IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Brewer, 2008 NSPC 63

Date: 17/10/2008
Docket: 1744848
1744849
1744850
Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Angus Brewer

Judge:	The Honourable Judge Castor H.F. Williams
Oral Voire Dire Decision:	July 18, 2008
Decision:	October 17, 2008
Charge:	253(a); 253(b); 255(2) Criminal Code
Counsel:	C. Nicholson, counsel for the Crown
	J. King, counsel for the Defendant

Introduction

[1] The police have charged the accused, Robert Angus Brewer, with offences under the ***Criminal Code***, ss.253(a),(b) and 255(2). However, he has raised several issues concerning the violation of his constitutionally protected rights under the ***Canadian Charter of Rights and Freedoms***. Consequently, on his initiative, the Court conducted a *voire dire* to determine whether, in all the circumstances, any protected rights were indeed infringed. Also, the parties agreed that any evidence submitted on the *voire dire* could be used in the trial proper without the necessity of recalling the same witnesses.

VOIRE DIRE

Discussion

[2] In the cold early morning hours of January 28, 2007, patches of thin ice were on the surface of Quinpool Road in the Halifax Regional Municipality. On this affected highway, the accused, Robert Brewer, was operating his motor vehicle when it left the traveled portion and collided with a telephone post on

the south side. The collision caused bodily harm to Murielle Theres Arsenault who was his sole passenger. To this single motor vehicle accident, the Halifax Regional Police Force dispatched Constables Trina Gillis and Nathan Cross and they arrived on the scene at about 0539 hours.

[3] When the police arrived on the scene they observed that the paramedics were present and were attending to the injured passenger. Also, they noted that the accused was standing on the roadway and by the driver's side door of the crashed and immobile motor vehicle. However, without any prompting, he identified himself and informed them that he was the driver of the motor vehicle at the time of the accident. Additionally, the paramedics remarked to the police that Brewer emitted, from his person, a smell of alcohol.

[4] From his observations of the air bag dust field and from his experience concerning the time such dust takes to settle after an accident but, without ascertaining the exact time of the accident, Constable Cross surmised that this accident could have occurred at least fifteen minutes before the police arrived on the scene. However, because of the cold, the existing debris field of air bag dust and the comments of the paramedics and the accused,

Constable Cross requested Brewer to enter the police cruiser. When Brewer was in the cruiser, the police noted that there was a smell of alcohol emitting from his breath and that he had bloodshot eyes.

[5] As a result of these observations and his conjecture concerning the time of the accident, and the driving information from Brewer, Constable Cross reasonably suspected that Brewer had alcohol in his body. Consequently, at 0543 hours he engaged Brewer in the process and procedure of a roadside approved screening device demand. Brewer signified that he understood the demand and at 0546 hours he complied and failed. Thence, at 0547 hours the police read to him the breathalyser demand, arrested him for impaired driving and impaired driving causing bodily harm and Chartered and cautioned him with reference to the charges before the Court. When Brewer eventually gave his breath samples, as demanded, upon analysis, they showed that his blood alcohol concentration exceeded the legal limit.

[6] Nonetheless, Brewer has submitted that his constitutional rights have been infringed in that, when the police arrived on the accident scene, he was neither in the operation of nor in the care or control of a motor vehicle. As a

result, the roadside demand made pursuant to the ***Criminal Code***, s.254(2) and the breathalyser demand made pursuant to the ***Criminal Code***, s. 254(3) were invalid. These demands were violations of his protected right against unreasonable search and seizure under the ***Canadian Charter of Rights and Freedoms***, s.8. Furthermore, in the circumstances, he was arbitrarily detained contrary to the ***Canadian Charter of Rights and Freedoms***, s.9. Consequently, any evidence obtained as a result of these violations ought to be suppressed pursuant to the ***Canadian Charter of Rights and Freedoms***, s.24(2).

[7] Brewer also submitted that, in the circumstances of the case, the police violated his right to consult counsel and the right to be informed promptly of the reasons for his arrest or detention, that are protected under the ***Canadian Charter of Rights and Freedoms***, s. 10(a) and (b). Similarly, any evidence obtained as a consequence of these ***Charter*** violations ought to be suppressed.

Issues

[8] Therefore and essentially, in this Court's opinion, the case at bar raises the issue of the principle of "past signification." Put another way, it raises the issue of what is required for the Court to consider, if at all, how much "past signification" should be attributed to the phrase, "is operating . . . or has the care or control of a motor vehicle."

Position of the Parties

(a) on behalf of the accused

[9] Here, Defence counsel argues that because Brewer was outside his vehicle at the time when the police formed the requisite suspicion as to the presence of alcohol in his body, the demands for breath samples were not lawful as the legal prerequisites did not exist. To a considerable degree, Defence counsel, relied on the primary rule of statutory construction and submitted that the words of the statute should be given their natural and ordinary meaning. Also, counsel posited that the then current legislation and the relevant case authorities support the proposition that as the ***Criminal Code***, s.254(2) is an investigating tool to assist in the detection and apprehension of

drivers with alcohol in their bodies, the critical time of driving was at the time of police contact and not some earlier time. ***R.v. Schmidt,*** [2001] S.J. No.493 (Q.B.), ***R.v. Stewart,*** [2007] B.C.J. No.235, 2007 BCPC 26.

(b) on behalf of the Crown

[10] On the other hand, Crown counsel argued that there was a motor vehicle accident shortly before the police arrived on the scene. Importantly, Brewer had voluntarily informed the police that he was the driver and thus had care and control of the motor vehicle at the time of the accident. Therefore, by his admitted words and actions he has created a self-incrimination connection between his recent past driving and his present ability concerning his care and control of the motor vehicle. Thus, the time delay between the accident and police contact, in the circumstances, did not vitiate his criminal culpability and did not bar the police from making a lawful demand. ***R.v. Neumajer***, [2007] O.J. No.960 (S.C.), [2008] O.J. No.469 (C.A.), ***R.v. Campbell***, [1998] O.J. No.1652(C.A.), ***R.v. Drapeau***, [1985] N.S.J. No.382 (C.A.).

Legislative References

[11] For ease of reference, the ***Criminal Code***, s.254(2) then read:

> (2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[12] But, (Bill C-2, effective July 2, 2008), now reads:

> (2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:
>
> (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[13] Therefore, in the Court's opinion, the fundamental issue turns upon an interpretation of that portion of the ***Criminal Code***, s.254(2) that referred to "a person who is operating a motor vehicle . . . or who has the care or control of a motor vehicle . . . "

Findings of Fact and Analysis

[14] Here, the Court finds that the events culminating in the charges before it are uncomplicated and not in dispute. Put succinctly, the Court finds that Brewer was driving his vehicle along Quinpool Road in the Halifax Regional Municipality when it collided with a telephone post. Likewise, on the arrival of the police on the scene he was standing outside but besides his now immobilized vehicle and he identified himself to them as the driver at the time of the accident. Additionally, his sole passenger, Murielle Theres Arsenault, was injured as a result of the collision.

[15] Further, the Court finds that the paramedics alerted the police that Brewer smelled of alcohol. Thereupon, and the Court finds, that given the inclement weather, the accident debris, his surmise of the time of the accident, Brewer's

own information concerning the accident and for further investigation, Constable Cross requested him to enter the police cruiser. Likewise, the Court finds that when he was inside the cruiser, the police detected a smell of alcohol emitting from his breath and that his eyes were bloodshot.

[16] In addition, the Court finds that Constable Cross, from his own observations, suspected that Brewer had alcohol in his body, and gave him the roadside demand which he understood, complied with and failed. Thereupon, the Constable gave him the breathalyser demand and arrested, Chartered and cautioned him with reference to the charges before the Court. Additionally, the Court finds that Brewer provided his breath samples which, upon analysis, showed that he had, in his body, one hundred and forty milligrams of alcohol in one hundred millilitres of blood.

[17] Because the ***Criminal Code***, s,254(2) used the present tense the argument is that the roadside demand could only be made to a person who “is operating” or who “has the care or control” of a motor vehicle. This use of language has generated much litigation in situations where there was an accident and the driver is outside the vehicle when the police arrived or an

accident where the vehicle is no longer operable or where the driver has left the vehicle.

[18] However, on this Court's assessment and research of various authorities, it finds that in many accident cases, other courts have deflected from construing the use of the present tense in s.254(2) by simply extending the meaning of the phrase "care or control." Thus, for example, persons have been found to be in ongoing "care or control" when they had ordered a tow truck, or retained the car keys, even though they had earlier ceased to have actual physical operation of the motor vehicle. See for example: ***Drapeau***, *supra*. , ***R.v. Lackovic***, [1988] O.J. No.1732 (C.A.), ***R.v. Judd,*** [1993] B.C.J. No.1968 (S.C.).

[19] Additionally, in cases where it cannot reasonably be said that the person is in ongoing "care or control" of the motor vehicle, courts have adopted the position as articulated by Wimmer J., in ***R. v Letkeman***, [1983] S.J. No. 1045 (Q.B.), at para.7:

> It is a primary rule of construction that any word or phrase used in a statute should be interpreted according to its natural and ordinary meaning unless to do so would lead to a result which could not reasonably be supposed to reflect the intention of those responsible for the enactment. While the word "is" most often will refer to the present, it can have a grammatically correct past

> signification, as in the sense of "has been". See: Black's Law Dictionary, 5th ed., pg. 745. It is in this sense that section 234.1(1) should, in my opinion, be interpreted. The section was no doubt enacted to assist police in pursuing the objective of removing from the road those persons whose ability to drive may be impaired by alcohol while, at the same time, creating only minor inconvenience for others. I cannot think it reasonable to suppose that Parliament intended that a police officer's power of investigation under the section could be completely circumscribed by a person simply leaving his vehicle before the officer had an opportunity to look for signs of the presence of alcohol in that person's body. ***So long as a person is known to have been recently driving a vehicle he is subject to being called upon to provide a breath sample for roadside analysis and to the consequences that flow from his refusal or failure to comply.*** [Emphasis added.]

[20] Nonetheless, the illustrative meaning of the phrase “care or control” was articulated by McIntyre J., in ***R.v. Towes***, [1985] 2 S.C.R. 119 at paras. 9 and 10:

> 9 As I have noted earlier, the offence of having care or control of a motor vehicle while the ability to drive is impaired by alcohol or a drug is a separate offence from driving while the ability is impaired. It may be committed whether the vehicle is in motion or not. This leaves the Court with the question: What will constitute having care or control short of driving the vehicle? ***It is, I suggest, impossible to set down an exhaustive list of acts which could qualify as acts of care or control, but courts have provided illustrations which are of assistance.***[Emphasis added.]

> 10 There are, of course, other authorities dealing with the question. The cases cited, however, illustrate the point and lead to the conclusion that acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. ***Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely*** [Emphasis added.]

[21] Thus, it appears that what is required is that the Court, in the circumstances of the case, is entitled to consider how much, if any "past signification" should be attributed to the phrase, "is operating . . . or has care or control" of a motor vehicle. Consequently, on reviewing several authorities, including those submitted by counsels, the Court finds that the cases vary as to the time factor where "past signification" has been attributed. For example, they range from ten minutes from the time the officer decided to administer the roadside test, ***R.v. Petit***, [2005] Q.J. No. 9804 (C.A.), to forty to forty-five minutes after the accident but with the suspicion formed about fifteen minutes after the accident. ***R. v Phillip***, [1992] A.J. No. 23 (C.A.).

[22] In any event, in the Court's opinion, the authorities are clear that the purpose of the ***Criminal Code***, s.254(2) is to screen drivers at the roadside for the presence of alcohol in their bodies and, a roadside demand made for any other purpose would be invalid. ***R. v Diguggiero***, [1998] B.C.J. No. 578 (S.C.). Furthermore, in the Court's view, all that is required to make a roadside demand is for the peace officer only to have a reasonable suspicion and that

reasonable suspicion need only relate to alcohol in the suspected person's body. The officer does not have to believe that the person has committed an offence. ***R.v. Lindsay*** (1999), 134 C.C.C.(3d) 159 (Ont.C.A.).

[23] Also, in the Court's opinion, the roadside test is only to determine the existence of alcohol in the body, if any. It is a test neither for the quantity of alcohol consumed nor for the behaviourial consequences of such consumption. ***R.v. Gilroy,*** [1987] A.J. No.822 (C.A.).

[24] What is more, it is the Court's opinion that it is not necessary for the peace officer who made the roadside demand to know or believe that the driver was actually operating or in care or control of the motor vehicle at the time of forming the grounds for a roadside demand. That factor, however, is something that the Crown, at trial, must prove beyond a reasonable doubt in order to secure a conviction under the ***Criminal Code***, s. 253(a) or (b). See: ***R.v. Ademaj***, [2001] O.J. No. 3767 (S.C.J.), aff'd [2003] O.J. No. 1189 (C.A.).

[25] Furthermore, while time is of the essence in making the demand, courts have accepted that a peace officer may take reasonable time, in the

circumstances, to enable him or her to complete the essential aspects of the investigation and to formulate the requisite grounds for the demand. ***Campbell***, *supra*., ***R.v. Kachmarchyk***, [1995] A.J. No.343 (C.A.). Here, the time that elapsed between the police arrival on the scene and the formulation of the requisite grounds and the demand was no more than seven minutes.

[26] Therefore, on the above analysis and the authorities cited, this Court respectfully does not think, given the purpose of the enactment of the ***Criminal Code***, s.254(2) and, as reinforced and evidenced by its recent amendments, that it is reasonable to suppose that Parliament intended that the police investigative powers under the provisions of the section could be completely circumvented by a person, at an accident scene, simply leaving his vehicle, as here, before the police had the opportunity to determine whether that person had alcohol in his body.

[27] In the case at bar, the Court accepts and finds that there was a lapse in time of no less than fifteen minutes between the time of the accident and the police arrival on the scene. Further, the Court accepts and finds that the formulation of the requisite grounds and the roadside demand was no more

than a further seven minutes. Significantly, Brewer admitted that he was the driver of the motor vehicle at the time of the accident and he was still standing beside the immobile vehicle and was cooperating with the police. As well, the Court accepts and finds that from information he received and from his own observations, the Constable reasonably suspected that Brewer had alcohol in his body. Furthermore, the Court accepts and finds that his suspicions were confirmed when Brewer failed the roadside test. As a result, the Court concludes and finds that the Constable had reasonable and probable grounds to believe that Brewer had committed an offence.

[28] Consequently, it is this Court's respectful opinion based on the above findings and analysis, that the weight of the authorities cited above supports its conclusion that, on the facts of the case at bar, Brewer had an ongoing care and control of the motor vehicle. Accordingly, this Court will therefore follow that line of cases that, in its opinion, have interpreted the statutory provisions in the manner that seeks to prohibit the mischief that is in accord with the intent and purpose of Parliament. As a result, this Court finds that Brewer had an ongoing care and control of the motor vehicle when the police arrived at the accident scene and the demands made by the police for him to perform the

roadside screening test and the breathalyser test were valid demands.

[29] In further support, as was put by Wimmer J., in ***Letkeman***, *supra*., at para 11:

> ...a police officer acting under the authority of section [254(2)] is conducting an investigation of a much more preliminary kind. He is proceeding merely on a reasonable suspicion that a person who is driving has alcohol in his body. The police officer's object at this initial stage is to determine whether his suspicion is well founded and, if so, whether the amount of alcohol present appears to be significant. While an arrest or detention might result if this preliminary investigation is taken to a second stage - that of demanding the person submit to a breathalyser analysis - it may equally happen that only a minor quantity of alcohol is detected and the person will immediately be allowed to proceed. It is only when the police officer comes to believe an offence has been committed, and further investigation is required before the person may be released, that a detention occurs and advice concerning the right to consult and instruct counsel becomes imperative.

[30] Thus, in this Court's opinion, when Constable Cross requested Brewer to enter the police cruiser, the Constable was conducting a preliminary investigation to confirm whether his suspicion that Brewer had alcohol in his body was well founded. At this stage of the investigation and during this type of delay Brewer is not entitled to his rights under the ***Charter***, s.10(b). ***R.v. Bernshaw***, [1995] 1 S.C.R. 254, ***R.v. Thomsen***, [1988] 1 S.C.R. 640. No criminal liability flows from his failing the roadside demand.

[31] However, Brewer's failure of the roadside screening test, gave the Constable reasonable and probable grounds to believe that an offence had been committed. Critically, it is at this stage that the underlying circumstances of his detention changed as he is now required for further investigation, to submit to a breathalyser demand, before he is to be released. It is at this stage, under the ***Charter***, s.10(a), that his right to consult and instruct counsel becomes imperative. ***R.v. Borden***, [1994] 3 S.C.R. 145. Here, however, on the evidence that the Court accepts to be reliable and trustworthy, it is satisfied and finds that the Constable, at this stage of the investigation, promptly informed Brewer why he was being detained in clear and simple language and that he, Brewer, understood the nature of his legal peril and the rights to which he was entitled. ***R.v. Mann***, [2004] 3 S.C.R. 59., para. 21.

[32] In this Court's opinion, the remaining issues raised on behalf of Brewer may be dealt with together. A lawful demand under ***the Criminal Code,*** s. 254(2), in the Court's view, cannot translate to be an unreasonable search and seizure simply because Brewer complied with the demand and failed. Similarly, a lawful demand under the ***Criminal Code,*** s.254(3) cannot be translated to be an unreasonable search and seizure because it demonstrated that an offence

was committed. They do not invoke, in the Court's opinion, scrutiny under the ***Charter***, s.8. Likewise, in the Court's opinion, merely detaining a driver of a motor vehicle to permit the police to investigate a traffic infraction, does not invoke successfully a consideration of the ***Charter***, s.9 which forbids arbitrary detention.

[33] However, even if it could be said that a breach of the ***Charte***r ss.8 and 9 was established, which this Court, on its analysis, does not accept, it has nonetheless considered the issue of exclusion under the ***Charter***, s.24(2) analysis and would apply the apposite reasoning of Doherty J., in ***R.v. Wills***, [1992] O.J. No. 294 (C.A.) , at paras. 109-112:

> 109 Lastly, I must address the effect of the exclusion of the evidence on the administration of justice. The evidence is essential to the prosecution and the charges are very serious. In addition, the charges involve allegations of a type of criminal conduct which is unfortunately all too prevalent in our society, despite the heightened public perception of the tremendous costs occasioned by drinking and driving offences.
>
> 110 In estimating the effect of the exclusion of the evidence, I return to where I started in my s. 24(2) analysis. The reasonable, dispassionate and fully informed member of the public would, in my opinion, properly wonder what principle or right would be vindicated by the exclusion of the evidence in this case. One could only respond that it was the accused's right not to perform the breathalyzer test, a right which, of course, he would not have had but for the malfunctioning of the A.L.E.R.T. machine.
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> 111 The exclusion of reliable evidence, crucial to the determination of

> culpability, in respect of serious offences which directly concern public safety is much too high a price to pay to vindicate a "right" which existed only because a piece of machinery did not work properly.
>
> 112 I am satisfied that s. 24(2) of the Charter does not mandate the exclusion of the evidence.

[34] Here, it was not the malfunction of a piece of machinery but a situation where Brewer admitted to the police that he was the operator of the vehicle at the time of the accident and on the principle of “past signification” the Court finds him to have had an ongoing care or control of the vehicle. As a result, and in the circumstance, the Court still thinks that when it applies the tests mandated in ***R.v. Collins***, [1987] 1 S.C.R. 265 and ***R.v. Stillman*** (1997), 113 C.C.C. (3d) 321 (S.C.C.), on a balancing of the interests, there would be no valid justification to exclude the evidence of the breathalyser results.

[35] In the result, it is this Court’s opinion that to exclude reliable and critical evidence that proves the commission of a serious offence may be too high a price to pay to vindicate a person’s “right” to avoid the consequences of a roadside screening test and a breathalyser test because he was standing outside his vehicle when the police arrived on the accident scene in which he admitted that he was the driver at the time of the accident. That, in the Court’s

view would be a most extravagant and distortional application of the ***Charter*** principles.

Conclusion on the *Voire Dire* Evidence

[36] On the basis of the evidence that it accepts and finds as credible and trustworthy this Court is satisfied that the ***Charter*** challenges, as presented, are not sustainable. In the result, the application to exclude the breath results and the certificate of the qualified technician is dismissed and the certificate is admissible.

FURTHER RELEVANT EVIDENCE ON THE TRIAL

[37] The passenger in the accused vehicle, Murielle Theres Arsenault, was his friend of a couple of years and, at the time in issue, a medical student. She testified that on the evening contiguous to the accident, she contacted the accused and they went to a local saloon to meet friends and to socialize. Consuming alcoholic beverages until about closing time at 0230 hours, they continued to mingle with friends until 0400 hours when they eventually left the

saloon.

[38] When they did leave the saloon, they decided to go for a drive during the course of which Arsenault fell asleep. She assumed that she was not wearing a seatbelt. In any event, her next memory recall was that she was laying in the car with a firefighter looking over her and, that emergency personnel removed her from the vehicle to an ambulance which took her to the hospital.

[39] As a result of the accident, she suffered from injuries that included sore back, shoulder and neck, and a bump to her nose. Further, because of these injuries, she was compelled, for a period of one week, to remain laying down as she could not do anything. Additionally, for the same period, she was unable to attend her academic classes that not only interrupted her education cycle but also threatened to endanger her completing her formal required studies on time. Likewise, she stated that for one month, “things were not quite right” and accordingly, she had to alter her schedules.

[40] The Crown presented expert opinion evidence through Jean-Claude Landry, a civilian employee of the Royal Canadian Mounted Police. He was

qualified to give expert opinion evidence on the theory and operation of breath testing devices, and the interpretation of the results obtained; the absorption, distribution, and elimination of alcohol in the human body and the factors that affect these processes; the effect of alcohol on individuals and on their driving performances; the interpretation and extrapolation of alcohol concentration in bodily substances.

[41] In his report, tendered as Exhibit 4, that was amplified in his *viva voce* testimony, Landry opined that:

> "all individuals are impaired in their ability to safely operate a motor vehicle when their BAC is 100mg% and greater (regardless to their tolerance to the effects of alcohol or their driving experience). Some individuals, however, who are inexperienced drinkers or drivers may be impaired at a level of 50mg%."

[42] Furthermore, in his opinion, slurred speech depended on one's experience with alcohol and the absence of slurred speech did not mean that one was not impaired if there were other supportive indicia of impairment. It was also his opinion that, assuming the last consumption of alcohol was between 0200 hours and 0230 hours; and, testing for alcohol was at 0618 hours and 0640 hours with a reading of 140/100; and, operating a motor vehicle was at 0400 hours with no additional consumption of alcohol; and, considering

the body's normal elimination rate of alcohol, the readings, when extrapolated back to driving at 0418 hours, would be between 160 milligrams and 180 milligrams of alcohol in 100 millilitres blood. On the same assumptions, if driving were at 0400 hours, his opinion was that the readings could be between 163 milligrams and 186 milligrams of alcohol in 100 millilitres blood.

[43] The "Certificate of Qualified Technician (Datamaster)" that was tendered as Exhibit VD1, indicates that the first breath sample was taken from the accused at 0618 hours. The analysis result was 140 milligrams of alcohol in 100 millilitres of blood. The second breath sample was taken from the accused at 0640 hours and the analysis result was 140 milligrams of alcohol in 100 millilitres of blood.

[44] In his testimony, the accused affirmed that, at the saloon, he had, between 2359 hours and 0200 hours, consumed four beers. Also, at about 0400 hours, accompanied by Arsenault, he left the saloon and they went for a drive. When he turned onto Quinpool Road from Purcell Cove Road at the Armdale Rotary, another vehicle suddenly appeared and was overtaking him. This other vehicle, a black Audi, came so close and it knocked off his driver's

side external rearview mirror. To avoid further contact, the accused steered his vehicle toward the curb, applied his brakes and attempted to get back onto the roadway but lost traction. As a result, his vehicle slid and collided with a telephone post.

[45] Although he was wearing his seatbelt, his passenger, who was dozing off intermittently, was not. In any event, the impact jolted her and she appeared to be in a state of shock. He called 911 and the emergency services arrived on the scene, within ten minutes, followed by the police, within fifteen minutes. Advising the police on what took place and that he was the operator of the vehicle at the time of the collision, they arrested him for alcohol related offences.

[46] In cross-examination, it would appear that he told the police that an outbound vehicle, (he was going inbound) swerved into his lane and that he took avoidance action and the collision was the consequential result. He, however, did not adopt this position at trial. Significantly, he did not tell anyone, including the police investigators, at the accident scene, that another car had sideswiped his vehicle and had broken his driver's side external rear view

mirror. Further, he was uncertain as to whether he told the police that the offending vehicle was a black Audi. Likewise, he neither took photographs of the alleged damage to his vehicle nor was he certain what part of the offending vehicle made the contact.

[47] However, the uncontradicted *"Report of Motor Vehicle Accident*," that was prepared by Constable Cross and tendered as Exhibit 2, gave the following description of the accident:

> Single vehicle accident, Mr. Brewer lost control of vehicle travelling East on Quinpool Rd., struck ice shoulder, the city metal pole, then telephone pole. Mr. Brewer failed SLT test, failed Breathalyzer.

Position of the Parties

(*a) on behalf of the Crown*

[48] The Crown submitted that there was no issue concerning the s.253(b) charge and accordingly, the accused should be found guilty as charged.

[49] On the issue of the s.255(b) charge, the Crown asserted that the accused

judgement in the operation of his motor vehicle was impaired by his consumption of alcohol. Even assuming that his story about the other vehicle, although suspect, is correct, the fact that his passenger was not wearing a seatbelt, his impaired state did contribute to the bodily harm "beyond *de minimis*" range. Further, the accused assertion that he only had four beers in the time frame and none before midnight was at odds with the breathalyser readings and the expert opinion evidence as to the probable level of his impairment.

[50] Moreover, it was indeed odd that if another vehicle was involved, as he claimed in his testimony, at the accident scene, neither did he report this fact to the police nor that his vehicle had sustained damage to its outside rearview mirror. Additionally, he did not produce any strand of evidence, for example, by way of a photograph, to support this critical exculpatory evidential factor that could have been tested at trial.

[51] Further, there was no evidence to support the hypothesis that this was an inevitable accident. On the contrary, it is clear, from the evidence, that his impaired state was either a real or a contributing cause of the accident that

resulted in causing bodily harm even if there were other contributing causes. As his version of events could neither be tested nor verified and as the quantity of his consumption of alcohol did not square with the breathalyser results and the corroborative expert evidence, his testimony was therefore not only unreliable, it was also not credible and did not raise a reasonable doubt. Consequently, he should be convicted of the offence as charged.

(b) on behalf of the accused

[52] At its core, the submission on behalf of the accused was that what occurred was an inevitable accident. It would have happened whether or not the accused was impaired by alcohol. Moreover, the accused has no criminal record, was concerned throughout with the well-being of his passenger and cooperated with the police. In any event, the accident was not his fault and, even if it could be said that it were, his passenger's injury resulted solely from her not wearing a seatbelt and not from any causative factors that could be attributed to the manner in which the accused operated the motor vehicle. As the burden was on the Crown to prove beyond a reasonable doubt the guilt of the accused and as the accused testimony was credible and has raised a

reasonable doubt he should be acquitted of the charge under s.255(2).

[53] With respect to the s.253(b) charge the accused offered no further submission and left the decision of guilt for the Court to determine based on its findings on the *voire dire*.

Findings of Fact and Analysis

[54] The Court reiterates its findings on the *voire dire* and, on the total evidence, concludes and finds, for the reasons stated, that at the time of the collision:

(a) the accused had the care and control of the motor vehicle;

(b) the accused had a blood alcohol concentration in his body of 140 milligrams of alcohol in 100 millilitres of blood;

(c) the passenger in the motor vehicle suffered injuries.

[55] After the collision, Arsenault, who was the passenger in the vehicle at the time, was compelled, for one week, to remain in bed as she was incapable of performing her normal tasks. The injuries disrupted her academic study scheduling and, for one month, it did interfere with her health and comfort. It was therefore, on the evidence that the Court accepts and finds to be credible and trustworthy, more than trifling and transient in nature. Thus, in the Court's opinion, there is no doubt that the injuries that she sustained amounted to "bodily harm" as defined in the ***Criminal Code***, s. 2. As a result, the Court concludes and finds that she did suffer bodily harm.

[56] However, the issue of causation arises. Did the accused operation of the motor vehicle cause the injuries that his passenger suffered?

[57] The position of the accused was that the accident was unavoidable and that his impairment was not a contributing cause to the bodily harm as it was not beyond the "*de minimis*" range. His impaired condition, as evidenced by his driving conduct and his reaction to make a crisis judgment, did not comprise a contributing cause as there was no causal connection between his condition and the ensuing bodily harm. Further, his impairment was not a significant

contributing cause of the accident as there was another offending vehicle and, Arsenault was not wearing her seatbelt.

[58] From the Crown's perspective, the accused, even accepting his version of facts concerning another vehicle, because of his impaired condition, his judgment and reaction time abilities were nonetheless compromised by his consumption of alcohol. Moreover, his story concerning another vehicle causing damage to his driver's side outside rearview mirror, was suspect. Significantly, at the accident scene, he neither disclosed this crucial fact to the police nor did he, at trial, provide any credible supporting evidence, or at all.

[59] Additionally, from the Crown's standpoint, the admitted quantum of his alcohol consumption, in the time frame under discussion, was at odds with the breathalyser readings and the expert's opinion evidence. Thus, even if Arsenault were not wearing a seatbelt, the accused impaired state was a significant or real cause of the bodily harm beyond the "*de minimis*" even if there were other contributing causes.

[60] Thus, it is the Court's opinion that there is an issue of the accused's

credibility. When addressing the issue of credibility, this Court opined in ***R.v. O.J.M.***, [1998] N.S.J. No. 362 at para.35:

> Overall, a witness' statement is considered true until there is some particular reason to doubt it. This may come about by circumstances of the inherent unreasonableness of the testimony itself, or by imputations extracted in cross-examination of the witness to infer, for example, the incredibility of a fact that reveals obvious errors. In addition, extrinsic evidence, or lack of it, may point to errors or inaccuracies in a witness' testimony and if never corrected to rehabilitate the credit of the witness, that testimony would have little or no probative value.

[61] In further addition, this Court opined in ***R.v. Killen***, [2005] N.S.J. No.41, 2005 NSPC 4 at paras. 19 and 20:

> 19 ... that in accepting the testimony of any witness, because credit is presumed, the truthfulness of the witness is also presumed. However, that presumption can be displaced and, in my view, can easily be refuted by evidence that raises a reasonable doubt about the witness's truthfulness particularly if that witness is never rehabilitated by belief or supportive evidence as explained in ***R. v. Vetrovec*** [1982] 1 S.C.R. 811 and ***R. v. W.(D***.) [1991] 1 S.C.R. 742. If credit is displaced and it is not restored, the witness's testimony becomes unreliable and untrustworthy and, in my view, it would have little or no probative value in deciding the facts in issue.

> 20. Second, there is always a common sense approach to the assessment of witnesses and the weighing of their testimonies with the total evidence as was underscored by O'Halloran J.A., in ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, and by Cory J., in ***W.(D.)*** at p. 747. In short, even if a witness is not disbelieved but remains discredited, reasonably, I could still refuse not to rely upon his or her testimony especially if, in my view, "it is not in harmony with the preponderance of the probabilities which a practical and

> informed person would readily recognize as reasonable" in the set of circumstances disclosed by the total evidence and material to the facts in issue.

[62] Here, in the Court's opinion, the critical factor is whether indeed another vehicle was involved in the accident as, most significantly, the accused presented no supporting evidence of this fact. To this end, the Court finds it odd and not "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" that in a motor vehicle accident where he would be asserting that another vehicle was at fault, he did not, at the accident scene, declare to the investigating authorities this exculpatory fact concerning the other vehicle. This is so, particularly given the fact that his passenger was injured and the alleged damage to his vehicle would have been visible and also readily and easily could have been confirmed.

[63] Additionally, the accused asserted that he told the police "what happened." However, in cross-examination he admitted that, at the accident scene, he neither told the police about the offending vehicle nor did he show them the alleged damage to his vehicle that was occasioned by the contact with the alleged offending vehicle. Further, knowing what would be his defence, he also did not take any photograph of the alleged damage that would have

supported his testimony. Of import, the investigator's report described the accident as a "single vehicle accident."

[64] Counsel for the accused observed, in argument, that he was restricted from confirming, in his cross-examination of the investigator, whether the investigator was aware, from talking to the accused, of the existence of the other vehicle. In the Court's respectful opinion, the prohibition was due to the negative testimonial credit approach in which the questions were framed. Respectfully, in the Court's opinion, in order to satisfy the Rule in ***Brown v. Dunn*** (1893), 6 R. 67 (H.L.) there is an evidential distinction between asking a witness, who has no personal knowledge of a fact in issue: "Are you aware that . . . ?" and, "Did [the accused] tell you . . . ? The former question, if the answer is intended to be tendered for the truth of its content, would offend the hearsay rule as it allows the witness to say that he obtained the crucial information, of which he has no personal knowledge, from the accused or some other source and, it would have a negative effect on his testimonial credit. For the accused, it could be considered as self-serving and oath-helping. However, the latter question, which would be more effective, can only elicit a "yes" or a "no" answer which would be in the witness's personal knowledge which, in the Court's

opinion, would have a positive effect on the witness's testimonial credit.

[65] Here, the Court does not doubt the sincerity of the accused. However, the inherent unreasonableness of his testimony, that was unsupported, and the imputations extracted in his cross-examination, in the Court's opinion, would lead a reasonable person to suspect, given the total evidence, that there was no other vehicle involved in the accident. This is so, as in the Court's opinion, his testimony was not compatible with the preponderance of the probabilities that then existed.

[66] Additionally, the Court finds that the unreliableness and untrustworthiness of his testimony have crystallized into a cloud of reasonable doubt concerning that testimony. That is so, because the extrinsic evidence, such as the alleged damage to his vehicle caused by the other alleged vehicle, was never revealed to anyone at the accident scene and it is not supported by any real evidence. In the absence of such critical real or supportive evidence, which the Court expects that, on the preponderance of the probabilities, a practical and informed person in the position of the accused and with his knowledge of the accident would readily reveal and produce in vindication of his position, leaves

the Court reasonably to conclude that there is an inaccuracy in his testimony.

[67] In the Court's consideration of the total evidence and in its assessing and weighing his testimony, the Court thinks that, given the legal jeopardy that he must have realized that he faced, as a reasonable person in his position, if an exculpatory factor then existed, absent a rational explanation, it was incumbent upon him to reveal that fact to the police for it to form an integral part of their investigation and report. This, he did not do. Here, the police report of the accident described it as "a single vehicle accident, Mr. Brewer lost control of vehicle . . . " This report was after the accused told them "what happened." Significantly, the accused, in his testimony, neither refuted nor challenged the contents of the accident report. Consequently, in the Court's view, his creditworthiness concerning the contact with another vehicle was displaced and it was never corrected nor rehabilitated by belief or supportive evidence.

[68] As a result, the Court concludes and finds that the accused testimony concerning another vehicle is unreliable and untrustworthy. The Court also finds that there is a reasonable doubt as to its truthfulness and therefore finds that aspect of his testimony to have little or no probative value in deciding the

facts in issue. Put succinctly, the Court does not believe him on that point. See: ***R.v. W.(D)***, [1991] 1 S.C.R. 742. For these stated reasons, the Court accepts the view that this was a single vehicle accident and finds accordingly.

[69] The Court now addresses the issue of causation. To prove impairment causing bodily harm there must be sufficient evidence to demonstrate that the accused impaired ability to operate his motor vehicle was at least a contributing cause of the bodily injury outside the *de minimis* range. ***R.v. Pinske*** (1988), 30 B.C.L.R. (2d) 114 at 123 (C.A.), (criminal negligence causing death in the operation of a motor vehicle), aff'd, [1989] 2 S.C.R. 979, ***R.v. Smithers,*** [1978] 1 S.C.R. 506 (criminal negligence causing death - non motor vehicle).

[70] It would appear that the ***Smithers*** test has been followed for prosecutions under the ***Criminal Code***, s. 249 and similar offences under s.255(2) and (3). See for example: ***R. v. Larocque,*** [1988] O.J. No. 330 (C.A.), (1988), 5 M.V.R. (2d) 221 (Ont. C.A.) ***R. v. Arsenault*** (1992), 16 C.R. (4th) 301 (P.E.I.C.A.). However, in ***R. v. Nette***, [2001] S.C.J. No. 75, [2001] 3 S.C.R. 488, a case of second degree murder, although the ***Smithers***' causation standard was still valid, the court explained that in applying the ***Smithers***' test, causation outside

the *de minimis* range means that the conduct of the accused was a "significant contributing" cause.

[71] In ***R.v. Fisher***, [1992] B.C.J. No. 721(B.C.C.A.), it was held that where the only proven fact was that there was a collision with a pedestrian and the breathalyser results with no evidence of unusual driving, the test for causation was not established. But, in ***R.v. Boomer***, [2001] B.C.J. No. 760 (B.C.C.A), the court distinguished ***Fisher,*** on the grounds that there was a substantial body of evidence that Boomer had, before and after the accident, demonstrated “obvious indicia of impairment” and there was no apparent reason for him to lose control of his vehicle. Additionally, where there was no supportive evidence of an explanation for the accident it was not an error for the Court to conclude that the accused impaired ability to drive contributed more than *de minimis* to cause the accident. ***R.v. Rhyason***, [2006] A.J. No. 1498 (C.A.), appeal to the SCC dismissed, [2007] S.C.J. No. 39.

[72] Here, the Court does not accept the accused submission that there was another vehicle that caused him to swerve off the road as the Court finds that this fact is not supported by the evidence before it. Consequently, it is the

Court's view that even if his impairment may have been slight and his departure from normal conduct was not egregious, as he has argued, there is still evidence to support the fact of an accident and no evidence to support a reason for the accident other than his impairment. Further, his contention that the accident was inevitable was not supported by any expert opinions or evidence of any extraneous interference. See for example: ***R.v. Brogan***, [2008] N.S.J. No. 313, 2008 NSPC 42.

[73] The fact of his impairment is supported by the breathalyzer readings and the expert's opinion that, in general, anyone with a reading of more than 100 milligrams of alcohol in 100 millilitres of blood is functionally impaired. What is more, the accused did not counter this empirical assumption of impairment by providing some evidence of his own level of impairment that would have affected his functional ability, if at all, after his admitted consumption of alcohol. See: ***R. v Andrews***, [1994] B.C.J. No. 1456 (C.A.). Thus, absent any evidence to the contrary, the Court concludes and finds, on the totality of the evidence, that the accused was impaired by alcohol to the degree that it affected his functional ability to operate his motor vehicle at the time of the accident.

[74] Furthermore, there is authority for the proposition that, if there are no explanations for the accident, causation can be established from evidence that includes the circumstances of the accident itself. See for example: ***Larocque***, *supra*. ; ***R. v. White*** (1994), 130 N.S.R. (2d) 143, 28 C.R. (4th) 160 at 173 (N.S. C.A)***; R. v. Laprise*** (1996), 113 C.C.C. (3d) 87 at 93-4 (Que. C.A.). Here, in effect, the Court finds that, save for his impairment, the evidence provided no other rational explanation for the accident. According to the police accident report, the weather condition was clear but cold and the road surface condition was paved and dry. Thus, in the Court's opinion, there is no evidence that raises a reasonable doubt about whether the accused impairment was not more that a *de minimis* cause of the accident.

[75] Further, in the Court's opinion, the argument of the accused that as his passenger was not wearing a seatbelt he should be exonerated from criminal liability for her injuries cannot be sustained. This argument respectfully ignores the fact that the underlying offence is the impaired operation of a motor vehicle that caused bodily harm. In the Court's opinion, where there is evidence to support all the elements of the underlying offence, which is the fact of the accident and that it is unexplained and, the presence of injuries that did not

exist before the accident, it can take the circumstances of the accident to establish both impairment and causation. This is the case, whether or not his passenger wore a seatbelt, which may be an aggravating circumstance, but which is not a determining factor with respect to his criminal liability for her injuries.

[76] The Court therefore finds, in all the circumstances, that it was the accused avoidable, dangerous and unlawful act of driving a motor vehicle while he was impaired by alcohol, which was likely to injure another person, that put his passenger at risk. Furthermore, as a result of his stated unlawful conduct, she did suffer bodily harm. See for example: ***Larocque***, *supra*. , ***Pinske***, *supra*. , ***R.v. DeSousa***, [1992] S.C.J. 77, (a non-driving case with the applicable principle that the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances.)

Conclusions

[77] Consequently, upon the Court's assessment of the total evidence and of the witnesses as they testified and its impressions of their testimonies and on

the above analysis and the noted authorities, it concludes as follows:

(a) The Crown has proved beyond a reasonable doubt that the accused had the care or control of his motor vehicle at the time of the accident and that his blood alcohol concentration was 140 milligrams on alcohol in 100 millilitres of blood. As a result, the Court finds him **guilty** of count number 1, operation of a motor vehicle with a blood alcohol concentration of more than 80 milligrams of alcohol in 100 millilitres of blood, contrary to the ***Criminal Code,*** s. 253(b), on the Information tried before me.

(b) Given the conviction on count 1 and the principle as proclaimed in ***R. v Kienapple***, [1974] S.C.J. No.76, the Court will enter a **judicial stay of prosecution** on count 2**,** operating a motor vehicle while his ability to do so was impaired by alcohol, contrary to the ***Criminal Code***, s.253(a).

(c) The Crown has proved beyond a reasonable doubt that the accused unlawfully had the care or control of a motor vehicle while his ability to operate it was impaired by alcohol and did cause bodily harm to Murielle

Theres Arsenault, contrary to the ***Criminal Code***, s. 255(2), and accordingly finds him **guilty** as charged.

[78] That is the decision of this Court.

J.