SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Gillespie, 2013 NSSC 185

Date: 20130418
Docket: CRP 362340
Registry: Pictou

Between:

Her Majesty the Queen

v.

John Arthur Gillespie

Judge: The Honourable Justice Glen G. McDougall

Heard: March 11, 15, 2013 in Pictou, Nova Scotia

Oral Decision: April 18, 2013

Written Decision: June 18, 2013

Counsel: T. William Gorman, for the Provincial Crown
H. Edward Patterson, for the Accused

BY THE COURT [ORALLY]:

[1] John Arthur Gillespie (henceforth referred to as "Mr. Gillespie" or "the accused") stands charged:

> THAT he on or about the 7th day of February, A.D., 2011, at or near, Little Harbour, County of Pictou, Province of Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did have the care or control of a motor vehicle contrary to Section 253(1)(a) of the Criminal Code;

AND FURTHER

THAT he on or about the 7th day of February, A.D., 2011, at or near, Little Harbour, County of Pictou, Province of Nova Scotia, did without reasonable excuse fail to comply with a demand made to him by Cst. Shane Foster, a peace officer, to provide forthwith a sample of his breath as in the opinion of Cst. Shane Foster, a qualified technician, were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to section 254(5) of the Criminal Code.

[2] After entering a "Not Guilty" plea on each of the two counts in the Indictment, the trial got underway on March 8, 2012.

[3] It was agreed between counsel that the matter would proceed by way of a blended *voir dire*. Crown counsel proposed to call all of the prosecution witnesses. The evidence of these witnesses could be considered in deciding the **Charter** motion advanced by the Defence and also in deciding whether the Crown had proved the case against the accused to the requisite standard of proof beyond a reasonable doubt.

[4] Any evidence called by the Defence would be for *voir dire* purposes only, leaving it to the Defence to elect to adopt that testimony as well as to call additional evidence for trial purposes after the Court ruled on the Defence allegation of a **Charter** violation.

[5] The Notice of Application filed by Defence counsel reads:

> TAKE NOTICE that an Application will be made to the Trial Judge presiding at Provincial Court, Pictou at 9:30 in the forenoon, Thursday, the 8th day of March, A.D., 2012 or so soon thereafter as the matter may be heard at Pictou Justice Centre, 69 Water Street, Pictou, Province of Nova Scotia:
>
> 1. For a declaration that the rights of the said John Arthur Gillespie pursuant to section 10(b) of the Canadian Charter of Rights and Freedoms were breached in the course of the investigation of the forgoing charges; and
>
> 2. An order pursuant to section 24(2) of the said Charter excluding all evidence obtained subsequent to the alleged Charter breach, in particular any and all evidence of relating to the alleged failure of the said John Arthur Gillespie to

provide a sample of his breath suitable for analysis to constable Shane Foster as alleged in the Information charging the foregoing refusal offense.

DATED at New Glasgow, Nova Scotia, this 1st day of March, 2012

[Original signed by:]

H. Edward Patterson

Counsel for John Arthur Gillespie

[6] The Court's ruling is confined to a determination of whether the accused's right to counsel – a right guaranteed by the **Canadian Charter of Rights and Freedoms** (henceforth referred to as "the **Charter**") – has been breached.

[7] Section 10, subsection (b) of the **Charter** reads:

> 10. Everyone has the right on arrest or detention
>
> ...
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

[8] In the Supreme Court of Canada case of **R.** v. **Bartle**, [1994] 3 SCR 173, Chief Justice Lamer writing for himself and Justices Sopinka, Cory, Iacobucci and Major spelled out first, the purpose of section 10(b), and then, secondly, the corresponding duties associated with a meaningful exercise of that right.

[9] At page 11 of 29 of the CanLII version of that decision Lamer, C.J. wrote:

> (a) *The Purpose of Section 10(b)*
>
> The purpose of the right to counsel guaranteed by s. 10(b) of the *Charter* is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233, at pp.l 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of

liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: *Brydges*, at p. 206; *R. v. Hebert,* 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, at pp. 176-77; and *Prosper*. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen,* 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

[10] On the same page and the one following the Chief Justice wrote:

(b) *The Duties Under Section 10(b)*

17 This Court has said on numerous previous occasions that s. 10(b) of the *Charter* imposes the following duties on state authorities who arrest or detain a person:

(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

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

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again except in cases of urgency or danger).

...

18 Importantly, the right to counsel under s. 10(b) is not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duty on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: ... Furthermore, the rights guaranteed by s. 10(b) may be waived by the detainee, although the standard for waiver will be high, especially in circumstances where the alleged waiver has been implicit...

19 Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible" manner: ... Unless they are clearly and

> fully informed of their rights at the outset, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence. ... Moreover, in light of the rule that, absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution, it is important that the standard caution given to detainees be as instructive and clear as possible....
>
> 20 Indeed, the pivotal function of the initial information component under s. 10(b) has already been recognized by this Court. For instance, in *Evans*, McLachlin J., for the majority, stated at p. 891 that a "person who does not understand his or her right cannot be expected to assert it". In that case, it was held that, in circumstances which suggest that a particular detainee may not understand the information being communicated to him or her by state authorities, a mere recitation of the right to counsel will not suffice. Authorities will have to take additional steps to ensure that the detainee comprehends his or her s. 10(b) rights. Likewise, this Court has stressed on previous occasions that, before an accused can be said to have waived his or her right to counsel, he or she must be possessed of sufficient information to allow him or her to make an informed choice as regards exercising the right. ...

[11] In a more recent decision from the Nova Scotia Court of Appeal styled **R.** v. **MacGregor**, [2012] N.S.J. No. 70, Justice Peter Bryson at para. 29, stated:

> 29 ... police are not mind readers and have no obligation to respond to an undisclosed, subjective understanding of a detainee. Rather, their obligation is to respond appropriately if it can be reasonably inferred that a detainee does not understand his or her rights. In *R. v. Kennedy*, [1995] N.J. No. 340, 135 Nfld. & P.E.I.R. 271 (Nfld. C.A.), the Newfoundland Court of Appeal put it this way:
>
> > **30 The detainee's right, therefore, is to be properly informed. There is no absolute protection against a lack of appreciation of the information conveyed.** The fulfilment of the informational component of the right to counsel does not hinge upon whether the detainee understood the communication but whether the essential elements of the right were adequately communicated. It is not, therefore, so much a question whether the message was comprehended; but if it was comprehensible.
> >
> > 31 ... **if there are indications that the person under detention has not sufficiently understood or appreciated his or her right to counsel when conveyed to him or her, the duty will entail such steps as are necessary to facilitate adequate comprehension.** In the absence of signs of lack of

> such comprehension, however, adequate communication will satisfy the requirements. This is clear from Bartle where, in underscoring the importance of the standard police caution given to detainees being as instructive and clear as possible, Lamer, C.J.C. refers at p. 193 to the rule that:
>
> > ... absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution ...

[12] As I understand the position advanced by counsel for the Defendant, the issue is not whether the arresting police officer adequately informed the detainee but rather were there indications that should have alerted Constable Foster to the fact that the detainee did not sufficiently understand or appreciate his right to counsel.

[13] The accused, Mr. Gillespie, testified that at some point in time after he moved from the front passenger's seat to the driver's seat of the Honda CRV he lapsed into a state after which he could no longer recall what had happened. It was only after he awoke the next morning in police cells that he once again became aware of his surroundings and could appreciate what was happening.

[14] Mr. Gillespie could vividly recall the events that occurred on the day prior to the incident and the events leading up to the time his vehicle left the travelled portion of the Egypt Road in Pictou County as well as some of the things that happened after the vehicle left the road while he was waiting for his friend, Gus Bezanson, to return with another of Mr. Gillespie's vehicles, a Ford F-150, ostensibly to tow the Honda CRV from the snowbank in which it was firmly embedded.

[15] Mr. Gillespie recalled in detail what meals he had and the various medications he took the day before the day of the alleged offence on February 7, 2011. He also recalled skipping breakfast and lunch that day while he attended to his stock market activities in his home office. Nor did he take his prescribed dosage of metformin on that day. Normally he would take two metformin pills in the morning and two more in the evening. Each pill had a dosage of 500 milligrams. Mr. Gillespie also took medication for hypertension (high blood pressure) and for cholesterol.

[16] Mr. Gillespie testified that he normally took his medication for these latter two conditions in the morning. As far as he could recall he took them as prescribed on the day of the events that led to these charges that are now before the Court.

[17] He also testified that on the day before, Sunday, February 6, 2011, he did not take his metformin pills as he normally would. Instead of taking two in the morning and two in the evening, he, instead, took all four at once. He testified that this would have been at 8 or 9 o'clock that evening after he had consumed his evening meal between 6:30 and 7:00 p.m.

[18] During the afternoon of Monday, February 7, Mr. Gillespie indicated that he had three drinks of Canadian Club whiskey from a previously opened pint bottle he happened to find tucked away in his wood pile.

[19] These three drinks, taken straight, were consumed in equal amounts between approximately noon and 3:30 p.m. Given the estimated amount of whiskey that was in the 375 millilitre bottle when Mr. Gillespie found it in the wood pile it was estimated that these three drinks would have amounted to approximately 164 millilitres of a beverage consisting of 40% alcohol by volume.

[20] Mr. Gillespie continued to work on his stock portfolio throughout the afternoon. Meanwhile his friend, Gus Bezanson, was laying flooring upstairs in the "Gillespie" residence. When he finished his work for the day, Mr. Gillespie, instead of waiting for his wife, Audrey, to arrive home in her vehicle and despite not having a valid driver's license, decided to give Mr. Bezanson a drive home in the Honda CRV. Like Mr. Gillespie, Mr. Bezanson was also prohibited from operating a motor vehicle due to some prior indiscretions.

[21] Mr. Gillespie and his passenger departed the Gillespie residence sometime around 5:15 p.m. or a little after. On the way to Mr. Bezanson's residence Mr. Gillespie stopped at Cornish's – a convenience store in the vicinity of the Egypt Road. Mr. Gillespie went into the store intending to buy a newspaper and a coffee and some cigarettes for Mr. Bezanson. Upon discovering that he had forgotten to take some money with him when he left his house, Mr. Gillespie returned to the Honda CRV without purchasing any of the items mentioned.

[22] Mr. Gillespie testified that he had not been feeling well on the way to Cornish's and he suddenly began to feel much worse. Consequently he asked Mr. Bezanson to drive while he took over the front passenger's seat vacated by his friend.

[23] Because Mr. Bezanson had indicated, in response to a question put to him by Mr. Gillespie, that he was hoping to be paid a $40.00 advance on his week's wages Mr. Gillespie instructed Mr. Bezanson to go back to the Gillespie residence so he could get some cash money to give to him.

[24] Mr. Bezanson had testified previous to Mr. Gillespie and for the first time acknowledged that he had been driving the vehicle at the moment it went off the road and got hung-up in a snowbank along the side of the Egypt Road where it was later discovered by some passers-by, one of whom was David MacDonald and another, Brian MacLeod.

[25] When Mr. MacDonald arrived at the scene where the Honda CRV had come to rest in the snowbank there was one other unidentified individual already there. This individual flagged Mr. MacDonald down. He asked Mr. MacDonald to call for help indicating there was a gentleman still in the stricken vehicle.

[26] Mr. MacDonald proceeded to call 9-1-1 to report the mishap. While he was doing this another individual who lived nearby arrived at the scene.

[27] This person was Brian MacLeod. Mr. MacLeod also testified. He was acquainted with the accused – Arthur Gillespie. Mr. MacLeod had some First Aid training as a Medical First Responder. He is a volunteer firefighter.

[28] Mr. MacLeod approached the Honda CRV to check on the sole occupant. He could not recall if the door was open or if he opened it. He leaned in at which time he recognized Mr. Gillespie who was sitting behind the wheel in the driver's seat.

[29] He asked Mr. Gillespie if he was okay. He did not get a response. Mr. MacLeod said he called Mr. Gillespie by name. He formed the impression that Mr. Gillespie noticed his presence. He said Mr. Gillespie's eyes appeared glazed. When he attempted to take Mr. Gillespie's pulse he recalled him resisting a little bit. Mr. MacLeod concluded that, at least, he was conscious and not in any immediate danger.

[30] Mr. MacLeod testified that he observed Mr. Gillespie's eyes to be watery and his skin tone was a little more reddish than the way it appeared as Mr. Gillespie sat in the courtroom on the day Mr. MacLeod testified. What he also recalled was that Mr. Gillespie's head was "sort of ... hanging down." He did not speak nor was he moving very much.

[31] Mr. MacLeod also observed Mr. Gillespie being assisted by a police officer, after he was removed from the Honda CRV, and as he walked towards the police vehicle. He also noted Mr. Gillespie's pants being wet. Mr. MacLeod could not say that Mr. Gillespie was staggering as he was being assisted to the police vehicle.

[32] Mr. MacLeod testified that he could not detect the odour of alcohol emanating from Mr. Gillespie. He also said he thought he recalled although he could not be positive that he heard the driver's door of the Gillespie vehicle being slammed shut.

[33] Mr. MacDonald earlier testified that he witnessed the vehicle's occupant reach out and shut the door. Both Mr. MacDonald and Mr. MacLeod testified that they did not observe Mr. Gillespie attempt to get out of the vehicle while they were there.

[34] I had earlier made reference to Gus Bezanson's testimony. His testimony attempted to corroborate the later testimony of Mr. Gillespie in respect to the events that took place from the moment when they left the Gillespie residence and the time when the vehicle then being driven by Mr. Bezanson, (as he claimed), landed in the snowbank.

[35] Mr. Bezanson testified that after some failed attempts to extricate the vehicle from the icy embrace of the snowbank, he hitched a ride from a passer-by who happened upon the scene with the intention of going back to the Gillespie residence to get the Ford F-150 truck and a tow rope so that he could return and pull the Honda CRV out of the snowbank.

[36] Mr. Bezanson testified that he explained his intentions to Mr. Gillespie before leaving. Mr. Gillespie testified that he had a need to urinate since the time he was at Cornish's convenience store. After Mr. Bezanson's departure the urge became more pressing and because he could not open the passenger side door due to the snow pressing up against it he decided to urinate where he sat.

[37] Mr. Gillespie said he later began to feel uncomfortable sitting on the wet seat and so crawled over the centre console and sat in the driver's seat.

[38] Mr. Gillespie also recalled drinking the remaining whiskey from the Canadian Club pint bottle – an amount later estimated to be about 164 millilitres. He said he did this to ward off the cold. He stated that he consumed the remainder of the whiskey – straight – over the course of about five minutes. As for the other full pint bottle of Canadian Club whiskey, found on the floor on the front passenger's side of the Honda CRV, by police, Mr. Gillespie testified that he was not aware of how this might have got there. He said it simply popped out from beneath the front passenger's seat when he crawled over the console to sit in the driver's seat.

[39] Mr. Gillespie also testified that he recalled shutting the driver's door after someone opened it to check on him. He felt cold so he closed the door which apparently remained closed until Cst. Foster persuaded him to get out in order to get into the police vehicle to be transported to the police station.

[40] Mr. Gillespie said he could not recall this happening. He testified that he could not remember anything about the trip to the police station or any of the things that took place there until he woke up in cells at the police station early the next morning.

[41] Upon being released, Mr. Gillespie called his son, Paul, to come and pick him up so he could be driven home.

[42] Mr. Gillespie recalled having pancakes for breakfast and a sandwich for lunch. He also recalled taking blood pressure and cholesterol medication that morning. He did not take any metformin pills under later that day sometime after supper. When he checked his blood sugar levels he remembered getting a reading of '17' which he indicated was high.

[43] Finally, Mr. Gillespie testified that once before he had felt weak, lightheaded and dizzy similar to the way he felt after exiting Cornish's on the day the Honda CRV went off the road.

[44] On that occasion someone gave him a chocolate bar to eat. After doing so he said he began to feel better. Despite having $1.54 in his pockets, Mr. Gillespie did not think to buy a chocolate bar when he was at the store. There were also some

candies found in his pockets at the time his belongings were taken from him prior to being placed in cells.

[45] When Mr. Gillespie's son Paul testified, he stated that his father has diabetes. When asked about his involvement in the events that brought this matter to Court, he said he received a call from his father on the morning of February 8, 2011 to come to the Pictou R.C.M.P. Station to pick him up. He went on to say:

> "And I picked him up and, yeah, he didn't look very good I guess, you know, a little bewildered or didn't seem his normal self, I guess you would say. And, yeah, so I just .... I picked him up and drove him home."

EVIDENCE OF DR. PETER W. MULLEN, B.SC., E.ED., M.SC., PH.D., F.C.S.F.S. (A FELLOW OF THE CANADIAN SOCIETY OF FORENSIC SCIENCES):

[46] Dr. Peter W. Mullen, Ph.D., a Fellow of the Canadian Society of Forensic Sciences was qualified as an expert in the area of toxicology permitted to offer opinion evidence:

> ... in regard to the effects of alcohol on the human body including the consumption, absorption, distribution and elimination of alcohol in the human body; the symptomatology of consumption of alcohol in humans; and, impairment of the ability of humans to drive motor vehicles resulting from the consumption of alcohol.

[47] Dr. Mullen was further qualified as an expert in the area of pharmacology:

> ... able to express opinion evidence in regard to the medications / drugs used in the treatment of diabetes and the effects that those medications / drugs have on the regulation of blood sugar in the body and on the treatment of diabetes generally and the effects that such medications / drugs have on the behaviour of humans who have been diagnosed with diabetes and are being treated with those medications / drugs.

[48] When I gave my ruling on Dr. Mullen's qualifications to offer expert opinion evidence I specifically stated that:

> [22] Dr. Mullen is not qualified to offer expert opinion evidence regarding the diagnosis, treatment or symptomatology of diabetes nor the diagnosis of states of hypoglycemia or hyperglycemia or the symptomatology, treatment or the effects on

> human behaviour of the existence of each state. That would be outside his proven area of expertise.

[49] I further pointed out that:

> [27] It should also be recognized that the opinion of a duly qualified expert offered in the area of expertise for which he or she has been qualified is only as good as the proven facts on which it is based.
>
> [28] Assuming facts that are not supported by evidence undermines the value of the opinion and might even render it useless.
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> [29] The only evidence presented that even suggests that Mr. Gillespie has diabetes is from his own mouth. He reports what he says was told to him by his family doctor. At best, that is hearsay.
>
> [30] Furthermore there is no evidence of the severity of the affliction or how it is being treated other than a print-out from a Pharmacy listing the various kinds of medications that Mr. Gillespie has apparently been prescribed by his attending physician or physicians.
>
> [31] This lack of evidence will likely restrict the nature and extent of the opinion evidence that counsel might attempt to elicit from Dr. Mullen.

[50] Not only did the Court not hear from an Endocrinologist who might be expected to have a sufficient knowledge of endocrinology, which is the study of the glands of internal secretion and their role in the physiology of the body including the diagnosis and treatment of disorders of the glands of internal secretion including a disorder of the kidneys resulting in diabetes, but neither did the Court hear from Mr. Gillespie's own family doctor who could, if so qualified, offer an opinion pertaining to his self-proclaimed diabetic condition.

[51] However, given the medication that Mr. Gillespie says he is on, specifically metformin, and knowing what metformin is prescribed to treat, based on Dr. Mullen's expertise as a pharmacologist, I am prepared to accept his assertion that he suffers from Type II diabetes.

[52] I have not, however, heard any evidence that would describe the severity of his diabetes nor the effects of a lack of food intake and a failure to take medication prescribed for the treatment of diabetes in accordance with prescribed timelines

combined with the consumption of alcohol might have on an individual such as Mr. Gillespie.

[53] All Dr. Mullen was able to offer, based on a hypothetical fact scenario that attempted to reflect the evidence offered by Mr. Gillespie, was that at approximately 5:30 p.m., the time when he was driving the Honda CRV to Cornish's store, his readings based on average rates of absorption and elimination in the general population and taking into consideration that Mr. Gillespie is considered a seasoned drinker, the range of alcohol in the blood would be from 0 to 35 milligrams of alcohol per 100 millilitres of blood.

[54] At approximately 7:18 p.m. after consuming the remainder of the 375 millilitre bottle of Canadian Club whiskey, Dr. Mullen estimated that Mr. Gillespie's blood/alcohol concentration would be in the range of 61 to 111 milligrams of alcohol per 100 millilitres of blood.

[55] In either scenario, assuming Mr. Gillespie was a seasoned drinker and there can be little doubt of that, Dr. Mullen did not think that Mr. Gillespie should have exhibited the symptoms described by the various witnesses who testified as to their observations of Mr. Gillespie that evening and based on Mr. Gillespie's evidence that he could not remember much of anything after he closed the door of the vehicle to ward off the cold sometime before he was assisted from the vehicle by Cst. Foster and taken to the police station to provide a breath sample pursuant to the breathalyzer demand. It was not until he awoke the next morning that he says he was once again able to remember things.

[56] Dr. Mullen based his opinion not on any specific tests he conducted on Mr. Gillespie but rather based on average rates of absorption and elimination. Furthermore, Dr. Mullen was not qualified to offer opinion evidence regarding the diagnosis, treatment or symptomatology of diabetes nor the diagnosis of states of hypoglycemia or hyperglycemia or the symptomatology, treatment or the effects on human behaviour of the existence of each state. Since there is not evidence of the severity of Mr. Gillespie's condition, Dr. Mullen's opinion carries little weight which is further diminished by the lack of specific testing on Mr. Gillespie himself.

R.C.M.P. CONSTABLE SHANE FOSTER:

[57] Cst. Foster was dispatched to the scene where he found Mr. Gillespie sitting in the driver's seat of the Honda CRV. The Honda CRV was stuck in a snowbank on the edge of the Egypt Road.

[58] Cst. Foster opened the driver's door and attempted to engage the vehicle's sole occupant in conversation. He got not response.

[59] Cst. Foster leaned into the vehicle compartment. He noticed the odour of alcohol emanating from the individual who had his hands on the steering wheel.

[60] Cst. Foster also noticed a paper bag from the Nova Scotia Liquor Corporation along with a cap from a liquor bottle on the floor between Mr. Gillespie's feet and an empty liquor bottle located between the front driver's seat and the passenger's seat.

[61] The vehicle's engine was not running but the running lights were on and the key was in the ignition.

[62] After advising the vehicle's sole occupant that he was under arrest for impaired care and control, Cst. Foster needed to use an arm manoeuver to persuade him to get out of the vehicle.

[63] After getting Mr. Gillespie out of the vehicle Cst. Foster advised him again that he was under arrest for impaired care and control of a motor vehicle. He then advised Mr. Gillespie of his right to retain and instruct a lawyer in private without delay. He also gave him the standard police caution. He then put handcuffs on the accused.

[64] Cst. Foster testified that his communication with Mr. Gillespie was all one-way. He did not get any response from the accused. He indicated that he observed the accused's eyes being open and he seemed to have a blank stare.

[65] Cst. Foster then proceeded to place Mr. Gillespie in the rear seat of the police vehicle. Mr. Gillespie was unsteady on his feet and required Cst. Foster's assistance while walking the short distance to the police vehicle.

[66] After he managed to get Mr. Gillespie in the back of the police vehicle, Cst. Foster shone his flashlight on him. This is when he noticed that the front of Mr. Gillespie's pants were wet. He said it was obvious that he had urinated in his pants.

[67] Cst. Foster also noted that Mr. Gillespie was still not communicating and had the same blank stare on his face. Cst. Foster then closed the rear door of the police vehicle and got in the driver's seat. He made some notes in his notebook and proceeded once again to advise Mr. Gillespie why he had been placed under arrest. This time he did not rely on his memory. He read from what he called "a **Charter** card."

[68] According to Cst. Foster's notes, which he was permitted to refer to in order to aid his memory, he gave Mr. Gillespie his **Charter** rights at 7:15 p.m. This was followed by the police caution.

[69] At 7:18 p.m. Cst. Foster gave Mr. Gillespie a breathalyzer demand. While he was doing this he turned around several times to make sure Mr. Gillespie was conscious and not sleeping or passed out. According to Cst. Foster, Mr. Gillespie "was alert with the same blank stare.... on his face..."

[70] Cst. Foster invited two paramedics who had arrived on the scene to check on Mr. Gillespie. He was advised by the paramedics that he did not appear to be injured in any way and it would be safe to take him to the police station. Cst. Foster said that based on his own observations Mr. Gillespie did not appear to have suffered any injuries.

[71] Enroute to the police station Cst. Foster heard some noises coming from the back seat. He described them to be like grunting or moaning.

[72] Cst. Foster stopped the vehicle, got out, opened the rear driver's side door to check on Mr. Gillespie. He explained to Mr. Gillespie that his hands were hand-cuffed behind his back and they were going to stay that way.

[73] When Cst. Foster got to the police station, Mr. Gillespie was taken out of the vehicle. Cst. Foster said he was staggering from side to side. He added that Mr. Gillespie appeared to be unsteady on his feet.

[74] After being taken inside the police station, Mr. Gillespie was directed to a chair. He made his way to the chair and then sat down. Out of concern for Mr. Gillespie's health, EHS personnel attended at the police station in Pictou. As Cst. Foster stated, his primary concern was for Mr. Gillespie's health. I commend Cst. Foster for this. At one point one of the EHS paramedics attempted to prick Mr. Gillespie's finger to take a blood sample. Cst. Foster heard Mr. Gillespie say "No." Cst. Foster said this was the only verbal response he heard from Mr. Gillespie that evening other than the moans or grunts referred to earlier. The EHS personnel were not about to force Mr. Gillespie to subject himself to any tests if he was not willing to give his consent. They then departed leaving him in Cst. Foster's custody. They apparently saw no reason to take him to the hospital for further medical tests or treatment.

[75] Cst. Foster again asked Mr. Gillespie if he wished to contact counsel or a lawyer of his choice at 8:06 p.m. He did not receive a response to this offer.

[76] At 8:08 p.m. Mr. Gillespie was given a breath demand. Again there was no response from Mr. Gillespie.

[77] He was then asked to accompany Cst. Foster to the room where the breathalyzer machine was located. Mr. Gillespie got up and followed Cst. Foster as directed. This was at 8:10 p.m.

[78] Mr. Gillespie sat in a chair. Cst. Foster demonstrated how to use the mouthpiece to provide a suitable sample of breath. Mr. Gillespie was then told to get up from his chair which was only about four to five feet from the Data Master – the breathalyzer machine – and walk over to provide a breath sample. Mr. Gillespie did not move from his chair. He just sat there motionless without saying anything.

[79] Cst. Foster told Mr. Gillespie that if he failed to provide a breath sample he would be charged with refusal.

[80] At 8:22 p.m. a ticket for refusing a breathalyzer was printed from the machine. Cst. Foster told Mr. Gillespie to stand up and exit the breath room and return to the cell block area which he did.

[81] Mr. Gillespie was told to remove his belt, his shoes and other valuables along with the contents of his pockets. He did as instructed. He was then searched and placed in cells where he remained until his release the next morning. At that time, Mr. Gillespie called his son, Paul, to come to the police station to pick him up.

RULING ON THE CHARTER MOTION:

[82] The accused, Arthur Gillespie, is now seeking a declaration that his right to counsel which is protected by section 10(b) of the **Canadian Charter of Rights and Freedoms** has been breached.

[83] The burden of proof is on the person who makes the allegation. The standard of proof is on a balance of probabilities.

[84] Should Mr. Gillespie be successful in establishing the **Charter** breach he asks for an order pursuant to section 24, subsection (2), of the **Charter**, to exclude all evidence obtained subsequent to the alleged **Charter** breach and, in particular, any and all evidence relating to his alleged failure to provide a sample of his breath suitable for analysis to Cst. Shane Foster.

[85] Section 24(2) reads:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[86] I do not propose to discuss this provision of the **Charter** in any greater detail given the ruling I am about to make.

[87] The evidence that I accept clearly establishes that the informational component of section 10(b) of the **Charter** has been met.

[88] Clearly, Mr. Gillespie was read his **Charter** right to contact counsel on at least three separate occasions by Cst. Foster after he was arrested roadside on the evening of February 7, 2011.

[89] Based on the evidence of Brian MacLeod who had some training in first aid as a volunteer firefighter and the evidence of Cst. Foster who testified that EHS paramedics had assessed Mr. Gillepsie where he sat in the back seat of the police vehicle and again later at the police station, Mr. Gillespie did not appear to have any injuries that might have required medical attention.

[90] Furthermore, when the EHS people attempted to prick Mr. Gillespie's finger to take a blood sample, he told them "No." He refused to consent to the test they were prepared to administer. The paramedics then left. They obviously were not concerned with Mr. Gillespie's medical condition at that time.

[91] Other than this one verbal communication and some grunts or moans heard coming from Mr. Gillespie as he was being transported to the police station, he did not say anything else. He did not tell Cst. Foster that he wished to avail himself of the opportunity to contact a lawyer despite being advised of his right on three separate occasions.

[92] A police officer cannot be expected to be a mind reader. There has to be some kind of indication that the party who is being detained or has been placed under arrest wishes to contact counsel. Once that happens then immediate steps have to be taken to allow the individual to speak to a lawyer in private.

[93] A non-response, absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, implies a waiver. A police officer is not required to make a call to a lawyer or to insist that the individual make the call. A police officer is not required to ignore a person's informed decision to not call a lawyer by forcing a phone into his or her hand and then putting him or her in a room with instructions to either call a private lawyer of his or her choice or a Legal Aid lawyer or duty counsel.

[94] I do not accept the accused's evidence that his awareness of his situation and his total lack of recall for a period of approximately 10 to 12 hours was due to any medical condition he might suffer from. There is simply no medical evidence or opinion to support this.

[95] I find it strange that Mr. Gillespie's memory was restored upon waking up in cells on the morning after his arrest.

[96] He had not been given anything to eat while he was placed in cells to "sleep it off" so-to-speak. And what I find particularly strange is that after he returned home and had breakfast he took medication for his hypertension and cholesterol problems but did not take the medication he says he was prescribed for his diabetic condition. According to his evidence he did not take that medication until after his evening meal. This would mean that he had gone 48 hours without taking it yet his memory, after being released from the police station lock-up, had somehow been miraculously restored . Perhaps there is something that might explain this but if there is, it was not offered in evidence during the course of the *voir dire*.

[97] The accused's application for a declaration that his right to counsel has been breached is denied as is the request for an Order to exclude evidence.

McDougall, J.