

ONTARIO COURT OF JUSTICE

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	Richard Garwood-Jones,
	)	for the Crown
	)	
— AND —	)	
	)	
BEN HOGAN	)	Michael H. O’Brien,
	)	for the defendant
	)	
	)	
	)	HEARD: June 21 and
	)	July 6, 2005

2006 ONCJ 9 (CanLII)

FORSYTH J.:

[1] Mr. Hogan was charged with operating his motor vehicle while his blood alcohol concentration exceeded 100 milligrams of alcohol in 100 millilitres of blood, contrary to s. 253(b) of the *Criminal Code*, and also with operating his motor vehicle while his ability to do so was impaired by alcohol, contrary to s. 253(a) of the *Criminal Code*. He pleaded not guilty and his trial was conducted on June 21 and July 6, 2005.

[2] The first witness called by the Crown was P.C. Korda. He testified that he was a Halton Regional Police Service officer on duty on June 16, 2004 when he was dispatched at 12:03 a.m. to the area of Waterdown Road North to pursue a complaint about a black Jaguar motor vehicle that had just left a park on King Road almost striking a pedestrian in the process according to the citizen who had called the police.

[3] P.C. Korda eventually observed the vehicle driving southbound on Waterdown Road and followed it. He said that it was travelling at a high rate of speed and eventually it pulled into a driveway at 1565 Waterdown Road. The turn into the driveway was made in a sufficiently wide fashion that it caught his attention, although of course his attention was already riveted on the vehicle because he was following it. P.C. Korda pulled his cruiser onto the driveway behind the Jaguar and approached the driver's door just as the accused, Mr. Hogan, was exiting from the driver's seat.

[4] P.C. Korda said that he noticed that the accused used the driver's door to steady himself as he exited the vehicle and that he appeared to be unsteady on his feet. He qualified that description by saying that he seemed to be walking carefully when he complied with P.C. Korda's request to walk back to his cruiser from the Hogan Jaguar. At this point, later in cross-examination, he conceded that the accused was wearing what he described as 'flip flops' and that they are much looser than are sandals or the type of footwear which the officer was wearing.

[5] He next asked the accused some questions to which Mr. Hogan readily responded. During this conversation, the officer noted the odour of an alcohol beverage coming from Mr. Hogan's breath. He noticed that his eyes were glossy and that there was a slight slur to his speech. Mr. Hogan told the officer that he had been to an Argo game and admitted that he had consumed a couple of beers there. P.C. Korda said that he asked Mr. Hogan if his driver's licence had been yet reinstated. This was a reference to a previous time when P.C. Korda had arrested the accused. Mr. Hogan said that he was supposed to be getting it back "any day now".

[6] At 12:14 a.m. P.C. Korda arrested Mr. Hogan for operating his Jaguar while his ability to do so was impaired by alcohol. He was handcuffed and placed in Korda's cruiser. It was at this point, said Korda, that he read to Mr. Hogan his s. 10(b) *Charter* rights to counsel and cautioned him. When he asked Mr. Hogan if he understood his rights to counsel, he said that the accused replied: "Yes, I'll waive all that." P.C. Korda testified that he thought Mr. Hogan meant that he had waived his right to call a "lawyer", so he replied to him that he would call duty counsel on his behalf. With this evidence, I conclude that P.C. Korda seemed to be implying that he thought that the accused had only waived his right to speak to a private lawyer, but not necessarily his right or desire to speak to duty counsel. He said that Mr. Hogan did not respond to his own statement that he would call duty counsel and he never told him not to make the call. In the officer's opinion, the accused understood the caution.

[7] P.C. Korda said that he then read the breath demand to the accused and told him that he had the right to be assisted by counsel without delay. He then checked with his sergeant who told him that there was no Halton Regional breath technician available, but that the nearby O.P.P. station did have one available. He therefore transported the accused directly to the Burlington O.P.P. station, arriving at 12:20 a.m.

[8] Once in the station, he said that he immediately took Mr. Hogan to the cells. He then left to call duty counsel at 12:45 a.m. and left the usual information with them requesting a return call. When there had been no response by 1:15 a.m. he called again. At 1:20 a.m. he said that duty counsel returned the call and Mr. Hogan was allowed to speak with her. P.C. Korda could not recall where the accused spoke with duty counsel, nor the

specific times for the completion of the call, but it was brief, he said. He said that he had no idea what he had been doing for the 35 minutes between the first duty counsel call and the return of the call at 1:20 a.m. However, he was willing to speculate that he had probably been engaged in small talk with the accused.

[9] At 1:23 a.m. he said that he turned the accused over to P.C. Cunningham who was the qualified O.P.P. Intoxilyzer technician. He said that Mr. Hogan did not complain about the waiting period for duty counsel to call back, nor did he complain about having to speak with duty counsel at all. Korda believed that he may have remained in the breath room with P.C. Cunningham and the accused, but he really wasn't sure on that point. At 1:55 a.m. he said the accused was returned to him and, after he served the Notice and copy of the Certificate of Analysis upon him, he drove him back to the Halton Regional Police Station.

[10] When asked directly by the Crown why he had called duty counsel in the face of the accused's waiver of his right to speak to a lawyer given at the scene, P.C. Korda replied that he felt that the accused was impaired by alcohol and, therefore, his judgment would be impaired and, therefore, it was in his best interests, in his opinion, to have Mr. Hogan speak with a lawyer.

[11] In cross-examination by Mr. O'Brien, P.C. Korda conceded that the Jaguar vehicle was a lower car than his cruiser from which to exit in relationship to the road, but he nevertheless felt that the use by the accused of the driver's door to help himself up was unusual. He conceded that he had made no note of the "walking carefully" phrase which he had used to describe the accused's gait in his evidence in Chief. He ventured to say that he thought that it would have the same meaning as unsteady. With respect to the slurred

speech, he again conceded that he had not made a note of that and he further agreed that he usually did note important items such as that observation in an impaired driving case. I also make the observation here that P.C. Korda gave no factual foundation evidence for his conclusory opinion of a “slight slur” to the accused’s speech. Finally, he described the accused as having been coherent and he admitted that the waiver was clearly expressed.

[12] P.C. Korda then volunteered that it had been his intention to call duty counsel regardless of the accused’s position on the point even though he admitted that he felt that the accused totally understood his rights to counsel. I must say that this final piece of evidence seems to be inconsistent with the officer’s previously stated concern that the accused’s judgment might be impaired by alcohol and, therefore, that was his stated reason for calling duty counsel. He categorically stated in cross-examination that he intended to call duty counsel regardless of the accused’s position and yet he never suggested that the accused had any trouble following their conversation, nor responding to their questions in a coherent manner.

[13] P.C. Cunningham was the next witness. He was the O.P.P. Intoxilyzer technician and said that he had been called at 12:25 a.m. to set up the 5000C approved instrument for the benefit of the Halton Regional officer. He said that he arrived at his station at 12:30 a.m. and turned on the instrument. He said that it needs 15 minutes to warm up and conduct its internal diagnostic checks. At 12:45 a.m. he spoke to P.C. Korda and received his grounds for the arrest of Mr. Hogan. At 1:23 a.m. he took custody of the accused and read his rights to counsel himself again. He said that Mr. Hogan responded by saying that he had spoken to ‘one’ and that he made no complaint about it to P.C. Cunningham. He did not complain that

the call had delayed the taking of his breath samples either. At 1:28 a.m. and 1:46 a.m. respectively he took two samples of Mr. Hogan's breath which provided readings of 118 and 115 milligrams of alcohol in 100 millilitres of blood respectively.

[14] P.C. Cunningham said that while he spoke with the accused and when he was completing his alcohol influence report he observed that the accused's eyes appeared to be watery and glassy and his speech to be slurred. However, he also did not provide any speech pattern description as a foundation for his conclusion as had been the case with Korda.. The failure to do so by both of these officers becomes more important when the evidence of the accused is considered later.

[15] In cross-examination P.C. Cunningham agreed that the accused appeared to totally comprehend his demand, his caution and his rights to counsel. He of course admitted that he had not heard him speak before that night either. This concluded the case for the Crown.

[16] Mr. O'Brien presented a non-suit motion on the s. 253(b) charge which was dismissed by the court. Mr. O'Brien then called a defence.

[17] The accused, Ben Hogan, was the only witness called. He admitted to having a criminal record, which includes a 2002 conviction for impaired conviction and 2004 convictions for driving over 80 and driving disqualified. He said that he had been to the Argonaut football game on June 15, 2004. He wasn't sure whether he had consumed alcoholic beverages before the game, but during the game he did recall drinking one beer during each quarter of the game. He said that the game ended between 10:00 and 11:00 p.m., and that he and his wife, his friend and the wife of his friend, in whose company he had

been at the game, all walked to their respective cars in the parking lot. Mr. Hogan said that he drove back to Waterdown and decided to show his wife a nice romantic lookout peak over Hamilton Bay which is called the Bayview Lookout. Unfortunately, he said, it was packed with loud, boisterous young folk and, after exchanging some unpleasantries with a couple of them, he decided to abandon the romantic idea and drive straight home. He said that he wasn't 'a happy camper' at that point and he admitted that he may have been driving a little fast, as the officer said, and he said he may well have taken a wide turn into his own driveway because he parks his vehicle in the middle of his 25-foot wide driveway so that his wife and son can park on either side of his vehicle. Therefore, he explained, his turn into his driveway may have looked a little wider than usual to the observing officer.

[18] He said that he noticed the cruiser pulling in behind him and he got out of his Jaguar and began to walk back towards the officer. He pointed out that the Jaguar is quite low to the ground and he conceded that he may well have used his driver's door for support when exiting. He also explained that he suffers from pinched nerves in his left leg and this causes some aching and residual stiffness especially after sitting for hours in a tight football stadium seat and also in the Jaguar. Therefore, he said that he tends to push down with his hands whenever he is getting out of the Jag on the top of the driver's door and especially on that night after such prolonged sitting at the game and during the trip home. He pointed out that he was standing in the witness box instead of taking the seat that was available to him for the same reason which was the discomfort from the pinched nerves in his left leg. He also explained that he tends to turn his legs to the side before attempting to get out of the Jag for the same reason.

[19] He said that his wife and son, who were present at the time, spoke to the officer briefly and then he said that P.C. Korda arrested him and did provide him with his rights to counsel and caution. He said that he waived ‘all that’ in just those words to P.C. Korda. He explained to the court that he knew what duty counsel advice was all about and he had Mr. O’Brien on retainer anyway. He testified that at that point he was waiving his right to call either duty counsel or a private lawyer. He did not respond to P.C. Korda’s statement, that he was going to call duty counsel anyway on his behalf because both the officer and he were polite with each other and he appreciated that Korda had authority over him at that moment and he tends to avoid arguing with authority figures about any of their courses of action.

[20] He did not try to offer any explanation for his glassy eyes, but he did say that he had lost his front teeth and now has a dental plate which tends to move around and, therefore, affects his speech a little bit. In answer to a question of the court, he produced the plate from his mouth and showed the court how it was broken on one side causing it, as he said, to float a little in his mouth. He has never had it repaired yet because he is putting off having more dental extractions and possible dentures as long as he can. I must say that this demonstration and explanation made perfect sense to me.

[21] In cross-examination he agreed that since he had consumed some alcohol and he had not made notes about the night in question, and that this combination could produce the result of a somewhat flawed memory of certain details of the night. For example, he said he wasn’t certain if he or his wife drove to the game. He said that usually his friend’s wife drank two beers during a game, but he couldn’t be certain if she did or not on that particular night. He readily agreed that while he usually remains seated for most of the football games

and he only steps out for a cigarette or a beer, he was relying more on his normal routine for that answer than he was on any exact recollection of that particular evening. I must say that, to me, that particular answer seemed to be somewhat ingenuous and candid with no attempt to embellish his evidence about his recollection of the night's activities at the football game.

[22] He used the witness stand to demonstrate to the Crown and the court how he had exited his Jaguar by grabbing the door jamb with his left hand and his right hand on the door frame. He repeated his evidence that he was informing P.C. Korda by his words after the rights to counsel were read, that it was not necessary for him to speak to a lawyer of any kind. He admitted that he wasn't adamant about it and he did not bother to repeat it to P.C. Korda later in the evening.

[23] He was reminded by the Crown that he had said in Chief that P.C. Korda had told him down at the police station when he was in the holding cell that he had called duty counsel for him. This was in response to a question of what he had been doing while waiting for duty counsel to return the call. His answer in cross-examination was that P.C. Korda was polite and had informed him of what was happening. He explained that his own attitude was more one of depression and compliance with authority than it was a desire to be argumentative with respect to the duty counsel call. He explained that that was why he did not refuse to speak to duty counsel, because he had been told it was going to happen anyway and he did as he was told by the officer. The Crown suggested that he had not been forced to talk to duty counsel, but Mr. Hogan disagreed, saying that P.C. Korda had told him that he was going to speak with duty counsel regardless and said he was taking him to the phone to speak with duty counsel when the call was returned. Quite frankly, I must observe that this

evidence sounds remarkably similar to what P.C. Korda said in his own evidence in Chief about his intention to make the duty counsel call regardless of the accused's position to the contrary.

[24] Finally, in the only area of his testimony where Mr. Hogan demonstrated some frustration with the actions of the police when he was pressed by the Crown on the point about his eyes being glassy, he said that that was just one of those 'prejudiced or standard' comments that police like to enter on their reports. This was spoken by a man with some previous experience at being arrested for drinking and driving offences, he explained.

[25] This concluded the case for the defence and the Crown did not call any reply evidence.

POSITION OF THE PARTIES

DEFENCE

SECTION 253(b) ARGUMENT

[26] Mr. O'Brien argues that the Crown has lost the benefit of the s. 258(1)(c) evidentiary presumption that the readings on the Intoxilyzer tests were the same as the concentration of alcohol in Mr. Hogan's blood at the time of the offence. That argument is with respect to the 253(b) charge. He then also argues that there is simply insufficient evidence of impairment symptoms for the Crown to obtain a conviction under the s. 253(a) count. He argues that the symptoms described by P.C. Korda and P.C. Cunningham have been adequately explained by Mr. Hogan so as to leave the Crown in a position of not being able to meet even the low threshold of *Regina v. Stellato* (1993) 78 C.C.C. (3d) 380 (Ont. C.A). The basis of his argument on the s. 253(b) charge and the arguable loss of the

evidentiary presumption to the Crown is that the tests were not taken as soon as practicable, which is one of the statutory requirements for the establishment of the presumption under s. 258(1)(c).

[27] With respect to the as soon as practicable argument, Mr. O'Brien points the court to the evidence of P.C. Korda wherein he stated that he arrived at the station at 12:20 a.m. and at 12:45 he called duty counsel. There is a delay, therefore, of 25 minutes between 12:20 and 12:45 which is totally unexplained in the evidence of P.C. Korda, argues Mr. O'Brien. During all of this period of time, the accused, Mr. Hogan, was apparently lodged in a cell.

Between 12:45 and 1:15 a.m. at best P.C. Korda says he may have made some small talk to the accused while awaiting the return call of duty counsel, although unable to give any particulars of it.

[28] P.C. Cunningham's testimony was that he did not receive a call until 12:25 a.m. to set up the Intoxilyzer. However, he said that by 12:30 a.m. he began to set up the instrument and that it only takes 15 minutes to be ready to go. At 12:45 a.m. he received P.C. Korda's grounds for the arrest of Mr. Hogan, he said, and yet P.C. Korda also said that at 12:45 a.m. he made his first call to duty counsel.

[29] Mr. O'Brien also argues that P.C. Korda admitted in his evidence that, as far as he was concerned, Mr. Hogan understood his rights to counsel and caution and that he had expressed a clear waiver of his right to call a lawyer. Nevertheless, P.C. Korda called duty counsel and stated that it was always his intention to do so regardless of the position taken by Mr. Hogan.

[30] Mr. O'Brien urges the court to find that the evidence of Mr. Hogan was to the effect that he was well aware of the meaning of his rights to counsel because of previous experience with the police and, indeed, P.C. Korda implied that he had had previous professional experience with Mr. Hogan by asking him if he had yet had his licence reinstated. Under such circumstances, Mr. O'Brien argues that P.C. Korda should have had no doubt about Mr. Hogan's ability to comprehend and understand his rights to counsel and his ability to provide an informed and unequivocal waiver to those rights which, Mr. O'Brien argues, is exactly what he did. Mr. O'Brien argues that the explanation of the accused for his lack of any complaint to P.C. Korda when duty counsel was called makes perfect sense given his situation in custody and his previous experience with police when he says that he just simply doesn't make a point of arguing with the authorities when they have control of him. Mr. O'Brien urges me to accept the evidence of Mr. Hogan when he says that he felt as if he really did not have a choice about talking to duty counsel.

[31] Mr. O'Brien relies on the case of *Regina v. Sleep*, [2004] O.J. No. 3681, a decision of the Ontario Court of Justice, Madam Justice Brown presiding. He refers that case to the court as being directly applicable to the issue in this case. Mr. O'Brien also argues the authorities of *Regina v. Kubas* [1997] O.J. No. 4230 and *Regina v. Barrick* [1998] O.J. No. 3252. The latter case is a decision of Mr. Justice Quinn in the Ontario Court of Justice (General Division) in Welland. I will deal with the particular portions of those cases argued by Mr. O'Brien in my analysis.

[32] In conclusion, on the s. 253(b) charge Mr. O'Brien argues that the evidence in this case reveals an unexplained 25 minute delay which cannot be assessed for reasonableness

and expediency with respect to the actions of the police since there is no evidentiary explanation for it. This flies in the face of the Ontario Court of Appeal's mandate in *Regina v. Seed* [1998] O.J. No. 4362, argues Mr. O'Brien. In addition, there is the 38 minute delay created by P.C. Korda's decision to call duty counsel in the face of what Mr. O'Brien argues was an explicit unequivocal and categorical waiver of his right to counsel by Mr. Hogan, who, P.C. Korda should have known from his previous professional experience with him, was well acquainted with his rights to counsel. Therefore, he argues that the breath tests were not taken as soon as practicable as required by s. 258(1)(c).

SECTION 253(a) CHARGE

[33] On this count, Mr. O'Brien emphasized that P.C. Korda's observations of symptoms consistent with impairment by alcohol were either well explained by the evidence of Mr. Hogan or were simply conclusory without any evidentiary foundation and, therefore, should be given little weight. As an example of the latter, he referred to the evidence of slurred speech which was totally conclusory. It was obvious in the evidence that P.C. Korda had spoken with the accused on previously occasions and he could have drawn some form of comparison had he wished to do so. However, I received no evidence of that nature.

[34] As far as the accused using his car door to support himself when exiting as observed by P.C. Korda and offered as a symptom of impairment, Mr. O'Brien submits that Mr. Hogan's evidence about the pinched nerve in his leg and the low slung nature of the car adequately explains that particular set of actions. Likewise, he says that P.C. Korda's evidence that Mr. Hogan was walking carefully as a description of unsteadiness in his gait

was totally consistent with walking in flip flops which was the footwear attributed to Mr. Hogan by the officer himself.

[35] Mr. O’Brien referred the court to the case of *Regina v. Singh* [1997] O.J. No. 1164, a decision of Mr. Justice Lesage, as he then was, the Chief Justice of the Ontario Court of Justice (General Division), with respect to a discussion of the application of the rationale of *Regina v. Stellato*, *supra*, to a fact situation. Likewise, he referred the case of *Regina v. Andrews*, 104 C.C.C. (3d) 392 to the court. This was a decision of the Alberta Court of Appeal in January 1996.

POSITION OF THE CROWN

SECTION 253(b) CHARGE

[36] In general, the Crown argued that the credibility of Mr. Hogan has to be assessed very carefully in light of his record which provides him with an obvious interest in the outcome of this particular case. The Crown argues that his evidence of his recollections on the night in question was poor because he used terms like his “past practice” or “probably” often when asked to remember certain aspects of the evening, referring to his habitual practices as opposed to actual memory. The Crown argues that these frailties must be carefully assessed when the court is considering whether or not Mr. Hogan’s words “I’ll waive all that” after his rights to counsel have been read to him by P.C. Korda constitute a clear and unequivocal waiver of his right and desire to contact or consult a lawyer. The Crown referred the court on this point to *Regina v. Kusnir* [2002] O.J. No. 10, a decision of the Ontario Superior Court of Justice by Mr. Archie Campbell. Mr. Justice Campbell was dealing with the argument made at trial that the tests were not taken as soon as practicable

because the officer contacted duty counsel on behalf of the accused. The Crown refers the court to paragraph 21 where Mr. Justice Campbell stated:

Even if these cases are correct, they should be interpreted restrictively. A voluntary waiver of the right to counsel, in order to be valid and effective, must be premised on a true appreciation of the consequences of giving up that right. It seems only prudent, particularly when people have been drinking and there are reasonable and probable grounds to believe they are impaired or over 80, to resolve any possible doubt against waiver and in favour of the right to counsel. Where there is any doubt at all about waiver it should be clear that there is a bright line duty on the police to ensure access to counsel. Otherwise, the courts discourage, rather than encourage, access to counsel by detained persons.

I must observe, however, that at paragraph 16 Mr. Justice Campbell, in referring to the evidence at trial in *Kusnir* said that “The appellant did not say he did want to talk to counsel” and “The appellant did not say he did not want to talk to counsel”. In this case, of course, P.C. Korda made it abundantly clear that Mr. Hogan very clearly expressed his desire to waive his right to talk to a lawyer. This was included in the cross-examination evidence of P.C. Korda which I have described above. In addition, Mr. Hogan himself testified to the same effect. Furthermore, while Mr. Justice Campbell refers to a situation where there is any doubt at all about waiver in paragraph 21, in this case once again P.C. Korda conceded in evidence that Mr. Hogan certainly had expressed himself very clearly and appeared to be very coherent and appeared to understand exactly what rights were being offered to him. In addition, P.C. Korda made it clear that he had previous professional discussions with Mr. Hogan on at least one other occasion. Therefore, it would appear that, in my opinion, there should not have been any doubt about the clear, unequivocal, and informed waiver as expressed by Mr. Hogan in this case as opposed to the concern expressed by Mr. Justice Campbell in the *Kusnir* case.

[37] Continuing to deal with the as soon as practicable argument, the Crown argued that the delay in this case in totality would be calculated from 12:20 a.m. to 1:26 a.m., which would be a total of 66 minutes. He submitted that the accused himself testified that he did speak to P.C. Korda at some point between 12:45 and 1:20 a.m. so, therefore, the court should be able to infer that he was continually informed by P.C. Korda as to what was happening during that 45 minute period of delay. The Crown submitted that it should be a very high threshold when the court assesses the officer's conduct in calling duty counsel even after a *prima facie* unequivocal waiver especially with possibly impaired subjects. This point, of course, was what he was arguing when referring the court to para. 21 in *Regina v. Kusnir, supra*.

[38] The Crown also argued that the Intoxilyzer tests could not have been conducted in any event until 1:26 a.m. because the 5000C was being operated from a "cold start". However, that does not seem to accord with the evidence of P.C. Cunningham who said that he turned the instrument on at 12:30 a.m. and that it only required 15 minutes to warm up. As I recall P.C. Cunningham's evidence, he did not say that he would have been unable to administer a breathalyzer test until 1:26 a.m. The Crown does argue that P.C. Cunningham's evidence is important because it's capable of supplying an explanation for the time expenditure between 12:25 a.m. when he arrived at the station and 12:45 a.m. when the accused was turned over to him. Therefore, that 20-minute period is adequately explained. The Crown refers the court to the case of *Regina v. Seed, supra*, for the proposition that the Crown is not required to explain every last minute of delay in order to satisfy the requirements under s. 258(1)(c), and with that submission I certainly agree.

SECTION 253(a) CHARGE

[39] The Crown simply argued on the impaired count that the symptoms observed by P.C. Korda and P.C. Cunningham about the person of Mr. Hogan should meet the standard in *Regina v. Stellato*. In particular, he asks the court to be circumspect with respect to the evidence of the accused in his attempt to explain away the slurred speech by his dental plate and his evidence about his pinched nerves in his leg because of the general inability of the accused to recall some details of the night in question and his obvious interest in the outcome due to his record. He reminds the court and also relies on an authority known as *Regina v. Michitsch* [2004] O.J. No. 1296 (S.C.J.) Hill J., that evidence of bad driving is not necessary to sustain a conviction for driving a motor vehicle while one's ability to operate it is impaired by alcohol. In any event, he still asks the court to rely to some extent upon the wide turn into the driveway by Mr. Hogan as evidence of impairment. In conclusion, he simply asks the court to find beyond a reasonable doubt on the rationale of *Regina v. Stellato, supra*, after the court rejects the explanatory evidence of the accused, that the Crown has proven this count beyond a reasonable doubt.

REPLY SUBMISSIONS BY MR. O'BRIEN

[40] On the 'as soon as practicable argument' Mr. O'Brien reminded the court that P.C. Cunningham was not even contacted promptly by the Halton Regional Police sergeant who was contacted by P.C. Korda on his own O.P.P. dispatch. There was a gap of approximately 10 minutes from 12:15 a.m. to 12:25 a.m. before he was dispatched to the station to set up the Intoxilyzer.

ANALYSIS

SECTION 253(b) CHARGE

[41] I find from a combination of P.C. Korda's evidence and also the evidence of the accused, Mr. Hogan, that the accused provided a fully informed and categorical waiver of his right to counsel pursuant to s. 10(b) of the *Charter* to P.C. Korda at the scene when his rights were first read to him. P.C. Korda himself conceded in cross-examination that the waiver appeared to be given in a very clear and comprehensible fashion. Mr. Hogan, in his own evidence, admitted to a record of two previous convictions involving impaired driving in 2002 and over 80 in 2004. It is obvious that he would have had his rights to counsel provided to him on each of those two occasions. The night in question here is in June 2004. This evidence, in my view, supports my conclusion that Mr. Hogan knew what he was talking about when he told P.C. Korda he would "waive all that". It was obvious also from P.C. Korda's evidence that he himself had had some professional dealing with Mr. Hogan in the past, although the specific example was not permitted to be introduced into evidence.

In my view, there is a marked distinction between that factual situation and the situation that was being contemplated by Mr. Justice Campbell in *Regina v. Kusnir, supra*, at para. 21 where he stated: "Where there is any doubt at all about waiver it should be clear that there is a bright line duty on the police to ensure access to counsel. Otherwise, the courts discourage, rather than encourage, access to counsel by detained persons." And further: "A voluntary waiver of the right to counsel, in order to be valid and effective, must be premised on a true appreciation of the consequences of giving up that right." In *Regina v. Sleep* [2004] O.J. No. 3681, a decision of the Ontario Court of Justice, Madam Justice Brown

stated that Mr. Justice Campbell was speaking in *obiter dicta* in para. 21. I agree, but even so, I find that the situation in *Kusnir* was quite different from the situation in the case at Bar.

At para. 16 Mr. Justice Campbell stated that the evidence was uncontradicted that “The appellant did not say he did want to talk to counsel” and “The appellant did not say he did not want to talk to counsel” and the officer thought there was mutual agreement that the appellant wished to talk to counsel. Clearly, in this case, P.C. Korda conceded that Mr. Hogan affirmatively stated that he wished to waive his right to talk to a counsel.

[42] I find that P.C. Korda, from his own evidence, had unilaterally decided that he was going to call duty counsel regardless of any position taken by Mr. Hogan to the contrary. He testified that he did so because of a concern about Mr. Hogan’s ability to fully comprehend his rights given that he had been drinking and that the officer had arrested him on reasonable and probable grounds on a charge of impaired driving. However, I find that P.C. Korda did not make that decision to call duty counsel based upon any residual concern about Mr. Hogan’s ability to understand his rights on the night in question. Rather, it was more of a policy decision on his part. He is absolutely clear in his evidence that he felt that Mr. Hogan was coherent and P.C. Korda actually believed that he understood his rights to counsel. As I earlier said, he also admitted that the waiver was very clear to him. I find that the delay that was caused by P.C. Korda’s unilateral decision to call duty counsel was 38 minutes. I find that this delay was totally and absolutely unnecessary.

[43] I accept Mr. Hogan’s evidence and find it to be eminently reasonable when he explained that when he is in the presence of the authorities he does not feel that he can challenge their procedures. In his particular case, he certainly has had enough experience

with the police to arrive at that conclusion if he so wished to do. Therefore, I accept his evidence when he says that he spoke with duty counsel because he was told by P.C. Korda that he was going to speak to duty counsel regardless of the situation. He said that Korda was taking him to the phone to speak to duty counsel. This evidence is almost completely in accord with the evidence of P.C. Korda himself on that point. In my view, that explains why Mr. Hogan did not complain to P.C. Cunningham about the fact that he had been taken to speak to duty counsel. In short, I find that Mr. Hogan simply acquiesced to the procedures that he felt were being imposed upon him by the police authorities in whose custody he found himself.

THE LAW

[44] In *Regina v. Seed, supra*, the Ontario Court of Appeal stated that the test is whether the police acted reasonably and expeditiously under all of the circumstances taken in totality. There is no standard requiring that the tests be taken “as soon as possible”. See *Regina v. Clarke* [1991] O.J. No. 3065 (Ont. C.A.).

[45] I find in this case that the actions of P.C. Korda in delaying the breath tests in order to satisfy his unilateral decision to call duty counsel in the face of the waiver by Mr. Hogan were not reasonable and expeditious. I, therefore, find that the delay that he created because of those actions on his part prevents the Crown from being able to satisfy this court that the breath tests were taken “as soon as practicable” as required by s. 258(1)(c) in order for the Crown to receive the benefit of the presumption that the readings obtained were the level of blood alcohol of Mr. Hogan at the time of the alleged offence. I, therefore, find Mr. Hogan not guilty of that charge.

SECTION 253(a) CHARGE

[46] The Ontario Court of Appeal in *Regina v. Stellato, supra*, established the standard to be applied by a trial court on a charge that an accused's ability to operate his motor vehicle was impaired by alcohol or drug. At page 384 of that case, Mr. Justice Labrosse stated:

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.

[47] In *Regina v. Andrews*, a decision of the Alberta Court of Appeal reported at 104 C.C.C. (3d) 392, Mr. Justice Conrad, speaking for the majority of the Court of Appeal, in discussing those statements of Mr. Justice Labrosse, himself stated at page six of the Court of Appeal case:

I am satisfied that the subsequent references to the word "impairment" in the paragraph really mean "that impairment" referring to the earlier described impairment of the ability to drive. Otherwise, the pronouncement is not in harmony with the reasons of Mitchell J.A. in *Regina v. Campbell*, (1991) 26 M.V.R. (2d) 319, quoted with approval by His Lordship which I set out for convenience:

The *Criminal Code* does not prescribe any special test for determining impairment. It is an issue of fact which the trial judge must decide on the evidence. The standard of proof is neither more nor less than that required for any other element, nor criminal offence. Before he can convict, the trial judge must receive sufficient evidence to satisfy himself beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.

Further, at page seven he stated:

The ratio of the judgment in *Stellato* is that it is not necessary for the Crown to establish a marked degree of the accused's ability to drive; rather, any degree of impairment of that ability, if proved beyond a reasonable doubt, will sustain a conviction. This is what the Supreme Court of Canada approved, not that a slight degree of impairment is to be equated to a slight degree of impairment of one's ability to drive. That would preclude a trial judge in every case from making the crucial finding of whether the accused's ability to drive was, in fact, impaired.

Mr. Justice Conrad also confirmed the principle that such a finding should not be made on a slight variation from the normal.

[48] An additional consideration that should be applied by the trial judge is whether or not there is evidence before the court that would tend to neutralize or render innocuous an otherwise *prima facie* physical symptom of impairment so as to remove that symptom from inclusion in the totality of evidence upon which the Crown urges the court to find that the requisite standard of proof has been met.

[49] In this case, P.C. Korda's evidence of the driving of Mr. Hogan consisted simply of the fact that he observed his vehicle southbound on Waterdown Road at what he felt to be a high rate of speed, although not clocked or documented, for a short distance and then a wide turn executed by the accused into his own driveway. He gave evidence that the accused seemed to steady himself by grabbing hold of his open car door as he exited the vehicle. He also said that the accused was unsteady on his feet as he walked back towards his cruiser. However, he immediately qualified that evidence without being asked to do so by then describing the walk as "careful". He said that that was a better description than "unsteady". In addition, he noted that the accused had a pair of what he called "flip flops" on his feet, otherwise known as sandals in the vernacular. I took this description to mean a type of

footwear that is loose and fastened by a single strap to the foot and open at the heel. P.C. Korda also described the odour of alcohol being present on the accused's breath and that his eyes were glossy and that he had a slight speech slur. The latter comment was conclusory only and he provided no evidentiary foundation of a speech pattern or particular words that caused him to form that conclusion. He also admitted that he had not made a note of the slightly slurred speech in his book. He confirmed that there was no stagger to the gait of the accused. P.C. Cunningham testified that the accused's eyes were watery, glassy, and that he had slurred speech. Again, the latter conclusion was offered without any evidentiary foundation.

There was no evidence given by either officer of any unsteadiness in the gait of Mr. Hogan while walking through the police station or previously walking from the cruiser to the police station.

[50] Mr. Hogan testified and offered explanations for almost every one of these observations made by the two officers. He explained that he parks his vehicle in the middle of the three lanes of his driveway in order to accommodate his family's additional vehicles, and so that was why his turn may have appeared to be a wide turn into the driveway by the officer. I found that to be an explanation which appeals to common sense and there is no evidence to dispute the factual content of it. He explained that he has a difficulty with stiffness in one leg after prolonged sitting and testified that he was experiencing that stiffness after being in a confined seat at the Argonaut football game for a number of hours and then driving home in his Jaguar. P.C. Korda agreed that the Jaguar was a lower slung car than was his police cruiser from which to exit and Mr. Hogan confirmed that it is a rather low

vehicle from which to exit and he did not deny using his driver's door to assist him in getting up out of the driver's seat and walking back to the cruiser. With respect to the evidence of slurred speech, he demonstrated his dental plate in court which he pointed out was slightly broken and tends to move around in his mouth and, therefore, could affect his speech pattern. I made the observation that Mr. Hogan in the witness stand spoke in a deliberate and somewhat slow fashion, almost a little bit halting in delivery.

[51] In general, I found that Mr. Hogan did not attempt to embellish his evidence. For example, when cross-examined about his memory of details of the football game with respect to the number of beers consumed and the times consumed and how much his friends and his wife had to drink, he was careful to point out that his evidence was based more on his habitual practice than it was upon an exact recollection. He was quick to agree that he made no notes of the evening and that time would have probably affected some of the details of his memory and he readily agreed that the consumption of alcohol, in his experience, could affect memory of details. Of course he did not suggest that he was having any difficulty remembering the major details such as driving home and his interaction with the police involving his arrest.

[52] In conclusion, I have no hesitation in finding that the evidence provided by the two police officers of symptoms of impairment by alcohol of the ability to operate his motor vehicle by Mr. Hogan, even without Mr. Hogan's evidentiary explanations, would be considered to be evidence of slight impairment. Based upon the rationale in *Regina v. Stellato, supra*, without explanation, it may have been sufficient to satisfy the Crown's onus.

However, after I consider the evidentiary explanations offered by the accused, which I find to be totally credible and acceptable to me, I find that the Crown is left with almost no evidence of symptoms of impairment except for glassy or glossy eyes that could be attributable to the ability of the accused to operate his motor vehicle. Therefore, I find that the Crown has not satisfied me beyond a reasonable doubt that Mr. Hogan's ability to operate his motor vehicle was impaired on the night in question and that charge is also dismissed.

Released: January 17, 2006

Signed: "Justice F.L. Forsyth"