, I find that there was no infringement of Mr. MacDermott's section 10(a) **Charter** rights.

[102] In the final analysis, having concluded that there were no infringements of Mr. MacDermott's section 7, 8 or 10(a) **Charter** rights, there is no need to determine whether the evidence obtained during that roadside questioning should be excluded under section 24(2) of the **Charter.**

Can the Crown Rely Upon the Presumption of Identity Evidentiary "Shortcut" found in Sec. 258(1)(c) of the Criminal Code?

[103] The admission of breath test results does not, by itself, prove that the accused person has committed an offence under either section 253(1)(a) or 253(1)(b) of the **Criminal Code**, because there will always be a time gap between the time of the alleged offence and the time of the testing. Section 258(1)(c) of the **Criminal Code** provides that the breath test results will be *presumed* to be identical with the blood alcohol level of the accused person at the time of the alleged offence. This statutory presumption was referred to as the "presumption of identity" in **R. v. St. Pierre**, [1995] 1 SCR 791 at paras. 27-28.

[104] Section 258(1)(c) of the **Criminal Code** provides, in part, as follows:

> "258(1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),……
>
> (c) where samples of the breath of the accused had been taken pursuant to a demand made under subsection 254(3), if
>
> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, **in the case of the first sample, not later than 2 hours after that time,** with an interval of at least 15 minutes between the times when the samples were taken,
>
> (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
>
> (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
>
> evidence of the results of the analysis so made is **conclusive proof** that the concentration of alcohol in the accused blood both at the time of the analyses

> were made and at the time when the offence was alleged to been committed was, if the results of the analysis are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses….."

[105] The Crown may take advantage of this evidentiary shortcut and statutory presumption of identity in section 258(1)(c) of the **Criminal Code** by offering proof by Certificates or by *viva voce* evidence of a Qualified Technician of the matters specified in section 258(1)(c) of the **Code.** In this case, the Crown has presented *viva voce* evidence from the police officers as well as a Certificate of a Qualified Technician [Exhibit 2] and Exhibit 1, which is the printout of the "Subject Test Results" from the Intox EC/IR II breathalyzer machine for Mr. Kevin MacDermott taken on June 23, 2018.

[106] Based upon my reading of section 258(1)(c) of the **Code**, in order for the Crown to rely on the statutory presumption of identity, the court must be satisfied, beyond a reasonable doubt, based upon proof by Certificate or *viva voce* testimony that the following pre-conditions have been established:

1. A demand has been made under section 254(3);
2. Each sample of breath was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than 2 hours after that time;
3. An interval of at least 15 minutes occurred between the times when the samples were taken;
4. Each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician;
5. An analysis of each sample was made by means of an approved instrument operated by a qualified technician; and
6. An absence of any evidence "tending to show" that the instrument was malfunctioning or was operating improperly.

[107] As I indicated previously, I am satisfied that Const. Steele had reasonable grounds to believe that an offence contrary to section 253 had been committed by Mr. MacDermott within the preceding three hours when he made the demand for him to provide a suitable sample of his breath for analysis by an Approved Instrument pursuant to section 254(3) of the Code..

[108] Based upon the evidence of Const. Steele and Const. Fiander, I find that the evidence established that there was an interval of at least 15 minutes between the times that the samples were taken, that each sample was received from Mr. MacDermott directly into an Approved Instrument and that the Instrument was operated by Const. Fiander, who was certified as a Qualified Technician at that time. Moreover, I find that Exhibits 1, 2 and 3 established that the analyses of each of the "suitable samples" of breath were made by means of the Approved Instrument which was operated by a Qualified Technician [Const. Fiander].

[109] In addition, I find that there is no evidence "tending to show" that the instrument was malfunctioning or was operated improperly.

[110] Therefore, in terms of the Crown's reliance on the evidentiary shortcut provided by the presumption of identity, the only precondition which I find to be in dispute between the parties is whether each sample of breath was taken as soon as practicable after the time when the offence was alleged to been committed and, **in the case of the first sample**, not later than 2 hours after that time.

[111] Dealing with the first aspect of this precondition, I find that each sample of breath was taken as soon as practicable after the time when the offence was alleged to have been committed as I accept the evidence of Const. Steele that once Mr. MacDermott's sample of breath registered a "Fail" on the ASD, the officer then made a demand to provide samples of breath into an Approved Instrument and informed him of his **Charter** rights**,** a police caution and provided a right to speak with legal counsel before being introduced to the Qualified Technician, Const. Fiander, who conducted the breathalyzer tests.

[112] In addition, I find that the short period of time required to transport Mr. MacDermott from Courtney Road, the location where he was arrested in Dartmouth to the Halifax Regional Police location in Dartmouth was only about five minutes and as such, was as soon as practicable. Const. Steele did not delay that transportation by attending to other matters which were not relevant to this investigation and proceeded directly to the police station within minutes.

[113] Moreover, once Mr. MacDermott was introduced to Const. Fiander at about 8:25 PM on June 23, 2018, he began a 15-minute observation period. The first suitable sample of Mr. MacDermott's breath for analysis was provided at 8:43 PM, with the result being 150 mg of alcohol in 100 mL of blood. After a further minimum 15-minute waiting period between the first sample and the second sample, Mr. MacDermott provided the second suitable sample for analysis at 9:10

PM. The analysis of that second sample of breath was 140 mg of alcohol in 100 mL of blood. Having accepted that evidence, I find that each sample of breath was taken "as soon as practicable" after the time of the alleged offence.

[114] However, the one remaining requirement to be able to rely on the so-called "presumption of identity" is the requirement in section 258(1)(c)(ii) of the **Code** that the first sample be taken **not later than two hours** after the "offence was alleged to have been committed." Given the fact that this is certainly an essential element in the establishment of this "presumption of identity" as an "evidentiary shortcut," I find that it must also be established by the Crown beyond a reasonable doubt. Of course, the Court may be satisfied that the timeline has been established by direct evidence of witnesses or based upon a reasonable inference from evidence that was adduced during the trial.

[115] There is no doubt that the evidence of Const. Steele established that he heard a dispatch call about a complaint relating to a motor vehicle accident at 7:35 PM and arrived on Courtney Road at about 7:37 PM. As I mentioned previously, the first suitable sample of Mr. MacDermott's breath which was analysed by the Approved Instrument occurred at 8:43 PM. In those circumstances, I find that the evidence established that the first sample of Mr. MacDermott's breath was taken 66 minutes after the police arrived on scene and began the **Motor Vehicle Act** investigation which, shortly thereafter, became an impaired operation of a motor vehicle investigation.

[116] However, Const. Steele acknowledged that he did not know the time when the accident occurred and apparently, thereafter, Mr. MacDermott drove his truck back into the driveway across the street from the damaged vehicle. There is no evidence that Mr. MacDermott was in care or control of his vehicle after it was parked in the driveway, as the police officers found him standing beside his car when they arrived on scene.

[117] Const. Steele had mentioned that his cadet partner who was with him that evening, had gone over to talk to the people standing around the damaged Toyota Corolla parked on the street. However, no civilian associated with the damaged vehicle or the police cadet were called as witnesses, who might have related some information to the court with respect to the time of the day when the accident occurred and the impaired operation and over 80 offences would have been alleged to be committed.

[118] As Defence Counsel pointed out during his cross examination and submissions, the only evidence that is before the Court relates to when Const. Steele received the dispatch call, not when the complaint to investigate a motor vehicle accident was made to the police. Moreover, even if the Crown had led evidence with respect to when the call was made, that does not necessarily indicate the time when the offence was alleged to have occurred, unless of course the report was something along the lines that the person across the street had "just" backed into my car, from which one could reasonably infer the "recency" of the incident.

[119] Although Const. Steele testified that Mr. MacDermott had identified himself as the driver of the vehicle that had backed into the car parked on the street, and the Court accepted that statement for the purpose of establishing grounds to make an ASD demand, the Crown Attorney acknowledged that it could not be used for the proof of the truth that, in fact, Mr. MacDermott had backed his vehicle into the car on the street. In any event, even with the identification of Mr. MacDermott as the driver of the truck who was involved in the accident being established, there was no indication in the evidence relating to the conversation between Mr. MacDermott and Const. Steele as to the time when that accident actually occurred.

[120] In the recent case of **R. v. Richard**, 2020 NBCA 43 (decided on June 25, 2020), the New Brunswick Court of Appeal allowed an appeal and acquitted the accused in a very similar case to the instant case. Like the present case, there was a two-car collision and the police officer attended at the scene of the accident around 4 PM. The officer subsequently determined that the appellant was the operator of one of the vehicles involved in the accident and shortly thereafter suspected the presence of alcohol in his body. At 4:40 PM there was a demand to provide a sample of breath into an ASD which registered as a "fail." Based upon that result, the officer concluded that an offence had been committed under section 253 **Code** within the previous three hours and demanded that the appellant provide breath samples pursuant to section 254(3) **Code.** The first breath sample was taken at 5:51 PM and resulted in an analysis of the accused's blood alcohol level that exceeded the legal limit at that point in time.

[121] The appellant did not testify during the trial and the Certificate of the Qualified Technician was received in evidence. The Court of Appeal noted that the first sample was certainly provided within two hours of the police officers forming the grounds to make a demand and the officer's arrival at the scene of the accident.

[122] However, the Court of Appeal in **Richard**, *supra*, at para. 25 held that the presumption of identity that arises from section 258(1)(c) (ii) of the **Code** is only engaged if the first breath sample was taken within two hours from the time that the defendant last operated his motor vehicle, not the time when the investigating officer considered that there were reasonable grounds to believe the offence of operating a motor vehicle with blood alcohol level in excess of legal limit had been committed within the previous three hours.

[123] In this case, as I mentioned it was about 66 minutes between the time of the first sample of breath and when the police arrived on scene and met with Mr. MacDermott, with the officer forming the requisite grounds to demand that the accused provide breath samples, a couple of minutes later at 7:40 PM on June 23, 2018. However, like the **Richard** case from New Brunswick, in this case, the Crown Attorney has not led any direct evidence to establish when the offence occurred, in other words, when Mr. MacDermott last drove or had care or control of his motor vehicle.

[124] While the Court has concluded, based upon reasonable inferences from the proven facts, that there was a proper demand to require Mr. MacDermott to provide samples of his breath for analyses based upon the officer's belief that an offence had occurred within the preceding three hours, Const. Steele stated that the call about this accident was not a "priority one" call to immediately get to the scene. Const. Steele acknowledged on cross-examination that it was possible that the call from a complainant may have been related to him by dispatch in as little as one minute or possibly up to one hour. He disagreed with Defence Counsel that the call might have been left in the dispatch queue for as much as 1 to 2 hours. Given that window of possible times, I cannot reasonably infer and conclude from the evidence led during the trial, that the call itself was made within two hours of the first breath sample, nor reasonably infer and conclude **when** the last driving of Mr. MacDermott had occurred.

[125] In those circumstances and for the same reasons as stated by the New Brunswick Court of Appeal in **Richard**, I find that the Crown has not established all of the prerequisites to be able to rely on the presumption of identity, beyond a reasonable doubt, that the first sample was taken within two hours of the offence of operating a motor vehicle with the blood-alcohol level in excess of the legal limit.

[126] While it is certainly possible and maybe even highly probable that the first sample was actually taken within two hours of the section 253 **Code** offence, I find

that without evidence to directly establish the time when that offence was alleged to have occurred or reasonable inferences from circumstantial evidence to establish that time, it still leaves open the possibility that the first sample was taken outside the two hour window. In those circumstances, I cannot conclude beyond a reasonable doubt **when** Mr. MacDermott last operated his motor vehicle and as such, I find that the evidence does not establish, beyond a reasonable doubt, all of the critical requirements to be considered as "conclusive proof" of the "presumption of identity."

[127] Of course, the Crown could have utilized the readings from the Approved Instrument and called expert extrapolation evidence utilizing those readings and provided opinion evidence as to what the blood alcohol concentration would have been, if the offence was alleged to have occurred outside the two hour window. However, in this case, the Crown did not call an expert to provide extrapolation evidence.

[128] In those circumstances, as the New Brunswick Court of Appeal concluded in **Richard,** *supra*, at para. 26, there was no evidence establishing the concentration of alcohol in the appellant's blood at the time when he was operating his motor vehicle. For the same reasons as articulated by the New Brunswick Court of Appeal, I find that the Crown has not established all of the prerequisites to be able to rely on the evidentiary shortcut in relation to the presumption of identity. As a result, in the absence of any expert extrapolation evidence, I cannot conclude, beyond a reasonable doubt, that the Crown has established all of the essential elements of the over 80 charge contrary to section 253(1)(b) of the **Code**.

[129] In conclusion, for the reasons outlined above, I find Mr. MacDermott not guilty of the one remaining charge before the court.

Theodore Tax, JPC