

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Her Majesty the Queen v. William Lionel Edmund Fogarty  
2013 NSSC 108

**Date:** 20130326  
**Docket:** Ant. No. 390826  
**Registry:** Antigonish

**Between:**

Her Majesty the Queen

Plaintiff

v.

William Lionel Edmund Fogarty

Defendant

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**DECISION**

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**Restriction on Publication:** Section 517 (1) Criminal Code of Canada

**Judge:** The Honourable Justice N. M. Scaravelli.

**Heard:** March 7, 2013, in Antigonish, Nova Scotia

**Oral Decision:** March 26, 2013

**Counsel:** Allen Murray and Darlene Oko, for the Plaintiff  
Luke Craggs, for the Defendant

**By the Court:**

[1] William Fogarty is charged in a four-count indictment that he, on the 24<sup>th</sup> day of November, 2011, at or near Tracadie, Antigonish County, caused the death of two victims while his ability to operate a motor vehicle was impaired by a drug contrary to s. 255 (3) of the *Criminal Code*; further that he caused their death by operating a motor vehicle in a manner dangerous to the public contrary to s. 249 (4) of the *Criminal Code*.

[2] This decision follows a voir dire hearing on a charter application made by Mr. Fogarty who alleges a breach of Section 8, 10 (a), 10 (b) of the *Charter of Rights and Freedoms*. He seeks to exclude evidence of a blood sample and its analysis.

**CHARTER OF RIGHTS AND FREEDOMS**

[3] Section 8 provides:

Everyone has the right to be secure against unreasonable search or seizure.

[4] Section 10 states:

Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right;

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[5] Section 24 (2) states:

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.

[6] Mr. Fogarty bears the burden on a civil standard that his charter rights have been breached. In the event of a breach, the burden is on Mr. Fogarty to establish on a balance of probabilities the admission of the evidence would bring the administration of justice into disrepute *R. v. Collins* [1987] 1 S.C.R. 265

[7] For the purpose of this charter application crown and defence counsel agreed the evidence adduced at the preliminary hearing as well as further evidence adduced on the voir dire hearing would constitute the evidence in this application. The following appears to be an undisputed summary of facts for the purpose of this application.

[8] On November 24<sup>th</sup>, 2011, at approximately 3:00 in the afternoon, Nicholas Landry was driving his 1994 Ford Mustang in an easterly direction along Highway #4 on a stretch of road known as the Tracadie Loop. His friend Kory Mattie was riding in the passenger seat. The accused, Mr. Fogarty, was travelling westbound along the same stretch of highway in his 2000 Ford Crown Victoria.

[9] The two cars crashed head-on at such an angle and with enough impact that the Crown Victoria spun around 180 degrees so it was facing east when it landed. The Mustang moved to its left and landed in the ditch on the north side of the highway.

[10] Tragically, both of the occupants of the Mustang died shortly after the impact. Nicholas Landry was declared dead at the scene and Kory Mattie succumbed to his injuries at St. Martha's Hospital a few hours later.

[11] After the impact Mr. Fogarty called 911. Other drivers soon showed up on scene and assisted Mr. Fogarty and the two young men in the Mustang.

[12] Meanwhile, Cpl. Shane Meisner of the Antigonish RCMP detachment was on duty. In the 75 to 90 minutes before the accident, he had become aware of reports of a white Crown Victoria driving erratically on stretches of highway east of the town of Antigonish.

[13] Cpl. Meisner was one of the first police officers on scene and quickly identified Mr. Fogarty as the operator of the Crown Victoria. Mr. Fogarty was placed in the ambulance, and Cpl. Misener rode with him and the paramedics. Cpl. Meisner listened to the exchange between Mr. Fogarty and the paramedics who were treating him.

[14] Cpl. Meisner contacted his superior, Sgt. Rehill, and briefed him on the situation. Sgt. Rehill conveyed further details of the erratic driving reports, which Cpl. Misener used, along with his own observations, to form the grounds for detention and subsequent arrest.

[15] At 16:26 hours Cpl. Meisner concluded he had grounds to demand Mr. Fogarty submit to drug recognition evaluation (DRE). He did not have the standard card from which to read the drug recognition evaluation demand, so he

contacted a Cst. Patrick Ryan and had Cst. Ryan relay the demand to him, which he subsequently read to Mr. Fogarty. The demand read to Mr. Fogarty was:

I demand that you submit to an evaluation conducted by an evaluating officer to determine whether your ability to operate a motor vehicle is impaired by drug or a combination of drugs and alcohol, and that you accompany me for that purpose. Do you understand?

[16] Mr. Fogarty answered in the affirmative.

[17] Mr. Fogarty and Cpl. Meisner arrived at St. Martha's Hospital at 16:40. Medical staff spent 18 minutes assessing Mr. Fogarty before clearing him. At 17:00, Cpl. Meisner placed Mr. Fogarty under arrest.

[18] Meanwhile, Cpl. Meisner had arranged for DRE expert Cst. Chad Morrison, to attend St. Martha's. Cst. Morrison was present when Cpl. Meisner arrested Mr. Fogarty, and read the following arrest script to Mr. Fogarty

I am arresting you for impaired driving by a drug. You have the right to obtain and instruct a lawyer without delay. You also have the right to free and immediate legal advice from duty counsel by making a free telephone call to 1-866-638-4889 or 902-420-8825 during business hours, and 1-800-300-7772, or 902-420-6581 during non-business hours. Do you understand? Do you wish to call a lawyer?

You also have the right to apply for free legal assistance, through the Provincial Legal Aid program. Do you understand?

[19] Mr. Fogarty answered in the affirmative to all of these questions. At this point he was still in the examination room at St. Martha's Hospital, so Cpl. Meisner waited until he was moved into a more private room to make the call to duty counsel.

[20] At 17:40 Cpl. Meisner placed a call to duty counsel, and Mr. Fogarty was put on the phone to duty counsel at 17:45. Mr. Fogarty finished with duty counsel at 18:00 hours, and entered an examination room with Cpl. Meisner and Cst. Morrison to conduct the drug evaluation examination at 18:16 hours.

[21] Mr. Fogarty complied with Cst. Morrison's examination. After conducting the examination and reviewing the results, Cst. Morrison read Mr. Fogarty the blood demand at 19:14 hours. The blood demand made to Mr. Fogarty was:

I demand that you now provide such samples of your blood that will enable a proper analysis to be made to determine whether you have a drug in your body. Blood samples will only be taken by or under the direction of a qualified medical practitioner, if the qualified medical practitioner is satisfied that the taking of samples will not endanger your life or health. Do you understand?

[22] Mr. Fogarty stated he understood.

[23] The attending physician, Dr. Jurga, arrived and was briefed by police. Dr. Jurga asked if Mr. Fogarty consented to the blood being drawn. This part of the narrative was examined in Cpl. Meisner's cross examination:

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Q...So, he, Dr. Jurga said, do you consent to the drug, the blood being drawn?  
Mr. Fogarty looked at you.

A. He looked at me quizzically, and I said, well if you don't, you can be charged with refusal.

[24] Mr. Fogarty was not given access to counsel after the drug evaluation examination was completed and the blood demand was made. He subsequently complied with the blood demand, although hospital staff had difficulty finding a suitable vein from which to draw the blood and it took several attempts before a suitable sample could be drawn. Mr. Fogarty co-operated fully in providing a blood sample.

[25] A suitable sample was drawn at 20:41 hours using an expired blood kit.

[26] Mr. Fogarty was given access to counsel a second time at 21:22 hours.



[27] At 22:05 Mr. Fogarty was still in police custody. At this time, Cpl. Meisner re-arrested him for impaired driving causing bodily harm and impaired driving causing death.

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[28] The blood sample that was drawn was subsequently analyzed by RCMP forensic services. Diazepam (Valium) and its metabolites were found in the blood sample.

[29] Evidence of Mr. Fogarty's 911 call from the scene of the accident as well as photographs of the damaged vehicles were introduced at the hearing.

### **CHARTER APPLICATION**

[30] Mr. Fogarty asserts the police breached his s. 10 (a) charter rights by arresting him for "impaired driving by drug" when they were in fact investigating a homicide. In other words he did not appreciate the seriousness of his situation at the time.

[31] He asserts a further breach of his s. 10 (b) charter right to counsel when no additional opportunity to access counsel was provided to him after the drug evaluation and demand for a sample of his blood for analysis.

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**SECTION 10 (a) and 10 (b) CHARTER RIGHT TO BE INFORMED OF  
THE REASON FOR ARREST AND RIGHT TO RETAIN AND INSTRUCT  
COUNSEL**

[32] In order for an individual to exercise his s. 10 (b) right to consult and instruct counsel in a meaningful way, he must know the extent of his jeopardy. The leading cases interpreting this section are *R. v. Smith*, [1991] S.C.J. No. 24 and *R. v. Evans*, [1991] S.C.J. No. 31.

[33] *Smith, supra*, involved the admissibility of an accused's statement after the waiver of right to counsel. The police were aware they were investigating a murder when obtaining the statement but only told the accused that he was being arrested for a shooting incident. The police knew the accused was unaware the victim had actually died as a result of the shooting. The court determined the

waiver of counsel was valid as the accused was aware of the extent of his jeopardy.

Addressing the issue the court stated:

[28] 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 details of what the accused may or may not have been told.

[34] In *Evans, supra*, the accused was arrested for a marijuana trafficking charge. He declined when advised of his right to counsel. During the course of obtaining a statement, the accused became the prime suspect in a murder investigation that initially involved the accused's brother. The police did not formally advise the accused that he was being detained for murder or reiterate his right to counsel. The court determined from the substance of the interrogation that the accused became aware he was being investigated for murder. The court stated:

[35] When considering whether there has been a breach of s. 10(a) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10 (b).

[35] These cases dealt with an individual's s. 10 charter rights in the context of waiver of counsel. In the present case Mr. Fogarty exercised his right to counsel. The issue, therefore, is whether in exercising his right to counsel, Mr. Fogarty had sufficient appreciation of the extent of his jeopardy to enable him to instruct and consult with counsel in a meaningful way. The police did not advise Mr. Fogarty he was being detained or arrested regarding a homicide prior to the DRE demand or blood demand. However, it is clear from the case law that failure to precisely identify the charge faced does not necessarily violate an individual's s. 10 charter rights.

[36] Considering all of the evidence before me, I am satisfied that Mr. Fogarty appreciated the extent of the jeopardy confronting him when he was initially arrested for impaired driving and given the drug evaluation demand. In this regard I have considered the following:

- a) Mr. Fogarty's own personal observations at the scene. Both his vehicle and the vehicle occupied by the two victims were very severely damaged in the head on collision as evidenced by photographs exhibited in the voir dire. Unlike Mr. Fogarty the

occupants of the other vehicle did not exit their vehicle following the accident.

b) Mr. Fogarty became aware that at least one of the occupants of the other vehicle had died and the other person was seriously injured as a result of the collision. This is evident from the 911 call he made at the scene as well as statements made in Mr. Fogarty's presence.

Under the circumstances I am satisfied Mr. Fogarty would have known that his arrest for impaired driving and demand for drug evaluation related to his involvement in and his possible responsibility for the accident.

#### **ADDITIONAL OPPORTUNITY TO CONSULT LEGAL COUNSEL**

[37] Mr. Fogarty was provided the opportunity to consult counsel after his arrest and demand for drug evaluation, which he accepted. Mr. Fogarty spoke to legal counsel for approximately 15 minutes prior to his evaluation test. As indicated Mr. Fogarty asserts that he should have been given a second opportunity to consult counsel after the completion of the drug evaluation and demand for blood sample.

[38] Section 255 (3.1) and (3.4) of the *Criminal Code* provides a procedure for detecting impairment by a drug. If a police officer suspects a person of committing an offence under s. 253 (1) (a) of the *Criminal Code* (Impaired Operation of a Motor Vehicle) by reason of consumption of drugs, the officer may make a demand that the person submit to a drug recognition evaluation. A police officer, qualified as a drug recognition evaluator, performs a standardized 12-step testing process which includes physical examination and coordination testing. If the evaluating officer has grounds to believe the person's ability to operate is impaired by drugs, the officer may demand that person provide samples, including samples of blood.

[39] Defence counsel submits a second opportunity to consult legal counsel was required as Mr. Fogarty, arrested for impaired driving, was not told by the police that should he fail the drug evaluation, a demand would be made for a blood sample. Further, that evidence of a "quizzical" look on Mr. Fogarty's face when the doctor asked if he consented, together with the police response that he could be charged with refusal for noncompliance, established that Mr. Fogarty had doubts and questions about what to do.

[40] In *R. vs. Sinclair* [2010] 2 S.C.R. 310, the Supreme Court provided instruction on the issue of subsequent consultation with counsel. The court explained the purpose of s. 10 (b) is to support detainees' rights to choose whether to co-operate with a police investigation or not, by giving them access to legal advice on the situation they are facing. Where new developments significantly change the situation a detainee faces, further opportunity for legal advice on the new situation would be required. The court set out three examples of categories where a second consultation with counsel would be required namely; new procedures involving the detainee; change in jeopardy; and reason to question the detainee's understanding of the s.10 (b) charter right. The court stated:

[55] The change of circumstances, the cases suggest, must be objectively observable in order to trigger additional implementational duties for the police. It is not enough for the accused to assert, after the fact, that he was confused or needed help, absent objective indicators that renewed legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so.

[57] It is assumed that the initial legal advice received was sufficient and correct in relation to how the detainee should exercise his or her rights in the context of the police investigation. The failure to provide an additional opportunity to consult counsel will constitute a breach of s. 10(b) only when it becomes clear, as a result of change circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct.

[41] In this case I have determined Mr. Fogarty was aware of the extent of his jeopardy when he consulted legal counsel. He was aware and understood the

demand for a drug evaluation test. He was aware the police wanted to test him to determine whether there was the presence of drugs in his body in relation to his arrest for impairment by a drug in the operation of his vehicle at the time of the collision. It was in this context that Mr. Fogarty consulted legal advice.

[42] Mr. Fogarty spoke to legal counsel for approximately 15 minutes following the demand for a drug evaluation test. It is reasonable to infer that competent counsel would have advised Mr. Fogarty of the procedure set out in s. 254 of the *Code*. That is, a demand would be made that he provide bodily samples in the event he failed the drug evaluation test. Also, the possibility that he could be charged with refusal should he not consent.

[43] Following consultation with legal counsel Mr. Fogarty, without prompting, told the evaluating officer he would be unable to balance himself on one foot and inquired whether there was another physical test he could perform.

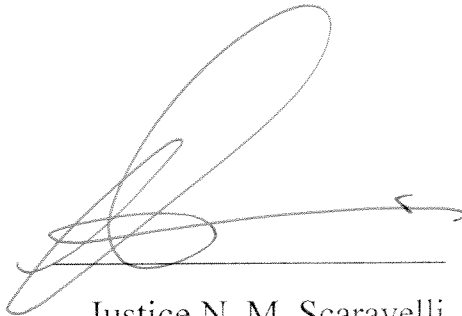
[44] There was no evidence produced on voir dire hearing that Mr. Fogarty did not receive competent legal advice or that he did not understand the legal advice



given. Further evidence of a “quizzical” look on the face of Mr. Fogarty, by itself, is insufficient to draw an inference of confusion or lack of awareness. Mr. Fogarty had previously confirmed he understood the demand for blood sample. The police statement that he could be charged with refusal should he fail to comply with the blood demand served to further inform the accused. This information often accompanies a standard impaired driving demand.

[45] In my view there is insufficient evidence to satisfy the court there was any change in Mr. Fogarty’s circumstances between the exercising of his right to legal counsel and the demand for the sample of his blood which, objectively viewed, would require further consultation with counsel.

[46] As a result I am not satisfied that there was a breach of Mr. Fogarty’s charter rights and I dismiss the application.



Justice N. M. Scaravelli