IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacNeil, 2011 NSSC 73

Date: 20110204
Docket: PHJCSC331346
Registry: Port Hawkesbury

Between:

Matthew David MacNeil

Applicant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Frank C. Edwards

Heard: February 4, 2011 in Port Hawkesbury, Nova Scotia

Counsel: John MacDonald, for the Crown
Kevin Patriquin, for the Defendant

By the Court:

Introduction:

[1] Mr. MacNeil is charged on an indictment with three offences contrary to Section 255(2) of the *Criminal Code of Canada*, occurring on or about the 16th day of September, 2009, at or near Highway 19, Troy, Nova Scotia.

[2] Mr. MacNeil claims breaches of his rights under Sections 8 and 10(b) of the Charter. Specifically, Mr. MacNeil is seeking to exclude the results of blood samples obtained by the police pursuant to a demand made by Constable Michael Black, and also to exclude the evidence of hospital lab results taken by employees of the Strait Richmond Hospital.

FACTS:

[3] On September 16, 2009, Cst. Michael Black responded to a call to attend at a motor vehicle accident at Troy, Nova Scotia. Cst. Black arrived at the scene at 10:27 p.m., approximately five to ten minutes after he received the call. At some

point he observed Mr. MacNeil sitting in the driver's seat of one of the vehicles involved in the collision.

[4] Mr. MacNeil was not cooperating with the paramedics on the scene in that he did not want to leave the vehicle to attend for medical treatment. His uncooperative attitude was of a verbal nature, and did not involve any physical confrontation. He eventually did cooperate and leave the vehicle. He got out mostly on his own accord with a little assistance from members of the Fire Department. When Cst. Black approached the vehicle, he indicated he could smell an odour of liquor and noticed that Mr. MacNeil was unsteady on his feet.

[5] The Supervisor for the Emergency Medical Services that was on the scene requested that Cst. Black transport Mr. MacNeil to the hospital. Cst. Black placed Matthew MacNeil in the back seat of the police car. The Cst. told Mr. MacNeil that he believed Mr. MacNeil had been drinking and that he was impaired. AT 11:25 p.m., Cst. Black read Mr. MacNeil the standard police caution and his right to counsel. Cst. Black did not arrest Mr. MacNeil, nor did he give him either a breathalyser or a blood demand.

[6] Cst. Black did not search Mr. MacNeil. Cst. Black allowed a lady at the scene, a friend of Mr. MacNeil's, to sit in the back seat of the police car for the approximate 20 minute drive to the Strait Richmond Hospital. They left the accident scene at approximately 11:30 p.m.. Cst. Black and Mr. MacNeil had no further conversation until after they arrived at the Strait Richmond Hospital.

[7] Upon arrival at the Strait Richmond Hospital, Cst. Black read him the standard blood demand for samples of his blood. He did not re-read him the police caution, nor did he re-read his rights to counsel. This occurred at 11:50 p.m., approximately one-half hour after Mr. MacNeil was cautioned and notified of his right to counsel.

[8] Mr. MacNeil consented to the police obtaining blood samples. Blood samples were not taken at that time as Mr. MacNeil and other parties involved in the motor vehicle collision were being treated by various medical personnel.

[9] At 00:57 hours on September 17, 2009 Cst. Black gave Mr. MacNeil a second demand for blood samples. Cst. Black testified that he reminded Mr. MacNeil of the police caution at the time of the second demand. Cst. Black was

unsure whether he gave a similar reminder at the time of the first demand. On neither occasion did Cst. Black remind Mr. MacNeil of his right to counsel.

[10] A doctor subsequently took two samples of Mr. MacNeil's blood at 1:14 and 1:17 a.m., September 17, 2009. The blood was obtained in a approved container pursuant to the provisions of the *Criminal Code* and kept by Cst. Black until he forwarded same on to the RCMP laboratory for analysis.

[11] At the time the blood was taken, the police did not have the doctor sign the necessary Certificate of a Qualified Medical Practitioner. The police did not make another attempt to have the Certificate of Qualified Medical Practitioner signed until some time in the year 2010.

[12] At no time was Matthew MacNeil placed under arrest by the police on the night of September 16 and September 17, 2009. At no time did police inform Mr. MacNeil that he was being investigated for impaired driving causing bodily harm. When he was given his rights to counsel, he was not informed that he was suspected of committing a criminal offence.

[13] Mr. MacNeil originally elected trial by judge and jury and this matter was set down for Preliminary Inquiry on June 17, 2010.

[14] For reasons which I will discuss, Sgt. Shelby Miller of the RCMP completed an Information to Obtain a Search Warrant on June 16, 2010, seeking the hospital laboratory report of Matthew MacNeil.

[15] In his summary in the Information to Obtain a Search Warrant, Sgt. Miller stated the following:

> "I have reviewed Section 254(3)(a)(ii) of the Criminal Code, and it was the opinion of Cst. Black at the time that Matthew MacNeil could not provide a breath sample. Cst. Black read Matthew MacNeil the blood demand and samples were taken. However, Dr. Mohan did not complete the Certificate of Qualified Medical Practitioner as required by the Criminal Code to ensure the taking of the blood from Matthew MacNeil would not put his life in jeopardy and that it was safe to do so.
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> I believe the taking of the blood for the blood sample did not jeopardize the life of Matthew MacNeil, and if it would have, Dr. Mohan would not have done so. If blood was taken for a medical purpose, it would be shown on a laboratory report. The existence of these results will determine the taking of the blood did not jeopardize his life because Matthew MacNeil is still alive today.
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> Dr. Mohan is currently in India and not due to return to Nova Scotia until the middle of July. This matter is set for Preliminary Inquiry on June 17, 2010, in Port Hawkesbury. This is why the laboratory report for Matthew MacNeil was requested."

[16] As a result of this Information to Obtain, a Justice of the Peace issued a Warrant to Search for the laboratory report for Matthew David MacNeil, regarding his visit and treatment at the Strait Richmond Hospital on September 17, 2009. The Warrant stated that it was to be executed on the 16th day of June, 2010. The Warrant also stated:

> "It is also ordered that a Peace Officer report in accordance with subsection 487.1(9) *Criminal Code* thereon as soon as practical but within a period not exceeding seven days from the execution of the warrant (or, if the warrant expires without execution, within seven days of the expiry) to the Clerk of the Court for the territorial jurisdiction in which this Warrant is intended for execution at: the Port Hawkesbury Provincial Curt, 15 Kennedy Street, suite 201, Port Hawkesbury, County of Inverness, Province of Nova Scotia. (Emphasis added)

[17] The laboratory report was seized pursuant to the Warrant, but the report to the Judge or Justice pursuant to Section 498.1 of the *Criminal Code* was dated and filed with the Court on August 4, 2010, some 49 days after the item was seized.

[18] The Crown did not introduce the laboratory report at the Preliminary Inquiry.

[19] On September 27, 2010, Sgt. Shelby Miller made an application to the Provincial Court for a Production Order pursuant to section 487.012 of the *Criminal Code.* In his conclusion in his Affidavit used as part of that application, Sgt. Miller stated as follows:

> "Initially, I requested a copy of the laboratory report to determine that the taking of the blood from Matthew MacNeil would not put his life in jeopardy. Upon seizing the laboratory report and reading it, I determined the following: a medical blood sample was seized and analysed from Matthew MacNeil..
>
> The conclusion goes on to state that:
>
> the reports I am requesting should show the chain of custody of the medical blood sample from the time it was drawn from Matthew MacNeil until it was analysed."

[20] A Provincial Court Judge granted the Production Order on September 27, 2010. Police seized the medical records of Matthew MacNeil, on September 29, 2010.

ISSUES:

[21] Mr. MacNeil seeks an exclusion of the following evidence pursuant to Section 24(2) of the Charter alleging that such evidence was obtained in a manner that infringed or denied his rights as guaranteed by Section 8 and 10(b) of the Charter, namely:

> a) evidence of the samples of blood obtained from Mr. MacNeil by Cst. Black in the morning of September 17, 2009 (the demand samples) and,
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> b) evidence contained in the laboratory report of Mr. MacNeil prepared at the Strait Richmond Hospital on September 17, 2009 (the medical samples).

ANALYSIS:

A: The Demand Samples

[22] I will deal first with the blood samples taken as a result of Cst. Black's demand on September 17, 2009 at 00:57 hrs. The Crown acknowledges that Cst. Black did not comply with the requirements of Section 254(3)(a)(ii) and Section 254(4) of the Criminal Code: Those Sections read:

> 254(3)(a)(ii) "if the peace officer has reasonable grounds to believe that their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood;
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> 254(4) Samples of blood may be taken from a person under subsection (3) or (3.4) only by or under the direction of a qualified medical practitioner who is satisfied that taking the samples would not endanger the person's life or health;

[23] Clearly, in order to establish reasonable grounds for a blood demand, Cst. Black must first consult with medical personnel to determine whether Mr. MacNeil was incapable of providing a breath sample or that it would have been impracticable to obtain a breath sample from him. Section 254(4) required consultation with medical personnel to ensure that taking blood samples would not endanger Mr. MacNeil's life or health. Cst. Black consulted no one. He therefore did not have the requisite grounds to make the blood demand.

[24] I am satisfied that Mr. MacNeil was "detained" at the scene. In the context of a serious motor vehicle accident, Mr. MacNeil, being found in the driver's seat, exhibiting some indicia of impairment (smell of liquor, vociferous, unsteady on his feet), Cst. Black would not have permitted Mr. MacNeil to leave. Cst. Black was

therefore obligated to read Mr. MacNeil his right to counsel. He did so at 11:25 p.m.

[25] But that was not enough. Cst. Black was also obliged to give Mr. MacNeil an opportunity to consult counsel at the time of the blood demands at 11:50 p.m., September 16 and again at 00:57 on September 17. At this point Mr. MacNeil's jeopardy had changed. Specifically, Cst. Black was then asking Mr. MacNeil whether he would agree to an invasive procedure which could provide incriminating evidence against him. He obviously had the right at those times to get legal advice about the implications of his decision and what his decision should be.

[26] The Crown has acknowledged the failure by Cst. Black to comply with Section 254 of the Code. Arguably, the seizure of the blood samples pursuant to an unjustified demand amounts to a Section 8 breach. But I need not go there. Failure to comply with the Code Sections would make the demand samples inadmissible. Even if that were not the case, the 10(b) breach would settle the issue.

[27] The Crown argues that the demand samples should not be excluded under S.24(2) of the Charter. The S.C.C. decision in **R. v. Grant** [2009] SCJ No. 32 provides guidance. The headnote reads in part:

> 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, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the *Charter* and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination. [paras. 71-72] [paras 76-77] [para. 79] [para.86] [para. 127]

[28] Further, at paragraphs 108-111, the Court stated:

> The first inquiry informing the s. 24(2) analysis - the seriousness of the *Charter*-infringing conduct - is fact-specific. Admission of evidence obtained by deliberate and egregious police conduct that disregards the rights of the accused may lead the public to conclude that the court implicitly condones such conduct,

> undermining respect for the administration of justice. On the other hand, where the breach was committed in good faith, admission of the evidence may have little adverse effect on the repute of the court process.
>
> The second inquiry assesses the danger that admitting the evidence may suggest that *Charter* rights do not count, whereby negatively impacting on the repute of the system of justice. This requires the judge to look at the seriousness of the breach on the accused's protected interests. In the context of bodily evidence obtained in violation of s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impression (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion of these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.
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> The third line of inquiry - the effect of admitting the evidence on the public interest in having a case adjudicated on its merits - will usually favour admission in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission.
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> While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

[29] The 10(b) breach does not withstand a 24(2) analysis. In its brief, the Crown at pp 9-10 quotes **B. v. Smith** [1991] 1 SCR 714 (SCC) as follows:

> "The question reduces to this: in this case was the accused possessed of sufficient information to make his waiver of counsel valid? To my mind, to establish a valid waiver of the right to counsel the trial judge must be satisfied that in all the circumstances revealed by the evidence the accused generally understood the sort of jeopardy he faced when he or she made the decision to dispense with counsel. The accused need not be aware of the precise charge faced. Nor need the accused be made aware of all the factual details of the case. What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis should be on the reality of the total situation as it impacts on the understanding of the accused, rather than on technical detail of what the accused may or may not have been told."

[30] Here, Cst. Black testified that Mr. MacNeil (when read his right to counsel at the scene) responded "I don't need one" or words to that effect. At that point there had been no mention of possible charges or the officer's intention to seek a breath or blood sample. The second blood demand (ie., the one that triggered the taking of the blood samples) did not occur for another hour and a half. It is impossible to know whether Mr. MacNeil even considered the lawyer option at this stage even though his legal jeopardy had starkly changed.

[31] The 24(2) **Grant** analysis requires that I look at the seriousness of the 10(b) breach. The Crown argues that the breach was made in good faith by a very inexperienced officer. Cst. Black had only two month's police experience at the

time. While that may be true, the breach was extremely serious in that it deprived Mr. MacNeil of the ability to make "an informed and appropriate decision."

[32] The last finding overlaps the second stage of the **Grant** analysis, namely the impact of the breach on the *Charter* - protected interests of the accused. Here the accused was effectively deprived of his 10(b) right. The breach completely undermined the accused's right to consult counsel and consequently, his right to be secure from what in this case amounted to an invasive and unjustified procedure to seize samples of his blood. The right to be secure from unreasonable search and seizure does not mean much if one cannot access appropriate legal advice in relation to that right.

[33] The third line of inquiry requires that I consider the effect of admitting the evidence on the public interest in having the case adjudicated on its merits. The blood samples obtained pursuant to the demand are probably reliable. That reliability is easily trumped by the fact that Mr. MacNeil was effectively deprived of the option to make an informed and appropriate decision about whether or not to consent to the taking of the blood samples. As noted, the seriousness of the 10(b) breach is compounded by the fact that the constable did not have grounds to make

a blood demand. The cumulative effect of the police errors requires that the blood samples be excluded. Their admission, in the circumstances I have outlined, would bring the administration of justice into disrepute.

B. <u>The Medical Samples</u>

[34] As the Preliminary Inquiry approached (June 17, 2010), Cst. Black's Supervisor, Sgt. Shelby Miller, noted that there was no Certificate of a Qualified Medical Practitioner. As far as Miller knew, the physician involved was in India and would not be returning for another month. Sgt. Miller mistakenly believed that the lack of a Certificate could be repaired if he were able to access Mr. MacNeil's medical records. He hoped that the records would show that other blood samples were taken for medical reasons at the same time the demand samples were taken. If that were the case, he reasoned, the Court could then infer that the taking of the blood samples did not endanger Mr. MacNeil's life, or health and therefore, the requirement of s.254(4) of the Code would be satisfied. Sgt. Miller now acknowledges that his reasoning is flawed and that a Certificate is required.

[35] As noted, the day before the Preliminary, June 16, 2010, Sgt. Miller obtained a Warrant and seized a laboratory report re Mr. MacNeil's treatment on September

17, 2009. The laboratory report showed that blood samples had been taken for medical reasons and that Mr. MacNeil's blood alcohol content had exceeded the legal limit. Sgt. Miller then (September 27, 2010) applied for and obtained a Production Order re Mr. MacNeil's medical records. He did this in order to determine who had drawn the blood samples and to establish the continuity chain for the samples.

[36] It is apparent that by this time Sgt. Miller realized that the demand samples might not be admissible evidence in Court. The Crown had elected not to proceed with the over 80 charges at the Preliminary. Sgt. Miller therefore had decided that the medical samples provided an alternative means of proving Mr. MacNeil's impairment.

[37] The Defence countered that "...the Information to Obtain (ITO) the Warrant was misleading and not obtained in good faith and that this procedure was used to get around a violation of Mr. MacNeil's rights." (Brief p.14) With respect, I disagree with this proposition. Sgt. Miller was mistaken but he acted in good faith. I am satisfied that he honestly, but mistakenly, believed that obtaining the medical samples could make up for the lack of a Certificate.

[38] I do not agree that the issuing Justice was misled. If I excise the impugned portions of the ITO (Paragraphs 5e, 5o, 5p, 5q, 11, 14 and 15 - the last four subparagraphs) I conclude that the Justice had a sufficient basis to issue the Warrant. Accordingly, I have read those portions of the ITO which do not refer to the demand samples nor to Sgt. Miller's desire to obtain samples to replace the Certificate of a qualified medical practitioner.

[39] The surviving portions of the ITO show that Cst. Black on September 16, 2009 observed Mr. MacNeil at the scene of a highway accident. At the time Mr. MacNeil was apparently the driver of one of the vehicles and was exhibiting indicia of impairment. A police accident reconstructionist determined on September 17, 2009 that the accident was apparently caused by the vehicle driven by Mr. MacNeil (Para. 7 of ITO).

[40] On June 15, 2010, Sgt. Miller, a 21 year veteran police officer, spoke with Elaine Cameron, Health Records Specialist at the Strait Richmond Hospital. In paragraphs 13 and 16 of the ITO, Sgt. Miller states the following:

> "Although Elaine Cameron would not confirm nor deny if a blood sample was taken from Matthew MacNeil for the Strait Richmond Hospital, it has been my experience, as a police officer investigating crashes that blood samples are taken and screened for drugs and a BAC. This is done to determine a proper course of treatment for the victim.
>
> I believe the evidence sought as a result of this warrant will afford evidence in this investigation."

[41] In short, Sgt. Miller related to the issuing Justice the grounds for his belief that Mr. MacNeil had been involved in the commission of a criminal offence. He also outlined why he thought Mr. MacNeil's medical records would afford evidence in relation to the alleged offence. On that basis, I would uphold the issuance of the Warrant.

[42] The laboratory report obtained pursuant to the Warrant confirmed the police suspicion that Mr. MacNeil's blood alcohol content exceeded the legal limit. Consequently, in view of my finding that the Warrant was properly obtained and issued, I have no difficulty with Sgt. Miller proceeding to obtain a Production Order in order to ascertain the identity of the taker of the medical samples and the chain of continuity.

[43] In short, I am satisfied there was no *Charter* violation in relation to the issuance of either the Warrant or the Production Order.

C. <u>Late Return on Warrant:</u>

[44] The Warrant obtained on June 16, 2010 contained the following clause: "It is also ordered that a peace officer report in accordance with subsection 487.1(9) Criminal Code thereon as soon as practicable but within seven days from the execution of the Warrant..."

[45] In fact the return was not made until August 4, 2010, ie., 49 days after the execution of the Warrant. Sgt. Miller candidly acknowledged that this was an "oversight" on his part. The failure to make a timely return is significant. In his Reply Brief, Defence Counsel quoted the following case law:

> In the Nova Scotia case of ***R. v. MacNeil*** (M), the Honourable Justice Davison quotes with approval the words of Justice Borins of the Ontario District Court, at paragraphs 23 - 24 (130 N.S.R. 2d 202) (copy attached). At paragraph 24, the Court quotes that *"it is obvious that if no return is made not only has the officer who has executed the warrant failed to comply with the law, but the justice is prevented from exercising the duties which the law has imposed on him or her, and those who have a legal right to examine the results of the search are prevented from doing so."*

> Justice Davison went on to quote as follows: *"I have no doubt that the necessity of making a return is an integral and essential aspect of the legal execution of a search warrant. As I will explain, the failure to act in compliance with s.443(1) removes an essential safeguard to the invasion of privacy rights permitted by that section. It is the courts and not the police who determine whether adequate grounds exist for retaining seized materials. When the provisions of s.443(1) have not been met the search is rendered unlawful."*
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> The case of ***R. v. Noseworthy*** [1995] O.J. No. 1759 (attached) is a decision on a case where a report to a Justice in accordance with section 490 of the *Criminal Code* was made 28 days after the execution of the search warrant. Justice Desmarais ruled that the search warrant was to be quashed. The lack of adherence to the procedure provided in the *Code* ignored the accused's rights under section 8 of the *Charter* and could not be condoned. It is the position of Mr. MacNeil that a similar ruling should be made in this case.

[46] I note that both the **MacNeil** and **Noseworthy** cases cited pre-date **Grant**. If I accept that a s.8 breach was occasioned by the late return, I must subject that breach to a **Grant** analysis.

[47] Accordingly, I look first at the seriousness of the Charter-infringing state conduct. Here, I am satisfied with Sgt. Miller's explanation that the late return resulted from an oversight. It was not a deliberate act; it was simple human error.

[48] Secondly, I consider the impact of the breach on the Charter-protected interests of the accused. Here the impact was minimal bordering on non-existent.

Nothing happened during the 49 day period - none of the seized evidence was distributed during that time period.

[49] Third, I consider society's interest in the adjudication of the case on its merits. Here the medical blood samples are apparently reliable evidence which will, at trial, be the subject of testimony by an expert. The evidence is obviously a critical component of the Crown's case. It is not conscripted evidence. The trial's truth seeking function would be better served by the admission of this evidence than by its exclusion.

[50] Defence Counsel cites **R. v. Dyment** (1988) 45 CCC (3d) 244 (S.C.C.) to support his argument that the accused's private medical records are inviolable. I would state that case was directed at "loose arrangements between hospital personnel and law enforcement officers." An individual's medical records may only be disclosed to police when the law requires it. That is exactly what occurred here with the Warrant and the Production Order.

[51] In conclusion, I am satisfied that the admission of the evidence related to Mr. MacNeil's medical blood samples would not bring the administration of justice

into disrepute. The medical blood samples will therefore be admitted into evidence.

J.

Sydney, Nova Scotia