

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

TRENT HAYWARD

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Transcript of the Decision of The Honourable Chief Judge  
R. D. Gorin, at Yellowknife in the Northwest Territories,  
on December 13th A.D., 2011.

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APPEARANCES:

Mr. N. Sinclair: Counsel for the Crown  
Mr. R. Gregory: Counsel for the Accused

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Charge under s. 253(1) (a) Criminal Code of Canada

1 THE COURT: Trent Ronald Hayward is  
2 charged that on or about the 13th day of  
3 November, 2010, at or near the city of  
4 Yellowknife in the Northwest Territories,  
5 while his ability to operate a motor vehicle  
6 was impaired by alcohol, did operate a motor  
7 vehicle contrary to Section 253(1)(a) of the  
8 Criminal Code.

9 Due to rather unusual circumstances, the  
10 accused did not provide a breath sample into  
11 an actual breathalyzer machine, and I have no  
12 evidence as to his blood alcohol level at or  
13 around the time that he was driving.  
14 Consequently, the accused is charged only with  
15 driving while his ability to do so was  
16 impaired by alcohol. He is not charged with  
17 driving while his blood alcohol level exceeded  
18 the legal limit of 80 milligrams percent.

19 While, as I have said, the circumstances  
20 are unusual, the evidence I have before me is  
21 what it is. I draw no inference one way or  
22 another as a result of the unavailability of  
23 evidence concerning the accused's blood  
24 alcohol level. My role here today is to  
25 examine the evidence presented in this case  
26 and determine whether or not all of the  
27 elements of the sole offence alleged by the

1 Crown have been proved beyond a reasonable  
2 doubt.

3 For the benefit of the public, I will note  
4 at the outset that Constable Hayward is not  
5 charged with "driving under the influence of  
6 alcohol". Driving under the influence of  
7 alcohol may be an offence in American law.  
8 However, that is not how the Canadian version  
9 of the offence is worded. In order to commit  
10 the offence which is proscribed by  
11 Section 253(1) (a) of the Criminal Code, a  
12 person must operate a motor vehicle while his  
13 or her ability to do so is impaired. For  
14 reasons on which I will elaborate, this is a  
15 distinction with significance.

16 This case is relatively simple. There are  
17 no complex legal issues. The Crown argues  
18 that all of the elements of the offence  
19 alleged have been proved beyond a reasonable  
20 doubt. The defence, on the other hand, states  
21 that it has not been proved beyond a  
22 reasonable doubt that there was actual  
23 impairment of the accused's ability to operate  
24 a motor vehicle at the time that he was  
25 driving. He refers me to the well known cases  
26 of *Stellato* 1994 SCR 478 Supreme Court  
27 decision and *Andrews* (1996) 104 CCC (3d) 392

1 (Alta. C.A.) leave to appeal to the Supreme  
2 Court of Canada refused 106 CCC (3d) vi.

3 In *Stellato*, the Supreme Court of Canada  
4 held that since the Criminal Code does not  
5 proscribe any special test for determining  
6 impairment such as "marked departure" from  
7 normal behaviour, if the evidence of  
8 impairment establishes any degree of  
9 impairment beyond the de minimus level,  
10 ranging from slight to great, the offence is  
11 made out.

12 However, in *Andrews*, the Alberta Court of  
13 Appeal qualified the Supreme Court of Canada's  
14 pronouncement in *Stellato*. The Court held  
15 that Section 253(1)(a) requires impairment of  
16 the ability to drive as an element of the  
17 offence as opposed to any impairment of the  
18 accused's functional ability.

19 The Court further stated that it cannot be  
20 assumed that where a person's functional  
21 ability is affected in some respects by the  
22 consumption of alcohol, it necessarily follows  
23 that his ability to drive is also impaired.  
24 Where proof of impairment consists of  
25 observations of conduct, in most cases, if the  
26 conduct is a slight departure from normal  
27 conduct it would be unsafe to conclude beyond

1 a reasonable doubt that the ability to drive  
2 was impaired by alcohol.

3 Put another way, simply being "under the  
4 influence of" or "affected by alcohol" is not  
5 in and of itself enough. An essential element  
6 of the offence charged, which must be proved  
7 beyond a reasonable doubt, is impairment of  
8 the ability to drive.

9 I agree with Mr. Gregory that, to a large  
10 extent, this case boils down to what is often  
11 referred to as a credibility contest. On the  
12 one hand there is the evidence of the accused  
13 that his ability to operate the motor vehicle  
14 was not impaired through the consumption of  
15 alcohol. On the other hand, there is the  
16 evidence of the arresting officer, Corporal  
17 Matt Hare, that the accused was quite  
18 intoxicated throughout his dealings with him.  
19 Then there is the evidence of the others who  
20 testified: Kiera Powder, Constable David  
21 Sullivan, Sergeant Dennis McLeod, and Shane  
22 Thompson - all of whom provided corroboration  
23 to one version or the other to varying  
24 degrees.

25 I must also consider the other evidence  
26 which was entered, including the video  
27 evidence of Constable Hayward's conduct when

1 he was at the detachment, the patrol unit  
2 history, and the photographs of certain text  
3 messages sent to Corporal Hare.

4 The case law, dealing with how to approach  
5 the contradictions between Hayward's evidence  
6 and the other evidence I have heard and seen,  
7 is very well established. It is not simply a  
8 case of deciding who is more likely telling  
9 the truth. I have to approach the evidence as  
10 follows:

11 First of all, if I believe the accused's  
12 testimony that his ability to operate a motor  
13 vehicle was not impaired by alcohol, I must  
14 find him not guilty. Secondly, even if I  
15 don't believe him but his evidence leaves me  
16 in reasonable doubt as to his guilt, I must  
17 find him not guilty. And thirdly, even if I  
18 reject his evidence to the extent that it does  
19 not leave me in reasonable doubt, I must  
20 examine all of the evidence which I do accept  
21 and determine whether, based on that evidence,  
22 it has been proved beyond a reasonable doubt  
23 that he is guilty of the offence that he is  
24 charged with.

25 I think it appropriate to review the  
26 evidence to some extent. While I do not  
27 intend to repeat all of the evidence, I will

1 say that I have reviewed it extensively during  
2 the course of my deliberations and if I do not  
3 mention a particular piece or portion of  
4 evidence, it does not mean that I have not  
5 considered it.

6 Corporal Hare was the first witness called  
7 by the Crown. He testified that during the  
8 course of his career he has been involved in  
9 excess of 200 investigations having to do with  
10 impaired operation of a motor vehicle or  
11 driving over 80.

12 His testimony was that he was working the  
13 shift that began at 7 p.m. on November 12th,  
14 2010, and ended at 7 a.m. the following day.  
15 He walked through the Gold Range bar in  
16 Yellowknife at approximately midnight. He saw  
17 Constable Hayward, who was off duty, seated  
18 with four to six other people. He saw that  
19 Hayward was with his girlfriend April Bell,  
20 who is also an RCMP constable. Four years  
21 earlier, Hare and Constable Bell were in a  
22 relationship. He said that another person at  
23 the table where Hayward was seated joked that  
24 Corporal Hare should take Constable Hayward  
25 away. However, Corporal Hare testified that  
26 he noted nothing unusual about Hayward's  
27 behaviour at the time.

1           He testified that at one point that  
2 evening he observed Hayward's truck by Boston  
3 Pizza, across from the Joe Tobie building.

4           Corporal Hare testified that sometime  
5 after observing Hayward at the Gold Range, he  
6 parked in the empty lot by the Raven Pub on  
7 the same block and side of the street that the  
8 Gold Range bar is located. At about 1:50  
9 a.m., he saw Constable Bell walking from the  
10 Gold Range in the direction of the Raven Pub.  
11 A short time later, he saw Constable Hayward  
12 following her.

13           He said that he could tell that Hayward  
14 was intoxicated just from looking at him. He  
15 stated Hayward was walking oddly and stumbling  
16 slightly with very rigid legs. He described  
17 Hayward was walking in a "funny rigid" manner.  
18 He had never seen Constable Hayward walk like  
19 this previously. He was unaware of Hayward  
20 having a limp. However, earlier in his  
21 testimony he stated that he has never worked  
22 at the same detachment at the same time as  
23 Constable Hayward. When he saw Constable  
24 Hayward, he said 'hi' to him and Hayward then  
25 waved back.

26           Corporal Hare testified that he then  
27 received a number of telephone calls from



1 Constable Bell. She requested a ride to  
2 locate Hayward so that she could get the keys  
3 to the house where she lived. Corporal Hare  
4 picked her up. She was quite intoxicated and  
5 quite upset. He drove her about a block and  
6 let her out. He went back to the spot by the  
7 Raven where he had had previously been parked.

8 He said that while he was there, he was  
9 approached by Hayward and the two of them had  
10 a 15 to 20 minute conversation. This would  
11 have been between 2:10 a.m. or 2:20 in the  
12 morning. He said that at this point Constable  
13 Hayward was significantly intoxicated. His  
14 speech was very slurred. He kept repeating  
15 himself. He would stop in mid sentence. His  
16 balance was very unsteady. He had a swayed  
17 stance. At one point he fell and used the  
18 front of Hare's police truck to hold himself  
19 up. Hayward's eyes weren't red but they were  
20 very glassy. He says that there was no doubt  
21 in his mind that at that point Constable  
22 Hayward was just plain intoxicated and drunk.  
23 He testified that he has seen Hayward on a  
24 number of occasions when he is sober at work  
25 and his behaviour was far different on this  
26 occasion. He described Hayward as being eight  
27 or nine on a scale of sobriety with ten being

1 passed out or falling down drunk.

2 The conversation ended when a fight  
3 erupted close by, to which Corporal Hare  
4 responded.

5 Hare testified that at 2:24 a.m., he  
6 received a text from April Bell stating that  
7 the accused was driving his truck and that he  
8 was going to Behchokò. This is corroborated  
9 through a photograph of the text message on  
10 Hare's cell along with the timestamp which was  
11 entered as evidence on consent. The text  
12 stated that Mr. Hayward had just left BPS.  
13 Hare responded, and he noted that Hayward's  
14 truck was gone from in front of Boston Pizza.

15 Corporal Hare then contacted Sergeant  
16 McLeod who was, at the time, Constable  
17 Hayward's superior in the community of  
18 Behchokò. A plan was formed in which Hare  
19 would proceed towards Behchokò and McLeod  
20 would proceed from Behchokò towards  
21 Yellowknife so that one of them would be sure  
22 to encounter Hayward. The two proceeded  
23 accordingly and ultimately met up about 30  
24 kilometres from Behchokò without encountering  
25 Constable Hayward. Hare, at the point,  
26 proceeded back towards Yellowknife and at  
27 around 3:30 or 3:40 a.m., he encountered

1           Hayward who was on his way to Behchokò.  
2           Hayward drove over on the other side of the  
3           road so that his wheels straddled the fog line  
4           on his side of the road while Hare passed by.  
5           Hare estimated that the vehicle being driven  
6           by Constable Hayward was proceeding at around  
7           80 kilometres per hour. From Hare's  
8           testimony, it would appear that it was the  
9           manner in which the vehicle was being driven  
10          which attracted his attention.

11                 After passing Hayward, Hare turned around  
12          and, as he approached Hayward's vehicle, from  
13          behind noted that it was driving down the  
14          centre of the right-hand lane but then moved  
15          to the right so that once again Hayward's  
16          vehicle was overtop of the fog line.

17                 Assuming for the sake of analysis that  
18          Hare's description of Hayward's driving is  
19          accurate, I don't think that it can be  
20          characterized as erratic. In fact, I'm not  
21          sure it can even be characterized as bad  
22          driving. According to Hare, Hayward was  
23          driving under the speed limit but not unduly  
24          so. It may be that Hayward pulled away from  
25          Hare when Hare passed him from the other  
26          direction. However, as Corporal Hare stated  
27          in his testimony, this highway is one on which

1 intoxicated people often drive. I also do not  
2 think it at all unusual that Hayward would  
3 straddle the fog line on his side of the road  
4 after seeing an RCMP vehicle turn around and  
5 follow him.

6 Hare testified that he followed Hayward  
7 for about ten seconds and pulled Hayward over.  
8 He testified that when he first observed  
9 Hayward he immediately noted that his eyes  
10 were still glassed over. They now appeared  
11 slightly bloodshot. He said that Hayward  
12 fumbled with his vehicle documents and dropped  
13 them in his lap. He noticed what he described  
14 as a slight odour of alcohol. The only other  
15 observations of intoxication which he noted  
16 were that Hayward's stance was "staggered".  
17 He clarified that by using this term, he meant  
18 that Hayward's legs were quite far apart side  
19 to side - to maintain his balance.

20 Corporal Hare testified that he then  
21 lodged Hayward in the back seat of his police  
22 vehicle. He said that Hayward was initially  
23 calm but then became upset after he provided  
24 Hayward with his Charter warning. Hayward  
25 said that the last time he had seen Hare was  
26 three hours ago. According to Corporal Hare,  
27 Constable Hayward then said a number of other

1 things. He asked Hare why he thought that he  
2 was impaired. He told him that he would be  
3 close to the limit but he also said that he  
4 would not be over the limit. Hare testified  
5 that during this conversation, he noticed an  
6 odour of stale alcohol coming from Hayward  
7 becoming stronger.

8 Hare testified that Constable Foley  
9 arrived soon after in order to assist.  
10 Constable Foley was not called upon to  
11 testify. I don't know how good of a position  
12 Constable Foley would have been to observe  
13 Hayward at the time and I am not going to  
14 speculate. However I will note that aside  
15 from Corporal Hare, all of the witnesses  
16 called by the Crown, observed Hayward some  
17 time later.

18 In any event, Corporal Hare and Hayward  
19 ultimately proceeded back to the Yellowknife  
20 RCMP detachment, a distance of approximately  
21 35 to 40 kilometres from where Hare had pulled  
22 over Hayward. This drive would have taken  
23 about 25 minutes give or take five minutes or  
24 so. Corporal Hare arrived at the detachment  
25 at 4:59, some 80 to 90 minutes after pulling  
26 Constable Hayward over.

27 Corporal Hare described Constable Hayward

1 as being very upset. He described Hayward's  
2 mood as "not angry" but rather as "a placid,  
3 pleading, upset". He said that Hayward told  
4 him that he had only had six drinks and that  
5 he knew that it took him more than 12 doubles  
6 to get him over the legal limit. Hayward told  
7 him that he had gone to the Long Lake area on  
8 the outskirts of Yellowknife to sober up prior  
9 to embarking on the trip from Yellowknife to  
10 Behchokò.

11 Hare stated that Constable Sullivan was  
12 called in as a breathalyzer technician.  
13 Sullivan introduced himself to Hayward and  
14 left to prepare the breathalyzer. Sullivan  
15 then discovered that the solution necessary to  
16 run the breathalyzer machine had expired.  
17 Sometime later he discovered that there was no  
18 unexpired solution whatsoever in the  
19 detachment.

20 For the benefit of the public and to avoid  
21 any confusion, I am going to explain that  
22 there are two different types of instruments  
23 referred to in the Criminal Code that measure  
24 blood alcohol which are referred to in the  
25 evidence of Corporal Hare and Constable  
26 Sullivan. One is an instrument which is often  
27 located in police detachments and which

1 obtains accurate readings of blood alcohol  
2 levels which can actually be used as evidence  
3 on charges of impaired driving or driving over  
4 80. Throughout this judgment, I am going to  
5 refer to this type of instrument as a  
6 "breathalyzer".

7 The other type of instrument is a portable  
8 device which police officers will often have  
9 with them while they are on patrol. This  
10 portable instrument can be employed by the  
11 police at roadside in order to determine  
12 whether or not to demand that a suspect  
13 accompany them to the police station to  
14 provide a breath sample into a breathalyzer.  
15 I am going to refer to this instrument as an  
16 "ASD", which is an acronym for "approved  
17 screening device".

18 Sergeant McLeod eventually arrived at the  
19 detachment. Hare and McLeod then discussed  
20 taking Hayward to Behchokò to conduct a  
21 breathalyzer test due to the unavailability of  
22 a properly working breathalyzer in  
23 Yellowknife. However, Hare and McLeod elected  
24 not to do so since by the time they got to  
25 Behchokò what Hare described as the "three  
26 hour limit" would have expired.

27 I pause to note that Section 254(3) of the

1 Criminal Code provides that if a peace officer  
2 has reasonable grounds to believe that an  
3 accused has committed the offence of impaired  
4 driving, within the preceding three hours, the  
5 peace officer may then make a demand - as soon  
6 as practicable - requiring the accused to  
7 provide - as soon as practicable - breath  
8 samples and to accompany the peace officer for  
9 that purpose.

10 So if, as Corporal Hare clearly maintains,  
11 he had the necessary grounds to make the  
12 breathalyzer demand while within three hours  
13 of the time that he observed Hayward driving,  
14 he could have made a valid breath demand. As  
15 long as the test was then carried out as soon  
16 as was practicable under the circumstances,  
17 the breath demand would still have been  
18 valid - even if the samples were ultimately  
19 provided outside of three hours from the time  
20 of driving.

21 Once Corporal Hare found out that the  
22 breathalyzer in Yellowknife was not operable,  
23 he could have had the test administered in  
24 Behchokò. He could have required Hayward to  
25 accompany him for that purpose. It is true  
26 that because the test, or tests, would have  
27 been performed outside the two hour limit (I



1 am referring to the two hour limit set out in  
2 Section 258) there would not have been the  
3 legal presumption that the blood alcohol level  
4 was the same at the time of driving as at the  
5 time that the tests were carried out. But, it  
6 would still have been open to the Crown to  
7 call a toxicologist, or other expert, as a  
8 witness to provide evidence concerning the  
9 accused's blood alcohol level at the time of  
10 driving.

11 Such evidence may have simplified these  
12 proceedings greatly. However, I will once  
13 again state that I draw no inference one way  
14 or another as a result of the failure to carry  
15 out the breath test. I will simply apply the  
16 evidence that I have before me to the charge  
17 that I have before me and determine whether or  
18 not the accused's guilt on that charge has  
19 been proved beyond a reasonable doubt.

20 Corporal Hare testified further that when  
21 he told Constable Hayward that there would be  
22 a charge of impaired operation of a motor  
23 vehicle, Hayward became very upset. Hayward  
24 was ultimately released at around six in the  
25 morning when his father came to pick him up.

26 Corporal Hare stated that during the time  
27 Hayward was standing at the release counter of

1 the cellblock, he could not work his cell  
2 phone properly. He said that there was one  
3 point where he hit two keys on his cell phone  
4 at once. He said that Hayward's fine motor  
5 skills were impaired.

6 During cross-examination Hare provided  
7 further important evidence. He confirmed that  
8 when Hayward was placed in custody, he was  
9 initially calm. He stated that Hayward's  
10 speech was "slightly slurred". He stopped  
11 Hayward on the highway at around 4:03 a.m.,  
12 and Hayward was in Hare's vehicle by 4:14, and  
13 that he would have arrested Hayward somewhere  
14 between those two times. He testified that it  
15 was at 5:30 a.m. that he was advised by  
16 Sullivan that there was no suitable solution  
17 for the breathalyzer.

18 He confirmed that Behchokò is 120  
19 kilometres away from Yellowknife and that he  
20 had a breath technician with him.

21 I note that, actually counting Sergeant  
22 McLeod who resides in Behchokò, he would have  
23 had two breathalyzer technicians with him.  
24 Corporal Hare reiterated that in his opinion  
25 he would have been outside the three hour time  
26 limit he thought applied to the actual taking  
27 of the breath samples by the time that he

1 would have arrived in Behchokò.

2 During cross-examination, Hare stated that  
3 at the detachment he gave Hayward the  
4 opportunity to blow into an ASD. Hare said  
5 that he gave Hayward the opportunity to do  
6 this since Hayward kept stating that he wasn't  
7 drunk. Hayward then voluntarily blew into an  
8 ASD provided by Constable Sullivan.

9 I have not been provided with the results  
10 of the ASD test. I should note for the  
11 benefit of the public that there are very  
12 sound legal reasons for my not having such  
13 evidence placed in front of me. Simply put,  
14 ASDs are roadside screening devices and are to  
15 be used only as an aid to allow a peace  
16 officer to form the reasonable grounds  
17 required to make a demand that the accused  
18 accompany him and provide breath samples into  
19 a "breathalyzer" machine. They do not have  
20 the necessary accuracy and reliability to be  
21 used in court as evidence of the accused's  
22 blood alcohol level.

23 Corporal Hare confirmed that at the time  
24 of Hayward's detention, he made notations  
25 respecting Hayward's level of intoxication on  
26 a document called a C-13 prisoner's report.  
27 He noted that Hayward's balance was fair. He

1           also noted that his state of mind was placid,  
2           and that his speech was clear.  However, in  
3           his actual testimony Corporal Hare did not  
4           adopt the entirety of what he had written in  
5           the C-13 report without qualification.

6           During Corporal Hare's cross-examination a  
7           number of video recordings of the cellblock  
8           area, which depicted Hayward and others with  
9           him, were played in court and admitted into  
10          evidence.  While there was no sound, and  
11          Corporal Hare and the others who were actually  
12          present would have had a better opportunity to  
13          observe Hayward's behaviour, I must say that  
14          from what I saw of the video alone, I am  
15          unable to conclude that there was any  
16          impairment on the part of Hayward.  Rather,  
17          what I saw appears to be more consistent with  
18          him being sober.  There was one point where I  
19          saw some unevenness in his gait when he was  
20          putting on his coat over his head while he was  
21          walking.  However, in my experience, less than  
22          perfect balance would not be unusual in a  
23          sober person carrying out the same sort of  
24          activity.  This is especially so, if Hayward's  
25          testimony as to his knee injury is accurate.

26          From Hayward's body language in the video,  
27          he did not appear to be behaving aggressively

1           towards Hare as they were discussing the  
2           charge.  However, Corporal Hare maintains that  
3           Constable Hayward was "verbally aggressive" at  
4           this point.

5           Kiera Powder testified next.  She is a  
6           civilian who works with the RCMP as a  
7           cellblock matron.  She was working at the RCMP  
8           detachment in Yellowknife when Constable  
9           Hayward was brought in.  Although she was only  
10          professionally acquainted with Hayward at the  
11          time, she is now friends with both him and his  
12          partner, Constable Bell.  She confirmed that  
13          she was the person sitting at the booking  
14          table in the video which shows Hayward when he  
15          was at the detachment in the early morning of  
16          November the 13th.  She testified that at the  
17          time she was able to detect a moderate odour  
18          of alcohol coming from Hayward.  She recalled  
19          Hayward and Hare arguing about a 24-hour  
20          driving suspension.  She said that Hayward was  
21          not yelling but that he was argumentative and  
22          louder than usual.  On cross-examination she  
23          confirmed that she had no difficulty  
24          understanding Hayward and that although he was  
25          agitated, his voice was clear.  She does not  
26          recall his voice being slurred.  She observed  
27          no difficulty with his walking.  She testified

1           that his speech and what he was saying seemed  
2           perfectly clear. Other than the smell of  
3           alcohol, she did not notice any signs of  
4           impairment whatsoever.

5           Next to testify on behalf of the Crown was  
6           Constable David Sullivan. He testified that  
7           at 4:39 in the morning he was requested to  
8           come into the detachment to conduct breath  
9           tests as a breathalyzer technician. Upon his  
10          arrival at the detachment, he noted Constable  
11          Hayward sitting on a bench opposite Hare. He  
12          noticed a strong odour of alcohol emanating  
13          from Hayward. He introduced himself to  
14          Hayward and noted that Hayward had red glossy  
15          eyes. In attempting to prepare the  
16          breathalyzer machine, he discovered that the  
17          solution which is necessary to administer the  
18          test had expired. He then found that there  
19          was no unexpired solution available in the  
20          detachment. He had some further face-to-face  
21          contact with Hayward when he administered the  
22          ASD. Sometime later, he had a conversation  
23          with Hayward wherein Hayward said that he had  
24          had only six beers. He says that Hayward also  
25          said that after consuming the beers, he went  
26          to his business and waited there for about  
27          three hours and then drove.

1           Sergeant Dennis McLeod was the next  
2           witness called by the Crown. He was and is  
3           the commanding officer at the Behchokò  
4           detachment and, as such, was Constable  
5           Hayward's superior at the relevant time. He  
6           said that he worked with Hayward from  
7           September 2009 up until the date charged.  
8           Sergeant McLeod has investigated over 200  
9           impaired driving charges and is, as I have  
10          already noted, a qualified breathalyzer  
11          technician and was so qualified on the date  
12          charged.

13           His testimony from the time that he  
14          received the telephone call from Corporal Hare  
15          about Constable Hayward largely agrees with  
16          that of Hare.

17           After driving to the point on Highway 3  
18          where he met Hare and returning to Behchokò,  
19          he heard Corporal Hare on the radio running a  
20          license plate check on Hayward's vehicle. He  
21          drove to the Boundary Creek area, checked the  
22          scene, and then drove to the Yellowknife  
23          detachment where he observed Hayward. When he  
24          was about a metre from Constable Hayward, he  
25          noticed, as did Sullivan, a strong odour of  
26          liquor coming from him. He testified that he  
27          noticed that Hayward's eyes were glassy and

1 bloodshot. He also noted that his speech was  
2 slurred and louder than normal. He observed  
3 that when Hayward was using his cell phone, he  
4 hit two keys at once. While he observed  
5 Hayward standing, Hayward's hand was on the  
6 counter.

7 Sergeant McLeod testified that although he  
8 had seen Hayward during stressful situations  
9 in the past, he had never seen Hayward  
10 speaking so loudly or for that matter slurring  
11 his speech. He said that Hayward's demeanour  
12 was different than what he is used to seeing  
13 from Constable Hayward. He came to the  
14 opinion that Hayward was impaired. He  
15 described Hayward as being a four, maybe a  
16 five, on a scale of one to ten. He stated  
17 that Hayward was not drunk or intoxicated but  
18 that he was impaired. He observed Hayward for  
19 a period of no longer 15 minutes.

20 Constable Hayward testified in his own  
21 defence. He said that he had been working in  
22 Behchokò on the morning of November the 12th.  
23 He decided to come into Yellowknife to go out  
24 to dinner with his girlfriend April Bell. He  
25 probably left Behchokò just after 5 p.m. and  
26 he estimated that he would have gotten into  
27 Yellowknife around 6 or 6:30. He went to



1           Constable Bell's house and then went to Boston  
2           Pizza at around 7 or 7:30. He parked his  
3           vehicle outside the Joe Tobie building. At  
4           Boston Pizza, he had dinner and two pints of  
5           beer. Three other people joined them while  
6           they were at Boston Pizza. He said that while  
7           he was at Boston Pizza, everybody else was  
8           drinking more than he was.

9           At around 10:30 in the evening, all of  
10          them left to the Gold Range bar a couple of  
11          blocks away. He said that while at the Gold  
12          Range, he had two Corona beers from typically  
13          sized bottles. Later on, Corporal Hare came  
14          through the bar. He recalled that Hare may  
15          have said 'hi' to him. In his testimony he  
16          recalled that one of the people whom he was  
17          with, Shane Thompson, joked with Hare about  
18          removing him - that is Constable Hayward -  
19          from the bar. He just thought of it as joking  
20          around and didn't say anything to Corporal  
21          Hare.

22          While still in the bar at around 12:30  
23          a.m., he and April Bell had an argument. She  
24          wanted to go to another bar, and he wanted to  
25          go home. At around 12:45 to 1 a.m., two of  
26          the people that he was with headed towards a  
27          different bar, as did Constable Bell.

1           Constable Hayward testified that a number  
2           of people were on the street and that at one  
3           point he began talking to an informant from  
4           Behchokò. He walked around and talked with  
5           him. The two of them walked up and down the  
6           strip which runs by the Gold Range several  
7           times. Hayward says that he was trying to  
8           obtain information from this individual.  
9           While they were walking, he was phoned several  
10          times by Constable Bell. He turned off his  
11          cell phone. The third time he and the  
12          informant walked down the strip, he saw  
13          Corporal Hare who asked him if he had gotten  
14          "good information". He replied that he had  
15          got "great information". He testified that it  
16          was obvious that Hare knew with whom he was  
17          speaking, and estimated that this interaction  
18          occurred at around 1:30 in the morning.

19          According to Constable Hayward, Corporal  
20          Hare's description of the conversation that  
21          the two of them had around this time is  
22          completely inaccurate as is Hare's description  
23          of his apparent state of sobriety.

24          Constable Hayward testified that after his  
25          interaction with Corporal Hare, he went to a  
26          store that he co-owns with his father a short  
27          distance away. He first dropped in to see his

1 father who tends bar at the establishment  
2 located in the same building as the store.  
3 When he found that his father wasn't there, he  
4 went into the store.

5 He said that he went in to check things  
6 out - to see how sales had been and to look at  
7 new products. He stated that he tried on  
8 clothes since he often gets his clothes from  
9 inventory. He puttered around the store for  
10 some time during which time Constable Bell  
11 sent him some text messages. He replied that  
12 he was at the store and that he didn't want to  
13 fight. At one point he and Bell had a  
14 telephone conversation. He stated that he  
15 thought that she was intoxicated from what he  
16 heard and he told her that he was going to go  
17 back to Behchokò.

18 He testified that he stayed at the store  
19 until 3:45 in the morning. He then left and  
20 got some gas and departed on the highway to  
21 Behchokò. On his way there, he saw the  
22 vehicle that Corporal Hare was driving towards  
23 Yellowknife. He saw the vehicle turn around  
24 behind him. He immediately pulled over to the  
25 side of the road and the truck came up behind  
26 him. He testified that he was driving at  
27 about 100 to 110 kilometres per hour. He

1           stated that he pulled over because he thought  
2           that the vehicle was being driven by an RCMP  
3           member from Behchokò who wanted to talk.

4           He further testified that when Corporal  
5           Hare asked him to step out of the vehicle, he  
6           and Corporal Hare got into an argument. He  
7           denied ever being requested by Hare to provide  
8           his documents. He testified that he never  
9           told Hare that he was going to be close to the  
10          legal limit for blood alcohol.

11          He stated that Constable Foley arrived at  
12          the scene and that he heard Corporal Hare  
13          contacting Sergeant McLeod and asking for a  
14          tow truck as well. He denies that he ever  
15          told Corporal Hare that he had stopped at Long  
16          Lake.

17          He testified that he was not impaired by  
18          alcohol but that he was upset at being accused  
19          of something that he did not do.

20          He also stated that he had previously torn  
21          an anterior cruciate ligament in his knee and  
22          that this injury causes him significant  
23          difficulty especially when he has been on his  
24          feet for extended periods of time. A  
25          photograph of his knee in a swollen state was  
26          provided to the court in evidence.

27          During cross-examination he was unshaken

1 as to his version of events. He was asked  
2 whether he took a nap on the mattresses that  
3 are located in the store. He testified that  
4 he could have done so but that he did not. He  
5 said that because he was up all day and had  
6 been dancing his knee was swollen. He said  
7 that on occasions he limps as a result of his  
8 knee injury.

9 He denied telling Constable Sullivan that  
10 he had six beers to drink. He denied telling  
11 Corporal Hare that he was close to the line.  
12 He also testified that his vehicle had been  
13 parked in the same location that Hare said  
14 that he had observed it by the Joe Tobie  
15 building. He said that he walked back to his  
16 truck after leaving his store and then drove  
17 to get gas before he left to go to Behchokò.

18 Shane Thompson also testified for the  
19 defence and was the last witness who I heard  
20 from in this case. He corroborated Constable  
21 Hayward's version of events. However, he  
22 denied that he himself had anything to drink  
23 at Boston Pizza although he admitted to  
24 drinking four Caesars at another bar prior to  
25 coming to Boston Pizza. During  
26 cross-examination, he said that these drinks  
27 were bottled Coronas that he poured into a

1 glass. He then had a few drinks later when  
2 they went to the Gold Range. He saw Constable  
3 Hayward have two beers while at Boston Pizza  
4 and estimates that Constable Hayward had about  
5 five drinks the whole evening when he was with  
6 him.

7 Mr. Thompson described Hayward as being  
8 "pretty straight". He also described the  
9 argument between Constable Hayward and April  
10 Bell in the same manner it was described by  
11 Hayward. Mr. Thompson remembered joking with  
12 Corporal Hare about taking Constable Hayward  
13 and Constable Bell away. He recalls Corporal  
14 Hare laughing. During cross-examination, he  
15 confirmed he saw Constable Hayward drink a  
16 maximum of five or six drinks.

17 Mr. Thompson, as I have indicated, was the  
18 last witness to testify.

19 One of the further pieces of evidence,  
20 which was entered by consent as a business  
21 record, was a patrol unit history. This  
22 document indicates that Corporal Hare was at  
23 another part of town from 1:51 to 2:06 a.m. on  
24 November the 13th of last year. The defence  
25 has used this evidence to challenge the  
26 accuracy of Corporal Hare's testimony that he  
27 first observed Hayward briefly on the street

1 at about 1:50 a.m. Corporal Hare states that  
2 the patrol unit history is incorrect in this  
3 regard and that they are often not completely  
4 accurate.

5 I accept Corporal Hare's testimony as to  
6 the inaccuracy of the log. Hayward himself  
7 admitted to having had a brief, albeit  
8 somewhat different, interaction with Hare at  
9 around 1:30 a.m. on the street that runs by  
10 the Gold Range.

11 Obviously it is the later and lengthier  
12 interaction described by Hare, which Corporal  
13 Hare maintained occurred at 2:10 to 2:20 a.m.,  
14 in which Constable Hayward says did not occur,  
15 that is in question. The portion of the log  
16 referred to by Mr. Gregory doesn't really  
17 assist me one way or the other resolving that  
18 factual dispute.

19 As stated, I agree with Mr. Gregory that  
20 to a large extent the evidence presented in  
21 this case boils down to a credibility contest  
22 between Constable Hayward and Corporal Hare.  
23 There are certain portions of other evidence  
24 which are confirmatory of Hare's testimony and  
25 other portions of the evidence which I think  
26 are confirmatory of Hayward's testimony.

27 The text messages on Hare's cell phone and

1 the timestamps on them corroborates his  
2 version of events when it comes to the  
3 messages received by Constable April Bell as  
4 well as their timing. Because these texts are  
5 hearsay, I am not allowed to consider them as  
6 evidence for the truth of what was actually  
7 said in them. Constable Bell, the author of  
8 these texts, was not called upon to testify.

9 Constable Sullivan's testimony as to what  
10 he was told by Hayward corroborates Hare's  
11 version that Constable Hayward told him he had  
12 six drinks as opposed to four. It is also, I  
13 think, further evidence that this is actually  
14 how much Hayward had to drink. On the other  
15 hand, what Constable Hayward told Constable  
16 Sullivan about where he went and what he did  
17 after leaving the Gold Range was not in  
18 contradiction of Constable Hayward's testimony  
19 in court.

20 I have Corporal Hare's testimony on the  
21 accused's state of sobriety. On the other  
22 hand, there were the notations made by Hare  
23 that recorded that Hayward's balance was fair.  
24 He noted that Hayward's state of mind was  
25 placid and that his speech was clear.

26 Shane Thompson's testimony on Hayward's  
27 apparent state of sobriety corroborates



1           Hayward's evidence on this point concerning  
2           the time that he left the Gold Range and to  
3           some extent Hayward's evidence in general.

4           Kiera Powder's testimony on Hayward's  
5           apparent state of sobriety at the detachment  
6           also appears to be somewhat confirmatory of  
7           Hayward's. Other than a moderate odour of  
8           alcohol she didn't really note any other  
9           physical signs of impairment. In fact I think  
10          that her testimony can be considered as  
11          evidence that Hayward was sober.

12          Constable Sullivan interacted with Hayward  
13          at the Yellowknife detachment and other than a  
14          strong odour of alcohol emanating from  
15          Hayward, the only indicia of intoxication that  
16          he noted were red and glossy eyes.

17          Sergeant McLeod's evidence concerning  
18          intoxication was more supportive of the  
19          Crown's theory than the evidence of Kiera  
20          Powder or Constable Sullivan. As noted, he  
21          stated that he detected a strong odour of  
22          alcohol. He also said that he noted that  
23          Hayward's speech was slurred and louder than  
24          usual. I have borne in mind that he certainly  
25          would have known how Hayward usually behaves.  
26          He says that Constable Hayward's demeanour was  
27          different from how he had observed him in the

1 past. However, I must also consider that  
2 Constable Hayward under the circumstances,  
3 even if not intoxicated, may have been quite  
4 emotional. As well, it is important that  
5 Sergeant McLeod clearly stated that Hayward  
6 was not drunk or intoxicated. He said that  
7 Hayward was a four or maybe a five on a scale  
8 of intoxication on a scale of one to ten.

9 He described Hayward as being "impaired".  
10 Given what he said about Hayward not being  
11 intoxicated, I take him to mean that in his  
12 view Hayward was under the influence of  
13 alcohol or, put another way, that there was  
14 some impairment of Hayward's functional  
15 ability.

16 His testimony agreed with Hare's in that  
17 he also observed Hayward hitting two keys at  
18 once on his cell phone. However I don't place  
19 a great deal of weight on this particular  
20 fact. Based on what I observe on a day-to-day  
21 basis, this is a problem that sober people  
22 often experience.

23 Of all the witnesses I heard, Sergeant  
24 McLeod's evidence concerning Hayward's state  
25 of sobriety was the most supportive of  
26 Corporal Hare's assessment. That said,  
27 Sergeant McLeod's evidence was quite

1 qualified.

2 As stated, the offence that Hayward is  
3 charged with requires impairment of the  
4 ability to drive and not impairment of any  
5 functional ability on his part. As Parliament  
6 has worded the offence, simply being under the  
7 influence of alcohol is not enough to make it  
8 out. I must respect what is clearly the will  
9 of Parliament in determining whether or not  
10 Constable Hayward is guilty.

11 At the end of the day, in order to convict  
12 Constable Hayward I must find that I am sure  
13 that there was actual impairment of the  
14 ability to drive.

15 There were certain aspects of Constable  
16 Hayward's evidence that I found and still find  
17 troubling. I agree with Mr. Sinclair, who  
18 appeared for the Crown, on a number of points.

19 I find Constable Hayward's testimony that  
20 following his departure from the Gold Range he  
21 was engaged in the conversation with the  
22 confidential informant for a significant  
23 length of time to be somewhat convenient. And  
24 as I have also noted, I find there are  
25 portions of the evidence that I find to be  
26 corroborative of Corporal Hare's testimony.

27 But, as to the lengthy interaction between

1 the two of them which Corporal Hare says  
2 occurred outside of the Gold Range, I have  
3 only their conflicting testimony. While I  
4 have the text message and the time it was sent  
5 to Corporal Hare by Constable Bell, I can't  
6 use it for the truth of its contents.  
7 Constable Bell was not called upon to testify.  
8 I can use it to corroborate Hare's version on  
9 the timing of his departure from Yellowknife  
10 and what he saw, but I am still left with the  
11 conflict between Hare and Hayward's testimony  
12 on when Hayward moved his vehicle from where  
13 he had initially parked it that evening.

14 I have observed Constable Hayward closely  
15 a number of times on the video recording  
16 entered as evidence; and, other than a rather  
17 moderate deviation in his walking while he was  
18 putting a coat over his head, I didn't observe  
19 anything about his behaviour that I felt was  
20 unusual. I do not think that his pattern of  
21 walking would necessarily be unusual in a  
22 sober person doing the same thing.

23 I also have to consider the evidence that  
24 I have heard and seen concerning the condition  
25 of Hayward's knee. I have to consider the  
26 photograph which was entered and  
27 uncontradicted which, I think, shows the

1 extent of the injury and shows the extent of  
2 the swelling which occurs on occasion.

3 I have considered that Corporal Hare was  
4 tested thoroughly during cross-examination and  
5 that his testimony remained in my assessment,  
6 for the most part, unimpeached; however, I  
7 find that by and large the same thing can be  
8 said of Constable Hayward's testimony.

9 I have also closely considered the  
10 evidence of Corporal Hare on what he observed  
11 of Constable Hayward's driving.

12 As urged by Mr. Sinclair, I have  
13 considered all of the witnesses's possible  
14 motivations to testify as they have but I  
15 think that I can only go so far with such an  
16 approach before seriously undermining the onus  
17 and standard of proof.

18 While I found Corporal Hare's testimony to  
19 be believable, I remind myself that the  
20 standard of proof beyond a reasonable doubt is  
21 high. Simply believing that Constable  
22 Hayward's ability to drive was impaired is not  
23 enough. Even if I find it probable that  
24 Hayward's ability to operate a motor vehicle  
25 was impaired, that in and of itself is not  
26 enough to find him guilty.

27 Certainly the Crown is not required to

1           prove the guilt of Constable Hayward to an  
2           absolute or scientific certainty. However,  
3           the Supreme Court of Canada has clearly stated  
4           that the standard of proof beyond a reasonable  
5           doubt lies closer to that of scientific  
6           certainty than it does to mere probability.  
7           As a number of authorities suggest, including  
8           most recently the English Court of Appeal in  
9           the 2009 case of Majid, the ultimate question  
10          that I should ask myself is whether or not, on  
11          the evidence that I have heard, I am sure of  
12          the accused's guilt. Am I sure that each and  
13          every element of the offence of impaired  
14          driving has been made out? Am I sure that  
15          Hayward's ability to operate a motor vehicle  
16          was impaired by alcohol?

17                 I have applied the three part test I  
18          earlier referred to. I have applied it in the  
19          order set out by the Supreme Court of Canada  
20          in R v. W. D., I have considered the evidence  
21          in its totality at length, and I find that  
22          this is a close case.

23                 However, when I ask myself whether I am  
24          able to say I am sure Hayward's ability to  
25          operate a motor vehicle was impaired, based on  
26          all of the evidence that I have heard, or  
27          otherwise observed, and after applying the

1 test set out in Stellato and Andrews, the  
2 answer is no. Therefore, I must find him not  
3 guilty. An acquittal will be entered.

4 I believe that that deals with everything.

5 THE CLERK: Yes, sir.

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Certified to be a true and  
accurate transcript pursuant  
to Rules 723 and 724 of the  
Supreme Court Rules,

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Lois Hewitt,  
Court Reporter

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