IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Hardie, 2013 NSPC 101

Date: November 1, 2013

Docket: 2348408

2348409

Registry: Halifax

BETWEEN:

Her Majesty the Queen

Vs.

Trenna Lee Hardie

BEFORE THE HONOURABLE JUDGE CASTOR H.F. WILLIAMS

Trial Held: **March 27, July 19, September 10, 2013**

Oral Decision: **November 1, 2013**

Charges: **253(1)(a); 253(1)(b), Criminal Code**

Counsel: **Tanya Carter, for the Crown**

Stan MacDonald, for the Accused

Introduction

[1] The police have charged Trenna Lee Hardie with impaired driving and failing the breathalyzer, contrary to the **Criminal Code,** ss. 253(1)(a) and 253(1) (b). She has pleaded not guilty to these offences and has raised the issue that the police have violated her s.10 (b) *Charter* right to counsel of choice. Equally included in this violation is that the police did not advise her, on her arrest and detention, that she could consult immediately with duty counsel and free of charge.

[2] This case therefore concerns a determination, on the evidence presented, whether the accused has shown that her right to counsel of choice has been infringed and if so, the available remedy. Also, it is a determination of whether the Crown has proved beyond a reasonable doubt that she has committed the offences as charged.

Synopsis of the Evidence

(a) Voir dire

[3] The trial was conducted as a blended *voir dire* with the parties agreeing that the evidence on the voir dire would be the same as the evidence-in-chief without the necessity of recalling the witnesses. On August 1, 2011, the Halifax Regional Police received a driving complaint of an erratic driving pattern occurring, at approximately 1330 hours, on the Bedford Highway that carried onto Moirs Mill Road. The driver of the offending vehicle a white female, had stopped for an unduly length of time at a traffic light, crossed the median lines on the highway and, in executing a right turn onto Moirs Mill Road, almost struck an oncoming vehicle and another which was parked on the highway and hit the curb. Receiving the licence plate number of the vehicle the police attended the residence of the registered owner but then received another call indicating that the offending vehicle and driver was to be found positioned at Paper Mill Lake where she was observed engaging in activities that also appeared to be unusual and which had attracted the attention of the life-guard on duty.

[4] When the police arrived at Paper Mill Lake, at 1351 hours, they spoke to the witnesses of the event who also identified Ms. Hardie as the person of interest. These witnesses were the same who had observed her driving on the Bedford Highway at about 1330 hours and when she arrived at the lakeside, about five minutes later, and parked her vehicle. The police arrived at the lakeside between five and ten minutes after Ms. Hardie's appearance. After interviewing the witnesses, the police arrested Ms. Hardie and charged her with impaired driving as, also on their own observations, she exhibited signs of impairment such as slurred speech, strong odour of alcohol emanating from her breath, red glossy eyes and unsteadiness on her feet.

[5] Correspondingly, they read her *Charter* rights, police caution and the breath demand at approximately 1430 hours. She indicated that she understood these rights and at first was uncertain whether she wanted to speak to counsel but eventually made it clear that she wanted to speak to her own lawyer before she took the breath test. She also informed the police that she had not consumed any alcoholic beverages before driving or arriving at the lake. Similarly, according to the police, she informed them that it was only at the beach and shortly before their arrival that she did consumed three coolers. She had a few drinks and was enjoying the sun.

[6] On that point, however, Ms. Hardie testified that she had poured a Smirnoff Ice vodka cooler into her gym or workout bottle and added to it about half of one cup of vodka. She had the bottle with this mixture in a bag in her car. Additionally, she claimed that she drank only three-quarters of this combination, within a two minute span between 1325 hours and 1330 hours but was uncertain as to its alcohol content and thus the quantity of alcohol that she had consumed. In any event, she admitted that it was having an effect upon her.

[7] However, witnesses at the beach observed that she did leave her vehicle and lay on a towel. Likewise, they saw her go into the water where they described her behaviour as odd. The lifeguard at the beach, because of his concerns, requested her to come out of the water and not to re-enter. On the shore, he checked her vitals and questioned her as to whether she had consumed any alcohol or had an accident. She,

in turn, questioned his authority to interrogate her, became hostile but denied any drinking or accidents. He, however, noted that her eyes were glossy which suggested to him, from his experience with dealing with intoxicated persons while on duty as a life-guard, that she was inebriated. Also, he observed that she staggered when she walked.

[8] To the other witnesses she appeared flushed with droopy eyes and to be intoxicated. Additionally, although all the witnesses at the beach had her under constant and continuous observation and had interactions with her since her arrival, no one saw her, while at the beach and before the police arrived, either eating or drinking anything. Moreover, when the police seized her vehicle at the beach and entered it to obtain the registration papers from the glove box, they saw nothing in plain view inside the vehicle or the odour of alcohol. Also, when they searched her they found no bottles.

[9] At 1500 hours when at the police station, the arresting police officer, Cst. Verner, allowed Ms. Hardie to use her own cell phone, as she requested, to call her lawyer of choice. Ms. Hardie testified that she called two lawyers and left messages on both their homes and office numbers. Cst. Verner did observe her making several calls on her cell phone and at 1505 hours noticed that she was not using it to speak to anyone. Upon inquiry, Ms. Hardie informed Cst. Verner that she could not get her lawyers but did leave messages for return calls. Believing that Ms. Hardie could not contact her own lawyer because it was a holiday and as Ms. Hardie would not and did not give any particulars of her counsel or her calls to her lawyer, Cst. Verner advised that she would therefore call duty counsel on her behalf. Cst. Verner called duty counsel who telephoned and spoke with Ms. Hardie.

[10] Nonetheless, before she spoke to duty counsel, Ms. Hardie kept restating that she wanted to speak to her own lawyer but would not provide Cst. Verner with the name or telephone number of her lawyer in order for the officer to assist her to accomplish her request. Cst. Verner had no idea of whether she had called a home or office number for her lawyer.

[11] However, after speaking with duty counsel, Ms. Hardie, upon demand, provided samples of her breath for analysis. At 1519 hours she provided an invalid sample but at 1525 hours did provide a valid sample that was recorded as 220 milligrams of alcohol in 100 millilitres of blood. Her second sample was taken at 1525 hours and the result was 210 milligrams of alcohol in 100 millilitres of blood. The corresponding Certificate of a Qualified Technician was tendered and submitted into evidence as Exhibit #4/VD2. Notably, up to the time when she was released at 1615 hours, no lawyer had returned her call. But, during the breath test she did ask to speak to her own lawyer.

Findings of facts and Analysis

(a)* On the *voir dire

[12] I bear in mind that it was, on agreement, a blended voir dire but that there are also two distinct and significant issues that carry two different burdens of proof. First, there are the statements of Ms. Hardie to the police either at the lakeside, in the police vehicle on the way to the police station or at the police station which the Crown must prove, beyond a reasonable doubt, are voluntary. Second, there is the issue of the police providing to Ms. Hardie the full informational component of her right to counsel which she must prove, on a balance of probabilities, was infringed.

(1)S.10(b) Charter breach

[13] Here, on the s.10 (b) ***Charter*** issue counsel for Ms. Hardie has raised three relevant points:

(a) Ms. Hardie was not provided the full informational component of her right to counsel,

(b) Ms. Hardie was denied the opportunity to speak to counsel of her choice , and

(c) In the circumstances, the breath results obtained by the police should be excluded.

[14] The issue of whether or not Ms. Hardie received the full informational component of her right to counsel arose from the evidence on the *voir dire*. Counsel for the Crown argues that as she had not received any proper notice and or particulars that this aspect of the alleged infringement should not be considered. Contrariwise, counsel for Ms. Hardie submitted that because his Notice of Charter Application stated that the "Applicant will rely on the evidence to be adduced at the hearing, including **viva voce** testimony…and such other and further material and evidence as counsel may advise," the Crown had sufficient and adequate notice. Furthermore, this was not a technical breach as from the evidence Ms. Hardie was not aware that there was a free duty counsel service and did not ask to speak to one. The Crown's view on this point was that Ms. Hardie knew her options and made a choice.

[15] First, in my view, the application was timely as it was asserted at the earliest possible point in the hearing of evidence and before an adjournment to hear further submissions on the blended voir dire. See: ***R.v***. ***Feldman*** **(**1993), 91 CCC (3d) 256 (BCCA), aff'd 93 CCC (3d) 575 (SCC). Besides, in my opinion, Ms. Hardie's s.10 (b) Charter right was and remained a live issue. Moreover, the Notice of Charter Application dated 21 February, 2013 subsumed that any issues that arose during the hearing of evidence that clearly impacted upon the accused' Charter rights would be subject to challenge. Here, there is strong evidence of a *prima facie* breach of the informational component of the right to counsel and I have heard submissions on the point. The Crown, in my view, had the time, to address fully the issue or even, if it so desired, to recall its witness on that point. Thus, in the circumstances, I think that I am duty bound to assess all the evidence presented considering the impact of any exclusion on the integrity of the justice system and to rule accordingly. See: ***R.v***. ***Travers*** (2001), 154 CCC (3d) 426 (NSCA).

[16] Second, the authorities are clear that the right to counsel include both the informational and implementation components. The Supreme Court of Canada in ***R.v, Bartle*****,** [1994] SCJ 74 at paras. 15–33**;** ***R.*****v.*****Cobham*** **(**1994), 92 CCC (3d) 333**;** ***R.v. Prosper*** **(1994**), 92 CCC (3d) 353**;** ***R.v.Harper*** (1994), 92 CCC (3d) 423**;** ***R.v.***

***Matheson* (1994),** 92 CCC (3d) 434; and ***R.v. Pozniak* (**1994), 92 CCC (3d) 472**,** has considered in depth the duties of the police with respect to a detained person s.10 (b) ***Charte*r** rights. Individually and collectively these cases stand for the proposition that the police are required to inform detainees about Legal Aid and duty counsel services which are currently in existence and available which provide free preliminary legal advice. Likewise, they must also provide basic information on how a detainee can access these services.

[17] Here, I find that Cst. Verner when providing Ms. Hardie her s.10 (b) ***Charter*** right read verbatim from a card which stated:

> You have the right to retain and instruct counsel without delay. You may call any lawyer you wish. You have the right to apply for legal assistance without charge to the Provincial legal Aid program. Do you understand? Do you wish to call a lawyer now?

[18] Likewise, I find that, on the card as read, there is neither any mention of duty counsel services that is available and free of charge and which immediately would provide free preliminary legal advice nor any information on how to access this service or the Legal Aid. A telephone number was not provided for these services nor was Ms. Hardie informed that she would have access to a telephone when at the police station in order to exercise her right to counsel. Thus, in my opinion, based upon the cited case authorities, the informational component of the s.10 (b) ***Charte*r** right, as mandated and required, was grossly deficient.

[19] This fact became relevant and obvious when Ms. Hardie was unable to obtain her lawyer and Cst. Verner told her, “You obviously can’t get a hold of your own lawyer. One will be provided for you.” I find that Ms. Hardie did not ask the officer to call a lawyer as she did not know that a lawyer was on call to provide her free preliminary legal advice. In short, I find that she did not know of the availability of duty counsel as initially she was not so informed. As well, I find that it was Cst. Verner, without Ms. Hardie’s request, who called duty counsel and apprised him concerning the situation. Similarly, I find that when the telephone in the holding cell rang Ms. Hardie did not initially answer it as she was not expecting anyone to call her on that telephone. Also, I

find that Cst. Verner then told her that the call was for her but did not tell her who was calling or the purpose of the call. However, I find that only when Cst. Verner told her to answer the telephone that she did so but did not know with whom she spoke.

[20] Consequently, I find that, in the circumstances, the police have failed in their informational obligations under s.10 (b) ***Charter***. See also: ***R. v. Luong,*** [2000] A.J. No. 1310 (C.A.)

[21] Accordingly, as was pronounced in ***Bartle***, *supra.* at para. 28:

> …It follows, therefore, that where the informational obligations under s. 10(b) have not been properly complied with by police, questions about whether a particular detainee exercised his or her right to counsel with reasonable diligence and/or whether he or she waived his or her facilitation rights do not properly arise for consideration. Such questions are simply not relevant under s. 10(b) (although they may be when it comes to considering whether the evidence obtained in the course of the Charter violation should be excluded under s. 24(2) of the Charter). The breach of s. 10(b) is complete, except in cases of waiver or urgency, upon a failure by state authorities to properly inform a detainee of his or her right to counsel and until such time as that failure is corrected.

[22] I therefore find that, on the balance of probabilities, Ms. Hardie has demonstrated that the police have failed to provide her with the proper and required s.10 (b) information. I also find, on the evidence, that she did not waive her right to counsel. Therefore, in my view, on the police's failure to provide the full informational obligations the s.10 (b) breach is complete and the issues of whether she had reasonable opportunity to speak to the counsel of her choice or whether or not she was diligent in exercising that right do not now arise for consideration under s.10 (b) ***Charter.*** See: ***Bartle*****,** *supra*.

(1) Voluntary statements

[23] I find that the police arrived at Paper Mill Lake at 1351 hours and arrested Ms. Hardie for impaired driving at 1430 hours. Also, I find that after they charged her with impaired driving and read her Charter right and police caution, she indicated that she understood those rights but initially was not sure that she then wanted to speak to a

lawyer. However, after they read her the breath demand I find that she indicated that she did not know if she wanted to take the Datamaster test until she had spoken to a lawyer. But, I find that she also indicated, at the lakeside, that she wanted to speak to her own lawyer.

[24] Given that I accept the testimony of Cst. Verner on the timelines of when Ms. Hardie was arrested, 1430 hours; and arrived at the station, shortly before 1500 hours; gave valid breath samples at 1525 hours and 1546 hours; and then released at 1615 hours, it was difficult but not impossible to reconcile with Cst. McLellan's cross examination testimony the precise times that she made utterances to the police.

[25] In any event, her statements were introduced as part of the *voir dire* and, without objection, her lawyer took the position as well as did the Crown in agreement, that if those statements are deemed admissible they should be considered as part of the evidence. To this end, I find that Ms. Hardie made the statements to the police without any threats or coercion to get her to talk about what happened that day. Likewise, I find that neither did the police make her any promises nor offered her any inducements to speak about what had occurred. Counsel for Ms. Hardie does not assert that these utterances violated her s.10 (b) right to counsel or that they were obtained by the police questioning her after she stated that she wanted to talk to a lawyer. As a result, I find that, beyond a reasonable doubt, her statements were voluntary and admissible. See: ***R. v. Hebert***, [1990] 2 S.C.R. 151.

[26] It would appear and I find that she made three statements. I find that the first statement where she said that she "drank three coolers at the beach and didn't drink at home…having a few drinks and enjoying the sun," was at the lakeside at 1425 hours. Next, when in the police vehicle and on the way to the police station, I find that she said that she "thought the police were her ex-husband's friends and were out to get her." Lastly, I find that she, while at the police station, said that she "drives over curbs all the time and that's why she drives a jeep."

[27] I think, however, that a clear distinction can be drawn between these statements. The one at the lakeside I find was before she was arrested. It therefore would have nothing to do with the alleged s.10 (b) violation, if at all, as the police had not yet arrested her and had no opportunity to inform her of her rights so as to trigger s.10 (b). ***Cobham***, *supra*. This statement according to Cst. McLellan and which was not contradicted was made at 1425 hours. The police arrested her at 1430 hours. However, the second and third statements would conceivably fall within the ambit of s.24 (2) of the ***Charter***.

[28] Even if I were to be wrong concerning the status of her first statement I, nonetheless, find that Ms. Hardie, in the set of circumstances, had an irresistible desire to deny that she drank and drove her vehicle. When the lifeguard had questioned her she denied it. Now, she is approached by the police on the same issue and she gave what to her was a reasonable exculpatory statement. In her testimony, she admitted that the drinking occurred between 1325 hours and 1330 hours at the beach and I find that the reasonable inference is that she definitely wanted the police to know that she did not drink and drive. If anything, I think that it is reasonable to conclude, on the balance of probabilities, that it was an exculpatory statement in response to police questions dealing with general background information.

[29] Thus, if it were to be argued and should it be determined that I am wrong on that point I also find that, on the balance of probabilities, she has not shown that her behaviour was affected by the alleged failure by the police to comply fully with the informational requirements of s.10 (b). I find that it is reasonable to conclude that, in any event, she would have acted in the same manner as she did as she had the strong impulse to make it known that she did not drink and drive. Further, in my view, the Crown has discharged its burden of proving that Ms. Hardie would not have acted any differently absent any alleged violation of her right. Also, I find that regardless of anything the police said or did she wanted to tell her story and she did so spontaneously. Accordingly, I will admit the statement.

[30] In my opinion, the admission of her second and third statements would not affect the fairness of her trial in a significant way and therefore I will admit them under s.24 (2) ***Charter***. See: ***R. v. Grant***, [2009] 2 S.C.R. 353. This breach of her s.10 (b) right was minor. I find that she understood her ***Charter*** rights and the police caution but continued to speak without any prompting or questioning by the police. Consequently, it is reasonable to conclude, and I conclude and find that in the circumstances, despite her acknowledged rights which she could have exercised, she had the alluring desire to exonerate herself and to explain her conduct regardless to what the police said or did. See: ***Harper***, supra.

Section 24(2) Charter re s. 10(b) Charter violation

[31] As I have earlier found, Cst. Verner did not read to Ms. Hardie the full informational component of her s.10 (b) right to counsel. Her failure and omission to inform Ms. Hardie of the existence of duty counsel and how to access this service was, in this case, prejudicial and should neither be encouraged nor condoned. The information about the existence of duty counsel and how to access this free and immediate legal service are an integral part of the informational component of the Charter right to counsel and, consequently, it cannot arbitrarily be omitted. I also found that Ms. Hardie did not waive her right to counsel. Thus, Cst. Verner calling duty counsel without a request, in my view, does not salvage her initial duty to provide Ms. Hardie with the proper information. In my view, Cst. Verner's failure and omission to provide the proper informational component was never corrected.

[32] Even though Ms. Hardie answered the telephone, as directed, I find that she spoke to a lawyer whom she did not call, requested to call, wanted to talk to or knew. This, however, invokes the implementation component of s.10 (b) which, as I have reasoned and applying ***R. v. Bartle***, *supra*, now does not properly arise for consideration under s.10 (b). Nonetheless, it is relevant contextually to explain Ms. Hardie's frame of mind and her response to the initial and continuing failure of the police to have provided her with the full informational component of her right to counsel.

[33] As a corollary, it should be clear that the police, however well-intentioned, must give a detainee the right, in a meaningful way, either a reasonable opportunity to speak to counsel of choice or to request or chose to call another lawyer if counsel of choice is unavailable. It is not for the police to select or to control which lawyer a detainee should consult. See: ***R. v. Willier***, [2010] 2 S.C.R. 429, at para.35, ***R. v. Trueman***, [2008] S.J. No. 522 (Q.B) at para. 12. Neither are they "allowed to push the detainee in the direction of Legal Aid as a convenient way of fulfilling the requirements of s.10 (b)." ***R.v. Kreiser***, [2013] S.J. No.498 (P.C.) Here, I find that that Cst. Verner waited, at most, only five minutes, while Ms. Hardie was still waiting to hear from her own lawyer, before she unreasonably interposed in the process.

[34] Even so, as was pronounced in***. Bartle***, *supra.*, I find that on Cst. Verner's initial failure and omission to provide the proper information on the right to counsel, which she never corrected, the breach of Ms. Hardie's s.10(b) right was complete.

[35] Notwithstanding my concluding that evidence was obtained in a manner that violated Ms. Hardie's ***Charter*** right to counsel it is not automatically excluded nor is it *prima facie* inadmissible. ***R. v. McCrimmon,*** [2010] 2 S.C.R. 402. Section 24(2) requires that I only exclude the evidence if it is established that its admission would bring the administration of justice into disrepute. ***Bartle,*** *supra*., R***. v. Collins***, [1987] 1 S.C.R.265.

[36] The manner of the inquiry that I must take was laid out by the Supreme Court of Canada, in ***R*****. v. *Grant*,** 2009 SCC 32, [2009] 2 S.C.R. 353 at para.71 as follows:

> 71. A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public [page 394] interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is

> to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

(1) The seriousness of the Charter-infringing state conduct

[37] Here, I bear in mind that it is important that the public retain its confidence in the rule of law and the legal processes. It is well-settled law that when the police arrest or detain a person they have a duty to inform the detainee of his or her right to counsel which include the availability of Legal Aid and duty counsel for free and immediate legal advice and how he or she can access this service by informing them of the telephone numbers to do so.

[38] I have found that Cst. Verner did not inform Ms. Hardie of the existence and availability of duty counsel for free and immediate legal advice nor did she provide any telephone numbers to access this service. It goes without saying that in enforcing the law police are expected to follow ***Charter*** directives. In my view, the police failure and omission to inform Ms. Hardie about the availability of duty counsel and how to access this free and immediate legal service cannot be viewed as a minor and inadvertent breach of her Charter rights after legions of case authorities and decisions on the point.

[39] I think that Charter rights must mean something and should not be sacrificed to expediency. Likewise, wilful blindness, ignorance of ***Charter*** standards and carelessness cannot equate to good faith. Here, I am satisfied that the breach was neither trivial nor technical. I find that because she was not informed of this important information Ms. Hardie was not aware of the existence of duty counsel and how to access this service. Thus, it is apropos and I restate what I said in ***R. v. Farahanchi***, [2010] N.S.J. No. 507 (P.C) at para.53:

> **53** Under this branch of the test, my concern is not to punish the police, or to deter Charter breaches, but rather to preserve public confidence in the rule of law and its processes in that the message is clear that the justice system does not condone serious state misconduct. Thus, in the result, under this first aspect

> of the s. 24(2) test, I will exclude the challenged evidence obtained after the breach.

(2) The impact of the breach on the Charter-protected interests of the accused.

[40] I consider the impact of the breach on Ms. Hardie to be severe. However, I find that she was not subjected to any demeaning or degrading procedures and the evidence collected from her was non-intrusive and involved minimal impact on her bodily integrity. This was a case where the police did have grounds to make a breath demand and she did speak to a lawyer albeit one that she did not know, trusted or even wanted to speak to. Nonetheless, although she spoke with duty counsel, she only desired to speak to her own lawyer and, in the circumstances, I adopt the words of Green J, in ***R. v. Markovic***, [2013] O.J. No. 2549(O.C.J.) at para.49:

> 49 There are, however, in my view, some obvious benefits to consulting with counsel of choice as opposed to duty counsel. Firstly, the detainee is speaking to someone he/she already knows. Secondly, counsel of choice will, in many cases, already know some information about the detainee to help structure the advice and highlight the pros and cons of cooperating with the police. Thirdly, counsel of choice in most cases will be a lawyer that the detainee already trusts and is comfortable with thereby increasing the likelihood of having a full and frank conversation which will also produce better legal advice.

[41] Here, I think that a reasonable person fully apprised of all the facts would express concern that Ms. Hardie's constitutional rights should count for something. Furthermore, apart from the fact that the police failed to give her the full informational component of the right to counsel, it impacted upon her awareness of the availability of duty counsel and whether to choose to access this service in the absence of contacting her own lawyer. Furthermore, I find that, in the circumstances, the police took no meaningful or reasonable steps to ensure that she fully understood that right and neither did they correct their initial failure to fully inform her of that right.

[42] Thus, I find it apropos and reaffirm my view stated in ***Farahanchi***, *supra*., at para. 55**:**

> **55** … given the voluminous jurisprudence on this point, in my view, [the breach] is severe and any admission of the evidence would taint the trial fairness. Thus, in balancing the interests of truth with the integrity and the long-term effect on the administration of justice, it should be clear, based on the well-established law, that constitutionally entrenched rights do mean something and cannot be trivialized. The ends do not justify the means. Consequently, I conclude and find that a consideration of this second aspect of the s. 24(2) test militates in favour of excluding the evidence.

(3)Society's interest in the adjudication of the case on its merits

[43] I agree that the breath sample evidence obtained was reliable and essential to substantiate the charge under the **Criminal Code**, s. 253 (1) (b). The Certificate of a Qualified Technician is highly reliable and its admission would enhance the truth seeking function of the trial. ***R.v. Harrison*** 2009 SCC 34, [2009] 2 S.C.R. 494. Conversely, excluding highly reliable evidence would have a negative impact on the repute of the administration of justice. ***R.v. Cote***, [2011] S.C.J. No. 46, at para 47. I am also reminded that ***Grant****, supra.*, emphasizes that the public has a heightened interest in a justice system that is beyond reproach. Thus, as drinking and driving are a serious social problem in Nova Scotia, the public does have an interest in seeing that these types of cases are dealt with on their merits. Therefore, I find that a consideration of this third factor of the s. 24(2) test weighs in favour of admitting the evidence.

Balancing the interests

[44] In balancing all three factors the Supreme Court in ***Harrison***, *supra*., stated at para. 36:

> 36 The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[45] Thus, the s. 24(2) inquiry must look beyond this particular case and to consider the impact, over time, of admitting evidence obtained by the infringement of Ms. Hardie's constitutionally protected rights. On the one hand the breach was very serious as it was the complete omission of an essential ingredient to the informational component of the right to counsel. On the other hand while the public has an interest in seeing cases decided on their merits "the public must also have confidence that whenever a person is detained or is in police custody, regardless of the crime charged, that person's guaranteed and protected constitutional rights will be assiduously implemented by the police" ***Farahanchi***, *supra*, at para 59.

[46] Consequently, when these factors are weighed and balanced I find that, in the circumstances of this case, to admit the challenged evidence would undermine the long-term confidence in the justice system and bring the administration of justice into disrepute. For those reasons, I think that the need to safeguard, in the long run, the integrity of the justice system and the repute of the administration of justice in relation to guaranteed Charter rights outweighs the truth-seeking interests of the trial. Accordingly, I will exclude the Certificate of a Qualified Technician into evidence.

Merit of the case

[47] As I have suppressed the evidence essential to the Crown's case, on the charge pursuant to s. 253 (1) (b) the Crown's case on that charge necessarily must fail. However, there is the remaining charge pursuant to s. 253(1) (a) that requires, in the interest of completeness, a determination on its merits.

Impaired driving per Criminal Code s. 253(1) (a)

[48] The issue here is whether, on the total evidence and my findings of facts, I accept as true that Ms. Hardie did not consume alcohol before she arrived at the lake area and that her assertion on this point is credible, reliable and trustworthy.

[49] On the issue of assessing the credibility of witnesses, the court in ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 (B.C.C.A.), pronounced at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

[50] Also on the point is our Court of Appeals in ***R. v. D.D.S.,*** [2006] N.S.J. No. 103 (C.A.), at para. 77:

> Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[51] I accept and find that Ms. Hardie left her home shortly after 1300 hours to go to the Paper Mill Lake initially travelling via the Bedford Highway. Likewise, I accept and find that she had a telephone conversation with her sister, Ms. Turner that commenced at 1244 hours for a duration of 17 minutes. Furthermore, I accept and find that at 1330 hours she was driving on the Bedford Highway in front of a vehicle in which were Jenna Hanes and Kevin Nicks.

[52] Ms. Hanes and Mr. Nicks observed that Ms. Hardie paused at a red light at an intersection for an unduly length of time, crossed the median line on the highway and

when making a right turn unto Moirs Mill Road almost struck an oncoming car , hit the curb and just avoided hitting a parked truck. Ms. Hardie's explanation for these actions was that at the lights she was reading an email and texting; crossing the median was because she could not make up her mind whether she would turn into a nearby service station to obtain gasoline; on the wide turn onto Moirs Mill Road, a water bottle had fallen on the floor and the truck was in the way and she had to make the manoeuvre in order to avoid hitting it. She, however, was vague and evasive on why, in the first place, she would have been in the lane of the oncoming vehicle.

[53] On that point, considering the total evidence, I find that it is reasonable to conclude and I do conclude and find that Ms. Hardie's account was a shrewd and resourceful account but with a partial suppression of the truth. Further, I find that it is not in harmony with the existing preponderance of probabilities. I say so because in explaining herself when at the lakeside, she was adamant and clear in her testimony that she only had consumed alcohol between 1325 and 1330 hours. However, it has been established, without any reasonable doubt, that she was then seen driving on the highway. Thus, the reasonable inference, considering the total evidence, is that she was trying to formulate a plausible story but in the end created a fanciful explanation which on the preponderance of the existing probabilities was also a partial suppression of the truth. It also would appear that she was tacitly admitting prior alcohol consumption. Furthermore, when the police searched her vehicle at the lakeside they did not see any bottle inside in plain view nor was a bottle found on her person. What, if anything, did she do with the fallen bottle? She, on the evidence, gives no elucidation to support her story on this point. Therefore, given her inconsistencies and my acceptance of other reliable evidence pertaining to this point it was difficult for me, without any reasonable doubt, to accept her story on this point. In short, and in applying ***R.v. W. (D)[D.W.]***, [1991] 1 S.C.R. 742 I do not believe her on this point.

[54] In my opinion, and I find that what the witnesses, Mr. Nicks and Ms. Hanes, saw as ordinary drivers, caught their attention and caused them to have concerns that Ms. Hardie's driving behaviour; the long pause at the red light; straddling lanes; wide right turn almost hitting another vehicle; completely overcompensating by hitting the curb on the right-hand lane and then overcompensating again by going entirely in the left-hand lane were circumstantial evidence of conduct in support of an inference of impairment of her ability to drive. They also observed that after she passed the parked vehicle she stopped and appeared to be shaken-up from the incident. Accordingly, they called the police

[55] These witnesses also saw her arrive at the lakeside. I accept and find that they observed her walking slowly and cautiously from her vehicle to the beach. I also accept and find that between them and the lifeguard, Michael Gremley, they kept her under constant and continuous surveillance. I find that they did so because they still had concerns as they observed that her face was flushed with droopy eyes and her conduct in the water was odd. They again called the police to notify them of her current location.

[56] I find that the lifeguard, Michael Gremley, also had concerns about her being in the water as she appeared to be floundering. As well, I accept and find that, out of concern for her safety, he asked her to get out of the water and not to re-enter. When on land, I accept and find that he checked her vitals, queried whether she had anything to drink or was involved in an accident. Also, I accept and find that she denied both queries and became hostile

[57] From his experience as a life guard, and dealing with intoxicated persons, Mr. Gremley observed that Ms. Hardie's eyes were glossy and that she staggered when she walked. His opinion was that she was inebriated. However, Ms. Hardie's explanation for these observations was that before she arrived at the lakeside and when at home she had poured a Smirnoff Ice vodka cooler into her gym or work-out bottle and had added about one half cup of vodka. Soon after she arrived at the lake she declared that she took this bottle from the rear of her car and consumed three-quarters of this combination within a two minute time span.

[58] However, she had denied any drinking to the lifeguard who saw signs of impairment. Furthermore, she also stated that she had three coolers at the beach. When the police interviewed her they observed that she had red glossy eyes, a strong smell of alcohol emanated from her breath, she slurred her speech and stumbled as she walked. Even if I were to accept her story that she only drank on her arrival at the beach and was there to enjoy the sun and have a few drink, a practical and informed person would readily ask whether it is reasonable that she would drink almost all of her drink so rapidly and quickly given that she also explained that she intended to remain at the beach for some time. Also, given the *viva voce* testimony of Cst. Verner on her breath sample readings which is part of the evidence pointing to impairment and, which, as determined in ***R.v. Dinelle***, [1986] N.S.J. No.246 (C.A.), I am entitled to consider, would she be exhibiting such observed advanced signs of impairment in a period of ten minutes?

[59] I accept and find that she was under continuous and constant surveillance on her arrival at the lake. As well, I accept and find that nobody, during this persistent surveillance, saw her either eat or drink anything or ever had a bottle in her hand before the police arrived and arrested her. Additionally, no bottle was found in her vehicle or on her person when the police did their searches. Thus, when I weighed all these factors it was difficult for me to accept Ms. Hardie's assertion that she had consumed alcohol only when at the beach, as credible and trustworthy.

[60] In the result, I find that her testimony on this point was inconsistent and not in harmony with the other evidence pertaining to it. Similarly, I find on the total evidence, that it was unreliable and untrustworthy. In short, on that point, I do not believe her.

[61] I think that Ms. Turner's testimony is neutral, of limited value and carries little or no weight. True, Ms. Hardie may not have exhibited any signs of impairment when they had a telephone conversation. But, that conversation ended at about 1303 hours. What happened before the conversation and before Ms. Hardie was seen driving? She has denied dinking at home but her evidence is inconsistent as to the time of drinking and I

have found that she certainly did not consume any alcohol at the beach but there she exhibited strong signs of impairment. Consequently, I find that the rational conclusion would be, as it is consistent with the observations made and which I have accepted, and inconsistent with any other rational explanation, that she most likely drank alcohol before she drove and arrived at the beach.

[62] The issue now is: was her ability to operate her vehicle impaired by alcohol?

[63] In ***R. v. Stellato*** (1993), 78 C.C.C. (3d) 380 (Ont.C.A.) aff'd [1994] 2 S.C.R. 478n the Court pronounced that if evidence of impairment establishes any degree of impairment from slight to great the offence is made out.

[64] However, in ***R.v. Andrews***, [1996] A.J .No.8. (C.A.), at paras. 16 and 17, Conrad J.A' for the majority, concluded that ***Stellato*** was unclear on the distinction that he had discerned and supported his contention by referring to the decision of Dickson J. in ***Graat v. The Queen***, [1982] 2.S.C.R. 819,. His opinion was as stated ([1996] A.J .No.8.) at para. 19:

> **19** Such an interpretation of the penultimate paragraph in Stellato would also be contrary to the pronouncement of Dickson J. in Graat v. The Queen, [1982] 2 S.C.R. 819. The Supreme Court of Canada has made it clear that "impaired" in this section means a certain degree of drunkenness, and not simply any, minimal degree. In Graat v. The Queen, a case dealing mainly with the question of whether a lay-person could give an opinion of whether a driver was impaired, Dickson J. (as he then was) said at p. 837:
>
> Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication.
>
> And at p. 839, he stated:
>
> I would adopt the following passage from the reasons of Lord MacDermott in Sherrard v. Jacob ...:
>
> The next stage is to enquire if the opinion of the same witnesses was also admissible on the question whether the respondent, if he was under the influence of drink, was so to an extent which made him incapable of having proper control of the car he was driving. ...
>
> And, finally, also at p. 839:
>
> ... whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. It does not involve the application of any legal standard. It is

> akin to an opinion that someone is too drunk to climb a ladder or to go swimming ...(Emphasis added)
>
> Ultimately, this is why it is so important not to deal with the issue of impairment separate from impairment of one's ability to drive. Stellato must not be understood to mean that a person who has anything to drink and then drives a motor vehicle commits the offence under s. 253(a). Nor does it mean any lack of sobriety is sufficient. This is evident from the approval in Stellato (at p. 383) of the opinion of Mitchell J.A. in Campbell that "It is not an offence to drive a motor vehicle after having consumed some alcohol as long as it has not impaired the ability to drive."

[65] After summarizing the law, the Learned Judge stated the following principles at para 29:

> **29** In my view the following general principles emerge in an impaired driving charge:
>
> (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
>
> (2) there must be impairment of the ability to drive of the individual;
>
> (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
>
> (4)that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
>
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[66] Here, there is evidence before me that I accept that Ms. Hardie's manner of driving was erratic and unusual. She paused for an unduly length of time at the red light, straddled the lanes of the highway, made a wide right turn into the path of an oncoming vehicle almost hitting it and overcompensated by hitting the right curb and overcompensated again by going fully into the left lane. I find that the evidence supports the conclusion that it was a marked departure from normal conduct and conduct that indicated a deviation from normal driving conduct

[67] She has admitted consuming alcohol and on the evidence, I conclude and find that such consumption most likely occurred before she drove and arrived at the beach. The observations of her conduct on her arrival at the beach and immediately afterwards, both by lay persons and police officers, were that she was intoxicated. See: ***Graat***, *supra*. She had red glossy eyes, slurred speech, strong smell of alcohol on her breath and unsteadiness on her feet. The life guard also felt that for her safety she was too inebriated to continue swimming. On the total evidence, I conclude and find that she exhibited signs of impairment. When I consider all these factors and weigh them with the total evidence I find, beyond a reasonable doubt, that her ability to operate her vehicle, when on the highway, was impaired by alcohol.

Disposition

[68] I therefore conclude and find on the cited authorities and on my above analysis that:

(a) The Certificate of a Qualified Technician is excluded and the charge contrary to the ***Criminal Code*** s. 253 (1) (b) necessarily must fail. The Crown has not proved this charge beyond a reasonable doubt and I find her **not guilty** as charged.

(b) The Crown has proved beyond a reasonable doubt the charge contrary to the ***Criminal Code*** s. 253 (1) (a) and I find her **guilty** as charged.