IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacDougall, 2010 NSPC 55

Date: 20 September 2010
Docket: 1998227/228 – 998231/32/33
Registry: Sydney, Nova Scotia

Between:

Her Majesty the Queen

v.

Eric MacDougall

Judge: The Honorable Judge A.P. Ross

Counsel: Ms. Diane McGrath, for the Crown
Mr. William Burchell, for the Defense

[1] Eric MacDougall is charged with impaired driving causing death and with operating a motor vehicle while his blood alcohol level was over the legal limit. The charges arise from an incident at St. Ann's, Victoria County, on December 6, 2008.

Facts

the incident, arrest and demand

[2] At 2:40 on the morning of December 6, 2008 Constables Aaron Brown and Jake Foran of the Baddeck detachment of the RCMP were each returning home at the end of a shift when they received a call from an emergency 911 dispatcher. They were notified of a single-car accident north of the Lobster Galley restaurant, which is on the Cabot Trail in Victoria County, Nova Scotia. Brown picked up Foran in a marked police car. Both were in uniform. Brown had been a member for three years, Foran for three weeks.

[3] Constable Brown believes the dispatcher told him that the accident had occurred about 40 minutes before, which would be at approximately 2:00 a.m. Constable Foran doesn't recall being given a particular time, but believed it had occurred within the previous few minutes. Evidently the police are the last of the emergency responders to be mobilized by the dispatcher in such circumstances.

[4] They arrived at the scene at 2:55. Brown remembers that it was a cool night, that the road had a few slippery patches, that there was no snow or rain, and that there was little to no traffic. He described the highway as "fresh grade new road" as of the previous summer. He agreed that there were some winding sections. Foran said that the road surface was wet and so although it was an emergency response they did not drive very fast due to conditions. It thus appears that both officers had an opportunity to observe and assess the general road and traffic conditions as they were at the time of the accident. They negotiated the same stretch of highway as had the accused minutes earlier.

[5] The police found a green Chev Malibu in the ditch, heavily damaged, apparently from a rollover. No other vehicle was involved. The airbags had deployed; there was blood on them. They noticed a number of bottles of Keith's beer inside the vehicle, unopened. Medics were working on a young lady, Emily Cardwell, who was not responsive. The police officers approached a group of bystanders, and noticed one in particular because of an injury to his left elbow. Brown said that the bone was sticking out. The young man was Eric MacDougall. Brown asked "what happened?". Mr. MacDougall replied that he was going too fast on a turn, hit the shoulder and flipped. Foran remembers the reply to be that he was going too fast on a turn and hit "loose gravel".

[6] Constable Brown detected a "strong odour of liquor" and glossy eyes. In cross

examination he said the smell was “overpowering”. He cited this and the fact that he could see no “outward reason” for the accident as his grounds to arrest the accused for impaired driving.

[7] At the time of the arrest, which was 3:00 a.m., Constable Foran was standing about two feet away from his fellow officer, who was face to face with the accused. Foran said he noticed an odour of liquor on the accused’s breath. He made no mention of the eyes.

[8] The accused was given his usual Charter rights. He said he understood. He said he did not want a lawyer, he “just wanted her to be o.k.”.

[9] The call which was placed to the 911 operator was recorded and introduced into evidence. Having thus had an opportunity to listen to it I know that at least two if not three people spoke to the dispatcher about the accident, the location, etc. One of them was the accused. He identifies himself and speaks about the condition of Ms. Cardwell, describing her as being in her twenties, thrown from the vehicle, not responding, breathing heavily, etc. There is a note of fear and concern in his voice. His speech was cogent and his words clearly formed.

[10] Ms. Cardwell was taken to hospital in an ambulance. So too was the accused. Brown said he did not make a demand for a breath sample from the accused because it was apparent that he had a compound fracture, and based upon his experience as a police officer, including some first aid training, he believed Mr. MacDougall would have to be checked by a doctor. He said he did not make a blood demand because the emergency responders were going to take control of the accused, he was unsure how serious the accused’s injuries were, and unsure whether he could comply with a blood demand. He instructed Foran to accompany the accused in the ambulance. Foran did, along with the ambulance attendant Sexton. There was no conversation with the accused en route to the Cape Breton Regional Hospital. No further observations were noted.

[11] Foran and the accused arrived at the hospital a few minutes before 4:00 a.m. Foran spoke to Brown by radio. Brown advised that “the best thing would be to get a blood sample”. Brown himself arrived a few minutes later and it appears was present when Foran read a blood demand to the accused. Brown testified that Foran read the demand “verbatim”.

[12] For his part Constable Foran said he spoke to the accused at the hospital who asked if Ms. Cardwell had died. Foran made inquiries of the nursing staff who said it would be ok to read a blood demand. He did so at 4:06 a.m. “about fifteen minutes” after arriving. It was the usual form of demand. Mr. MacDougall said he understood and agreed to provide samples. Foran testified that he gave a blood demand because of the accused’s injuries, believing there would be x-rays and other treatment which

would consume a lengthy period of time. He said he did not read a blood demand sooner than this because “his (the accused’s) health had to get higher priority”.

[13] Inquiries having been made whether it would be safe to take blood samples, Dr. Heese, the attending physician, who was working the ER that night, did so. Brown had checked that a proper kit was available and sealed the samples in the appropriate containers. Two samples were obtained, at 4:45 and 4:47. I will refer to these hereafter as the “police samples”. Neither officer made any further requests of Dr. Heese.

[14] While having little memory of the events of that night, Dr. Theresa Heese testified to the fact that she was the attending physician who drew blood from the accused. She said a blood sample was taken for medical purposes. It is clear she was referring to a sample over and above those taken at the behest of the police. This additional sample was subsequently seized by police pursuant to warrant. I will refer to it hereafter as the “hospital sample”.

[15] Dr. Heese indicated that even in the case of a fractured elbow there was a concern about internal injuries that may not have been evident from Mr. MacDougall’s appearance. She said seriously injured people may not have a mark on them. She knew he had been in a car accident. She stated that blood loss and internal damage were possible. She said the trauma guidelines call for taking a blood sample in such circumstances, particularly where there was serious injury to another person in the same motor vehicle. The sample is analyzed for the presence of intoxicants, which can mask pain. This is one part of “a panel of labwork” which, on her evidence, assists in proper treatment. Her evidence was uncontradicted on these points. She has done emergency medicine since 1994.

the warrant

[16] RCMP Constable Mark Skinner obtained a s.487 search warrant from a provincial court judge at Sydney on October 26th, 2009. It authorized search and seizure of a toxicology report for Mr. MacDougall generated as a result of his visit to the Regional Hospital on December 6, 2008.

[17] Skinner’s involvement in this investigation began a couple of days after the car crash with the taking of statements. Some time later - the exact date is not clear on the evidence - he spoke with Dr. Heese at the Regional Hospital while he was there in connection with an unrelated impaired driving incident. He learned from her that it was normal hospital procedure to take a blood sample for analysis where a patient is being treated for injuries suffered in a motor vehicle collision. Either before or after learning this, but before applying for the warrant, police and Crown had discussed the possibility of obtaining the results of any blood alcohol analysis done on the hospital sample. This

would be evidence over and above the blood analysis done on the two samples taken by police demand and analyzed independently at the police laboratory.

[18] Constable Skinner wanted to ensure that such a sample had in fact been taken from the accused before beginning the process of obtaining a warrant to procure the lab results. In this regard he followed up his conversation with a brief exchange of emails. He wrote to her on August 28, 2009 asking confirmation of the fact that she was the ER doctor on the night in question. This was confirmed, and so Skinner wrote to Dr. Heese the next day with details of the names of the driver and the deceased. He advised that Mr. MacDougall was facing charges in Ms. Cardwell's death and mentioned the police samples. He then asks "Do you remember if due to his injuries if the hospital also drew some blood for analysis? If so that's fine, I will direct the Crown to prepare a production order for it . . . if we know that there was data waiting for us we would do the production order instead of just hoping there is data there for us." Dr. Heese replied on September 9, 2009 that she was indeed working on the night in question, had checked the records, and that "There was lab drawn from him the night of Dec. 6, so you can start the paperwork to have it released to you. Hope this helps." At some point Skinner also spoke with a Ms. Hawko, a health records technician, and learned from her that the "toxicology report" would be the document to ask for.

[19] The Information to Obtain prepared by Constable Skinner and presented to the judge on October 26th, 2009, contains a brief summary of the exchange between the officer and Dr. Heese outlined above. It states his belief that the sample taken at the hospital "for his medical treatment" was analyzed, and that according to Dr. Heese this testing would include the level of alcohol in the blood. He identifies the toxicology report as the document being sought, and cites a belief that it would afford evidence of the offence of impaired driving causing death. He mentions the fact that other blood samples were taken pursuant to a police demand, but he does not disclose the results of this analysis. He gives a synopsis of Brown and Foran's occurrence report of the crash scene. He includes Brown's observations of the accused (strong smell of liquor, glossy eyes). He mentions the accused's statement that he was the driver, and his stated reason for losing control (which makes no mention of impairment).

[20] From the Information to Obtain (ITO) one learns that there were three passengers in the vehicle before it stopped to pick up Ms. Cardwell. Skinner summarizes the statements of two of them. One passenger had observed the accused drinking beer at a party earlier that evening in Baddeck, but she expressed no view about his impairment, one way or the other, and says he did not drink any beer during the car ride. Another describes recklessly fast driving by the accused, but says he noticed no signs of alcohol impairment, and had not seen him consume any liquor at any time.

[21] From the ITO one learns that two attendants accompanied the accused in the ambulance. The statement of one was summarized. He says that the accused, while

being treated at the scene, said he was the driver and had consumed eight beer during the evening. This witness noted a smell of alcohol and "signs of intoxication".

[22] In cross examination Constable Skinner appeared to agree that the other ambulance attendant, whose statement was not summarized in the ITO, had not noted signs of alcohol impairment. He also agreed that a civilian who had come across the crash scene did not smell any alcohol from the accused. I will accept, for the purposes of this *voir dire*, that these persons, and possibly others, had given statements to police which may point away from the possibility that the accused was impaired by alcohol, but which were not mentioned in the ITO.

[23] Skinner attended at the Sydney Justice Centre on October 26th, 2009. Ms. Bonar, an administrative JP, swore the affidavit. While Skinner waited in the reception area, Ms. Bonar delivered the sworn ITO, and the s.487 warrant which was being sought, to the judge in his office. It came back about ten minutes later, having been signed and issued in the form requested. The issuing judge did not review the ITO in the presence of Constable Skinner, and did not consider it necessary to meet with him face to face.

[24] The ITO outlines the various sources of information. It has a one-paragraph overview, a nine-paragraph history of the investigation, and a three-paragraph summary of the grounds upon which the warrant is sought. The paragraphs are written clearly and succinctly, many in point form.

[25] Defense has challenged the propriety of police action on a number of fronts. Defense also made a number of objections to the admissibility of the results of the analysis of the blood samples. A voir dire was held in Baddeck on May 31, 2010. Counsel made final arguments on June 22, 2010. The trial proper is presently scheduled to take place before me in provincial court in Baddeck on October 27 and 28, 2010. I will here attempt to outline my reasoning in the disposition of the issues raised.

[26] Readers will note that this hearing and this decision concern certain discrete pieces of evidence - the results of analysis done on blood samples taken from the accused - and whether they are admissible at trial. The actual blood alcohol readings were not put in evidence at the voir dire and are thus unknown to me at this stage of the proceedings. The evidence and findings of fact in this decision are solely for the purposes of the voir dire. Whether certain statements, observations, etc. noted in these reasons make their way into evidence "in chief" must await the trial itself. The accused embarks upon his trial fully entitled to the presumption of innocence, whatever the outcome of this pre-trial hearing.

Police samples

preconditions to the blood demand

[27] Defense argues that the demand for blood samples was invalid because the prerequisites for a valid blood demand were not observed. In particular defense says that the timing of the demand was improper in that the “as soon as practicable” requirement was not met. Non-compliance with statute would vitiate the ensuing demand, potentially rendering the police samples an illegal seizure of evidence from the accused.

[28] I recently had occasion to consider this issue in R. v. Doyle [2009] N.S.J. No. 656, and wrote there:

7 The basis for a valid blood demand is set out in s. 254(3) of the Criminal Code. The wording of the section has changed somewhat in recent years, but previous case law remains relevant to the issues here. As of July 13, 2008, and still today it reads as follows:

If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable,

(i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and

(b) if necessary, to accompany the peace officer for that purpose.

8 A belief that an offence of impaired driving has occurred within the previous three hours is a precondition common to both a breath and blood demand. To make a blood demand the peace officer must know that the samples will be extracted by qualified medical personnel and that doing so will not endanger the health of the person. There is also the stipulation which is at issue in this case, namely that the physical condition of the person either (I) renders him or her incapable of giving a breath sample, or (ii) otherwise makes it impracticable for the peace officer to obtain a breath sample. If

either the "incapable" requirement or the "impracticable" requirement is met, a blood demand may be given. The incapacity or impracticability (as the case may be) must relate directly to the physical condition of the person. Cases have held, for instance, that the unavailability of breath test equipment does not meet the test of impracticability.

9 The idea of "practicability" is found in s. 254(3) at three different points. These three occurrences, like the circumstances to which they refer, impinge on one another. The section should be read as a whole, and the element of practicability interpreted in more or less the same way throughout.

10 There are obvious tensions between the requirement that the peace officer, if s/he chooses to make a demand of some sort, make it "as soon as practicable" and the requirement that s/he believe "it would be impracticable" to obtain breath samples before proceeding to a blood demand. There is a need to act with reasonable dispatch, yet a need to ascertain whether circumstances are such that a breath demand is not feasible. Is the officer entitled only to consider the situation at a particular moment, or instead required to take a larger context into account? Is an officer required, in some situations, to hold off until certain things become clearer?

[29] In Doyle I also summarized a number of cases from Nova Scotia and elsewhere in which a blood demand was ruled to be either valid or invalid. I did so in order to make factual comparisons with the circumstances pertaining in Doyle. I have those cases in mind here, along with cases cited by counsel on this application, as I consider the circumstances in which a blood demand was made upon Mr. MacDougall.

[30] In Doyle I concluded that the blood demand, made at the scene upon a person being loaded into an ambulance, was precipitous. The evidence did not show that it was impracticable, in all the circumstances, to obtain a breath sample within a reasonable time. There was no assessment by the police officer of the need for the more intrusive blood procedure.

[31] In the present case the officer who made the demand, Constable Foran, waited until he was at the hospital with the accused. Foran, a newly minted police officer, had received some advice from his more senior colleague, Brown. I see nothing inappropriate, much less invalid or illegal, in the police deferring the demand to this point in MacDougall’s medical treatment. It is a common thread in the reported cases that the legitimate interest of the police in gathering evidence must often give way to any pressing medical needs of the suspect. This accused had a serious injury. A broken bone was protruding from his elbow. He had just been in a serious car crash. Both police officers knew this, and understood that ambulance personnel would be taking control of Mr. MacDougall and transporting him to hospital for assessment and treatment.

[32] Defense argues that Foran, at the scene, had no reason to think that Mr.

MacDougall was incapable of giving a breath sample, despite the broken arm. While strictly true - Mr. MacDougall may well have possessed the physical capability to give a breath sample if there had been a machine there - the section also entitles the police to consider the impracticability of a breath demand based upon his physical condition. In Doyle I noted:

46 In many cases it is the steps taken by medical personnel, rather than the physical condition of the person per se, which creates the impracticability of a breath demand. It may later be determined that an accused who is strapped to a board, put on a stretcher, administered medical tests, taken to hospital, put under observation, x-rayed, etc. is perfectly fine. But it would make no sense to allow such an accused to argue later that a blood demand was not based on his "physical condition".

[33] Defense correctly says that between the interactions at the scene and the making of the demand at the hospital at 4:06 a.m., a period of about one hour, Foran did not develop any additional grounds for the demand. But formulating grounds for a demand still leaves open the matter of what form - breath or blood - the demand should take, which itself may affect the timing of the demand. The fact a person is arrested for impaired driving does not mean that the police must always follow up right away with a demand of some sort. The decision not to make a demand at the scene did not cause any arbitrary detention of Mr. MacDougall. Again, from Doyle :

48 Going hand in glove with a demand, whether for breath or blood samples, is the requirement to accompany the peace officer. Where the accused is under the control of medical personnel en route to (or in) a hospital the peace officer must accompany the accused, rather than the other way around, but the individual is nevertheless under a form of detention and the time which the peace officer assumes control over the accused's movements is merely suspended. In the circumstances of this case, where the police officer formulates grounds at the scene but the accused, in accordance with medical protocols, is being taken to a hospital, the officer is, as a practical matter, required to accompany the accused to hospital. This is so whether s/he makes a breath demand at the scene, or makes a blood demand at the scene. I have noted above that it may have been better had Constable Forgeron made a breath demand at the scene and, if necessary, a blood demand later. Considering the practical implications of the various courses of action, one thing is clear. Whether the police officer makes a breath demand at the scene, a blood demand at the scene, or holds off and later makes a demand of one kind or the other, s/he will have to accompany the accused to the hospital and await the outcome of the medical assessment and any ensuing tests or treatment. In practice, therefore, nothing is gained by making a blood demand at the scene -- putting aside the rare case where the three hour limit within which a demand must be made may come into play -- except that there is no longer a need to mobilize a breath technician at the nearest detachment.

[34] In conclusion on this point, I find no violation of the practicability requirements in s.254(3).

r***easonable and probable grounds - demand***

[35] Defense submits that Constable Foran, who made the blood demand upon the accused, lacked reasonable and probable grounds to do so. As the police samples represent a warrantless seizure of evidence from an accused, the Crown must show that the seizure was reasonable. In other words, the onus is on the Crown to show that Foran had reasonable and probable grounds, failing which the demand would be invalid. This would result in a breach of the accused's s.8 Charter right to be free from unreasonable search and seizure. Defense argues that this in turn should lead to an exclusion of the evidence at trial pursuant to s.24 of the Charter. The blood alcohol readings are undoubtedly critical evidence in the case.

[36] In R. v. Censoni [2001] O.J. No. 5189 Hill, J. wrote:

43 Reasonable grounds in the context of a s. 254(3) breath demand is not an onerous threshold. It must not be inflated to the context of testing trial evidence. Neither, of course, is it so diluted as to threaten individual freedom. All too often, however, the defendant invites the trial court to engage in minute decisions of the officer's opinion - an opinion developed on the spot without the luxury of judicial reflection. This undoubtedly led McFadyen J.A. in Regina v. McClelland, supra at 517 to observe:

It is neither necessary nor desirable to hold an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable.

[37] Reference should be made to R. v. Shepherd [2009] 2 S.C.R. 527 where the Supreme Court discusses the test of reasonableness as a component of a breath demand. In R. v. Wang [2010] O.J. No. 2490 the Ontario Court of Appeal said this about the Shepherd test:

17 In short, Shepherd explains that where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A prima facie case need not be established. Rather, when impaired driving is an issue, what is required is simply that the facts as found by the trial judge be sufficient objectively to support the officer's subjective belief that the motorist was driving while his or her ability to do so was impaired, even to a slight degree, by alcohol: see R. v. Stellato (1993), 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478.

[38] In R. v. Musgrave 151 N.S.R. (2d) 29 the summary conviction appeal judge upheld a ruling of this court that a single vehicle accident with no apparent external

cause coupled with a smell of alcoholic beverage from the driver constituted sufficient grounds for a breath demand. In a subsequent case in this court, R. v. Burton [2002] N.S.J. No. 452 the grounds for the blood demand comprised a single car accident with no apparent explanation, a smell of alcoholic beverage from the accused and a remark from the driver that he'd had three beer. There, as here, one officer had attended to the accused at the hospital on the instruction of another more senior officer. At para 18 I referenced Musgrave and found that the grounds existing in Burton were, if anything, more than sufficient.

[39] In the present case I have again an instance of a single car accident with no obvious cause other than driver error, coupled with a smell of alcoholic beverage. Arguably this alone provides grounds for a demand, but Constable Foran also noted the unopened bottles of beer in the vehicle. This is a relevant circumstance which he was entitled to take into account in deciding whether to make the blood demand.

[40] A person might lose control of a motor vehicle for any number of reasons. Some highways, or parts of them, are inherently more dangerous than others and require drivers to exercise greater caution. This crash occurred near a turn on a relatively winding stretch of road. It may well be the case that a sober driver and an impaired driver are both more likely to go off the road at such a spot than on a wide, strait highway. However this does not mean that it is off limits to police to investigate how it is that the loss of control, the driver error, came about.

[41] Various cases subsequent to the above have considered what importance a single-vehicle accident may have in the formulation of grounds for a demand.

In R. v. Watson [2010] B.C.J. No 1186 (BCCA) a vehicle collided with two pedestrians in a crosswalk. The officer noted that the weather and road conditions were dry, and that there were no skid marks indicative of braking. At para 6 and 12 the court says:

6 Ultimately, the trial judge concluded that Cpl. Burpee had reasonable and probable grounds for demanding a breath sample. In doing so, the trial judge evaluated the indicia of impairment and the officer's subjective and objective grounds to believe that an offence had occurred, instructing himself by reference to R. v. Saulnier, (1990) 23 M.V.R. (2d) 16 at 22 (B.C.C.A.) In deciding whether the constable had reasonable and probable grounds, the trial Judge was entitled to consider everything the constable saw or knew about this matter at the time he made his demand, including the circumstances of the accident, particularly that this was a one-vehicle accident.

12 Cpl. Burpee did not specifically state that the circumstances of the accident formed part of his grounds of belief. Nevertheless, he testified as to his observations of the accident and it is apparent that the totality of Cpl. Burpee's observations informed his opinion. As in R. v. Rhyasson, [2007] 3 S.C.R. 108, "the presence of an unexplained

accident was one factor that the trial judge appropriately took into consideration when determining that those grounds existed" (at para. 19).

[42] This requires a consideration of what “unexplained” means. Here defense argues that Mr. MacDougall gave an explanation of the crash by saying that he was going too fast on the turn, hit the shoulder / loose gravel, and lost control. But does this explain why he was going so fast, among other things?

[43] A driver has control of a motor vehicle. It is obvious that even the most cautious and careful driver may have an accident - brakes may fail, another vehicle may suddenly cross it’s path, the person may suffer a heart attack, etc. This, I think, is the sort of “explanation” which might negate the importance of an “accident” in the formulation of reasonable and probable grounds, because these are things which truly are accidental. They are beyond the control of the driver.

[44] Had Mr. MacDougall been forced off the road by an oncoming vehicle, swerved to avoid a deer on the road or had a steering failure I would be more inclined to discount the crash as a reasonable ground for the blood demand. But his explanation just begs more questions, such why he was going the speed he was, whether there was inattention to the turn in the road, an so forth. His explanation does not discount the likelihood that his own inattention or carelessness played a role. Coupled with other observations made by the police, it was reasonable for them to consider whether alcohol consumption had impaired his ability to focus on his driving, or disinhibited him from driving at a prudent speed.

[45] Mr. MacDougall is a seemingly healthy young man, with no obvious frailties or infirmities.

[46] From what police observed at the scene, and having heard from Mr. MacDougall, they came to a reasonable belief that there were no external causative factors for the vehicle crash. It is in this sense that it was “unexplained”. I think this is what was meant by use of the term in most previous cases. It is in this sense that such circumstances may appropriately be considered as part of the grounds for a breath or blood demand.

[47] The blood demand was made by Constable Foran at the hospital. The judgement of our Court of Appeal in R. v. Farrell [2009] N.S.J. No. 15 at para 20 suggests that trial courts should consider the thinking of the police officer not just at the scene Abut again at the hospital when the demand for blood samples was made.”

[48] During closing argument I asked counsel whether the fact that Brown had arrested the accused for impaired driving at the scene, a fact known to Foran at the when the blood demand was given, was something which Foran was entitled to factor into his grounds. Defence counsel strenuously argued that it was not, and I agree. The

simple fact that an arrest was made by another police officer, in and of itself, does not provide a basis for a demand. This is not to say that observations made by one officer cannot be transmitted to and acted upon by a second. However these points are somewhat moot in this particular case, because Foran personally made the observations which were critical to his formulation of grounds.

[49] In summary, Constable Foran, when he made the blood demand, had received some advice and direction from his more senior partner. At the same time the evidence shows that at the time he made the demand he himself held a subjectively honest belief that an impaired driving offence had occurred, based upon these objective criteria : an "unexplained" single vehicle crash (in the sense noted above), a smell of alcoholic beverage from the breath of the accused at the scene, and the presence of unopened bottles of beer in the vehicle. These factors, in my view, having considered case authority, are sufficient to justify a blood or breath demand.

[50] Defense has argued that the foregoing factors are equivocal - that each could be indicative of something other than impaired driving. Single vehicle crashes occur from simple inattentiveness or distraction. A smell of liquor on someone's breath may indicate recent consumption, but not the presence of alcohol in the bloodstream. Unopened bottles of beer in a vehicle does not necessarily mean the occupants were consuming beer. It would be a mistake, however, to consider each of these indicia in isolation. It is the presence of them together, the totality of the circumstances, which should be evaluated.

[51] In R. v. Andrea [2004] N.S.J. No. 399 the Nova Scotia Court of Appeal restored a conviction entered at trial, which had been overturned by a summary conviction appeal judge, saying that the latter had mistakenly weighed individual pieces of evidence separately. At para 19 the court stated ". . . the appeal court judge erred in assessing the various indicia on which the constable formed his belief in isolation, rejecting each on the grounds of consistency with other explanations. The indicia must be evaluated in total . . ."

[52] In R. v. Johnson [2009] B.C.J. No. 2710 the provincial court judge framed the question appropriately at para 17 - " The question is, do (the police officer's) own observations amount, in totality, and in his mind, to an objectively supportable opinion" Citing the British Columbia Court of Appeal in R. v. Todd, 2007 BCCA 176, it states:

29 I would characterize the analysis based on this line of cases, and including Todd, as an assessment of the totality of the symptoms, viewed from the officer's trained perspective, including any apparent alternate explanations for them which are based on the evidence, and of which he was aware at the time. In a sense, the Court is taking an appellate role; not substituting its opinion for that of the trained officer. Judges are specifically proscribed by Todd from analyzing the symptoms from their own [lay] perspective, absent another apparent explanation based on the circumstances

presented to the officer.

[53] In R. v. Levy [2007] N.S.J. No. 606 the blood demand followed a motorcycle mishap. It was a single vehicle accident. The officer noted a smell of alcohol. In testimony the officer said she believed the accused was impaired "because of the accident" and "I formed the opinion he had alcohol in his blood". The court found that the officer had focused on the presence of alcohol rather than impairment. Judge Tufts said this about the proper approach for a court to take when assessing adequacy of a breath or blood demand:

9 It is not an onerous threshold -- I refer to R. v. Censoni, supra where Justice Hill gave a very complete review of the law in this area. It is not proper to measure the evidence as if it was a trial, R. v. McClelland, 98 C.C.C. (3d) 509 nor is it necessary to establish a prima facie case for impaired driving, R. v. Lanthier, [2006] O.J. No. 4939, R. v. Storrey, 53 C.C.C. (3d) 316 (S.C.C.). Something less than what is required for a committal to trial following a preliminary inquiry is all that is necessary. It is a question of fact. Also, the test is not as exacting as in other situations where reasonable and probable grounds are required such as the issuance of a search warrant.

[54] In that case the court decided that the mere smell of alcohol coupled with what the officer knew about the accident was not sufficient to support a breath demand. In the present case before me, the officer appears to have had a better appreciation of the road conditions and overall circumstances of the accident than did the police officer in Levy, and in addition had seen beer bottles inside the vehicle.

[55] In R. v. Turner, 1 M.V.R. (5th) 191 (2004) the Ontario Court of Justice cited an earlier case in the province, R. v. Ruelland, for the proposition that an unexplained accident, even when combined with a strong odour of alcohol, does not necessarily constitute reasonable and probable grounds. However, in circumstances where the defendant struck a guardrail on a wide highway under good road and weather conditions, coupled with a strong odour of alcohol on the breath, the court found that the grounds existed.

[56] In R. v. Rhyasson [2007] 3 S.C.R. 108 the Supreme Court of Canada affirmed the decision of the trial judge who ruled that the officer had reasonable and probable grounds for a breath demand where the accused told the officer that he had been driving and the officer noted that the accused had bloodshot eyes, a blank stare and an odour of alcohol on his breath. A pedestrian had been killed in a crosswalk, a circumstance also known to the officer. At para 18 the Court said " . . there is abundant jurisprudence confirming that the circumstances of an accident can be taken into account, along with other evidence, in determining whether an officer had reasonable and probable grounds . . ." At para 20 it said "the trial judge signaled that he was relying on more than just evidence of consumption as a basis for his finding that the officer had grounds to demand a breath sample."

[57] In dissent Charron, J. found no fault with the general proposition advanced by the majority, but said that it was not clear the officer was actually relying on the circumstances of the accident in formulating his grounds. At para 28 Charron, J. says that if the officer had given evidence about his observations of the scene her finding may have been otherwise, saying “But Constable Stevens nowhere said that >an accident with no other obvious cause’ formed part of his grounds.” In the present case, Constable Foran had knowledge of the circumstances of the accident and it is clear this factored into his appraisal of the situation and his decision to make a demand.

[58] It is my conclusion, based on the evidence, in light of established case law, that constable Foran had reasonable and probable grounds to make a blood demand on the accused at the hospital.

The arrest

[59] Defense argued that the arrest of the accused, effected by Constable Brown just five minutes after arriving at the scene of the crash, was without sufficient foundation. My reasoning on this point largely mirrors that expressed above about the grounds for the demand. I will simply say that I find that Constable Brown did possess sufficient grounds to arrest Mr. MacDougall for impaired driving. I might say at the same time that this issue likely has less significance than the others dealt with herein.

Extent of jeopardy

[60] In argument defense submitted that while the accused had been advised of his right to counsel, it was in the context of an arrest for impaired driving *simpliciter* and that police should have re-apprised him of this right once it became obvious that the potential charge could be much more serious. As in R. v. Ward [2010] N.S.J. No. 266 the decision of the Supreme Court in R. v. Bordon [1994] 3 S.C.R. 145 is often cited on this issue.

[61] While this argument was not developed as fully as others, I have considered whether the accused waived his right to counsel without a sufficient appreciation of the extent of his jeopardy. Pertinent is the accused’s own comments to the 911 operator, before police had even arrived on scene, in which he is clearly concerned about the precarious state of Ms. Cardwell. Later, at the hospital, before submitting to the blood demand, he asked whether Ms. Cardwell had died. As in R. v. Smith [1991] S.C.J. No. 24 it appears the accused had a sufficient understanding of the seriousness of the situation, and thus of his own jeopardy, when he dispensed with the opportunity to consult with counsel. It is well and widely known that impaired driving causing death is far more serious than simply driving with blood alcohol over the legal limit..

S.24(2)

[62] While I have not found any infringement of the accused's s.8, s.9 or s.10 Charter rights, I will consider whether s.24(2) of the Charter would lead to the exclusion of the evidence at trial, even supposing, on another view, a breach was found to have occurred.

[63] The Supreme Court revisited s.24(2) in the seminal case R. v. Grant [2009] S.C.J. No. 32. From para. 67 - 71 of the judgement:

The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.

The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

(1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

[64] In Grant at para. 106 the Supreme Court said "Notably a breath sample tendered on impaired driving charges has often suffered the fate of automatic exclusion even where the breach in question was minor and would not realistically bring the administration of justice into disrepute." At para. 111 it said " . . . where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive." With Mr. MacDougall the evidence was obtained by extraction of his blood, which is regarded as more intrusive than a breath sample, and this must be borne in mind. I am also mindful that he was being treated for a serious arm injury when the samples were drawn, and that a blood sample would have been (and indeed was) drawn as part of his treatment.
As Hill, J. said in R. v. Bryce [2009] O.J. No. 3640 the previous tripartite test in Collins/Stillman has been replaced by a more flexible, multi-factored approach. In that case the accused's s.9 and s.8 Charter rights had been violated - he had been arbitrarily detained and unreasonably searched - but despite these breaches the bid to have breathalyzer results excluded from evidence under s.24 was denied. At para. 56, 57 and 60 the court notes that ". . . there exists a continuum of unconstitutional departure from the minor, trivial, technical or product of an understandable mistake to wilful or reckless desregard of Charter rights . . . The more severe or deliberate the unconstitutional departure, the greater the need for the court's dissociation from the fruits of the unlawful conduct . . . The impact of the police conduct on the appellant's Charter-protected interests is also a fact-specific determination . . .The more serious the incursion the greater the case for exclusion . . ." At para 67 the court states "Although the seriousness of the charge must not take on disproportionate significance, impaired operation of a motor vehicle is a notorious threat to public safety", citing various cases in the Supreme Court in support.

[65] Needless to say, impaired driving causing death is still more serious and gives rise to an even stronger public interest in seeing an adjudication of the charge on its merits. The situation with Ms Cardwell - the fact that she was critically injured - is not a relevant consideration with respect to the formulation of grounds for a breath or blood demand from Mr. MacDougall. However, when the matter of exclusion of evidence

arises later in court, i.e when it comes to the application of s.24(2) to the circumstances of the case, the presence of a fatally injured person cannot be ignored.

[66] In the pre-Grant case of R. v. Farrell, above, our Court of Appeal restored a trial judge's finding that a blood demand was invalid but said that the judge erred in excluding the resulting evidence. It noted that the evidence was likely discoverable in any event, that the officer did not act in bad faith, and that the alleged offence was a serious crime.

[67] In R. v. MacFadden [2006] N.S.J. No. 46 the trial judge excluded evidence obtained from an invalid blood demand after concluding that (a) there were insufficient grounds to support the police officer's belief as to the time of the accident and (b) the demand was invalid because the officer failed to adequately consider whether a breath demand would have been feasible. However there is little in the judgement about the reasoning behind the decision to exclude the evidence.

[68] Levy, above, was also a pre-Grant case where the evidence was excluded, although the judgement does not deal with the s.24(2) issues at any length.

[69] Turning to a few decision since Grant, in R. v. Appleby [2009] A.J. No. 1135 the officer made observations over a very brief interval of time. The court found at para. 17 that "he could not reasonably believe that the accused's ability to drive was impaired by alcohol" and thus there had been a Charter infringement. The evidence was excluded upon a finding at para. 20 that the breach "was not committed in good faith but rather a careless disregard for the accused's protected Charter rights." As this case shows, "the Supreme Court of Canada in Grant is not suggesting that breath samples are always admissible" where a court has found a breach of the accused's Charter rights.

[70] In R . v. Shaw [2009] O.J. No. 4142 the court excluded evidence pursuant to 24(2) in circumstances where the officer should have administered a screening device demand, but had insufficient grounds for the breathalyzer demand. The court noted the great delay and expense which the breach had caused the accused.

[71] In R. v. Robinson [2009] O.J. No. 4018 the court decided that the grounds for a s.254(3) demand were insufficient, saying the police should properly have made a screening device demand on the lower standard which applies under s.254(2). The resulting evidence was excluded under s.24(2). Regarding the impact of the breach on the accused, the court noted that Mr. Robinson had been handcuffed and spent an extended detention in custody (see para 31).

[72] In R. v. Anderson [2009] S.J. No. 584 the appeal court upheld a trial judge's decision not to exclude breath sample evidence despite a breach of Charter rights owing to insufficient grounds. The trial judge had stated at [2008] S.J. No. 771 at para.28:

I begin by noting that the accused is not deprived of a fair hearing by the admission of this evidence. Nor, is there any judicial condonation of unacceptable conduct by the police officer. To the contrary, the police officer was very polite and professional throughout. The sole basis for excluding the evidence would be because I disagree with the officer as to whether there were appropriate grounds for the demand. Exclusion of the evidence in this case would be an "almost automatic exclusion" of the evidence for breach of a Charter provision. It is difficult to imagine a situation where a s. 24(2) remedy would be denied and evidence admitted, if that does not happen here. Most importantly however, in my view, the administration of justice would be brought into greater disrepute by the exclusion of this evidence than by its admission.In R. v. Anderson [2009] S.J. No. 584 the appeal court upheld a trial judge's decision not to exclude breath sample evidence despite a breach of Charter rights owing to insufficient grounds. The trial judge had stated at [2008] S.J. No. 771 at para.28:

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[73] In R. v. Cochrane [2010] O.J. No. 2413 the trial judge found that the arresting officer did not have sufficient grounds to arrest the defendant nor to make a breath demand. This officer had acted on a 911 dispatch initiated by a second off-duty officer. The off-duty officer had observed erratic driving. The arresting officer stopped the vehicle without noticing any unusual driving, although she did note an odour or alcohol and red, glassy eyes. Breath samples were procured. While the court found that the absence of grounds by the demanding officer led to a breach of the defendant's s.8 Charter right, it did not exclude the evidence of blood alcohol levels. Part of the reasoning is found at para 41 where the judge states "All the information in the collective possession of both officers was more than sufficient to provide adequate grounds for arrest and the breath demand. . . None of the officers actions were egregious or a deliberate abuse of power."

[74] In R. v. Mejia [2009] A.J. No. 1169 the court found that the breath demand was invalid due to insufficient grounds. At para 40 to 70 a number of cases concerning the admissibility of breath samples in the context of a Charter breach were compared and considered. Breaches were noted to occupy a "scale of seriousness". There, as here, the breach was towards the lower end of that scale. As in Johnston, if there was a

breach at all (contrary to my own conclusion that there was not) it was a relatively minor one. With respect to the impact of the breach on the accused's interests Mr. Mijia, unlike Mr. MacDougall, had been handcuffed, transported to the police station and detained there for 2 2 hours. Despite this the court declined to order exclusion of the evidence under s.24(2),In R. v. Mejia [2009] A.J. No. 1169 the court found that the breath demand was invalid due to insufficient grounds. At para 40 to 70 a number of cases concerning the admissibility of breath samples in the context of a Charter breach were compared and considered. Breaches were noted to occupy a "scale of seriousness". There, as here, the breach was towards the lower end of that scale. As in Johnston, above, if there was a breach at all (contrary to my own conclusion that there was not) it was a relatively minor one. With respect to the impact of the breach on the accused's interests Mr. Mijia, unlike Mr. MacDougall, had been handcuffed, transported to the police station and detained there for 2 2 hours. Despite this the court declined to order exclusion of the evidence under s.24(2),

[75] In R. v. Johnston, above, the judge had ruled the blood demand valid, but nevertheless went on to consider (as I am doing here) whether the results of the blood analysis should be excluded were that ruling to be in error. She discussed the three aspects of a Grant analysis: (1) the seriousness or the Charter infringing conduct, (2) the impact of the breach on the defendant's Charter rights, and (3) the societal interest in adjudication of the charge on the merits. Her reasoning largely mirrors my own. Firstly, *if* the grounds fall short, they are just short. The demand upon Mr. MacDougall was administered by an inexperienced police officer in good faith upon particular facts known to him. Secondly, Mr. MacDougall was going to be taken to hospital for medical reasons in any event, where blood would be taken from him for medical reasons, and there thus appears to be less impact on his charter-protected interests. Thirdly, there is serious public concern for impaired driving, and a strong societal interest in the adjudication a case where it is alleged that someone has died as a result.

[76] In conclusion, even in the event that a Charter breach occurred (which I do not think to be the case) these are circumstances where the evidence obtained ought not to be excluded under s.24(2).

The hospital sample / warrant

[77] The defense has mounted an argument against admission of evidence obtained from analysis of the so-called "hospital sample" of Mr. MacDougall's blood. It will be remembered from the outline of the facts, above, that the attending physician drew a third blood sample, aside from the two drawn at the behest of the police. This sample was analyzed at the hospital laboratory for, among other things, the presence of intoxicants.

[78] Defense mounts an attack on the admissibility of these results at trial. It first

contends that Dr. Heese was acting as an agent of the police rather than out of medical necessity. I find no merit in this argument, based on the evidence which I have heard. The doctor *did* act under police direction in obtaining two samples for them pursuant to their demand. There scarely seems to be any reason why she should, of her own accord, divorced from medical considerations, order a third sample just in case the police happened to need it. In the same vein, defense contends that the doctor disclosed more than she should have to police when they first inquired into the possibility that a third sample had been taken.

[79] The Supreme Court of Canada in R. v. Dersch [1993] 2 S.C.R. 768 said that participation in emergency treatment does not itself render doctors agents of government, nor does taking a blood sample for medical purposes. However a police officer later obtained, merely by written request, the results of tests from the medical blood sample. This was found to by a breach of the duty of confidentiality on the part of the doctor, and a breach of the accused's s.8 Charter rights by the police. This is distinguishable from the case before me where the doctor simply disclosed the existence of the hospital's blood analysis, not its content, and the police resorted to a search warrant to obtain the actual results.

[80] Some of the same issues were taken up by our Court of Appeal in R. v. Spidell 151 N.S.R. (2d) 290 (1996). There an ER doctor treated the accused who had gone to the hospital of his own accord seeking treatment and had told the doctor he'd suffered the injuries in a motor vehicle accident. He also told the doctor he had been drinking, and the time of the accident. The doctor, believing he had an obligation to report accidents, called the police and relayed this information to them. Police came to the hospital, observed some signs of impairment, and made a breath demand. The accused refused and was charged accordingly. There was thus no blood analysis and no results, and because the information was volunteered by the accused, no search and seizure. The case is nevertheless instructive. The court found that the doctor may indeed have breached his duty of confidentiality in divulging some of the information without the patient's consent. However it went on to conclude the doctor was not acting as an agent of the state in either obtaining or reporting the information.

[81] I note here, as I did above, that Dr. Heese did not report the results of the hospitals blood analysis to police, merely the fact that an analysis was done. Nor did the police request the results from her, they obtained them by warrant.

[82] Other cases cited by the Crown support a conclusion contrary to the defense position. In R. v. Day [1998] O.J. No. 4461 a police officer who obtained a search warrant had learned from hospital personnel that the accused had provided a blood sample and that it was stored at the hospital. No results of any tests were provided. The Ontario Court of Appeal concluded that there was no expectation of privacy with respect to the mere fact that blood samples were taken by medical personnel when the accused was admitted to the hospital in a coma.

[83] R. v. Decap 42 M.V.R. (4th) 10 (2003) is a case where an initial demand was made in violation of the accused's s.10(b) Charter rights. However the police subsequently obtained a search warrant to seize blood samples taken at the hospital. The Saskatchewan Court of Queen's Bench, endorsing the testimony of the attending physician, said that where a patient is admitted to a hospital emergency department there is an implied consent to take a blood sample for medical purposes. Hospital personnel informed police only that a sample had been taken, but did not provide them with the results. Subsequent seizure of the blood sample pursuant to warrant was ruled to be valid.

[84] In R. v. Tapper 85 M.V.R. (5th) 137 (2009) the Newfoundland and Labrador Supreme Court had a case where the accused was taken to hospital after a two car accident. At hospital the police officer noted certain signs of impairment and also learned that blood had been taken for medical purposes, recording the names of the staff who had done so. Police later obtained a warrant to seize the medical file, the actual sample having been destroyed according usual hospital practice. The court ruled that this evidence could be used by the Crown at trial. The court stated:

> 49 In this instance, the police did not take the sample, nor did they request that it be taken. The only sample available was taken by the hospital for medical purposes. The laboratory prepared a report on its analysis, including the alcohol content. That report is part of the Applicant's medical record, and is subject to being used as evidence under the requisite circumstances.
>
> 50 In this case, the hospital drew the blood, and the evidence before me is that once the analysis is complete and the report submitted, the sample was kept for four weeks and then destroyed. This is the normal practice of the hospital. As I have indicated earlier, the hospital is not an agent of the Crown with an obligation towards individuals accused in the courts. In this case it acted according to its normal practice.

[85] In R. v. Erickson 38 M.V.R. (2d) 260 (Alta C.A.) blood was taken from an injured accused for medical reasons, and an alcohol screen done by staff which showed levels above the legal limit. A doctor subsequently showed these results to police, who then obtained warrants. The court found that the disclosure of the results violated the accused's s.8 rights, and since the warrants were obtained on the basis of illegally obtained evidence, the warrants were invalid. In the case at hand no illegally obtained evidence was used to obtain the search warrants. Dr. Heese simply advised police that the hospital had taken and analyzed blood samples. No actual results were divulged.

[86] R. v. O'Brien [2005] O.J. No. 6249 the accused was treated by a trauma team at the hospital who drew vials of blood for medical purposes. At para 21 the trial judge refers to various cases which support the proposition that an accused does indeed have an expectation of privacy in the results of such blood analysis, undertaken for medical

reasons. Accordingly such results should not be shared with police without consent or without lawful authority, such as a valid warrant. A warrant, of course, is exactly what the police obtained in the case of Mr. MacDougall.

[87] I will turn now to whether the warrant was validly issued.

[88] Defense contends that the search warrant used to obtain the results of the blood analysis from the hospital was defective. It raises concerns about the fact that the issuing judge did not meet face to face with the applicant police officer. It argues that the judge did not have sufficient information before him to issue a search warrant. It contends that police did not give a balanced account of the various statements of eyewitnesses.

[89] While it may be preferable for a judge or justice who issues a warrant to actually meet face to face with the officer, I am aware of no caselaw to support the proposition that the failure to do so *ipso facto* undermines the validity of the warrant. Officer Skinner went to the court office with his Information to Obtain (ITO). He likely did not know which particular judge might be available to review his application. He presented the documents to court staff who directly relayed them to the judge. The officer knew then which judge would be considering the warrant, and the judge would know that Constable Skinner was attending upon the application. Applicant and judge each dealt with the other through Ms. Bonar, a member of the court staff and a justice of the peace, who swore Constable Skinner to the truth of the assertions in his ITO. This constitutes an appearance before the issuing judge for all intents and purposes. If the judge had considered in necessary to clarify anything in the application, or to impose conditions in the warrant not anticipated by the applicant, a face to face meeting could have been arranged immediately. If the Information and other written material (such as the proposed warrant itself) was proper and sufficient, a face to face meeting would serve no real purpose.

[90] Defence says that the applicant should have included the results of the analysis on the police samples. I think that *not* doing so shows a more scrupulous and prudent approach by the officer. As to whether the ITO omits mention of certain witness statements to the effect that these particular people did not smell alcohol from the accused, these statements were not tendered at the voir dire and so it is difficult to conclude that the ITO was so seriously unbalanced and unfair as to be invalid. The ITO does say that one passenger did not smell alcohol from the accused. The ITO quotes from one of two ambulance attendants, whose statement supplies strong grounds for the warrant (see above). Even if, as defence argues, the other attendant did not note signs of impairment, it is difficult to see how including this in the ITO would render it insufficient. The first attendant's evidence would still exist. The issuing judge could not possibly tell which might be the more credible. The issuing judge was not conducting a trial. The accused's statement to the first attendant that he had consumed eight beer during the evening was very significant and of great weight. While it is certainly

possible, in a theoretical sense, that police could “cherry pick” from evidence at their disposal to such a degree that it would taint a resulting search warrant, I detect no such misconduct or abuse of process here.

[91] Defence says that Police and Crown conferred prior to the decision to apply for the warrant, suggesting that the Crown was concerned that the police samples were illegally obtained and it wanted the results on the hospital samples as insurance. However I am aware of no rule or doctrine which prevents the Crown or police from obtaining relevant evidence, even if it resembles other evidence already obtained. Conceivably there could be some difficulty with the technical analysis of the police samples rather that concern about the grounds for the blood demand. I do not see why the Crown should be called upon to justify the gathering of relevant evidence. I do not think that there are impermissible limits on the quantity of potentially incriminating evidence which may be obtained by police and made available to the Crown at trial. So long as the evidence is legally obtained, this does not result in “unfairness” to an accused in any legal or constitutional sense.

[92] Upon review I find that the ITO established a credibly-based probability that relevant evidence would be found. The issuing judge had before him sufficient reliable information to justify issuing a s.487 search warrant. I conclude that the warrant was valid and the evidence obtained admissible at trial at the instance of the Crown provided, of course, that all other requirements to admissibility are met.

Dated at Sydney, Nova Scotia, this 20th day of September 2010.

Judge A. Peter Ross