Case Name:

R. v. Sharma

Between
Her Majesty the Queen, and
Parshotam Lal Sharma, Accused

[2011] A.J. No. 696

2011 ABPC 186

16 M.V.R. (6th) 192

48 Alta. L.R. (5th) 290

95 W.C.B. (2d) 152

[2011] 12 W.W.R. 121

520 A.R. 309

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Docket: 090679465P1

Registry: Edmonton

Alberta Provincial Court

M.G. Allen Prov. Ct. J.

Heard: December 22, 2009, July 27, 2010 and January 10, 2011.
Judgment: June 21, 2011.

(111 paras.)

Criminal law -- Criminal code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Breathalyzer or blood sample demand -- Trial of Sharma who was charged with impaired operation and operating a motor vehicle while his blood

alcohol limit exceeded the legal limit -- Sharma convicted of impaired driving and conditional stay ordered for offence of operating a vehicle while impaired by alcohol -- Sharma had been arrested at his home after being seen stumbling around a parking lot -- Sharma's testimony that he had been drinking while in his house, and not prior to driving, was not accepted as credible -- Crown proved beyond reasonable doubt that Sharma's ability to operate a motor vehicle was impaired by alcohol -- Criminal Code, ss. 253(1)(a) and 253(1)(b). Criminal law -- Evidence -- Witnesses -- Credibility -- Trial of Sharma who was charged with impaired operation and operating a motor vehicle while his blood alcohol limit exceeded the legal limit -- Sharma convicted of impaired driving and conditional stay ordered for offence of operating a vehicle while impaired by alcohol -- Sharma had been arrested at his home after being seen stumbling around a parking lot -- Sharma's testimony that he had been drinking while in his house, and not prior to driving, was not accepted as credible -- Crown proved beyond reasonable doubt that Sharma's ability to operate a motor vehicle was impaired by alcohol -- Criminal Code, ss. 253(1)(a) and 253(1) (b).

Trial of Sharma who was charged with impaired operation and operating a motor vehicle while his blood alcohol limit exceeded the legal limit. On May 8, 2008, a witness reported seeing Sharma in a parking lot of a liquor store, walking with difficulty toward that store, and stumbling when he exited his vehicle. Sharma eventually left the store, returned to his vehicle, and drove home. The witness had notified the police of Sharma's behaviour, who then arrived as Sharma was walking up the stairs to the front door of his residence. The officer approached Sharma and saw that he had a set of keys in his hand. Sharma had a strong odour of alcohol on his breath, and was unsteady on his feet. The officer also noted that he had "bloodshot and glossy" eyes and, as a result, placed Sharma under arrest for impaired driving. Upon searching Sharma, the police found an unopened bottle of vodka tucked in his trousers. A subsequent breath sample at the police station revealed a reading of 340 milligrams of alcohol in 100 millilitres of Sharma's blood. Sharma testified that he had not consumed any alcohol when he drove to the liquor store to buy a bottle of vodka. Instead, Sharma claimed that after he had parked at his residence, he had entered using a side garage door and, while he was in the house for seven or eight minutes, he consumed quite a bit of alcohol; it was after he had consumed this alcohol that the police came upon him. The Crown submitted that the evidence of Sharma's drinking was incredible and should not give rise to a reasonable doubt. In the alternative, the Crown submitted that, even if Sharma's testimony as to his post alcohol consumption raised a reasonable doubt, he could not be acquitted of the s. 253(1)(b) offence.

HELD: Sharma convicted of impaired driving and a conditional stay ordered for offence of operating a vehicle while impaired by alcohol. Sharma's testimony had been provided in an evasive fashion. His story of the events was illogical and unbelievable. When considered in light of the context of the evidence as a whole, it did not raise a reasonable doubt that he entered his residence and then consumed alcohol. The Crown, in relying upon s. 258(1)(c), had proven the required elements beyond a reasonable doubt, meaning that the lowest reading taken by the breath technician was conclusive proof of the alcohol presence at the time when the offence was alleged to have been committed.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Criminal Code, R.S.C. 1985, c. C-46, s. 237(1)(c), s. 237(1) (f), s. 253(b) P ES s. 253(1)(a), s. 253(1)(b), s. 254(3), s. 258(1), s. 258(1)(d.1), s. 258(1)(c), s. 258(1)(g)

Interpretation Act (Canada), s. 24(1), s. 25(1)

Counsel:

J. Snowdon, for the Crown.

B. Mohan, for the Accused.

Judgment

M.G. ALLEN PROV. CT. J.:--

Introduction

1 Parshotam Lal Sharma is charged with two *s. 253(1) Criminal Code* offences: impaired operation [contrary to *subsection (a))*] and operating a motor vehicle while his blood alcohol limit exceeded the legal limit [contrary to *subsection (b)*)].

2 The evidence revealed that Mr. Sharma was highly intoxicated during the police investigation. The accused provided two samples of breath to a breath technician. The lowest reading was three hundred and forty milligrams of alcohol in one hundred millilitres of blood.

3 The accused testified that he entered his residence, and consumed alcohol after he drove his vehicle and prior to the police arrival.

4 Mr. Mohan, on behalf of the accused, submitted that the evidence of the accused should be believed or at least create a reasonable doubt that he operated a motor vehicle while his ability to do so was impaired by alcohol. In addition, he submitted that the evidence should give rise to a reasonable doubt that he drove while his blood alcohol level exceeded the legal limit.

5 Ms. Snowdon, on behalf of the Crown, submitted that the evidence of the accused as to his drinking was incredible, and should not give rise to a reasonable doubt. In the alternative, she submitted that, even if the accused's testimony as to his post offence alcohol consumption raised a reasonable doubt, he could not be acquitted of the *s. 253(1)(b)* offence. Her latter submission was

based upon *s. 258(1)(d.1)*.

6 Hereafter reference to a section number without reference to a specific statute means a *Criminal Code* section. Moreover reference to "over eighty" or "over eighty mgs" or "over eighty milligrams" means over eighty milligrams of alcohol in one millilitre of blood, the standard expressed in *s. 253(1)(b)*. Similarly, reference to the offence of "driving or operating over the legal limit" or "driving or operating over eighty" means an offence contrary to *s. 253(1)(b)*.

Summary of the Relevant Evidence from the Crown Witnesses

7 One civilian witness, and three police officers were called by the Crown. A copy of an audiotape was introduced into evidence.

8 The evidence from these Crown witnesses and the audiotape will be explored under separate headings below.

Lyle Barnes

9 Lyle Barnes testified on May 8, 2008, at approximately 2:20 p.m. he was in a parking lot of liquor store when he noticed the accused walking with difficulty toward that store. The accused stumbled when he exited his vehicle, and walked in a staggering manner as though he was out of step. The witness noticed that the accused's eyes did not appear to be focussed. Mr. Barnes suspected that the accused was impaired; he parked his vehicle behind the accused's van in order to take its licence number. The witness dialled 911 and asked for the police emergency operator. During this time, the accused returned to his van and backed up, almost striking Mr. Barnes' vehicle.

10 The van drove past a stop sign in the parking lot and proceeded east on 23rd Avenue. Mr. Barnes followed. He kept the 911 operator informed as to his progress. The van drove on 23rd Avenue weaving within its lane. The van drove in an erratic manner. The driver almost missed a stop sign and came to a sudden stop. The van was driving too quickly for a residential area, and drove close to parked vehicles.

11 The van drove into a driveway of a residence. Mr. Barnes drove past and turned his vehicle. He conceded that he might have lost sight of the van for a few seconds while he was turning. The van then backed onto the roadway. The accused went to the back of his van. Mr. Barnes was not able to see the accused. The witness saw the police arrive and saw the accused in police custody within a minute.

The Audiotape

12 An audiotape containing the 911 call was entered as Exhibit one. The tape is approximately ten minutes long. The tape verified the oral testimony of Mr. Barnes. The witness told the operator

that the accused slid through a stop sign leaving the parking lot. On a number of occasions he told the operator that the van was all over the road and driving quickly. The witness told the operator that the accused stopped suddenly at the last minutes at a stop sign. The van continued at a high rate of speed in the residential areas. Mr. Barnes then ventured that the driver was all over the road in the residential area. At six minutes and thirty-one minutes Mr. Barnes told the operator that the van had entered a yard. At six minutes and fifty-three seconds Mr. Barnes said that he heard police sirens. At seven minutes and seventeen seconds, Mr. Barnes advised the operator that the accused was on the road, parking his van and looking in his direction. At eight minutes and three seconds the witness advised that the police car went by. At eight minutes and thirty-seven seconds the operator asked if the driver was still there, or did he go into the house? Mr. Barnes responded, "I'm not sure." At eight minutes and fifty-seven seconds Mr. Barnes told the operator that the police had arrived. He asked if he could leave. The operator told him to remain there as the police might need a statement because the driver might have gone into his residence. Mr. Barnes responded, "Oh, he's in his frickin house." At nine minutes and forty-six seconds the operator told Mr. Barnes that the police had a person under arrest.

Cst. Peter Hlbocan

13 At 2:20 p.m. Cst. Peter Hlbocan was sent to investigate. The officer received periodic updates on the location and operation of the accused's vehicle from the police dispatcher. He arrived at Mr. Sharma's residence at 2:25 p.m. The officer parked his vehicle behind the accused's vehicle and saw the accused walking up the stairs to the front door of his residence. Mr. Sharma opened the screen door. The officer approached the accused and saw that he had a set of keys in his hand. The accused had a strong odour of alcohol on his breath, and was unsteady on his feet. The officer noted that he had "bloodshot and glossy" eyes. Cst. Hlbocan placed him under arrest for impaired driving.

14 The accused insisted that he had not been driving his motor vehicle. The accused was unsteady on his feet while walking to the police vehicle; the officer assisted him in walking because he felt without that assistance the accused would fall down. The accused informed him that his licence was in his residence. The officer took the keys from the accused, and tried to open the door but was unable to do so

15 The officer returned to the vehicle and searched the accused; he found an unopened bottle of vodka tucked in the accused's trousers. The officer advised Mr. Sharma of his *Charter* right to counsel; Mr. Sharma indicated that he wanted to speak to a lawyer. When he read him *Charter* advice as to the right to silence, the accused told him that he did not understand. The officer also read the accused a demand for breath samples. Again, the accused told him he did not understand. The officer obtained assistance from Cst. Sran another to translate in Punjabi. Cst Sran read the demand in that language, and the accused responded, "Yes, I will do it."

16 The accused was transported to the police station thereafter; they arrived at 2:53 p.m. Mr. Sharma was taken into a room with a telephone, and told he could call a lawyer. The accused asked

for his wallet so he could find a card to access his lawyer. The officer retrieved his wallet and passed it to the accused. The accused searched his wallet and had difficulty extracting the card from his wallet because of poor fine motor coordination skills. As he was extracting the card he was leaning against the wall for balance. When he extracted the card, he told the officer that he could not read the small print on the card. The officer wrote the telephone number for him in large print. The accused indicated that he still couldn't read the print, and asked the officer to dial the number for him. The officer did so. Mr. Sharma asked for the officer to dial for him and the officer did so. When the telephone began ringing, the officer handed the telephone to the accused. At 3:16 p.m. the accused indicated he was done using the telephone. At 3:18 p.m. the officer read the accused the second *s. 254(3)* demand. Cst. Sran also translated that and the accused asked to speak to his lawyer again. The officer returned to the telephone room and dialled the number again. Mr. Sharma signalled the officer for assistance. The officer entered the telephone room and spoke to a legal advisor who informed him that she could not understand the accused because of his slurred speech. The officer explained the situation to the legal advisor and left the accused so he could obtain legal advice. At 3:26 p.m. the accused advised the officer that he was done.

17 The officer then took him before a breath technician. Mr. Sharma provided two suitable samples at 3:30 p.m. and 3:50 p.m. The lowest reading was three hundred and forty milligrams of alcohol in one hundred millilitres of blood. Because of the high readings, the police called for EMS. They arrived and checked the accused then informed the officers that Mr. Sharma did not require hospitalization but should be released into the custody of a sober person.

18 Cst. Hlbocan summarized his observations as to indicia of impairment. When the officer first saw the accused on the step, a strong odour of liquor was emanating from him, his eyes were bloodshot and glossy, and he had an empty-minded look on his face. After he was placed under arrest, the accused was unsteady on his feet to the extent that the officer had to assist him to walk to prevent him falling. The accused was constantly smiling without any apparent reason. He was thirsty and was licking his lips. At the police station he swayed when he stood and used the walls to support his balance. Cst. Hlbocan believed that the accused's speech appeared slurred. At the police station, the accused had difficulty reading and dialling a telephone.

19 The officer gave his evidence is a straightforward manner. He memory of the events was supported by his handwritten notes and his police report. I believe that his memory of events was reliable.

Cst. Yuvraj Sran

20 Cst. Yuvraj Sran was asked by the investigating officer to interpret the demand for samples to the accused.

21 Cst. Sran testified that the accused had extremely glossy eyes and slurred speech. When the accused walked to use the telephone to call a lawyer he was not walking a straight line and moved in an abnormally slow manner. The accused leaned against a wall for balance.

22 The officer gave his testimony in a straightforward manner. I find that his evidence was honest and reliable on these points.

The Evidence of the Accused

23 Mr. Sharma testified that he had not consumed any alcohol when he drove to a liquor store to buy a bottle of vodka. When he arrived at the parking lot, he stumbled as he left the vehicle because the pavement in the lot was uneven. After purchasing the bottle, he returned to the parking lot and backed his vehicle from a parking spot. A driver in a vehicle parked behind him honked his horn loudly. Mr. Sharma responded by making a rude gesture with his finger. As he drove away, he noticed that the vehicle followed him. The driver of that vehicle was honking, signalling to him, and tailgated his vehicle; he was frightened by the actions of the driver.

24 When Mr. Sharma arrived at his residence, he quickly parked his van. He entered his residence using the side door on the garage. He estimated that he was in the house for seven or eight minutes. During that time he consumed quite a bit of alcohol Mr. Sharma explained he consumes alcohol when he is frightened. On one previous occasion, he drank heavily after being assaulted. The police did little to investigate his complaint. While he was inside, he heard a police siren and stepped outside his residence in order to seek assistance from them. The accused exited the front door of the residence, and locked it. The lock on the door was difficult to open. When the accused came outside, he saw the van that had been following him and he tried to use his keys to enter through the front door. It was at this time that the police came upon him.

The Onus and Credibility

25 In a criminal trial the Crown must prove all the elements of any charge alleged beyond a reasonable doubt. This burden remains on the Crown throughout the trial; it never shifts to the defence. Conversely, if a reasonable doubt exists as to the guilt of the accused he or she must be acquitted. Reasonable doubt means a doubt based upon reason and common sense, and is logically connected to the evidence or absence of evidence. It is not based upon sympathy or prejudice.

26 In circumstances where the accused testifies, the comments of Mr. Justice Cory in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.)(*W.(D.))* at p. 309 must be applied:

> "It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative; namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.
>
> In a case where credibility is important, the trial judge must instruct the jury that

> the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *[1988] 2 S.C.R. 345, supra*, at p. 357.
>
> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
>> First, if you believe the evidence of the accused, obviously you must acquit.
>>
>> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>>
>> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

Assessment of the Credibility of the Accused

27 In most circumstances it is best to begin with the testimony of the accused.

28 I find that the accused was deliberately evasive in his responses to Ms. Snowdon's cross-examination questions. For example, when asked why he would drink alcohol when he was facing danger, he responded that he had been attacked, and the police were not trustworthy. The response could not have been prompted by a lack of understanding because the question was translated to him.

29 Moreover, the explanation was inconsistent in its details and illogical.

30 A number of questions arise from his evidence:

> * Mr. Sharma testified that the pursuer followed him to his residence. It is

difficult to understand why he would consume alcohol and make himself more vulnerable to attack.

* It is also difficult to understand why Mr. Sharma needed to consume "quite a bit of alcohol" to quell his fear. Surely, a small portion would suffice.
* If Mr. Sharma was in great fear, it is illogical that he would leave his residence at all. His fear would prompt him to be cautious and make it possible to retreat to his residence if necessary. He would hardly have made it more difficult to return to his residence by locking a door which was difficult to open. His explanation that he closed the door automatically because other family members occupy the residence. Yet there were no other members of his family present.
* Mr. Sharma explanation for leaving the house was to seek assistance from the police. Yet according to Mr. Sharma he did not trust the police.
* Mr. Sharma testified that he returned to his residence because he saw the pursuer's vehicle outside and he was afraid. It is illogical that he would not have sought the most easily accessible entrance to that residence, i.e., the side door to the garage that he used earlier.
* The accused's evidence was shifting and inconsistent in its details. In his testimony in chief he explained that his panic attacks were brought on because he was assaulted by some teenagers. Yet in cross-examination he seemed to suggest that the panic attacks were due to a rock throwing incident.

Credibility of the Other Witnesses

31 The concern with Mr. Sharma's evidence is compounded when that testimony is considered in the context of the other evidence in the trial. It is important to understand that the *W.(D.)* instructions do not prohibit the consideration of other evidence in the trial. Indeed, the instructions require that accused's evidence be considered in the "context of the evidence as a whole." What *W.(D)* points out is that the trier of fact does not merely compare the version of the Crown witnesses with that of the accused to find the most credible version; rather, reasonable doubt must be taken into account in this process.

32 The evidence of Mr. Sharma on this point must be considered in light of testimony of the Crown witnesses, and the audio tape tendered in evidence.

33 As I have already indicated, I find that the testimony of the police officers to be reliable. Mr. Barnes was an honest witness who had a good memory of the events he described, his memory was reliable, and his version of the events is corroborated by the 911 tape.

34 Mr. Barnes testified that the accused drove his vehicle into his residence driveway and then parked his vehicle on the roadway. The audio tape confirmed that he described this action to the

police. Cst. Hlbocan confirmed that he found the vehicle parked on the roadway.

35 It is difficult to understand why the accused would park his vehicle on the roadway at all if he was frightened and attempting to escape an angry pursuer. Certainly, it is not believable that the accused would back the vehicle onto the street if he was truly panicking.

36 The most important fact to be determined is whether Mr. Sharma entered his residence and consumed alcohol.

37 Mr. Sharma testified that he was in his residence for seven or eight minutes where he consumed quite a bit of alcohol. Thereafter, he exited his residence using the front door, and locked that door. Then he observed Mr. Barnes' vehicle, turned and attempted to open the front door of his residence.

38 It is impossible that the accused was in the house for a period of seven minutes. The audiotape is ten minutes long. The action near the house comprises approximately three and half minutes of that tape.

39 Mr. Barnes testified that he only lost sight of the accused for two brief periods: when the witness was turning his vehicle, and immediately before the police arrived. The second period was under a minute. The brevity of the time period is confirmed in the audiotape.

40 During the audiotape Mr. Barnes informed the 911 operator that the accused was in the house. The comment must be put in its proper context. This comment was made after Mr. Barnes asked the 911 operator if he could leave. The operator told him he couldn't leave because of the possibility that the accused might enter his house. Subsequently, Mr. Barnes lost sight of the accused while he was behind his vehicle, and it was at this point he offered his comment. As Mr. Barnes explained he assumed that the accused had entered his residence because he lost sight of him.

Conclusion as to Mr. Sharma's Credibility

41 I have considered Mr. Sharma's testimony carefully. I find that he gave his testimony in an evasive fashion. His story of the events is illogical and unbelievable. When considered in light of the context of the evidence as a whole it does not raise a reasonable doubt that he entered his residence and consumed alcohol.

42 What is left to be determined is whether the evidence of the Crown proves each of the charges laid beyond a reasonable doubt.

Impaired Operation

43 Mr. Sharma is charged with impaired operation. The only issue in this case concerns whether the Crown has proven that the accused operated his vehicle while his ability to do so was impaired by alcohol.

44 The leading cases related to proof of impairment are: *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.)(*Stellato)*; *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 (Alta. C.A.)(*Andrews*) [leave to appeal to the S.C.C. refused [1996] S.C.C.A. No. 115, 106 C.C.C. (3d) 160 n].

45 In *Stellato,* Labrosse J.A. at p. 380 explained that the Crown must prove the ability to operate a motor vehicle was impaired beyond a reasonable doubt. However, any degree of impairment of that ability will suffice:

> "In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out."

46 On appeal, the Supreme Court adopted the analysis of Mr. Justice Labrosse: *R. v. Stellato,* [1994] 2 S.C.R. 478.

47 In *Andrews*, Conrad J.A. explained that judges must not confuse impairment of functional ability to equate automatically to impairment to operate a motor vehicle. At p. 399 she wrote:

> "The question is not whether the individual's functional ability is impaired to any degree. The question is whether the person's *ability to drive* is impaired to any degree by alcohol or a drug. In considering this question, judges must be careful not to assume that, where a person's functional ability is affected in some respects by consumption of alcohol, his or her ability to drive is also automatically impaired."

48 Conrad J. A. added at p. 403:

> "Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by Sissons C.J.D.C. in *McKenzie*, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired. In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in *Stellato*, the conduct observed must

> satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol."

49 Later, Conrad J.A. added at p. 404-5:

> "The question is simply whether the totality of the accused's conduct and condition can lead to a conclusion other than that his or her ability to drive is impaired to some degree. Obviously, if the totality of the evidence is ambiguous in that regard, the onus will not be met. Common sense dictates that the greater the departure from the norm, the greater the indication that the person's ability to drive is impaired. For instance, if one is assessing driving conduct, exceeding the speed limit is something that many people do whether or not they have consumed alcohol. Thus, that factor would naturally be less indicative of one's ability to drive being impaired, than would weaving back and forth from lane to lane, or travelling on the wrong side of the road. In the end the test remains, is the *ability to drive* of the person impaired?
>
> In my view, the following general principles emerge in an impaired driving charge:
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> (1) the onus of proof that the *ability to drive is impaired* to some degree *by alcohol or a drug* is proof beyond a reasonable doubt;
> (2) there must be impairment of the *ability to drive* of the individual;
> (3) that the impairment of the ability to drive must be *caused* by the consumption of alcohol or a drug;
> (4) that the impairment of the *ability to drive* by alcohol or drugs need not be to a marked degree; and
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extend the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the *ability to drive* is actually impaired."

50 The determination of whether Mr. Sharma's ability to operate a motor vehicle was impaired by alcohol must be determined by reflecting upon the evidence as a whole. The proof must meet the standard of beyond a reasonable doubt.

51 Mr. Barnes testified that Mr. Sharma was driving in an erratic fashion. His vehicle drove quickly in a residential area, braked suddenly at a stop sign, and drove close to parked motor

vehicles.

52 The observations of the witnesses as to the indicia of impairment were consistent. Mr. Barnes saw that the accused had difficulty walking to the liquor store. Similarly, the officers who dealt with the accused shortly after the operation of his motor vehicle found that he had great difficulty with his balance throughout their investigation.

53 Both officers testified that the accused had glossy eyes and smelled strongly of liquor. Moreover, Cst. Hlbocan testified that the accused had difficulty reading.

54 Since I have found that Mr. Sharma did not consume alcohol after the operation of his motor vehicle, the observations of the officer can be related to the time of his operation of the motor vehicle. These indicia are not consistent with a slight deviation from normal conduct; they support a finding that the accused's ability to operate his motor vehicle was substantially impaired by alcohol. In all the circumstances, I find the Crown has proved that Mr. Sharma's ability to operate a motor vehicle was impaired by the consumption of alcohol. Accordingly, I find him guilty of that offence.

Operating Over the Legal Limit

55 Mr. Sharma is also charged with operating a motor vehicle while his blood alcohol level exceeded eighty milligrams of alcohol in one hundred millilitres of blood.

56 The Crown relied upon the breath technician's certificate which set out that the lower of the two readings obtained was three hundred and forty milligrams in one hundred millilitres of blood. The certificate is evidence of the facts alleged therein: *s. 258(1)(g)*.

57 The Crown also relied upon *s. 258(1)(c)* to prove that the blood alcohol reading at the time of operation of the motor vehicle. That section provides that upon proof of the elements set out therein the lowest reading taken by the breath technician is conclusive proof of the alcohol at the time when the offence was alleged to have been committed. The Crown has proven the required elements beyond a reasonable doubt.

58 Accordingly, I find the accused guilty of that offence.

The Crown's Alternative Argument

59 Ms. Snowdon submitted that even if I believed the accused consumed alcohol subsequent to the operation of the motor vehicle, I am required to find Mr. Sharma guilty of the *s. 253(b)* offence because of the present *Code* provisions. The provision she relied upon, specifically was the present version of *s. 258(1)(d.1)*.

60 I will explore this alternative submission for completeness although in view of my findings it is not strictly necessary.

Moreau, Crosthwait, and St. Pierre

61 To comprehend the submission it is best to begin with Supreme Court jurisprudence before the enactment of the previous *s. 258(1)(d.1)*: *R. v. Moreau*, [1979] 1 S.C.R. 261 (S.C.C.)(*Moreau*); *R. v. Crosthwait*, [1980] 1 S.C.R. 1089 (S.C.C.)(*Crosthwait)*; *R. v. St. Pierre* (1995), 96 C.C.C. (3d) 385 (S.C.C.)(*St. Pierre*).

62 In *Moreau*, the accused's test results were 90 milligrams of alcohol in 100 millilitres of blood. The Defence called an expert who testified that the Borkenstein breathalzyers were subject to a possible error of 10 milligrams. The issue in the case was whether the evidence was evidence to the contrary that could rebut the presumption in *s. 237(1)(c)* [now *s. 258(1)(c)*]. Beetz J., writing for the majority, held that the evidence presented was not evidence to the contrary within the meaning of the section. At p. 271 Beetz J. explained:

> "What is "evidence to the contrary" within the meaning of this section has been the subject of some discussion in various courts. I agree with what was said on the subject by McFarlane J.A. speaking for the British Columbia Court of Appeal in *R. v. Davis*, [1973] B.C.J. No. 808 at p. 516:
>
>> While not expressed too clearly, I think the intention of Parliament becomes manifest when it is remembered that the fact to be proved is the proportion of alcohol to blood at the time of the offence. The result of the chemical analysis is one method of proving that fact: and the certificates are evidence, *inter alia,* of that result. It follows, in my opinion, that the concluding part of the subsection means that the result of the chemical analysis is proof of the proportion of alcohol to blood at the time of the offence in the absence of evidence that the proportion at that time did not exceed 80 to 100. Any evidence, therefore, tending to show that at the time of the offence the proportion was within the permitted limits is "evidence to the contrary" within the meaning of the subsection. (Underlining is mine)
>
> In order to comply with the wording of the Code, "evidence to the contrary" has to be evidence which tends to establish that the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was not the same as that indicated by the result of the chemical analysis. There is no such evidence in the case at bar. Apart from the certificates, there is no evidence of any kind directed at showing what was the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed. What evidence there is, tendered on behalf of the accused, is expert

> evidence from which Courts are asked to conclude, contrary to what the Code explicitly prescribes, that the result of the chemical analysis is not or ought not to be proof of the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed. This, in my opinion, is not evidence aimed at rebutting the presumption provided for in the section but at denying its very existence. "Evidence to the contrary" cannot be evidence solely directed at defeating the scheme established by Parliament under ss. 236 and 237." [Underlining in the original].

63 In *Crosthwait* the Crown tendered the breath technician's certificate pursuant to then *s. 237(1)(f)* [now *s. 258(1)(g)*]. In addition, the technician testified. The technician did not take the room temperature, but he did perform a standard alcohol solution test on the apparatus. The instruction manual specified that the temperature of the solution and the room temperature should be within one degree centigrade of each other if accurate results are to be obtained. Because the reading on the solution was within the prescribed limits, the technician assumed that the room temperature was within the prescribed limits, and the apparatus was performing normally. A defence expert testified that it was unlikely that the results of the standard solution test would have differed had the room and solution temperatures been within one degree centigrade of each other, but that it was possible that there was a discrepancy outside the tolerable limits could have resulted. The trial judge acquitted on that basis. The Supreme Court allowed the Crown appeal and entered a conviction. Pigeon J. wrote for an unanimous court.

64 Pigeon J. referred to *s. 237(1)(f)* and the *s. 24(1)* of the *Interpretation Act (Canada*) [now *s. 25(1)*]. The first section provides that the certificate of the technician is "proof" of its contents. The latter section sets out that when "an enactment provides that a document is evidence of a fact without anything saying it is conclusive evidence ... then the document is admissible and the fact shall be deemed to be established in the absence of proof of any evidence to the contrary."

65 Then he at 1099 he observed:

> "In the instant case, the certificate filed at the trial fully complies with the conditions stated in para. (*f*). It was, therefore, by itself, evidence of the results of the analyses. With respect, I cannot agree that there is another implicit condition namely, that the instrument used must be shown to have been functioning properly, and the technician had followed the manufacturer's instructions in testing its accuracy. It is clear from the wording of the *Code* that the rebuttable presumption arises from the mere statements in the certificate itself. The presumption may no doubt be rebutted by evidence that the instrument used was not functioning properly but the certificate cannot be rejected on that amount [sic]. It may very well be that a scientist would not sign a certificate of analysis on the basis of the tests as performed by the technician, but this is irrelevant. Parliament has prescribed the conditions under which a certificate is evidence of

> the results of breath analyses and did not see fit to require evidence that the approved instrument was operating properly. Parliament did not see fit to require a check test be made with a standard alcohol solution and made reference only to the solution used for the actual test. Technicians are instructed to make a check test but the making of this test or its results have not been made conditions of the validity of the certificate and it has not been provided that the certificate would not be valid if it was not shown that the instrument had been maintained and operated in accordance with the manufacturer's instructions."

66 Pigeon J. continued at p. 1100:

> "This does not mean that the accused is at the mercy of the technician: while the certificate is evidence by itself, the facts of which it is evidence are "deemed to be established only in the absence of any evidence to the contrary". Thus, any evidence tending to invalidate the result of the tests may be adduced on behalf of the accused in order to dispute the charge against him. As was pointed out in *R. v. Proudlock* it is not necessary in such cases that the rebutting evidence should do more than raise a reasonable doubt and, of course, this evidence may be sought in depositions given by witnesses of the Crown as well as in depositions of defence witnesses. Therefore, in my view, the situation here is that the certificate was evidence of the results of the analyses by virtue of the express provisions of the *Criminal Code,* however, the further question remained: Was there any evidence to the contrary sufficient at least to raise a reasonable doubt?"

67 At p. 1101 Pigeon J. then suddenly referred to *s. 237(1)(c)* (which was not the section in issue):

> "I am therefore of the opinion that the evidence of Dr. Newlands does not constitute evidence to the contrary under s. 237(1)(*c*) of the *Criminal Code*. Mere possibility of some inaccuracy will not assist the accused. What is necessary to furnish evidence to the contrary is some evidence which would tend to show an inaccuracy in the breathalyzer or in the manner of its operation on the occasion in question of such a degree and nature that it could affect the result of the analysis to the extent that it would leave a doubt as to the blood alcohol content of the accused person being over the allowable maximum. There is no such evidence before the Court in the case at bar. Dr. Newlands' testimony, taken at its face value, does not supply it. It merely affords evidence of a mere possibility of some inaccuracy in the check test, but no evidence as to the extent of such inaccuracy in the case at bar or as to the possibility or probability of the effect which any such inaccuracy might have had upon the results of the breath analysis. The certificate therefore remains uncontradicted."

68 In *St. Pierre*, the accused was charged with having care or control of a motor vehicle while her blood level alcohol exceeded the legal limit (*s. 253(b)*). She was taken to a police station and waited for an hour until her breath tests. She provided two samples exceeding the legal limit. She went to the washroom before she gave her breath samples. She showed the officer two small bottles of vodka and informed him that she had consumed these before the test "to calm her nerves." The Crown relied upon the presumption contained in *s. 258(1)(c)*. The trial judge found that the evidence of consumption constituted evidence to the contrary and acquitted the accused. The Supreme Court agreed. Iacobucci J. wrote the majority decision.

69 The Crown argued that based upon *Moreau* and *Crosthwait* that evidence to the contrary for the purposes of *s. 258(1)(c)* would need to establish that Ms. St. Pierre's readings were below the legal limit. Iacobucci J. disagreed. Comprehension of his analysis is important in understanding how the subsequent jurisprudence developed.

70 Iacobucci J. explained that the *s. 258(1)* contains two presumptions that the aid the Crown in proving *s. 253(1)(b)* offences: the presumption of accuracy contained in *s. 258(1)(g)* and the presumption of identity contained in *s. 258(1)(c)*. The first presumption is brought about as a result of *s. 258(1)(g)* and *s. 25(1)* of the *Interpretation Act (Canada).* At para. 26 he described the presumption of accuracy:

> "Clearly, the result of these two provisions is that a presumption that the reading received on the breathalyzer provides an accurate determination of the accused's blood alcohol level at the time of the testing is established. Hence, the certificate can be tendered in evidence to prove what this blood alcohol level was. However, if the accused leads or points to "evidence to the contrary" which tends to show that, in fact, his or her blood alcohol level, at the time of testing, was not that shown on the certificate, then the certificate is no longer proof of that fact. Therefore, for the Crown to be successful it must prove the accused's blood alcohol level some other way. Indeed, the Crown may still prove that the blood alcohol level of the accused at the time of the offence was over 80 mg of alcohol in 100 ml of blood. This "presumption of accuracy" relates to the accuracy of the readings at the time of the test, as stated in the certificate of analysis, and is presumed by the operation of s. 25 of the *Interpretation Act*, in the absence of "evidence to the contrary". This is not, however, the presumption at issue in this case." [Underlining in the original].

71 In *St. Pierre*, Iacobucci J. explained that presumption of identity set out in *s. 258(1)(c)* was in issue. At paras. 28-29 he described that presumption:

> "This presumption assists the Crown over the hurdle of having to prove, in every case, that the accused's blood alcohol level at the time of driving was the same as his or her blood alcohol level at the time of testing, which could be as much as

two hours later. Section 258(1)(*c*) presumes that the breathalyzer reading at the time of testing is the same as the reading would have been at the time of driving. If all of the conditions of the section are met, then the presumption applies, unless there is some evidence to the contrary. This presumption is the so-called presumption of identity.

I agree with the following remarks of Arbour J.A., found at p. 237, which distinguish between the two presumptions:

> "This presumption [of identity] can be displaced by evidence to the contrary; that is, any evidence which raises a reasonable doubt that the levels at the two different points in time were in fact identical. When the Crown loses the benefit of the presumption, for instance because of evidence indicating that the accused consumed alcohol between the two points in time, the Crown does not lose the benefit of the presumption that the certificate accurately represents the blood alcohol level at the time of the test. The Crown may still prove, with or without recourse to expert evidence, that the blood level of the accused at the time of the offence was over 80. One of the relevant pieces of evidence will be, of course, the reading taken by the breathalyzer, the accuracy of which is not disputed." [Underlining in the original]

72 Iacobucci J. held that it was the important to keep the two presumptions separate and that the courts "have had difficulty with the distinct nature of these presumptions and confused them": see para. 30. Thereafter, Iacobucci distinguished *Moreau*, and *Crosthwait. Moreau* was distinguished because it was a case where the defence led general evidence denying the presumption as opposed to specific evidence. *Crosthwait* was distinguishable because it really dealt with presumption of accuracy. In Justice Iacobucci's view the reference of Pigeon J. to the presumption of identity was simply "a slip of the pen" : see paras. 31-43.

73 Iacobucci J. rejected the Crown contention that evidence to the contrary to rebut the presumption of identity meant that the evidence would need to show that the accused's blood alcohol level was below 80 milligrams at the time of driving. At paras. 49-50 he explained:

> "The presumption of accuracy establishes the blood alcohol level necessary for the offence. The presumption of identity in effect puts the accused in the car with that blood alcohol level at a prior point in time. Hence, the presumption of identity is a temporal presumption designed to simplify the evidentiary necessity of bridging the time gap between the time of the breathalyzer and the time of the offence. The presumption is simply a "short-cut" for the Crown, and if the

> accused is able to show that the short-cut should not apply in this case, and that his or her blood alcohol level was different at the time of driving from that at the time of the test, then it would be unreasonable to apply the presumption, and on the wording of the section, the presumption would be rebutted.
>
> Moreover, it may not matter a great deal if the presumption is rebutted. The majority's concerns about an accused rebutting the presumption of identity by simply showing that his or her blood alcohol level at the time he or she was driving was different, in that it was higher, than at the time of the test are unfounded. If an accused proves that his or her blood alcohol level at the time of driving was actually higher than at the time of the test, then the presumption of identity would be rebutted because the evidence is that the blood alcohol level was different. The accused, however, could still be convicted because even without the presumption of identity, the elements of the offence could be made out. The same holds true where the accused leads evidence to the effect that his or her blood alcohol level at the time of driving was lower than at the time of the test, but still over .08."

74 Iacobucci J. concluded that the trial judge was correct in concluding that the evidence that the accused drank two bottles of vodka rebutted the presumption of identity, and the accused must be acquitted: see para. 63.

75 The result of the *St. Pierre* was that a rebuttal of the presumption of accuracy required evidence creating a doubt that the blood alcohol level was below 80 milligrams at the time of the police tests; whereas, a rebuttal of the presumption of identity only required a reasonable doubt that the blood alcohol level proof that the blood alcohol at the time of driving was different than at the time of the testing by the police.

The Previous Section 258(1)(d.1)

76 In response to *St. Pierre* decision, Parliament passed the previous *s. 258(1)(d.1)*. It read:

> "(d.1) where samples of the breath of the accused or a sample of the blood of the accused have been taken as described in paragraph (c) or (d) under the conditions described therein and the results of the analysis show a concentration of alcohol in blood exceeding eighty milligrams of alcohol in one hundred millilitres of blood, evidence of the result of the analyses is, in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offense was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood, proof that the concentration of alcohol in the blood of the accused at the time when the offense was alleged to have been committed exceeded eighty milligrams of alcohol in

> one hundred millilitres of blood."

77 As can be seen, a new presumption was created by the section. According to this section, where the blood alcohol of the accused exceeds eighty milligrams of alcohol eighty milligrams of alcohol in one hundred millilitres of blood at the time of the breath technician's tests that is proof that it exceeded that level at the time of the offence, in the absence of evidence tending to show that the blood alcohol concentration was below that level at the time of the commission of the offence. This additional presumption of identity is sometimes referred to the presumption of excessive blood alcohol.

78 Using this new presumption, Ms. St. Pierre would be convicted of driving over the legal limit because there was no evidence before the court that her level was below eighty milligrams on the evidence presented in this case. The conviction would not be for the reading at the level of the police testing but a conviction for exceeding 80 milligrams.

Boucher, and Gibson

79 Because of the new presumption the litigation took a new turn. The defence evidence allegedly rebutting the presumption of identity consisted of evidence with two prongs: evidence from the accused that he had consumed a certain quantity of alcohol, and evidence from an expert opining that this level of drinking would put him below the legal limit. In making this argument the defence relied upon cases such as *R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.)(*Carter)*. In *Carter,* Finlayson J.A. observed at p. 178:

> "Clearly, since the breathalyzer instrument is intended to measure the quantity of alcohol in the person being tested, any evidence as to how much alcohol the person tested had in fact consumed is relevant evidence and if accepted can raise a doubt as to the accuracy of the breathalyzer reading. If, for example, an accused person faced with evidence of a breathalyzer reading well in excess of the permissible maximum, testified that he did not drink on any occasion and had nothing to drink prior to being tested, then the trial judge must either disbelieve the accused or accept that for some reason or other the breathalyzer reading is wrong."

80 In *Carter,* the accused had consumed some alcohol but a toxicologist testified that his level of consumption would have put him at zero at the time of the offence. The Court found that this was sufficient evidence to raise a reasonable doubt to presumption in *s. 258(1)(c).*

81 The Supreme Court has reaffirmed the presumption of accuracy and the presumption of identity analysis in two recent decisions: *R. v. Boucher*, [2005] 3 S.C.R. 499 (S.C.C.)(*Boucher*); *R. v. Gibson*, [2008] 1 S.C.R 397 (S.C.C.)(*Gibson*).

82 In *Boucher,* the accused was stopped at a road block and provided two samples indicating that

he had 93 and 92 milligrams of alcohol in 100 millilitres of blood. He testified that he had only consumed two beers. A defence expert testified that his consumption would only have resulted in a reading of 60 milligrams per 100 millilitres of blood at the time of the police testing. He argued that his evidence rebutted the presumption of accuracy contained in *s. 258(1)(g).* The trial judge found that his evidence did not raise a reasonable doubt and convicted him. His conviction was upheld by the majority of the Supreme Court. Deschamps J. wrote the majority decision.

83 Deschamps J. held that there were three presumptions in the *Code* and the standard to rebut each was the same, i.e., reasonable doubt. At paras. 14-15 she explained:

> "Where samples of an accused's breath have been taken pursuant to a demand made under s. 254(3) *Cr. C.*, Parliament has established separate presumptions in s. 258(1) *Cr. C.* to facilitate proof of the accused's blood alcohol level: two presumptions of identity and one presumption of accuracy. According to the presumption of identity in s. 258(1)(*c*) *Cr. C.*, the accused's blood alcohol level at the time when the offence was alleged to have been committed is the same as the level at the time of the breathalyzer test. According to s. 258(1)(*d*.1) *Cr. C.*, where the alcohol level exceeds 80 mg at the time of the test, there is a presumption that it also exceeded 80 mg at the time when the offence was alleged to have been committed. The presumption of accuracy in s. 258(1)(*g*) *Cr. C.* establishes *prima facie* that the technician's reading provides an accurate determination of the blood alcohol level at the time of the test. These presumptions have certain similarities, but they remain distinct presumptions.
>
> 1.2 *Similarities*
>
> The standard of proof that must be met to rebut the presumptions of identity and accuracy is the same: reasonable doubt. The defence has no burden of proof. Where there is evidence tending to show (1) that the blood alcohol level recorded on the certificate is not the same as the level at the time of the offence, (2) that the level did not exceed 80 mg or (3) that the certificate does not accurately reflect the blood alcohol level, the court does not have to be satisfied on a balance of probabilities. This evidence can come from that adduced by the Crown or the accused. In *Proudlock*, in explaining the expression "evidence to the contrary" in s. 306(2)(*a*) *Cr. C.*, the Court made the following comment:
>
>> ... all the presumption does is to establish a *prima facie* case. The burden of proof does not shift. The accused does not have to "establish" a defence or an excuse, <u>all he has to do is to raise a reasonable doubt</u>. If there is nothing

> in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt. [Emphasis added; pp. 548-49.]"

84 Deschamps J. also explained that *St. Pierre* had noted there were differences between these presumptions. The presumption of identity can be rebutted by evidence showing that the blood alcohol level at the time of the test was different from the time of the offence: para. 19. Evidence to rebut the presumption of accuracy must tend to show that the breath technician's certificate does not in fact correctly reflect the blood alcohol reading at the time of the breath test; thus, this evidence must raise a reasonable doubt as to the accuracy of the approved instrument's result: para. 21. Deschamps J. did not make reference to a need to create a reasonable doubt that the reading was inaccurate to the degree that was below the legal limit. However, this is implicit in her analysis since she adopted the *St. Pierre* approach.

85 Deschamps J. found that the issue in the case was whether the accused had adduced evidence to the contrary that raised a reasonable doubt as to the accuracy of the breath test results. In other words, the issue was whether the evidence adduced rebutted the presumption of accuracy. Deschamps J. held that the rejection by the trial judge of the accused's testimony meant that the evidence of the expert was theoretical and without a proper foundation. The clear inference from her analysis is evidence from an accused as to consumption and expert evidence placing the accused's blood alcohol level below 80 milligrams would rebut the presumption of accuracy.

86 *Gibson* dealt with appeals from two accused. Each had testified as to their consumption, and adduced expert evidence. The expert in each case testified that the accused's alcohol consumption would have placed his blood alcohol level in a "range" which "straddled" the legal limit.

87 Charron J. wrote the decision for the majority of Court. She explained that straddle evidence is an attempt to defeat the statutory presumption contained in *s. 258(1)(d.1).* The basis for her decision is found within her introductory remarks set out at paras. 3-8:

> "As I will explain, it is my view that in *all* cases straddle evidence merely constitutes an attempt to defeat the statutory presumption itself and, as such, does not tend to show that the accused's blood alcohol concentration did not exceed the legal limit at the time of the alleged offence within the meaning of s. 258(1)(*d*.1). I also conclude, on the basis of the undisputed scientific fact that absorption and elimination rates vary continuously, that post-offence testing of the accused's own elimination rate will rarely, if ever, add anything of value to the expert opinion evidence and, for obvious policy reasons, should not be encouraged, let alone required.

It is undisputed that the human body absorbs and eliminates alcohol over time, and that absorption and elimination rates vary, not only from person to person, *but also from time to time for the same individual*, depending on a number of factors, some of which concern the person's digestive process at the relevant time. It is therefore impossible to ascertain the precise rate at which the accused was metabolizing alcohol at the time of the alleged offence. Parliament can be assumed to have known that blood alcohol levels are subject to these inherent variations. Yet, it saw fit to implement the presumption. The legislative scheme must be interpreted in this context.

Because absorption and elimination rates continually vary, it is readily apparent that a breathalyzer reading of 95 mg, for example, may not reflect the *actual* concentration of alcohol in the accused's blood at the time of the alleged offence -- it would depend on the rate at which the particular accused is metabolizing the alcohol during the relevant time period on the day in question. Yet, it can be no defence for an accused to say that the actual alcohol concentration at the material time may have been less than the legal limit based on this variable alone. To admit such a defence would obviously fly in the face of the presumption itself. It is because of these inherent variations in absorption and elimination rates that the presumption of identity is needed in the first place. In order to facilitate proof of the offence, the presumption treats all persons as one person with a fixed rate of elimination and absorption.

Straddle evidence puts the accused in no better position. It merely confirms that the accused falls into the category of drivers targeted by Parliament -- namely, those who drive having consumed enough alcohol to reach a blood alcohol concentration exceeding 80 mg. Parliament, in creating this offence, clearly regarded driving with this level of consumption as posing sufficient risk to warrant criminalization. It is therefore not enough to show, based on evidence about the accused's pattern of consumption of alcohol during the relevant time period, that the accused consumed enough alcohol to exceed the legal limit, *albeit* in a quantity that would place him within a range that may be somewhat different than that which could be extrapolated from the breathalyzer reading. It is clear from the wording of s. 258(1)(*d.* 1) that the presumption can only be rebutted by evidence that tends to show that the accused's blood alcohol concentration *did not exceed* the legal limit and, hence, that the accused was not in the targeted category of drivers.

> In order to displace the presumption, the evidence must show, therefore, that based on the amount of alcohol consumed, the accused's blood alcohol concentration would not have been above the legal limit at the time of driving, *regardless* of how fast or slow the accused may have been metabolizing alcohol on the day in question. Of course, the court need not be convinced of that fact. It is sufficient if the evidence raises a reasonable doubt.
>
> Further, because it is scientifically undisputed that absorption and elimination rates can vary from time to time, nothing is really gained by post-offence testing of an accused's elimination rate. Short of reproducing the exact same conditions that existed at the time of the offence, assuming this is even possible, any expert opinion evidence based on actual tests would have to be given with the qualification that absorption and elimination rates vary from time to time, and therefore the accused's blood alcohol level at the material time cannot be measured with precision. Ultimately, the best evidence an expert can provide, as the expert opinion evidence adduced in Mr. MacDonald's case exemplifies, is likely to be a range reflecting average elimination rates. In any event, it is my view that this Court should not interpret this legislative scheme, which is intended to combat the social evils resulting from drinking and driving, as requiring accused persons, some of whom may well be battling with alcohol addiction, to submit to drinking tests in order to make out a defence. Surely, Parliament cannot have so intended."

88 At para. 17 Charron J. explained that the rebuttal of any of the presumptions was based on the same standard, i.e., reasonable doubt; and the phrases in the various subsections which described the type of evidence requirements were equivalent:

> "It is well established that the standard of proof required to rebut the statutory presumptions is reasonable doubt. The expressions "evidence to the contrary" in s. 258(1)(*c*), "any evidence to the contrary" implicit in s. 258(1)(*g*) and "evidence tending to show" in s. 258(1)(*d.* 1) reflect this same standard. In *Boucher*, the Court emphasized that the burden of proof never shifts to the accused. Rather, "it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt" (*Boucher*, at para. 15, citing *R. v. Proudlock*, [1979] 1 S.C.R. 525, at p. 549).

89 At para. 32 she concluded:

> "As I stated in my introductory remarks, it cannot be disputed that the presumption is a legal fiction and that a breathalyzer reading that exceeds the legal limit may not be reflective of the *actual* concentration of alcohol in the

> accused's blood at the time of the offence because it always depends on the rate at which the particular accused is metabolizing the alcohol during the relevant time period on the day in question. Yet the offence is clearly made out. The breathalyzer test provides legal proof that the accused "consumed alcohol in such a quantity" that it put him or her over 80 mg contrary to s. 253 of the *Criminal Code*. The accused cannot rebut the presumption by relying on inherent variations in absorption and elimination rates. Straddle evidence puts the accused in no better position. Evidence that merely confirms that alcohol was consumed in a sufficient quantity to produce a blood alcohol concentration that exceeds the prescribed limit, *whether or not it be within the same range that could be extrapolated from the breathalyzer reading*, cannot rebut the presumption under s. 258(1)(*d*.1). When considered in this sense, straddle evidence, in effect, is tantamount to arguing, for example, that the accused should not be convicted because he or she only drank a sufficient quantity of alcohol to reach a 90-mg concentration rather than a 95-mg concentration as recorded by the breathalyzer. Parliament, by creating this offence, clearly regarded driving with this level of consumption as posing sufficient risk to warrant criminalization. To hold otherwise would be to defeat the presumption itself and it cannot be allowed."

90 As I hope I have demonstrated, the previous jurisprudence established that evidence of accused persons as to their consumption accompanied by evidence of an expert which placed them below the legal limit would suffice to rebut both presumptions of identity and the presumption of accuracy.

The New Provisions

91 On July 2, 2008, *s. 258(1)* was amended. The amendments applicable to breath samples are reproduced below:

> "(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
>
> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
>
> (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
>
> (iv) an analysis of each sample was made by means of an approved

instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things -- that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

(d.01) for greater certainty, evidence tending to show that an approved instrument was malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

(i) the amount of alcohol that the accused consumed,
(ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or
(iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed;

(d.1) if samples of the accused's breath or a sample of the accused's blood have been taken as described in paragraph (*c*) or (*d*) under the conditions described in that paragraph and the results of the analyses show a concentration of alcohol in blood exceeding 80 mg of alcohol in 100 mL of blood, evidence of the results of the analyses is proof that the concentration of alcohol in the accused's blood at the time when the offence was alleged to have been committed exceeded 80 mg of alcohol in 100 mL of blood, in the absence of evidence tending to show that the accused's consumption of alcohol was consistent with both

(i) a concentration of alcohol in the accused's blood that did not exceed 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed, and

(ii) the concentration of alcohol in the accused's blood as determined under paragraph (*c*) or (*d*), as the case may be, at the time when the sample or samples were taken;"

Similarities Between the Old Provisions and the New Provisions

92 Certainly, these amendments represent a change to the type of evidence capable of rebutting the presumptions found in *s. 258(1)(c)* and *s. 258(1)(d.1)*.

93 There are some similarities between the previous sections and the present sections; however, there are substantial differences.

94 Let me first deal with the similarities.

95 *Section 258(1)(c)* still has the same component elements to prove the presumption. *Section 258(1)(d.1)* still contains a presumption that the blood alcohol reading exceeds the legal limit if the elements of *s. 258(1)(c)* are established.

The Differences between the Old Provisions and the New Provisions

96 Substantial differences can be seen as a result of the new provisions.

97 In the previous *s. 258(1)(c)* the presumption simply was that the blood alcohol sample from the lowest test sample taken from the accused by the police was "the same" as that at the time of commission of the offence. Now the presumption is that the lowest blood sample is "conclusive proof" of blood alcohol level at the time of the commission of the offence. Conclusive proof seems to lend a higher quality to the new presumption. The choice of the phrase would seem to echo the words of the *s. 25(1)* of the *Interpretation Act.* In that section if an enactment states that something is "proof" then can be rebutted by evidence to the contrary; however, conclusive proof cannot be rebutted by such evidence.

98 The presumption of identity found within *s. 258(1)(c)* can no longer be rebutted by evidence leading to a reasonable doubt that the blood alcohol level was different. The old section did not specify how the presumption was to be rebutted other than by "evidence to the contrary." The evidence to rebut the present presumption is clearly specified. The evidence must show three things: the instrument was malfunctioning or operating improperly, that the malfunction or improper operation resulted in the determination that the blood alcohol exceeded 80 milligrams of alcohol in 100 millilitres of blood, and that the concentration of alcohol in the accused's blood did not in fact

exceed 80 milligrams of alcohol in 100 millilitres of blood at the time the offence was alleged to have been committed. Moreover, *s. 258(1)(d.01)* adds that the first two things cannot include evidence from the accused of the amount of alcohol consumed, or the rate at which the alcohol consumed would be absorbed or eliminated, or a calculation on that evidence of what the concentration of alcohol would have been at the time of the commission of the offence.

99 Clearly, Parliament meant to make it impossible for the accused to rebut the presumption in *s. 258(1)(c)* based upon evidence from an accused as to their consumption coupled with the evidence from an expert that their level would be below the legal limit. Parliament chose to take the view that breath sample evidence was highly reliable. In coming to that conclusion, Parliament adopted a view that the *Carter* defence was scientifically unsustainable in the absence of evidence showing that the approved instrument was malfunctioning or operated improperly, and the malfunction or improper operation resulted in a blood alcohol reading exceeding eighty milligrams.

100 *Section 258(1)(d.1)* has now been changed. Previously, the presumption could be rebutted by evidence establishing a reasonable doubt that the accused's blood alcohol level was below the legal limit at the time of the commission of the offence. There is now an additional requirement for the rebuttal evidence, i.e., there must be evidence tending to show that the accused's consumption was consistent with the concentration of alcohol in the accused's blood at the time of testing.

101 In the previous version of the legislation, the presumptions in *s. 258(1)(c)* and *s. 258(1)(d.1)* could be easily read together to create a comprehensible scheme. The accused could rebut the former presumption by raising reasonable doubt that the reading was different at the time of the commission of the offence from the lowest police test. However, the accused was unable to escape conviction for an offence of being over the legal limit unless the evidence established doubt that his blood alcohol level was below the legal limit because of the latter presumption. Reading the two provisions together to create a comprehensible scheme is not as simple because of the new amendments. The specific requirements to rebut the presumption in *s. 258(c)* require proof that the approved instrument was malfunctioning or operated improperly. On the other hand, the requirements to rebut the presumption in *s. 258(1)(d.1)* rely upon the proper operation or functioning of the approved instrument. This is because the latter section requires "evidence tending to show" consistency with concentration of blood alcohol at the time that the samples were taken.

102 This apparent lack of coherence between the two sections is nettlesome. For practical and constitutional reasons, the courts are required to consider alternatives that allow for the proper working of the legislation. In my view, the two sections in a consistent manner if *s. 258(1)(d.1)* is considered as applying only to a discrete set of circumstances. In view of the history of *s. 258(1)(d.1)* it would seem to me that it would be applicable to circumstances where the accused drank subsequent to the commission of the offence.

103 If I am in error in believing the apparent contradiction cannot be resolved in this manner, I still am able to deal with the requirements of *s. 258(1)(d.1)* on their own. In any event, that is the

section that the Crown asks me to consider.

104 The present version of *s. 258(1)(d.1)* has been applied in circumstances of bolus drinking, i.e., where an accused who commits the offence has consumed a quantity of alcohol just prior to being stopped by the police: *R. v. Pereira* 2010 ONCJ 67 (Ont. Ct. Justice)(*Pereira*); *R. v. Morris* 2010 ABPC 369 (Alta. Prov. Ct.). I have some reservations about the applicability of the section to bolus drinking cases. It might be able to be argued that bolus drinking like straddle evidence in *Gibson* is an attack on the legal fiction in *s. 258(1)(c)* that the lowest breath test result is the reading at the time of the offence. Bolus drinking is not in issue here. I leave to another case, where the issue can be more thoroughly argued whether bolus drinking can raise a reasonable doubt to rebut the presumption in the section.

The Conjunctive Nature of Section 258(1)(d.1)

105 *Section 258(1)(d.1)* provides that the evidence to rebut the presumption must tend to show that the accused's alcohol consumption was consistent with both:

> (i) a concentration of alcohol in the accused's blood did not exceed 80 milligrams of alcohol in 100 millilitres of blood at the time the offence was alleged to have been committed, and
> (ii) the concentration of alcohol determined under paragraphs (c) or (d), as the case may be, at the time when the sample was taken.

106 In *Pereira*, Justice Perkins-McVey aptly observed at para. 17:

> "In my view, now under section 258(1)(d.1) where there is no attack on the functioning of the approved instrument the evidence must not only "tend to show" that the accused consumption of alcohol was consistent with a blood alcohol concentration under 80mg in 100 millilitres of blood at the time of driving but must also be consistent with the test results later taken by the approved instrument. There can be no other interpretation of section 258(1)(d.1)."

107 The section does not change the ultimate burden of persuasion. The standard to be applied to the section is proof beyond a reasonable doubt. The accused only has to be able to point to evidence either from his own evidence or the Crown's case that supports a reasonable doubt. However, the evidence that establishes the reasonable doubt must be consistent with both parts of the section. Reasonable doubt cannot be based upon speculation or conjectural possibility: *R. v. Wild*, [1971] S.C.R. 101 (S.C.C.) ; *Crosthwait* at para. 18; *R v. White* (1994), 89 C.C.C. (3d) 336 (Nfld. C.A.) at p. 351; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at para. 51.

Application of the Section

108 The testimony of an accused person that he had consumed alcohol is capable of causing a doubt that his blood alcohol was below 80 milligrams. Thus, if the evidence of the accused caused me a reasonable doubt that he would have met the first precondition set out in the section. However, in these circumstances there was no evidence led that would tend to show the drinking pattern attested to by Mr. Sharma was consistent with the readings obtained by the breath technician.

109 Since there is no evidence to support a reasonable doubt as to the second precondition of *s. 258(1)(d.1)* the presumption in the section cannot be overcome.

Res Judicata

110 In *R. v. Terlecki* (1983), 4 C.C.C. (3d) 522 (Alta. C.A.) [affirmed [1985] 2 S.C.R. 483 (S.C.C.)] the court held that *s. 253(1)* contained alternative offences, and that the rule against multiple convictions precluded entry of guilty findings on both offences. The proper course of action is to enter a guilty finding on both charges if they both are proven beyond a reasonable doubt and enter a conditional stay with regard to one of the offences.

111 In this case I enter a guilty finding on the *s. 253(1)(b)* offence and enter a conditional stay related to the *s. 253(1)(a)* offence.

M.G. ALLEN PROV. CT. J.