Action No: 0080745532P1
E-File Name: ECP09POLOWYE
Appeal No:_____

THE PROVINCIAL COURT OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

HER MAJESTY THE QUEEN

v.

EDWARD FREDRIC POLOWY

Accused

T R I A L

February 19, 2009
Edmonton, Alberta

Transcript Management Services, Edmonton
5th Floor North, 10365 - 97 Street
Edmonton, Alberta T5J 3W7

Phone:(780) 427-6181 Fax: (780) 422-2826

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Proceedings taken at Trial in the Provincial Court of Alberta, Law Courts Building, Edmonton, Alberta

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February 19th, 2009 — Afternoon Session

The Honourable Judge L. Wenden — The Provincial Court of Alberta

J.P. Quenneville — For the Crown
S. Oleskyn — For the Accused
S. Rosin/M. Kassian — Court Clerks

Discussion

MS. OLESKYN: Good afternoon, Sir, Stephanie Oleskyn, Gunn Prithipaul & Hatch, here on the Polowy matter. Mr. Polowy is present, Sir.

THE COURT: Yes.

MS. OLESKYN: If he could join me at counsel table, please?

THE COURT: Yes, he can.

MR. QUENNEVILLE: Thank you. Quenneville, initials J.P., for the Provincial Crown.

THE COURT: Yes.

MR. QUENNEVILLE: We're hoping that you have Information ending 5532P1, a two-count Information, impaired in '08, before you?

THE COURT: Yes.

MR. QUENNEVILLE: It's our sole trial matter for today. I'm ready to proceed. I have two witnesses: A police officer and a civilian.

Now, there's a charter notice as well. How does my friend wish to conduct the trial, does she want to do her --

THE COURT: They conduct it the way I decide.

MR. QUENNEVILLE: I -- thank you, Your Honour. Just to --

THE COURT: And other thing is with respect to the notice, it is not a notice. What you have is a conclusory statement. The police did not have reasonable and probable grounds based on their observations of the defendant and the information available to them to make an evidential demand. That is a conclusion.

So what -- let me read to you something from the Supreme Court of Canada in the case of *R. v. Pires* and *R. v. Lising*. Paragraph 34:

> As noted earlier, the concern over prolixity was expressly stated as a reason for placing reasonable limits in cross-examination in *Garofoli*. Provincial appellate courts have often expressed their concern over the increasing length of court proceedings. For example, counsel have referred us to *R. v. Vukelich* -- citations omitted -- leave for appeal refused, where the importance of avoiding the inefficient use of court time was emphasized by McEachern, C.J.B.C. Chief Justice McEachern suggested the following approach at para. 17:
>
> > Generally speaking, I believe that both the reasons for having, or not having, a voir dire, and the conduct of such proceedings should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems.
>
> I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these inquiries. Finlayson in J.A., in *R. v. Durette*, (1992), 72 C.C.C., forcefully and succinctly expressed the same concern in the following words:
>
> > The Supreme Court of Canada and appellate courts across Canada have been attempting in recent years to restrict the issues that go to the jury to those which have, on the evidence, an air of reality to them. Just as we have tried to restrict the trial of an accused on the merits to factual issues that are directly raised in the particular case, so should we strive to restrict pre-trial motions to matters of substance where defence counsel can establish some basis for a

> violation of rights. Unless we, as courts, can find some methods of rescuing our criminal trial process from the almost Dickensian procedural morass that has now bogged it down, the public will lose patience with our traditional adversarial system.

And that was -- came to my attention as a result of a decision -- or not a result of a decision, it was a report of the Chief Justice's at advisory committee on criminal trials in the Superior Court of Criminal Justice. And there they talk about the ability of the judges to screen pre-trial motions. And, as well, they say that, generally speaking -- and this is from -- in *Pires* -- I believe that both -- well, I've read that. But the issue is that I have got to know what it is before you -- there is enough cases that say you cannot have a voir dire as of right. And nothing has been revealed here. What is the evidence upon which you say that there were no reasonable and probable grounds?

MS. OLESKYN: I'm sorry, Sir, I'm not meaning to be obtuse here, but just for my own clarity then, would the Court prefer it if we were to reproduce the disclosure or, I'm not certain how the Court wishes us to go about --

THE COURT: Well, I am not telling you how to do your trials. I am simply saying that there is enough law that says that defence counsel, when they are making an application --

MS. OLESKYN: Yes, Sir.

THE COURT: -- should put before the Court enough detail almost to allow me to -- or to allow a Court, rather to look at it and say, well, there is or there is not grounds here for a breach. What we have here is we have got a conclusion. So this is based on what?

MS. OLESKYN: And, Sir, perhaps the best way for me to do it actually is then to go through the disclosure and the evidence that I anticipate will come through --

THE COURT: Whatever.

MS. OLESKYN: -- to light.

Sir, I'm looking at the disclosure of a report prepared by Constable -- I believe it's Reucker; is that correct? I'm sorry, Sir, there's two constables here and I just want to make sure that I'm giving you the right one. That's correct, Sir, Constable Reucker. He

responds to a report of a possible impaired individual. He arrives on the scene. He notices the individual to have difficulties -- when he arrives, sir, the individual is on his hands and knees outside of the vehicle searching for something. He notes the individual to -- when -- first of all, he doesn't first hear the officer when he first approaches. He has difficulty standing up. I believe the officer will testify that the individual had to hold on to a -- the vehicle to do so. He also has difficulties in his speech.

In his interactions with the driver of that vehicle, he notices a handicapped placard hanging in the rear-view mirror. He has some discussions with that -- about the handicapped placard, Sir, with the individual whom he is speaking to, and that individual tells him that he has multiple sclerosis and that this explains his inability to -- to speak properly and also his inability to walk and why he's required to hold on to his car, essentially, Sir.

The only other -- and in my view of the file, Sir -- indicia possible relating to here is that there is a -- the officer notes a moderate odour emanating from the individual's breath. And, Sir, I'm just going to do a quick check here to make sure I haven't missed anything. And also that he has red, bloodshot eyes, Sir. It's on the basis of that evidence that I suggest that a section 8 charter voir dire is appropriate.

THE COURT: Mr. Quenneville, is that how you see it?

MR. QUENNEVILLE: Well, I see more evidence – from the disclosure I see more evidence than has been listed.

Essentially, if I can extract from my friend's submissions, she's focusing, hopefully like a laser, on the sufficiency of the indicia as whether or not that constitutes reasonable and probable grounds. Now, that isn't particularized in her notice, as Your Honour has pointed out, but that's what I take to be her argument?

MS. OLESKYN: That's correct, Sir.

THE COURT: Okay.

MR. QUENNEVILLE: Now, that leaves us with the question that perhaps --

Your Honour correctly pointed out the conduct of the trial is within the Court's hand. The question I was going to direct to my friend was whether, if we proceed with -- should we proceed with -- does my friend want her voir dire before the trial or is she prepared to admit that if the evidence is admissible it doesn't need to be repeated and should form the

record of the trial rather than having to go over the same evidence twice with the same witnesses; the productivity of that is somewhat dubious, in my mind.

THE COURT: I must confess I am no farther ahead. What -- you say there is more evidence, what is --

MR. QUENNEVILLE: Okay. Crown's going to be alleging that there was a civilian who both made the 9-1-1 call at the incident. The incident's at a liquor store, he hope -- if it emerges as I expect, the civilian will say that he saw the person emerging from the liquor store going to the car, leads him to make a 9-1-1 call. That information is in the hands of the constable when the constable interacts with the accused. There is -- that information -- the constable was aware of that at the time.

THE COURT: What is the substance of the --

MR. QUENNEVILLE: And the -- he also has a conversation with the accused with regards to whether the accused had anything to drink, and I -- my understanding of the evidence is that the accused states to the officer that he's unsure how much he had to drink, but that's in the positive sense. That's expected to be the allegation.

MS. OLESKYN: I think, Sir, that that conversation actually comes back at the station and not prior to the formation of grounds, is my recollection of the file.

MR. QUENNEVILLE: Well, I have to go over that again. But anyhow, that's part of what I'm expecting; that the officer, in fact, has more evidence than my friend's alleging, and even if only had what my friend is alleging, that's still reasonable and probable grounds, that's -- would be the crux of the Crown's case with regards to the voir dire.

THE COURT: Okay. So as I say, I am not farther ahead. You say -- well, there is a phone call that is received from the civilian?

MR. QUENNEVILLE: Yes.

THE COURT: It is expected the civilian will tell him what?

MR. QUENNEVILLE: The civilian makes the 9-1-1 call, also is at the scene when the officer attends, I think. The civilian's my first witness on the trial proper and that information which the officer has received was that the civilian had seen the accused exiting the liquor store, which the vehicle was parked in front of, stumbling to

the vehicle, entering the driver's side door. Provides the same license plate and description as the officer is dealing with, so the officer thinks they're the same person as he's just heard about. And the civilian, I think, would have told the officer that the person had been in the driver's seat when trying to work with the vehicle. The officer arrives. The accused would have been outside the car looking at the driver's side foot well at the pedals and that is part of the difficulty. The officer arrives in a continuing scene where the civilian has been relaying information, so the officer's sort of entitled to rely on the hearsay of the civilian in forming his grounds.

THE COURT: Yes.

MS. OLESKYN: I don't take any issue with that at all, Sir.

THE COURT: That is not an issue with them.

MR. QUENNEVILLE: Okay. So that additional information is in the officer's hands when he's dealing with the --

THE COURT: Well, we will -- it is marginal, but let us hear it.

MR. QUENNEVILLE: Thank you. So --

THE COURT: Why do we not just start out and then we can have a voir dire.

MR. QUENNEVILLE: Thank you. And the issue as to whether or not the evidence can become evidence on the trial proper, my friend want -- and wait for the close of the voir dire to take a position on that or?

MS. OLESKYN: Sir -- and, again, I'm not meaning to be difficult or obtuse. I think that would depend on -- well, not I think, I know that that would depend on -- on the approach taken with respect to the voir dire. As I understand the section 8, it's my initial burden to establish certain things; however, once it is established that it's a warrantless search, as I understand it, the burden then shifts to my friend. If this is a situation where -- where I would be leading the officer, certainly I'll lead him as required. But if I'm prevented from cross-examining the officer, then, no, I would not be willing to consent to the evidence going in on the trial proper.

THE COURT: Well, that -- first, dealing with the first -- the issue that you made of the onus, that was something else that was considered by the Chief Justice. In 284 they say:

> The second area that is concerned was the notice as required where the defence seeks to challenge a warrantless search, pursuant to section 8 of the charter. Pursuant to the recommendation, the accused would be required to file the notice of application and supporting material. The question that arose was whether the defence would only be required to file a notice indicating it was a warrantless search and, therefore, presumably unreasonable, leaving the Crown to respond with the material upon which a trial judge could conclude that the search was reasonable. Under the new rules on this scenario, the defence would not be entitled to merely establish that the search was warrantless. While a warrantless search is prima facie unreasonable, the fruits of the search are not prima facie unreasonable. They remain admissible until the applicant, the accused, establishes they should be excluded, pursuant to section 24(2). And I appreciate that they were talking about this within the context of rules, but interestingly enough, in the case of *R. v. Megahy*, Mr. Justice Martin talked about the concept or near-concept of automatic exclusion of constrictive evidence obtained as a result of a charter violation, and came to the conclusion that it was not an automatic thing.

With respect to cross-examination, there is, of course, the decision of Madam Topolniski in *R. v. Ward*, which says that you do not have -- on a voir dire, do not have -- as of right, you do not have the -- you do not have the right as a right to cross-examine.

MS. OLESKYN: That's correct, Sir.

THE COURT: So there is that evidence. And I think it is even covered to some extent in *R. v. Pires*. So --

MS. OLESKYN: Well --

THE COURT: -- those being the grounds rules --

MS. OLESKYN: Then, Sir, perhaps I'll just make my position clear than. If I am leading the evidence or from the officer in examination-in-chief, I would not be willing to consent to that evidence going in on the voir dire because I haven't had a chance then to cross-examine the officer and I would want the opportunity to do so on the trial proper.

THE COURT: Well, actually, obviously if these cases say that you can make -- you do not start out being able to cross-exam, but if the police officer shows that he is hostile or unwilling, then you can always make application for cross-examination of a witness. It is not a strict prohibition. So if you feel that you can -- you know, if you feel that you are not being -- getting the answers you want, you can ask to cross-exam.

MR. QUENNEVILLE: If it assists my friend, if I lead the witnesses, in chief, for the purposes of the charter voir dire and she's permitted to cross-examine without having to make the application, on that basis, would she be willing to allow the evidence which is not excluded by reason of the to be the evidence on the trial at that point?

MS. OLESKYN: Yes, Sir, I think that would be a fair application.

THE COURT: All right. That is fine. Go ahead, do that.

MR. QUENNEVILLE: Certainly. I propose to call my first witness then --

THE COURT: Thank you.

MR. QUENNEVILLE: -- the civilian, Mr. Ryan Tyce, I'd ask for permission to step outside to fetch him in.

THE COURT: Yes.

MR. QUENNEVILLE: Thank you.

MS. OLESKYN: And, Sir, perhaps if he could have an order of exclusion.

THE COURT: Yes.

MR. QUENNEVILLE: Just for the benefit of the Court, the gentleman in the back is an SLS student-at-law.

THE COURT: Okay. That is fine.

MS. OLESKYN: And, Sir, perhaps just for my own record, if I could just have the name of that case, the first one that Your Honour referred to.

THE COURT: Which one is that?

MS. OLESKYN: I think it was perhaps *Pire*?

THE COURT: Oh, yes, just a moment.

MS. OLESKYN: I just wanted to note it down to --

THE COURT: Yes, just a minute, please

MS. OLESKYN: -- make our office aware.

THE COURT: *R. v. Pires*, P-I-R-E-S, P-I-R-E-S, semicolon --

MS. OLESKYN: P-I-R-E-S?

THE COURT: Yes. *R. v. Lising* and you can find it in 201 C.C.C. (3rd) 449.

MS. OLESKYN: Thank you, Your Honour.

THE COURT: M-hm.

RYAN TYCE, Sworn, Examined by Mr. Quenneville (Voir Dire)

Q MR. QUENNEVILLE: Thank you, Mr. Tyce, would I be correct in saying that you live in the City of Edmonton, the Province of Alberta?
A Yeah.

THE COURT: And for the record there will be an order excluding all witnesses.

(WITNESSES EXCLUDED)

THE COURT: Keep going.

MS. OLESKYN: Thank you, Sir.

MR. QUENNEVILLE: Thank you.

THE COURT: I am sorry, sir, keep going.

MR. QUENNEVILLE: No problem, thank you.

Q MR. QUENNEVILLE: I'm going to take you back to the 27th day of May of 2008, I understand that you were at some sort of store on that day?

A Yeah, I was just driving up to a Mac's store that's in the same parking lot there and witnessed -- I witnessed somebody crawling on the ground and unable to keep his balance outside of a liquor store, so I kind of assumed that he might be under the influence and called the -- called 9-1-1.

Q Okay. And you said you saw him crawling on the ground, where was he crawling on the ground in relation --

A Basically, like, when I first got there he couldn't really stand straight. And then he tried to open up his door and it looked like he was looking for something, which it ended up that he was looking for his keys. Staggering, just didn't -- didn't look like he was -- he was a hundred percent sober. The police did arrive some time later and I made a witness statement.

Q Okay. Now, I'm just going to take you back to a couple of things. You say that he's crawling on the ground, you said you're near the Mac's, now where is he?

A I'm parked at the Mac's store, he's about a -- I'd say a hundred -- a hundred feet away and -- and -- and I can spot it from there, it just looks -- it just looks unnatural and he's -- and he's -- and he's -- I mean, stumbling and -- and -- you know, just can't really keep his balance and looking for something and he's just crawling around on the ground there.

Q All right. Where he is, is there any buildings near where he is or any --

A Just outside the liquor store. I mean, there's a whole mall there, right? We were in a mall, it's close to my house I'm there all the time, so is he.

Q Okay. So he's just outside a liquor store; do you know --

A Yeah.

Q -- the name of the place or anything like that?

A Liquor Depot, I think it is?

Q Okay. Now, how far from that place was he when you saw him?

A About three steps, in the handicapped parking stall. Maybe five steps.

Q Okay. Now, you said -- you said he -- had the impression he was looking for

something and you said something about his keys; how did you arrive at that conclusion, what led you to that?

A Well, see, like the -- the operator there she wanted to keep me on the phone until the police arrived, so I was kind of talking out everything that was going on. So basically I was trying to tell her that he's looking for something, I don't know what he's looking for, maybe he doesn't have his keys and he can't leave. But, you know, he was -- he was definitely -- you know, in my opinion, looking for something. And then so then when the police did finally arrive and they searched the car or whatever, they found -- I think they found some alcohol in there --

MS. OLESKYN: Sir, I object to that.

MR. QUENNEVILLE: Okay.

A -- and then some keys.

MS. OLESKYN: That's hearsay.

THE COURT: Yes.

MR. QUENNEVILLE: Okay. Let's just slow down.

Q MR. QUENNEVILLE: Okay. Were you still there when the police arrived?

A Yeah, oh, yeah.

Q Okay. Do you actually see them find these things?

A Yeah, oh, yeah. They --

Q Okay.

A They found a bottle of liquor, I don't know what it was, I can't remember. And then had some keys -- they found the keys in the backseat.

Q And do you remember where they found the liquor?

A The alcohol was in the back somewhere and I can't remember if it was an open bottle or a closed bottle or what kind of bottle it was, but I know they found something back there.

Q All right. Now, how long is it before the police came?

A It was probably about -- I don't know -- and -- and, you know, it -- I can't tell you for sure, that would be guessing and it's probably around 15 to 20 minutes, maybe half --

maybe even 25.

Q Okay. And is he still -- how much of that 15 to 20 minutes is he looking for?
A The whole time.

Q Okay. And you said he was looking where? What areas was he looking at?
A In the backseat of the car, underneath the car, you know -- you know, crawling around -- I don't know. All over his car, on the roof and looking flabbergasted.

Q Okay. You say the police arrive; what happens at that point?
A They -- well, they -- they kind of start asking me what happened, I was giving my statement. They were also asking him what happened and if he has been drinking or whatever. He said, no. He also said he had some medical -- something going on like MS, I think he said, so it could be a reason for -- for the stuttering, stammering, disoriented look. But, you know, the first thing that came across my mind was that he was intoxicated because I made the assumption, he was outside of a liquor store, right?

Q Okay. Now, how close did you get to him yourself?
A I was about five feet away from him.

Q Okay. And when you were five feet away from him, did you notice anything about him?
A I didn't smell any alcohol or anything like that. I -- he did look a little disoriented and that's all I remember.

Q Okay. All right. How far were you away when they're searching his car and they find the keys?
A Right there, like -- like, I was right at his door. They're -- they're writing my statement, you know, as they're searching the car there, there's a couple cops.

Q Okay. All right. And how long does that go on for that you and the police and him are --
A I'd say I gave my statement for about five -- five or ten minutes and then -- and then they let me be on my way kind of thing.

Q Okay. All right. And I take it from something you say that you were talking to 9-1-1 at some point?
A Like, the whole time they wanted me to stay on the line with them.

Q Yeah.

A Until the police got there. So I kind of just stayed at the Mac's store and told them what he was doing and the police arrived and I hung up with the operator and went and talked to the police, that's what she told me to do.

Q Okay.
A And that's what I did.

MR. QUENNEVILLE: All right. Thank you. Those are my questions for this witness. If you could answer any questions my friend has.

THE COURT: Okay. This, again, is part of the voir dire, is it?

MR. QUENNEVILLE: We're on the voir dire, yes, Sir.

THE COURT: Thank you, ma'am.

Ms. Oleskyn Cross-examines the Witness (Voir Dire)

Q MS. OLESKYN: Good afternoon, sir. Now, sir, I think you said you were parked about a -- was it a hundred feet or a hundred metres away?
A About a hundred feet away.

Q A hundred feet away. And I believe you indicated that the individual's vehicle was parked in a handicapped stall; is that correct?
A Correct.

Q Okay. Did you note a handicapped placard in the vehicle at all?
A I don't remember seeing one.

Q Were you looking for one?
A I -- I remember looking for one, I just don't remember if I saw one or not.

Q Okay. It's possible that there was one, you just can't say.
A It could have been.

Q Okay. And I believe you indicated that you didn't smell alcohol coming from the individual; is that right?
A Correct. I don't think I would have been close enough to.

Q Okay. And -- but you were close enough to hear the discussion that he had with the police; is that right?

A I had heard some -- a couple of questions being asked to him for sure.

Q Okay. And so you -- but you -- you testify that you heard him explain about a medical problem.

A Something about MS.

MS. OLESKYN: Okay. Sir, those are my questions, thank you.

THE COURT: Thanks.

MR. QUENNEVILLE: Thank you, those are my questions for --

THE COURT: You are free to leave, sir.

MR. QUENNEVILLE: Thank you.

THE COURT: Thank you very much.

A Thanks.

THE COURT: Call your next witness.

MR. QUENNEVILLE: Thank you. There's an officer in the side room, can you send him in for us? Thank you.

A Sure. Am I going home or?

THE COURT: You are free to go, sir, thank you.

A Thanks. I don't see anybody out here.

(WITNESS STANDS DOWN)

MR. QUENNEVILLE: Oh, he's in the side room, if I could be excused for a second.

THE COURT: Yes.

MR. QUENNEVILLE: Thank you. He was in the side room, Your Honour, he must have gone to the washroom or something without asking. If we could perhaps have 10 or 15 minutes, I'll look for him.

THE COURT: Oh, okay. That is fine. Thank you.

(ADJOURNMENT)

MR. QUENNEVILLE: Thank you, Your Honour. The policeman has returned, I'm read to proceed with my next witness.

THE COURT: Thank you.

MS. OLESKYN: And, Sir, perhaps just for clarification, as I understand, we had started in a voir dire; is that correct?

THE COURT: That is right.

MS. OLESKYN: Thank you, Sir.

MR. QUENNEVILLE: Constable, can you join us, please.

Madam Clerk will swear you in where the silver microphone is.

JARED RUECKER, Sworn, Examined by Mr. Quenneville (Voir Dire)

THE COURT: Sir.

MR. QUENNEVILLE: Thank you.

Q MR. QUENNEVILLE: Constable, I understand that you're a member of the Edmonton Police Service serving in Edmonton in the Province of Alberta?
A That's correct.

Q All right. I'm going to take you back to the 27th day of May in 2008, were you on duty on that day?
A That's correct.

Q Were you in or out of uniform?
A In uniform.

Q All right. We're going to get to a story at a particular location. Did you get involved with a vehicle, or on foot, or how were you involved?
A I, myself? I was in a vehicle and I was informed to attend a specific location, yeah.

Q Okay. Marked or unmarked vehicle?
A Marked.

Q Okay. Now, what time of day is it when you get involved?
A The approximate time of day? If you -- like, I could look at my notes, but is around, I believe, 6:00? 1800, 1700.

Q Okay. Would you have an exact time in your notebook somewhere?
A Would I be able to check my notes?

Q Before you do, would your notebook have that information?
A Offhand, I'm not too sure.

Q Okay. What place were you sent to?
A Liquor Spot.

Q Where is that?
A Approximately 95th Avenue and 172nd Street.

Q All right. And which city or province is that in?
A Edmonton, Alberta.

Q Okay. Now, we're within the voir dire so I'm going to ask some questions having to do with that. Before you arrived there, did you have any information as to why you were going there?
A Yeah. Our dispatch call said it was an impaired driver.

Q Can you tell us in as much detail as you can what information you had before you arrived on scene.
A We were given, on our dispatch call, that it was an orange Mercedes Benz and the license plate was given, therefore it came back to a -- at the Mercedes Benz and that it was parked in front of the liquor store or Liquor Spot, sorry. We were told that -- or informed by the witness who observed him that they'd seen him --

Q Okay. I'm starting first of all with the -- before we even get to the scene --
A Yeah.

Q What information you had before you get to the scene. Just as much detail as you can.
A Yeah, that's what I recall. And that –

Q Okay. Did --
A -- the vehicle was parked in front of Liquor Spot.

Q Did your dispatcher give you any information as to what the person was relaying to them as to what you could expect when you got there?
A Just that there was an elderly man walking to his vehicle.

Q And was there anything remarkable that you were to expect about that situation?
A No, just -- I -- I believe on the call it also said that he had a bottle of alcohol in his hand, and that was -- that was about it.

Q Okay. Now, when you arrive at the scene, before you deal with any people, just describe the scene and what you observe on arrival.
A On arrival I noted the orange Mercedes Benz. I parked up directly behind it. I also noted that it was parked at an angle within the stall. And I observed Polowy -- sorry about the name -- within the -- well, bent over in the vehicle looking for something.

Q Okay. You've said a word or a name, who are you referring to or --
A The accused there.

Q Okay.

MS. OLESKYN: Identifying the accused, Sir.

THE COURT: Thank you.

Q MR. QUENNEVILLE: And you said that he was bent over in same way, can you describe how that set up was, in as much detail as you can.
A Yeah. He was on his knees, hunched forward in the driver's seat -- his knees were on the ground and he was hunched forward on -- in the driver's seat, appeared to be looking for something. The door was open as well, the driver's door.

Q And now you've indicated his knees were on the ground, was he inside the vehicle looking out or outside the vehicle looking in?
A He was -- the knees were on the outside looking in, so he just leaned forward in the driver's seat.

Q Okay.
A Sorry, outside the car leaning forward.

Q Okay. And did you have any idea, from his body position, where he was looking at?

A No, not -- not a specific direction, I just know that he was looking in towards the -- possibly on the mat, the driver, by the gas pedal around the seat area.

Q Okay. Now, did the person appear to be aware of you at that time?
A Not at all.

Q Okay. And just by wary of context, you arrive -- told us you arrived in a police motor vehicle and that you were in uniform. You said that you parked your vehicle in some sort of arrangement with regards to this --
A Yeah, I parked directly behind the vehicle at an angle so the vehicle -- just in case that person did get into the vehicle, could not drive away. It was right into the middle of the parking lot.

Q All right. And you indicated that you arrived at the location, can you explain to us, the orange Mercedes Benz, what relationship did it have with any buildings there?
A It -- it was a customer's, as far as I was aware by the dispatch call it was a customer there.

Q Okay. When you arrived and you observed the scene, where is it parked?
A It's parked directly in front of the Liquor Spot.

Q Okay. And --
A At an angle within the stall.

Q Okay. Now, you told us that the person is bent over looking; what are you doing during this time?
A At that -- upon arrival --

Q Yeah.
A -- as soon as I parked my car, the marked police car, I stepped out of the vehicle and stood at -- the back of his trunk there, and I proceeded to inform him that I was a police officer and -- and that was it at that point.

Q Just by way of the obvious, what sort of object is a Mercedes Benz?
A Mercedes Benz? It's just a car.

Q Okay. All right. Now, had the person noticed you yet or what happens next?
A Not at all. I was pretty forthright and loud when I addressed the gentleman and still no response.

Q Okay. How did you address him?

A I informed him that I was Constable Reucker with the city police.

Q Okay. Sorry, did the person appear to have noticed you at that point?
A No.

Q What's he doing at this point?
A Still fidgeting around within the vehicle -- sorry, his hands were -- still knelt over with the --

Q All right. And then what happened next?
A I proceed to address him again, I believe for the second time. Then I got a response.

Q Okay. What response did you get?
A He observed me, he -- he looked outside the vehicle and noticed that I was standing there in the uniform.

Q Yeah?
A I proceeded to ask him to stand.

Q Yeah?
A At which he did comply.

Q What happens next?
A As he was standing, I noticed that he was leaning on the car. And then as he stood, he was -- he had -- had his hand on the car facing towards me.

Q All right. What happens next?
A I asked him if I could speak with him and that if he would come towards me, which he did still leaning on to the vehicle using assistance.

Q Okay. Then what happens next?
A He only walked mid-way to the car and then I approached him and I inquired about what he was doing.

Q Okay then what happens next?
A He continued to tell me that he was looking for his keys to his vehicle.

Q All right.
A He seemed a little frustrated and we continued to banter, and he -- it was at that point that I could smell some alcohol emanating from his breath.

Q Okay. And how close or how far were you from him at that point?
A Probably just within a metre, fairly close.

Q Okay. Sorry, go ahead.
A I also observed red, bloodshot eyes.

Q Yeah?
A Which appeared to be glossy as well.

Q Yeah?
A And just -- he was slightly agitated.

Q Okay. Now, at this point, give any specific -- do you have a word-for-word recollection of the conversation at that point or do you have it written down anywhere or?
A I don't have a word-for-word other than just addressing him and asking him what he had been doing there, but I don't recall the response.

Q Do you have it in your notes somewhere?
A I -- if you let me look I could check to what his – a verbal response was, but --

Q Okay. Before I do that, when would you have made the notes?
A That day -- no, at the time of the arrest would probably be when I wrote the notes down, so I probably wouldn't have an exact word-for-word.

Q Okay. And if you were to look at those notes and there is more in there, would you think that that might help you remember in more detail?
A You know what, looking at it or thinking about it now, probably just would have the time of the arrest when I talked to him.

Q Okay. So we're at the point where you noted -- smelled alcohol on his breath within a metre of him, he has red, bloodshot eyes which are glossy. What happens next at that point?
A That's when I formed the reasonable, probable grounds that he had been -- he was unable to operate a motor vehicle and was impaired by alcohol.

Q And do you know offhand what time that was?
A Approximately seven -- or 1947 hours.

Q Okay. So on the 24-hour clock that's 7:47 PM?
A That's correct.

Q Okay. All right. Now, you formed this belief, have you arrested him yet, are you still talking with him, what's going on?
A At that time I -- I arrested him and I turn around, placed him in handcuffs and assisted him to my car.

Q All right. Have you had any conversation with him up to that point as to whether or not he'd had any alcohol that day?
A He did not state that he had any alcohol.

Q All right. Are there any other members on scene by this point or not?
A That's correct. Constable Pura, reg number 2254, he assisted us while -- with seizing the vehicle.

Q And what time does that member arrive?
A Shortly after I did. I would say 1930, so 7:30 hours.

Q Okay. Now, you've just handcuffed the accused; what's done with him at that point?
A I placed him in the back of my marked vehicle. He -- he -- he was agitated, upset about his keys as well within the vehicle. Still assisted him to my car and placed him in the back of the marked police vehicle.

Q Okay. Sorry, you said he was agitated, how was he expressing that to you?
A Oh, just -- he demanded his keys, he wanted to go back to his car and find his keys, continued to -- I wouldn't say resist, but attempt to go to his vehicle while even in handcuffs.

Q All right. So what happens next at that point?
A No, just placing him in my vehicle, and at that time I chartered and cautioned him. I informed him that my partner would locate the keys to his vehicle.

Q Okay. So he's in your vehicle at that point?
A That's correct.

Q All right. What happens next at that point?
A I -- we, my partner located his keys and gave him the keys; therefore, we didn't seize the vehicle, we felt that it was in a safe place and wouldn't have a problem with it, and transported him to west division station.

Q And is the vehicle searched before you leave?
A I did not search it, but my constable -- Constable Pura did search the vehicle.

Q Okay. Did Constable Pura transmit any information to you with regards to the results of the search?
A Yeah, he informed me that -- and with his notes as well, that there was some alcohol in the front passenger and the rear passenger of the car.

Q You're referring to the seat positions?
A That's correct.

Q Okay. Do you remember what time you left the scene?
A If I could look at my notes it would be there.

Q All right. Do you remember offhand or would you have to look at your notes?
A It'd be approximately, I'd give you an approximate if that's sufficient. About 1942 hours. No, sorry. Probably 1950 hours.

Q All right. Do you know the time you would have -- okay. First of all -- I'm getting ahead of myself. Do you actually successfully arrive at west division?
A That's correct.

Q What time would you have gotten there?
A Approximately 1954, would have been four or five minutes to get there.

Q Do you have an exact memory or you're just having to guess here?
A Exact, but -- or it's -- sorry, that's a guess. But I can give you an exact time.

Q Okay. If you looked at your notebook do you think that would help you --
A Absolutely.

MR. QUENNEVILLE: I'd ask that the witness --

THE COURT: Yes.

MR. QUENNEVILLE: -- be permitted to look the --

MS. OLESKYN: I have no objection, Sir.

MR. QUENNEVILLE: All right.

A Sorry, I left at 2004 hours from the scene and I arrived at west division at 2009 hours; so 8:04 PM and arrived at 8:09 PM.

Q MR. QUENNEVILLE: All right.
A At west division .

Q What's done with the accused then at that point?
A We typically take them in the back and search them a little bit further regarding jewelry or laces, et cetera, before we place them in a cell.

Q Was that done with this accused or?
A That's correct, yeah.

Q Okay. Then what happens next?
A I informed him again that he was under -- chartered -- or, sorry. Informed that he was under arrest for impaired and asked him if he would like to speak to a lawyer. At which time he did, so I placed him in the phone room.

Q Okay. What time?
A May I look at my notes?

Q Do you remember or do you have to look at your notes to have an exact time?
A An exact time, I have to look at my notes.

MS. OLESKYN: It's all right. I have a non -- a continuing non-objection to the notes.

THE COURT: Okay.

Q MR. QUENNEVILLE: Could you tell us the time for that, please?
The time he was placed in the phone room is 8:24 PM.

Q Okay.

MR. QUENNEVILLE: I'm just going to lead to the point to where we're done with the evidence my friend's trying to exclude. I take it my friend won't have any problems if I lead the witness a bit on the narrative matters.

MS. OLESKYN: That's fine, Sir.

THE COURT: All right.

MS. OLESKYN: And, Sir, I could put on the record, perhaps, that

I'm taking no issue with 10(b) compliance, perhaps if that assists my friend.

THE COURT: Okay.

MR. QUENNEVILLE: Thank you.

Q MR. QUENNEVILLE: What time is the person out of the phone room?
A He was out of the phone room at 2030 hours.

Q Okay. What happens next?
A From -- immediately from there he was placed and dealt with a breath technician, Constable Blue.

Q All right. So Constable Blue was the qualified tech on this file?
A That's correct.

Q All right. And I understand that you yourself aren't a qualified tech; is that correct?
A That's correct.

Q All right. Now, I won't ask you anything about the description of the machine or anything like that. Does the person blow into any machines on this file?
A After several times, yes.

Q Okay. When Constable Blue's done with the person, does Constable Blue provide any paperwork to you?
A Yeah. She provides the -- the tech and the breath and all the required samples.

Q All right. What do you do with regards to the accused and these papers?
A I write him up a promise to appear.

Q With regards to the paper that Constable Blue gives you, what do you do with that?
A Right. I sign it.

Q Yeah.
A And concur that he had blown over.

Q Okay. I'm not asking about the contents. What do you do with the copies of the paper that Constable Blue had given you?
A Submit them.

Q Okay. Do you give any copies to anyone else?

A I --

MS. OLESKYN: Objection. Leading.

THE COURT: (INDISCERNIBLE).

MR. QUENNEVILLE: Thank you.

A I give them to the gentleman, as far as the -- the driving documents.

Q MR. QUENNEVILLE: I'm going to show you a document, see if you recognize it if --

MR. QUENNEVILLE: Permission to approach the witness?

THE COURT: Yes.

MR. QUENNEVILLE: I'm going to just show my friend before I show the witness. Thank you. I'm going to -- if I might approach the witness?

THE COURT: Yes.

MR. QUENNEVILLE: Thank you.

Q MR. QUENNEVILLE: Show you a document, see if you've ever seen it before, if it's familiar to you (INDISCERNIBLE)?
A Yeah, it looks familiar.

Q All right. What would you have done with this document once you --
A I would have sworn it.

Q Okay.
A Obviously indicate to the gentleman there that -- put a place and name and date it and sign it.

Q All right. On the back of the document there appears to be an attestation; was it you who completed that?
A That's correct.

Q Okay. What did you do when you were doing that?
A Signing it?

Q Well --
A What was I doing at the time?

Q -- what process leads you up to doing that?
A That he'd failed the -- the breath sample --

Q Okay.
A -- there.

Q The back --

MR. QUENNEVILLE: If I might approach the witness again?

THE COURT: Yes.

MR. QUENNEVILLE: Thank you.

Q MR. QUENNEVILLE: The back of this document appears to be an affidavit of service for giving a copy of a document to somebody; how does that come about?
A After his breath sample --

Q Yeah.
A -- we provide him a copy as well --

Q Okay.
A -- stating that I did provide him a copy.

Q Okay. Is that what actually happened?
A That's correct.

Q Okay.

MR. QUENNEVILLE: I'd ask that that be an exhibit on the voir dire, 'A', if it pleases the Court.

THE COURT: 'A' for identification.

MR. QUENNEVILLE: If you could hand that to madam clerk.

EXHIBIT A - FOR IDENTIFICATION – Certificate of Analysis with Affidavit of Service (Voir Dire)

MR. QUENNEVILLE: All right. Thank you. There's some statements that I could ask voluntariness questions on, perhaps if I just asked them here in case voluntariness is an issue on trial.

Q MR. QUENNEVILLE: There's some things the person you were dealing with said to you; did you make any threats or promises to get those statements out of him?
A No.

Q Okay. Other than the handcuffing you've already described, is there any use of force that we should know about?
A None.

Q Okay. Was there any other threatening circumstances about what -- that we haven't heard about that we haven't covered or that's it?
A That was everything.

MR. QUENNEVILLE: All right. Thank you. Those would be my questions on the voir dire.

THE COURT: Cross-exam.

MS. OLESKYN: Thank you, Sir.

Ms. Oleskyn Cross-examines the Witness (Voir Dire)

Q Good afternoon, constable.
A Good afternoon.

Q Now, constable, as I understand it, you were responding to a call from dispatch; is that correct?
A That's correct.

Q Now, when you arrive on scene, you park your -- your marked police vehicle behind that of the Mercedes Benz; is that right?
A That's correct.

Q And then you approach Mr. Polowy; is that right?

A The -- the rear of the vehicle, yeah.

Q Okay. So you approach the rear of that vehicle. So then you do not speak to the witness who is on scene prior to approaching Mr. Polowy.
A That's correct.

Q Okay. Now, I believe you indicated that, upon your arrival, he was kneeing outside of the vehicle; is that right?
A Yeah.

Q He appeared to be looking for something inside of the vehicle?
A Within the -- pardon?

Q He appeared to be looking for something inside --
A Yes, that's correct.

Q -- of the vehicle? Okay. But his -- his knees, he was actually outside of the vehicle.
A Yeah.

Q So when he stood up, he was actually outside of the vehicle?
A That's correct.

Q Okay. Now, I believe you indicated that when he was standing up, he -- he held on to the door and then, when he turned to talk to you, he also held on to the door; is that right?
A Yes, to the vehicle.

Q Okay. Now, constable, did you notice a handicapped placard in Mr. Polowy's car?
A I did.

Q Okay. You had some discussion with him about that; is that right?
A No.

Q You did not have discussion with him about that?
A No. I saw the placard.

Q Okay. Constable, you prepared a report in conjunction with this investigation; did you not?
A That's correct.

Q Okay. And, constable, do you have a copy of that report with you today?

A I do.

MS. OLESKYN: Does my friend have any objection to him referring to reports?

MR. QUENNEVILLE: No. Please do.

Q MS. OLESKYN: Okay. Constable, if I could direct your attention to paragraph 4 of your report.
A Yeah.

Q And the first line of that says:

> When speaking with Polowy, I observed that he had a handicapped placard on his rear-view mirror –

A M-hm.

Q -- inside the car. Polowy informed me that he had multiple sclerosis, explaining his -- et cetera, et cetera?
A Right.

Q So it would seem that you had some discussion with him about that?
A No, he had mentioned that to me within the -- when we were in the car, in the marked police vehicle.

Q I see. So here it -- so you're indicating that he doesn't tell that to you -- at what point does he tell that to you?
A Within the marked police vehicle.

Q I see.
A He mentioned that.

Q So, constable, if I could just read to you what -- the remainder of your paragraph, you indicate -- and I'm going to read just the last period -- or, I'm sorry, the last sentence. As Polowy was speaking, it was evident that he had been drinking as Constable Reucker -- I'm sorry if I pronounced your name wrong. -- continued to smell a moderate odour of alcohol emanating from his breath. And then, at paragraph 5, you say:

> In light of the above indicia, Constable Reucker was confident that

Polowy's ability to operate a motor vehicle was impaired by alcohol, placing him under arrest.

A Right.

Q So it would seem that this happened before you --
A Right.

Q -- place him under arrest?
A Yeah, I'd understand that, yeah.

Q Okay. So this conversation then actually would have happened and him informing him you of the multiple sclerosis would have happened before you placed him under arrest?
A I don't recall that conversation.

Q Okay.
A I -- I recall noting the placard and him just completely focused on the keys of this car.

Q Okay. But from your notes or from your report, that's what it would seem to be --
A Right.

Q -- is that correct?
A Yeah.

Q Okay. Now, when he -- when you asked him back to your vehicle, he actually asked you for his walking stick; did he not?
A No.

Q You have no recollection of that?
A No.

Q Did you yourself look in his vehicle?
A I did not.

Q Okay. So had there been anything in there, you would be unaware?
A If there was anything in there I would -- yeah, I wouldn't have known.

Q Okay. Now, sir, I believe you indicated he was handcuffed prior to the journey back to your vehicle; is that correct?
A That's right.

Q Okay. But you've -- and then he gets into your vehicle?
A Right.

Q Okay. And you have him -- you don't have any notes of him having any difficulty doing that?
A Difficulty walking to the car?

Q Getting into your vehicle.
A Oh, there was -- it's a tight car, most people have difficulty getting in the car.

Q Okay.
A But Mr. Polowy -- but, yeah, he was -- had to assist him even walking to the car.

Q Okay. And you -- you -- but you made no notes of him having difficulty getting into your car?
A No.

Q Okay. And did you ask him for driving documents?
A Yeah.

Q Okay. And he provided those to you?
A Yeah.

Q Okay. And he --
A From his fanny pack.

Q Okay. I see. So he didn't actually provide those then -- at what point did you ask him to provide those?
A Within the car.

Q Oh, I see. So --
A From the car --

Q -- he doesn't provide them to you at his car, he's in your car?
A You know what, I don't recall when those were provided. I -- I don't have that in my notes.

Q Okay.
A I don't recall when those were provided.

Q But he provides them.
A Yeah –

Q And you don't recollect --
A -- they are provided. I may have gone, with permission, into his fanny pack and -- and got the driver's license, but --

Q You don't recollect him having any difficulty in doing so?
A No.

Q Okay. You appeared to understand the things that he was saying to you?
A Yeah, he talked about his car and his keys, yeah.

Q Okay. But he -- you understood what he was saying to you?
A Yeah.

Q When you advised him of his rights, et cetera --
A Yeah.

Q -- he appeared to understand the things that you were saying to him?
A Yeah.

Q Okay. Now, when Mr. Polowy was placed in your -- your vehicle, he did not have his keys; is that correct?
A That's correct.

Q Because those were subsequently found by someone else?
A Constable Pura.

Q Sir, if I'm -- I'm going to take you back to paragraph 4 of your report there --
A M-hm.

Q -- about the questions I had earlier asked with respect to the handicapped placard and the discussion you had with Mr. Polowy. He told you, did he not, that as a result of his disease that he has difficult -- any difficulties with speech and walking, that that's attributable to his disease; is that right?
A If -- if it had been brought up in that conversation, most people state anything they can to justify their actions, so -- he -- if he did mention MS, I would have not -- I wouldn't have really considered the fact.

Q Okay. But you did note that, did you not? You wrote: Polowy informed me that he

had multiple sclerosis --
A Right.

Q -- explaining his inability to speak and walk normally --
A Right.

Q -- therefore stating why he was required to hold on to his car?
A Right.

Q Okay. And when you were dealing with Mr. Polowy, he did not have a cane present with him; is that correct?
A That's correct.

Q And you don't recall him asking you for the cane?
A Not at all.

Q Is it possible that he could have asked you for the cane and you simply don't recall that?
A No, I -- I -- if he had a cane I would have, by all means, gotten the cane or --

Q It wouldn't have been an officer safety concern?
A Well, no. No. If he needed it, no.

MS. OLESKYN: Thank you, sir. Those are my questions.

THE COURT: Thank you.

MR. QUENNEVILLE: Thank you. And that's the evidence for the Crown on the voir dire.

THE COURT: Okay. Crown is closing on the voir dire.

MS. OLESKYN: There will be no evidence for the accused --

THE COURT: Fine.

MS. OLESKYN: -- on the voir dire.

THE COURT: You may stand down.

(WITNESS STANDS DOWN)

MR. QUENNEVILLE: Sir, I just the officer wait outside --

THE COURT: Wait outside.

MR. QUENNEVILLE: -- in case we need -- in case we need him, don't leave just yet. It's my friend's application.

THE COURT: Yes.

MS. OLESKYN: Yes, Sir. I'll just wait until the officer's departed.

THE COURT: Okay. Yes.

Submissions by Ms. Oleskyn (Voir Dire)

MS. OLESKYN: Sir, I know that Your Honour is very aware of the law in this area, I won't belabor it too extensively. Essentially we're looking at a Bernshaw type situation where we're looking for subjective and objective grounds. The first issue is whether or not the officer subjectively believed in the ability -- or in -- I'm sorry. Subjectively had the grounds to make the demand. And, second of all, whether or not they're objectively justifiable.

Sir, the officer has testified that he himself had -- you know --

(PORTION OF PROCEEDING NOT RECORDED)

-- the opinion that the accused's ability to operate was impaired by alcohol, Sir. I'm taking issue with whether or not that view is objectively justifiable. And specifically, Sir, you likely got a sense of where I'm going with this in my cross-examination, is with respect to the multiple sclerosis. He receives some information prior to coming on scene, and as the officer testifies, he says that the only information he received was that there's a possible impaired driver. He doesn't -- and also there's an elderly man walking to a vehicle. He doesn't say that there's anything more than that. He arrives on scene and he sees an individual outside of the vehicle essentially on his hands and knees who appears to be looking for something. When the man then stands up, the officer notes him to have difficulty doing so with his balance, essentially he's leaning on the vehicle, sir. The officer notes a handicapped placard and some discussion ensues between the officer and the individual as to what that situation is. And essentially what comes out is that the man suffers from multiple sclerosis. And I read from the officer's report, sir, what the officer

had written is that:

> He informed me that he had multiple sclerosis, explaining his inability to speak and walk normally, thereby -- I'm sorry -- therefore stating why he was required to hold on to his car.

The only other indicia, , that we have are the eyes and -- my recollection was he said they were glassy and bloodshot and he indicates an odour, Sir.

In all of the circumstances, Sir, I suggest that that is insufficient to satisfy the objective standard, Sir.

Subject to any questions, Sir.

THE COURT: Mr. Quenneville.

Submissions by Mr. Quenneville (Voir Dire)

MR. QUENNEVILLE: Thank you. Your Honour, I think it's mainly a legal determination -- application of the legal standard to a factual circumstance. I think if I summarized the facts that I'm relying on that's the most important thing I can do.

The officer from 9-1-1 has an elderly man walking to a motor vehicle. And my notes say, with alcohol in his hand, which is considerably more than just walking to a motor vehicle.

THE COURT: Bottle of alcohol.

MR. QUENNEVILLE: Pardon me?

THE COURT: Bottle of alcohol.

MR. QUENNEVILLE: Bottle of alcohol.

He observes, when he arrives, the accused on the ground on his hands and knees looking in the foot well, which is unusual behavior in itself. The person has difficulty noticing the presence of the officer and the arrival of a police motor vehicle at close proximity to himself. He's addressed loudly by the officer on the first attempt to get the accused's attention, and that isn't sufficient to get the guy's attention until the second attempt. The accused has difficulty with balance, which may be explained by his MS, but that basically is the end of the MS. The MS does -- there's no indication in the evidence that the MS

would explain any of the other symptoms. We have alcohol on his breath. We don't have a time exactly when Constable Pura gives the information about the alcohol in the vehicle to the officer, but there's that information there. The accused's eyes are glassy and bloodshot. There's alcohol on the breath, and the accused is agitated and wants to continue searching for his keys.

So in addition to the alcohol on the breath, the glossy and bloodshot eyes and the strange behavior and the lack of observation, we have a desire to continue looking for the keys when you've been informed you've been arrested for impaired driving. This is a constellation of circumstances, knocking out one of them does not disprove the absence of reasonable and probable grounds in the totality of them; they're ample, in my submission.

THE COURT: Thank you. Anything further?

MS. OLESKYN: Not without repeating myself, Sir.

THE COURT: No? Okay. Fine.

Ruling (Voir Dire)

THE COURT: This is an application by defence counsel under section 8 and at 24(2) that the certificate be excluded from the evidence on the basis that there were -- it was an illegal unreasonable search because there were no reasonable and probable grounds. The onus is on a balance of probabilities. We have the evidence from Constable Reucker, he said the information that he had was an impaired driver and an elderly man who was walking around with a -- walking to his vehicle with a bottle of alcohol in his hand. He said when he arrived at the location he noted the manner in which the vehicle was parked, noted someone on their knees, turned out to be the accused, who was looking in the wheel -- or the foot well, the wheel well. He said the person was not aware that he was there. He got directly behind him and he said loudly that he was a police officer, there was no response. A second time he announced his presence and then he got a response. He was asked to stand, and it was noted that he was leaning on the car and he had a hand on the car when he was facing the police constable.

The police constable noted that the -- it was a smell of alcohol emanating from his breath, that he had red, bloodshot eyes and that he appeared to be agitated and was interested in looking after his keys. Police constable said that he noted a -- a placard, handicapped placard on the rear-view mirror in the Mercedes Benz, which was the vehicle driven by the accused. There is the question was it was mentioned to him that -- by the accused that the accused had MS which caused him to need support, to lean on the car. He said if that

conversation took place it took place inside the police car after he had formed his reasonable and probable grounds. He is satisfied that the accused did not ask him for a walking stick. He said that if he had a cane, I would have given him -- gone and got it for him if he needed it.

On all the evidence I am not satisfied that the defence has met the onus and the application is dismissed.

MS. OLESKYN: Thank you, Sir.

THE COURT: Thank you.

MR. QUENNEVILLE: Okay. And (INDISCERNIBLE) evidence on the voir dire, there was also some statements made by the accused with regards to searching for the keys and also the -- there's a voluntariness issue with regards to that, but just generally with regards from the evidence from the voir dire being evidence on the trial, does my friend have a position?

MS. OLESKYN: Sir, if I could just have a moment, I'm just looking for one particular section of the code. I'm not certain if something I'm going to raise should be a voir dire issue or if it should be a trial proper issue, so if I could just have a moment, please.

Sir, could I just have a very brief adjournment? I just wish to make a very quick phone call and seek some advice.

THE COURT: All right.

MS. OLESKYN: Sir, just five minutes will be sufficient.

THE COURT: Fine.

(ADJOURNMENT)

MS. OLESKYN: Thank you very much for that, Sir.

I wasn't actually able to get ahold of anyone from my office, so I'm going with my gut, essentially.

Sir, essentially what I'm going to argue on the -- I think, properly on the voir dire is compliance with section 258(7); that section reads that:

> No certificate shall be received in evidence pursuant to …

Any of the paragraphs.

> … unless the party intending to produce it has, before the trial, given to the other party the reasonable notice of his intention to produce a copy of that certificate.

So I, Sir, just by reading that paragraph, it would seem to me that the appropriate time to address that would be prior to it being entered in to evidence.

THE COURT: Address what?

MS. OLESKYN: The compliance with section 258(7) and whether or not the Crown has demonstrated that, Sir.

THE COURT: I thought the question was whether or not you are going to get -- let the questions on the voir dire be part of the trial, that is what I understood we --

MS. OLESKYN: Oh, I'm sorry, Sir. I have -- my friend had asked with respect to the admissible evidence. Your Honour had ruled that the officer had a reasonable and probable grounds, and certainly I have no objection to the other evidence. But I wanted to address another issue with respect to admissibility of the certificate prior to applying that evidence to the trial proper.

THE COURT: Well, I think it is putting the cart before the horse, but --

MS. OLESKYN: Okay. I'm sorry, Sir, just as I read the section it seems to imply that; to be addressed before the certificate is received into evidence.

THE COURT: Well, okay. Let us hear you.

MR. QUENNEVILLE: Well, first of all, with regards to the voir dire, my understanding is that it's already an exhibit on the voir dire.

MS. OLESKYN: That's correct.

THE COURT: Yes. That is right, yes.

MR. QUENNEVILLE: Okay. My question for my friend was simple. Does he (sic) have -- does she consent or not to the evidence from the voir dire being evidence on the trial?

THE COURT: Yes, that is all. And if not, we will just run through the whole thing again. Run -- let us run through the whole thing again. Let us go.

MS. OLESKYN: But, Sir, perhaps if I could --

THE COURT: No, no. We will run through the whole thing again.

MS. OLESKYN: Sir, I -- if I could --

THE COURT: Call -- sit down, please. Call your witness.

MR. QUENNEVILLE: Thank you.

THE COURT: Because we will run through the whole thing so there is no issue.

THE COURT CLERK: Do you wish him re-sworn, Sir, or acknowledged?

THE COURT: Please.

THE COURT CLERK: Sorry, Sir?

THE COURT: Yes, please.

JARED REUCKER, Re-sworn, Examined by Mr. Quenneville

Q MR. QUENNEVILLE: Thank you. Constable, I understand that you're a member of the Edmonton Police Service working at Edmonton in the Province of Alberta; is that correct?

A That's correct.

Q I'm going to bring you back to the 27th day of May of 2008, were you on duty on that day?

A That's correct, yeah.

Q Were you in uniform or out of uniform?
A In uniform.

Q All right. Were you dispatched to a particular place?
A Yes, I was.

Q Can you tell us what that place was?
A The Liquor Spot.

Q All right. And do you remember the municipal address of that place?
A Approximately at 172 Street, 95 Avenue.

Q All right. And about what time would you have gotten there?
A Approximately 1930 hours.

Q So that'd be about 7:30 --
A 7:30, yes.

Q -- on a regular clock. All right. Can you describe for us what you see when you arrive on scene.
A I see an orange car, a Mercedes Benz and the subject in question here leaning forward in the car, leaning, bent over on his knees.

Q Okay. Now, you mentioned the subject here, is that person somewhere in the courtroom?
A Yes, sitting right there.

THE COURT: Identifying the accused.

A I -- the male, the accused.

Q MR. QUENNEVILLE: Okay. Now, can you describe his position for us, please?
A Yeah, he was on his knees, on the ground, outside, leaning forward in his car, leaning over on the driver's seat and on the mat floor, around that area.

Q All right. What do you do? Do you remain in your car? Do you get out?
A I pulled up behind him, step out of my marked police vehicle, stand at the rear of his vehicle and address the gentleman.

Q Did you notice anything about the manner, where he was parked or how he was parked or anything like that?
A He was parked forward towards the store at an angle.

Q Okay. Was he correctly parked within the stall or not?
A No.

Q Okay. And which way was -- how was it incorrect?
A It was incorrect -- he was over the line, there's parallel lines there and he was outside those lines. He was facing forward towards the store, the front of the vehicle towards the Liquor Spot, just outside the front doors, actually.

Q Now, you've gotten out of your vehicle, we're about to get into a conversation with the accused?
A Not -- well, I attempted to several times, yeah.

Q All right.

MR. QUENNEVILLE: I propose to enter a voluntariness voir dire.

THE COURT: Okay. Fine.

MR. QUENNEVILLE: Thank you.

JARED REUCKER, Examined by Mr. Quenneville (Voir Dire)

Q MR. QUENNEVILLE: Can you lead us through that conversation in as much detail that you can, please?
A I addressed him that I was Constable Reucker with police quite loudly, actually and then I did so a second time.

Q Okay. Did he respond the first time?
A No, he did not respond.

Q Did he appear to notice you the first time?
A Not at all, not even when I pulled up. I had my lights on, my overhead lights on, a marked vehicle and was unaware that I was even there.

Q Okay. What happens when you address him the second time?
A A second time I spoke louder, at which he looked towards me and proceeded to stand up holding on to the vehicle.

Q Okay. Did you notice anything while he was doing that?
A Standing up?

Q Yeah.
A That there was a slight -- a slight difficulty.

Q Would you describe his difficulty, please?
A It was slow and assisted. He had to push himself up off the -- the bottom of the car, like, the frame, and then proceed to stand up, at which he faced me and walked mid-way to the car holding on to the vehicle.

Q Okay. What happens next?
A I approached him, spoke to him, asked him why he was -- what he was doing. He implied that he was looking for his keys and wanted to find his keys to his vehicle which he had dropped inside the vehicle, unknown where.

Q Okay. What happens next?
A It was at that point I noted that he had alcohol emanating from his breath, glossy eyes, slurry speech, and I had the reasonable and probable grounds that he was unable to operate a motor vehicle and was impaired by alcohol.

Q Okay. Based on that belief, what did you do next?
A I -- I arrested him, placed him in handcuffs, informed him that he was under arrest and brought him back to my vehicle.

Q Okay. What happens next?
A Placed him in my vehicle and -- on the passenger's side and received his driver's license, and informed him that he was under arrest for impaired, and chartered and cautioned him.

Q Okay. And that's from the card provided by the Solicitor General to police for charter and caution?
A That's correct.

Q All right. What did you do or read to him then?
A What did I read to him?

Q Yeah.
A I informed him that he was under arrest and then read the charter and caution. If you like, I can read the --

Q Okay.
A -- charter and caution?

Q And after the charter and caution, what do you do?
A I read the first demand –

Q Okay.
A -- the breath demand.

Q What's the first demand?
A The first demand is stating - I can read it if you like - but it just states that he is requested to see a qualified technician back at west division to provide a breath sample. If he did not provide, he would be charged, under the *Criminal Code*, as a refusal.

Q Okay. Could I get you to read that to us from -- verbatim from the card, please.
A Absolutely. It says this:

> In accordance with the provisions of the *Criminal Code*, I demand that you provide such a sample of your breath as are necessary, in the opinion of a qualified technician, to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in your blood and that you accompany me for that purpose. You will be charged under provisions of the *Criminal Code* if you do not comply. Will you comply with this demand?

Q Okay. And did he reply to you after you read him that?
A He did reply.

Q All right. Do you remember what his reply is?
A Yeah, he complied. He said, I comply.

Q Okay. Then what happens next with him? Can you close your notebook for a sec.
A Sure.

Q Okay. What happens next?
A I informed him that he'd be transported to west division, at which I requested a technician, Constable Blue to meet me.

Q Okay. Do you leave the scene or do you stay there, or what happens next?

A Well, through all this he had mentioned that he wanted keys. My partner found the keys, we received the keys and we left.

Q Okay. So you received keys from your partner from?
A Constable Pura.

Q Okay. And where did the keys come from?
A He found them within the car, I don't know where -- exactly where. I know that they were on the driver's side.

Q Okay. So you didn't see, but Constable Pura --
A Right.

Q -- gives them to you somewhere --
A Yes.

Q -- from the vehicle?
A He handed me the keys and then I placed the keys in his fanny pack.

Q Okay. And then you leave the scene, I take it?
A That's correct.

Q Okay. Where do you go?
A We go to west division station.

Q Okay. What time do you get there?
A 8:09 PM?

Q Okay. What's done with the accused then?
A He's searched and was placed in the cell, at which I informed again that he was placed under arrest for impaired and informed him that if he would like to speak to a lawyer he has an opportunity, at which he accepted and I placed him in the phone room.

Q Okay. And what time does he get out of the phone room?
A At 8:30 PM.

Q Okay. Then what's done with him?
A Immediately following that, my partner, Constable Blue, was ready as the -- the testing machine was ready to be go -- to be tested on.

Q So you escort him to see constable --

A I escorted him to see Constable Blue.

Q All right. And I -- what's -- okay. I understand you're not a qualified technician?
A That's correct, I'm not.

Q All right. So you wouldn't be able to tell us what machine Constable Blue used?
A Not at all.

Q All right. So Constable Blue has the accused do some things with the machine?
A Pardon?

Q Constable Blue deals with the accused and the machine --
A That's correct.

Q -- for a while. Constable Blue gives you some papers after dealing with the machine?
A That's right, she provides some documents.

Q All right. If I were to show you some paper would that be the paper --

MR. QUENNEVILLE: Madam Clerk, if you could hand 'A' for Identification to the witness --

A Thank you.

MR. QUENNEVILLE: -- please.

Q MR. QUENNEVILLE: Is that document familiar to you, have you seen it before?
A That's correct, yeah.

Q All right.
A I've seen it.

Q Can you tell us what -- is that the paper Constable Blue gave you or some other thing?
A No, she provided this to me, yeah.

Q All right. And turning it over, can you tell us whether or not you would have done anything -- based on receiving this paper from Constable Blue, would you have given a copy to anyone?
A Yeah, I -- after signing it, I provided it to the subject standing over there, the accused.

Q Okay.
A At the time.

Q So you provided him with a copy?
A That's correct.

Q All right. And the copy that you have in front of you is identical to the one you received that day?
A Yeah, yes.

MS. OLESKYN: Objection, leading.

THE COURT: No, it's either yes or no.

MR. QUENNEVILLE: Thank you. I'm still on the voluntariness voir dire, so I'm going to go a bit further before I deal with the exhibit.

Q MR. QUENNEVILLE: Now, you gave the accused a copy of it. What happens next with the accused?
A The accused is -- well, after he blew over, he was provided additional documents and -- and released.

Q All right. Now, in your dealings with accused, did you make any threats to him or offer him any promises that -- in order to obtain any of his statements?
A None.

Q All right. Other than handcuffing him, was there any other use of force or threatening circumstances we should know about?
A No.

Q All right. Was the accused's demeanor fearful of you or --
A Pardon?

Q Was there anything remarkable about his demeanor with regards to being fearful or --
A No.

Q Okay. Thank you.

MR. QUENNEVILLE: I'm going to be asking that the --

THE COURT: Not until you are done the voir dire, she has got

to --

MR. QUENNEVILLE: Yes.

MR. QUENNEVILLE: We're still in the voluntariness voir dire.

THE COURT: Any cross-examination on the voluntariness voir dire?

MS. OLESKYN: I have no questions on the voluntariness voir dire.

THE COURT: Thank you.

MR. QUENNEVILLE: Thank you. Perhaps I can excuse the witness --

THE COURT: Yes.

MR. QUENNEVILLE: -- while I make my submissions on the voir dire, just --

THE COURT: Just go outside, please.

Submissions by Ms. Oleskyn (Voir Dire)

MS OLESKYN: Sir, perhaps I can just say I take no objection to voluntariness.

Submissions by Mr. Quenneville (Voir Dire)

MR. QUENNEVILLE: Okay. Perhaps I would ask that the Court accept the statements as voluntary.

Ruling (Voir Dire)

THE COURT: I accept the statements as voluntary then.

MR. QUENNEVILLE: Thank you. I'd be applying that the certificate become an exhibit on the trial, Exhibit 1 if it pleases the Court.

MS. OLESKYN: Sir, I'd ask that it remain an exhibit for

identification only at this point, subject to my cross-examination on trial proper and submissions.

THE COURT: Why?

MR. QUENNEVILLE: I'll renew my application later and perhaps --

THE COURT: No, no, go ahead, why? Do you have any further questions?

MR. QUENNEVILLE: No further questions for this witness.

THE COURT: Thank you. Carry on.

Ms. Oleskyn Cross-examines the Witness

Q MS. OLESKYN: Constable, you would agree with me that memories fade over time?
A Yes.

Q Your memory of these events would have been fresher on the date in question than they would be today?
A Pardon?

Q Your memories of the -- of the events on the date in question would have been fresher back then than they were today?
A Yeah.

Q Okay. You testified just a moment ago that upon your arrival, the vehicle was parked at an angle outside of the lines of the stall; is that correct?
A Yeah.

Q There's no note of that anywhere in your -- in your handwritten notes or in your report; is that correct?
A Yeah.

Q In fact, what you have noted is that: Mercedes was parked on an angle in a handicapped parking stall. Is that correct?
A If that's in my notes then, yes.

Q Okay. It's at paragraph 2, if I could --

MS. OLESKYN: Does my friend have any objection to him referring to the report?

MR. QUENNEVILLE: None at all.

Q MS. OLESKYN: Paragraph 2 of your report. And it's the third line down.
A Okay.

Q You make no mention at all, do you, of the vehicle being parked outside of the lines?
A No, not in the report.

Q Okay. Now, I believe you indicated that the accused told you that he was looking for his keys; is that right?
A Yeah.

Q Now, and you had said that they had been dropped; is that correct?
A I -- from what I understood from what he -- yeah, yes.

Q Okay. But did he actually tell you that or is that something that you just assumed by virtue of the fact that he was looking?
A Well, he said he was looking for his keys.

Q Okay.
A So whether -- you're right, I don't know if he dropped them or not.

Q Okay. So -- and you don't know where they would have been or?
A No.

Q Okay. And you yourself didn't actually locate the keys, so you don't actually know --
A I did not locate them.

Q -- where they were found.
A Yeah, that's correct.

MS. OLESKYN: Okay. Thank you, sir. Those are my questions.

THE COURT: Thank you.

MR. QUENNEVILLE: Thank you. I'd renew my application for the

certificate to be marked as a full exhibit.

MS. OLESKYN: Then perhaps I'll make argument --

THE COURT: Yes.

MS. OLESKYN: -- to that effect. Sir, I'll be making argument against the certificate --

THE COURT: Are you done with him?

MS. OLESKYN: I'm done.

MR. QUENNEVILLE: Perhaps if the witness could be excused.

THE COURT: Yes.

MR. QUENNEVILLE: I've got no further questions.

THE COURT: Do you have any further questions? You are free to go, sir, thank you.

A Thank you, Sir.

(WITNESS STANDS DOWN)

Final Submissions by Ms. Oleskyn

THE COURT: Yes, ma'am?

MS. OLESKYN: Sir, with respect to the admissibility of the certificate to the trial proper, I am objecting on two grounds: The first is compliance with 258(7), which I had read earlier. And, madam clerk, could I please see that first exhibit, please? Thank you. Thank you.

Sir, the code requires notice to an individual about the Crown's intention to produce the certificate on a trial. The viva voce evidence that we have from the constable is that -- and I'm just going to turn to my notes here, Sir. That Constable Blue gave him a copy, that he signed it -- and by, he, I mean the investigating constable -- and provided a copy to the accused, that he gave him a copy of the document, Sir.

He doesn't indicate that he went through it with the accused. He doesn't indicate that he informed the accused that it would be produced at court. He doesn't indicate that the copy he provided was a true copy. He doesn't indicate that he, in any way, compared the documents -- the copy provided with the copy that he had to indicate that they were one in the same, that they were different, that it was a true copy, et cetera.

Now, I anticipate that my friend will be saying, well, you know, in any event, if the viva voce evidence is not sufficient, there's his affidavit. Sir, I would submit that the affidavit is not proper. Essentially, if we look to --

THE COURT: Well, let me see it, please. M-hm.

MS. OLESKYN: Look to the affidavit, Sir, the last line says: And leaving the same with, blank. There's no indication with whom that certificate was left, Sir. On that basis, I would suggest that the affidavit is not sufficient to demonstrate compliance with 258(7), Sir.

Additionally, , I'm also arguing the compliance with *Hruby*, a case from our Court of Appeal, which essentially lays out pre-conditions for a Certificate of Analysis; namely, that a demand is made under section 254(3). The numbers at the time of *Hruby* were different and that samples of breath were provided. We do not have evidence from this constable saying that samples of breath were provided on the trial proper, Sir.

Final Submissions by Mr. Quenneville

MR QUENNEVILLE: Thank you. Starting with the -- any deficiencies in the affidavit, the constable testified to giving a copy of the document to the accused, the affidavit is an abstraction when the witness testifies that he gave a copy. With regards to whether it's a true copy or not, there was an objection to whether the question's leading or not, and the witness answered that, yes, it was a copy; in the context, it's a true copy. He got it from the person gave the copy, then and there, to the witness. In the circumstances, I would submit it's a true copy. The certificate itself has a notice of intent on the front of it.

THE COURT: What of the other two?

MR. QUENNEVILLE: Sorry, the?

THE COURT: What of the other two comments that she has made that there is no evidence that there was a breath sample?

MR. QUENNEVILLE: Yeah, the certificate itself says that in its text, I obtained two samples of breath from the person. That's actually in the text of the front of the certificate.

MS. OLESKYN: Sir, there's actually a wealth of case law unto whether or not a judicial officer is entitled to look to the certificate itself, whether or not one can actually look to a document --

THE COURT: He did not say for sure, but I -- did he not say, provided two samples?

MR. QUENNEVILLE: I didn't ask the officer what was done with the machine or not because -- I was very careful to step away from that. Constable Blue is the qualified tech. This officer can't even say what type of machine the machine is. He hands the accused to --

THE COURT: He does not know --

MR. QUENNEVILLE: -- Constable Blue. Now, in order to rely on the contents of the certificate, the certificate has to be admissible. My friend is trying to confuse the difference between the requirements for admissibility and the evidential effect of the certificate. The contents of the certificate has to be a certificate which says the things that a certificate has to say in order for it to be a certificate. She is correct in saying you can't use the evidential effect of the certificate until the prerequisites for admission are met.

Now, I'm suggesting that the prerequisites for admission is that the certificate has to say, this is a certificate of a qualified technician that I received two samples of breath. You're not supposed to take a look at the readings until the certificate meets the prerequisites. I think that's what my friend is trying to say if we are careful with our grammar.

MS. OLESKYN: Well, Sir, actually I take the contrary position, I think *Hruby* is the case on point that --

THE COURT: Do you have a copy of it?

MS. OLESKYN: I can certainly -- we stand down, Sir, I can go and get a copy. With respect to -- and *Hruby* is from our Court of Appeal that talks about essentially prerequisites for admissibility. There is --

THE COURT: What date is it?

MS. OLESKYN: The date of *Hruby*?

THE COURT: Yes.

MS. OLESKYN: Sir, I can't really off the top -- I think it may have been early 2000s, but I'm -- it may have been older than that, I truly don't know, . I can, however, get it from either Quick Law or my office.

With respect to whether or not Your Honour is entitled to look at a certificate to determine whether or not samples of breath have been taken, there is a whole wealth of case law on that issue as well. I've actually -- in the past I've written submissions on that, so I can also obtain that case law. One case that I recall offhand is from justice -- I think it's Marceau, , Alberta Court of Queen's Bench, in a case called *Jackson* in which he says that, no, one is not entitled to look to the very document in which we're determining to be admissible for its own admissibility.

THE COURT: What about the situation though that we have here where you have got a policeman who does not know anything about the machine?

MS. OLESKYN: Sir, it's -- what we're not looking for is anything about the machine. What --

THE COURT: No, no. He does not know -- he does not know anything about the machine, he does not know what the guy is doing with the machine.

MS. OLESKYN: No, Sir, but he -- what he often will hear in these types of situations is what he saw. I saw this man put his lips around something and he was blowing. At least then we know that we're dealing with breaths, not blood or urine or any other sort of samples. We don't have that evidence here that there's any sort of -- sort of blowing at all going on. As I recall the evidence, , and I'm just referring to my notes, he essentially says that -- that -- that he, himself, is not a qualified tech. It's Constable Blue who deals with the machine and the accused. And that Constable Blue gives him some documents. He doesn't testify at all to having observed the accused do anything at all.

THE COURT: Okay. Mr. Quenneville?

MR. QUENNEVILLE: Can I borrow my friend's code for a second?

MS. OLESKYN: Yes. And mine's the '08 version, just for --

MR. QUENNEVILLE: That's all fine. I'm pretty sure the sections of the code haven't changed very much. I think it's 258 that I'm looking at for?

MS. OLESKYN: 258.

MR. QUENNEVILLE: Yeah. Does Your Honour have a copy handy?

THE COURT: Yes.

MR. QUENNEVILLE: Okay. All right. Now, I think we're looking at 258(1)(c): Where samples of the breath of the accused have been taken, pursuant to a demand under section 254(3). No problems with the demand. Practical, that's not being argued. Evidence of the results --

MS. OLESKYN: And, Sir, perhaps just before my friend is --

MR. QUENNEVILLE: There's a certificate section.

THE COURT: No, let him finish, okay? Let him finish before you interrupt.

MS. OLESKYN: Oh, my apologies, Sir.

MR. QUENNEVILLE: There's a section with regards to certificates. Does my friend know offhand which section the presumption of the certificate is under?

MS. OLESKYN: Yeah, if I could just have a look.

MR. QUENNEVILLE: Please.

MS. OLESKYN: I think it's -- it's maybe 'G' or 'H'.

MR. QUENNEVILLE: Yeah, it's in there somewhere.

MS. OLESKYN: That's alcohol standards.

THE COURT: Well, his evidence is the facts alleging the certificate without proof of the certificate or the official character?

MR. QUENNEVILLE: It's 258(1)(g), my friend has pointed me to it.

THE COURT: Yes.

MR. QUENNEVILLE: Where samples of the breath of the accused have been taken pursuant to a demand made under (254)(3), a certificate of a qualified technician stating that the analysis of each of the samples have been made by means of an approved instrument operated by the technician, ascertained by the technician to be in working order by means of an alcohol standard, identified in the certificate that is suitable for use with an approved instrument, a result of the analyses and that the samples were taken by the technician then we get the effect of --

Oh, sorry. And also that the samples were -- that if the samples were taken by the technician, the certificate has to state all these things. Then, at the end of (g):

> Is evidence of the facts alleged in the certificate without proof of the signature of the official character of the person appearing in the certificate.

Now, the officer testifies, Constable Blue gives me a piece of paper, right?

THE COURT: M-hm.

MR. QUENNEVILLE: In order to be admissible, the certificate has to have, on its face, everything in 258(1)(g). Facial validity. You're not allowed to look at the breath numbers, the blood alcohol reading in order to buttress the evidence of Constable Reucker. It actually has to be the certificate -- it's like a warrant, it has to be facially valid. If it's not facially valid then it's not admissible.

THE COURT: Well, I think -- I now take -- I mean, there is one argument upon which defence counsel has -- you know, perhaps struck a chord . And she says there is some case law that says unless there is evidence that I said I saw him blow into a machine, the certificate is not admissible. I believe that is her argument.

MR. QUENNEVILLE: I take that to be her argument as well. Now, what might be productive is if my friend's referring to one case, if we can refer to that one case and that solves the argument. There's no better answer than if my friend's rely on that one case we read that one case.

THE COURT: Where is the -- can you get a copy? You do not have --

MS. OLESKYN: Sir, I can just run to the library and print off a copy of *Hruby*, if I can have ten minutes.

THE COURT: We are talking about more like 20, to be frank with you. How is it spelled?

MS. OLESKYN: It's H-R-U-B-Y. It is from our Court of Appeal. And, Sir, I'm sorry, offhand I don't recall who penned it.

THE COURT: Okay. Well, fine then.

MR. QUENNEVILLE: Yeah. And just anticipate --

THE COURT: 4:00.

MR. QUENNEVILLE: And if I lose on that issue, I'll be arguing the impaired anyhow. But anyhow --

THE COURT: Okay.

MR. QUENNEVILLE: -- just to let the Court know where I'm at.

(ADJOURNMENT)

MS. OLESKYN: Sir, I -- was Your Honour able to locate the *Hruby* case?

THE COURT: I got the *Hruby* case, yes.

MS. OLESKYN: Okay, I also the case of *Jackson* which I had referred to, my friend has this. This is the one from Justice Marceau that talks about looking at the certificate itself for --

THE COURT: Yes.

MS. OLESKYN: -- its own -- I don't know if Your Honour wants --

THE COURT: No, it is okay, I will just -- let us get on with *Hruby*.

MS. OLESKYN: So essentially, , we're looking at paragraph 16 and 17 of *Hruby* and what the Court of Appeal says there is it's simply stated:

> The section, when analyzed, commences by finding, in clear language, two conditions precedent to the admission of a Certificate of Analysis: Firstly, that samples of breath be taken; and, secondly, that they be taken pursuant to a demand made under …

What then was 235(1). These are two separate elements, the section does not recognize the element of time. What the Court then says is that:

> … upon proof of these two elements; that is the making of the demand and the taking of the breath samples pursuant thereto, the prosecution is then in a position to tender the certificate in evidence, and if it appears (INDISCERNIBLE) on its face in that it contains the statements that are dictated by the section, it becomes admissible.

So, with respect, I would disagree with my friend's suggestion that Your Honour can look at the certificate for -- to determine whether or not it's -- satisfies the section on its face. What *Hruby* tells us -- and, Sir, I think even if we just look to the section, the way that that's worded, it's a condition precedent, namely that the breath samples be taken.

THE COURT: Read a little bit farther though and I will pick up the reading. This proposition, in my view, is confirmed by the logic of the following quotation from the reasons for judgment given for the Court of Appeal in Ontario by Gail, C.J.O. in the *Pickles* case at 215: (as read)

> At the moment we are inclined to agree with the proposition that the certificate cannot be admitted in evidence until these two conditions, mainly that a sample of breath of the accused was taken and that it was taken pursuant to a demand under section 235, have been proved apart from the contents of the certificate. Putting it another way, these two conditions may have to be shown without reference to the certificate. And of course if it is so, the certificate cannot prove them. This point is not discussed in the team judgment. In this case, however, we do not have to decide that point for it is our view that, apart from the contents of the certificate, there was evidence from which any Court could logically conclude that this accused received a demand pursuant to section 235(1) and that a sample of his breath had been taken. According to the stated case, a demand

> was made by Officer Doidge to the accused at approximately 4:15 requiring him to deliver a sample of his breath into a breathalyzer machine. Doidge then took the accused to the London detachment office and handed him over to the custody of police Constable Brendan who was described by Doidge as the breathalyzer operator. At the conclusion of the test, submitted Constable Deutsche, the Crown tendered a certificate of the breathalyzer operator pursuant to section 237(1)(f) of the *Criminal Code*. Having regard to the special type of operator and the form of certificate that is contemplated by section 237 of the *Criminal Code*, this was a significant circumstance with respect to this issue. Thus, we are of the opinion that, on the evidence before Judge Carson and at the stage when the certificate was tendered to him, the only logical inference which could be drawn was that a breath sample had been taken from the accused and that was taken pursuant to a demand proved to have been made under section 235(1). That being so then, in our view, the certificate ought to have been admitted in evidence and, once admitted, it therefore follows from what I have said earlier that it was evidenced in the statement contained in it which statements permit the application of the rebuttable presumption created by section 237(1)(c).

Is that not the situation we have here?

MS. OLESKYN: Sir --

THE COURT: We have a demand, right?

MS. OLESKYN: I'm sorry, Sir, I didn't want to interrupt your line --

THE COURT: No, no, go ahead, go.

MS. OLESKYN: Well, certainly, Sir, we have a demand, but my recollection of the demand is that it doesn't -- it indicates that he was going to have to provide a sample into a machine, but it doesn't -- it's not a breathalyzer where -- I don't think that officer ever referred to an Intoxilyzer or the make of the machine. When you say, breathalyzer, it's implicit in that that is a sample of breath, I don't believe that we have that evidence. Further, I don't believe the tech was ever referred to as – you know, that this was -- he was -- that machine was never identified. He's called a qualified technician, he's not a breathalyzer operator, simply he's a qualified technician, . So I'd say

that on the facts, we don't have any reference to a breathalyzer machine, there's no evidence at all to the type of machine that we're dealing with here. So maybe if we had some sort of a --

THE COURT: Well, the only thing we can do -- what is your --

MR. QUENNEVILLE: First of all, the demand read by the officer (INDISCERNIBLE) refers to an instrument -- an approved instrument, that's a defined term under the code. The officer also referred to Constable Blue as a qualified technician, another defined term under the *Criminal Code*.

MS. OLESKYN: If I could just have a second here, Sir --

THE COURT: Yes.

MS. OLESKYN: -- I just want to look at something. Actually, Sir, the term used in the code is, approved breath analysis instrument. I'm not meaning to be picky, tier --

THE COURT: What page is that?

MS. OLESKYN: It's -- in my -- it's under section 254, Sir, but it's page 482 in my '08 version. And it's under the regulations portion. And I'm not -- maybe I'm splitting hairs here, Sir, but, approved breath analysis instrument, tells you what you're dealing with, you're dealing with breath. Just to say, an approved instrument, doesn't tell us that we're dealing with breath.

THE COURT: Approved instrument means that instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person and is approved as suitable for the purposes of section 258, by order of the Attorney General.

MS. OLESKYN: And then, Sir, if we keep reading it says: Approved breath analysis instruments.

THE COURT: Ordered.

MS. OLESKYN: That's correct.

THE COURT: But that doesn't change the meaning of an approved instrument.

MS. OLESKYN: Sir, I'll leave that in your hands. I would simply point out again that this isn't a situation where evidence was ever given as to what type of -- I'm sorry, , I just want to look here. Sir, with respect to the qualified technician, if we look -- and, Sir, I'm sorry, that's a little bit further, that's on the next page, 483 in my book. Qualified technician has two meanings with respect to both breath and blood.

THE COURT: Yes.

MS. OLESKYN: So that the fact that he has referred to him as a qualified technician isn't necessarily synonymous with breath. If we look at that version, (b) of the qualified tech --

THE COURT: But it is not exclusive of breath.

MS. OLESKYN: It's not exclusive, , but I -- respectfully, this is my friend's burden to bear. These are pre-conditions that my friend is required to establish beyond a reasonable doubt. It's not something that I'm required to prove or disprove.

MR. QUENNEVILLE: And for admissibility I only have to establish them on a balance of probabilities.

THE COURT: Anything further?

MS. OLESKYN: Sir, I'll leave it at that.

THE COURT: Thank you. In my view, there is evidence from which I can logically conclude that the breath sample had been taken. The demand that was read into the record is the demand that is approved by the Solicitor General's Department and one that is in use all the time. The police constable did -- meant approved instrument is contained within the demand and approved instrument means an instrument of the kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration section of blood -- in the blood of that person and is approved as suitable for purposes of 258 by order of the Attorney General. The constable -- what was it, Constable Blue? Was called a qualified technician and means, in respect to breath samples, a person designated by the Attorney General as being qualified to operate an approved instrument. The accused is asked to provide a breath sample, he agreed to take a breath sample. I am satisfied that there is evidence from which I can infer that the accused did give samples of his breath as a result of a lawful demand. Certificate is admissible.

MR. QUENNEVILLE: Thank you. I'd ask it be marked as Exhibit 1, please.

THE COURT: Exhibit 1.

EXHIBIT 1 – Certificate of Analysis with Affidavit of Service (Formerly EXHIBIT A - FOR IDENTIFICATION)

MR. QUENNEVILLE: Thank you. And that'd be the case for the Crown.

THE COURT: Crown is closing.

MS. OLESKYN: Sir, the defence calls no evidence.

THE COURT: Okay.

MR. QUENNEVILLE: Thank you. My submissions are very brief. I'm relying on the contents of the certificate for the second count. Your Honour heard our submissions with regards to the first count. There's no expert evidence as to what MS does, but other than that, those are the indicia. I would -- I'd invite conviction on both counts.

MS. OLESKYN: Sir, my submissions relate mostly -- in fact totally -- not totally perhaps -- with respect care and control.

THE COURT: Yes.

MS. OLESKYN: There's no one that places the accused in the motor vehicle, the driving seat of the motor vehicle, he's actually kneeling outside of it. So I take the position that my friend isn't entitled to rely upon the presumption in 258, I think it's (1)(a). So, , essentially my friend is in a position where he's -- needs to prove care and control and I'd suggest that that hasn't been done. There's no evidence that this man was in the seat normally occupied by the driver.

THE COURT: A lot of evidence that he is looking for the keys though.

MS. OLESKYN: There was a lot of evidence, Sir, that he's looking for the keys, but there's no evidence that he ever finds them. There's no evidence

that he ever is -- is in the motor vehicle. There's no evidence that he was, you know, attempting to start the vehicle or anything like that. In fact, the only evidence that we have with respect to where the keys are ultimately found is that of the civilian witness who said they're found in the backseat. So Mr. Polowy doesn't have the keys, it's not a situation where he could accidentally set the vehicle in motion, in fact, he's not even -- his legs, et cetera, are not in the vehicle at any time that anyone testifies to, , he's kneeling outside of the vehicle. Sir, essentially I take the position that that is not sufficient to establish care and control.

MR. QUENNEVILLE: It's an attempt, Your Honour, that's about all I have to really say. He's trying to get the keys, he's also into the foot well, so he's continuing to attempt it throughout. And he's also -- he actually has possession of the motor vehicle, he's in the process of attempting to find the thing that'll permit him to put it in motion.

Reasons for Judgment

THE COURT: May I see the Information, please?

Thank you. Well, clearly the -- when one looks at the cases in the annotations, of course, whether or not one is in care and control is very much fact driven. And there are two cases, which I will refer to later, but first I will go over to the evidence of the police constable. And the evidence of the police constable is -- and I think it is fair to say that the accused was taken with looking for his keys. When the police constable got to the scene, the accused was in the foot well or the wheel well -- whatever one chooses to call it -- with his knees outside looking for something. He said he was looking for his keys. When he was assisted to the car, he was agitated about his keys, he wanted to get back to the car in attempt -- he wanted to go back to his car and he wanted to find his keys. And the police constable, again, said during the time that he was in the vehicle he was asking for the keys. There are -- the case of *R v. Pilon*, which is page 483, it says:

> A course of conduct associated with a vehicle that would involve a risk of putting the vehicle in motion can constitute care and control. Accordingly, care and control was established where the accused was asleep in the driver's seat with the keys on the floor of the vehicle. And the mere fact that the individual is the custodian of the vehicle does not alone constitute care and control. There must be a risk of danger that the car might be put in motion or other danger where there is no risk of the vehicle unintentionally be set in motion or any other risk, care and control is established.

In my view, on all of the evidence, the accused was looking for the keys, he was exercising at that time, some control over the vehicle, and the keys, of course, are the means by which you could set the matter in motion. And on all of the evidence, I draw the inference that he was looking for the keys to leave and but for the intervention of the police that is what would have happened.

THE COURT: Satisfied beyond a reasonable doubt that the Crown has proven its case on both counts.

MR. QUENNEVILLE: Thank you, Your Honour. Under the *Kienapple* principle, I'd invite a judicial -- conditional judicial stay on Count 1.

THE COURT: Judicial stay on Count 1.

MR. QUENNEVILLE: And proceeding with Count 2.

THE COURT: Crown alleging any record?

MR. QUENNEVILLE: No record to allege.

Speaking to Sentence by Mr. Quenneville

MR. QUENNEVILLE: There's a mandatory minimum sentence imposed by parliament, the parliament having altered the range of sentence, there's no need for me to ask for more than what parliament's asked for. I think the mandatory minimum sentence is now a thousand.

THE COURT: Thousand.

MS. OLESKYN: Sir, this is a precis case, the change in penalties do not apply.

MR. QUENNEVILLE: Under --

THE COURT: Yes, 27th of May.

MR. QUENNEVILLE: Under 11 (h) of the charter, he has the benefit of the old $600 –

THE COURT: Yes.

MR. QUENNEVILLE: -- fine.

THE COURT: That is right.

MR. QUENNEVILLE: So $600 fine, driving prohibition for one year, if it pleases the Court. And victim fine surcharge, we'll have to hear about his financial circumstances.

THE COURT: Ma'am?

Speaking to Sentence by Ms. Oleskyn

MS. OLESKYN: Sir, Mr. Polowy's 68 years of age. He resides here in Edmonton. He's divorced and has two children, ages 32 and 34. He has MS quite severely, Sir, he was diagnosed at 26 years of age. At that point they told him that he had 12 years until he would be in a wheelchair. He tells me that he has been in a wheelchair at one point and essentially his disease kind of ebbs and flows. He's had to teach himself how to walk -- re-teach himself, pardon me, how to walk, et cetera, by virtue of his disease. Today he's walking with a cane. He tells me he usually uses two walking sticks, but security gives him trouble with that when he comes in the door. He said that his condition is getting worse with age, Sir. He's on his own essentially, his family has kind of -- he used the word abandoned him. He says that when the bank of dad closed that everyone kind of made themselves scarce. He's retired. When he was employed, sir, he used to work in the technology field. He tells me he used to work with computers and telephones, et cetera. He does have a limited income by virtue of his retirement and an inability to work, Sir. I would be asking for application to interlock after six months.

Sentence

THE COURT: Yes. Fine. I'll fine him with the minimum fine; therefore, pay a fine of $600, in default the deemed days. Given his financial situation, there will be no victim surcharge. And he is prohibited from driving a motor vehicle on any street, road, highway or public place in Canada for a period of one year, except that driving prohibition is reduced to three months if he is participating in the provincial program covering the use of the ignition interlock device during the remainder of the year. The order will be read to him, a copy of the order will be given to him, and I must inform him of subsection 259(4) --

MR. QUENNEVILLE: And also I'll have to ask if he has a driver's license with him.

THE COURT: Very well.

MR. QUENNEVILLE: Thank you.

THE COURT: Everyone who has a motor vehicle -- operates a motor vehicle in Canada while disqualified from doing so is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction by up to a fine of $2,000, six months in gaol or both.

Does he have -- do you have your license, sir?

THE ACCUSED: Yes.

THE COURT: You will have to hand it in, please. Time to pay?

MS. OLESKYN: Just a moment, Sir, please. He has surrendered his license, Sir, to the Court. Sir, he says he's going to pay it today.

THE COURT: Payable forth -- well, will he be able to pay it today? It is 4:29.

MR. QUENNEVILLE: Perhaps we should give him until tomorrow at least.

THE COURT: By 4:00.

Discussion

MR. QUENNEVILLE: In case the registry's closed.

THE COURT: By 4:00 tomorrow.

MS. OLESKYN: Okay. So --

THE COURT: That is the 20th.

MR. QUENNEVILLE: Thank you, Your Honour. I think that that's our matters.

MS. OLESKYN: And, Sir, that's 20 -- right, today's the 19th.

THE COURT: Yes.

MR. QUENNEVILLE: I think that's our matters for today's list, Your Honour.

THE COURT: Will there be anybody down there to give him the order, madam clerk?

THE COURT CLERK: Probably not.

MR. QUENNEVILLE: Perhaps if Your Honour instructs him to attend at the registry tomorrow morning, he's being directed by a judge to do so, that would be sufficient.

THE COURT: Fine. Then that -- where is -- where does he sign?

MR. QUENNEVILLE: Downstairs at the fine payment counter, I think.

THE COURT CLERK: So he can pay --

THE COURT: Okay. Sir, you go downstairs -- because it is not likely you will be able to sign it now. So you can come in tomorrow by 4:00 to sign the driving prohibition.

THE ACCUSED: Okay. What's happening?

THE COURT: Oh, okay. It is 4:30.

THE ACCUSED: Yeah.

THE COURT: Everything closes at 4:30.

THE ACCUSED: Okay.

THE COURT: So the likelihood of the papers getting down in time for you to sign are remote. Now, I suppose you can hang – madam clerk, do you know if it will be drawn up if he waited for a bit?

THE COURT CLERK: I can put a note on the file and somebody will have to do it, but he probably won't be able to pay though.

THE COURT: Okay. Well, at least he can go downstairs.

THE COURT CLERK: Because all the tills go down at 4:30, so --

THE COURT: Okay. So you got your choice, sir, I mean, the tills are down so you cannot pay, so you can some back tomorrow to pay and sign your order or sign your order today; it's up to you. But you will have to wait.

THE ACCUSED: What -- what is -- what's the order?

THE COURT: Drive -- that you cannot drive.

MS. OLESKYN: Sir, I can explain to him.

THE COURT: Okay. Okay. Thank you. We will adjourn then.

THE COURT CLERK: So you will come back tomorrow to sign it then to pay?

THE COURT: Yes.

THE COURT CLERK: Okay.

THE COURT: Okay. I prohibited you from driving a motor vehicle. You have to sign an order.

THE ACCUSED: Okay.

THE COURT: That order has to be signed and given to you. Now, they have got to draft it up, sir, that is going to take a little bit of time. We can push it, it will be done by about 5:00, I would suppose, but I am not certain, or you can come tomorrow and sign that order when you pay.

THE ACCUSED: Okay.

MR. QUENNEVILLE: In any case, just for clarify, I think Your Honour's making clear to him, he can't drive home today in either case.

THE COURT: No.

MS. OLESKYN: Sir, he took a -- took a taxi here today.

THE COURT: Good.

MR. QUENNEVILLE: Okay.

THE COURT: Thank you. Okay. We will adjourn.

MR. QUENNEVILLE: Thank you.

MS. OLESKYN: Thank you, Sir.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Marlene Kassian, certify that this recording is a record of the oral evidence of proceedings in Provincial Court held in Courtroom 353 at Edmonton, Alberta, on the 19th day of February, 2009, and I and Starr Rosin were in charge of the sound-recording machine.

Certificate of Transcript

I, Marg Lavay, certify that the foregoing pages are a true and faithful transcript of the contents of the record, including the certificate of record given orally by the court official, recorded by means of a sound-recording machine, and transcribed to the best of my skill and ability.

_____

M. Lavay
Transcriber

Date Certified: (March 24, 2009)