IN THE ONTARIO COURT OF JUSTICE

B E T W E E N :

R E G I N A

- AGAINST -

PHILIP SZTEJNMILER and DAVE STOLL

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REASONS FOR DECISION ON PRELIMINARY INQUIRY

BEFORE THE HONOURABLE MR. JUSTICE STEPHEN J. HUNTER delivered on the 5th day of July, 2013

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Contrary to the ***Criminal Code of Canada***

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A P P E A R A N C E S :

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REASONS FOR DECISION ON PRELIMINARY INQUIRY

PART I - INTRODUCTION:

On February 5th, 2012 a group of people assembled at the Angry Beaver Bar and Grill to watch and celebrate the National Football League's Super Bowl. Less than 18 hours later, in the morning hours of February the 6th, the event ended tragically when Korin Howes, driving westbound in the eastbound lanes of Highway 401 caused an horrific head-on collision with an eastbound vehicle operated by Shaina Harrison. Both young ladies were killed in the crash.

Philip Sztejnmiler and David Stoll were the owners and operators of the Angry Beaver as officers, directors and shareholders of Ontario Incorporation No. 2207697 under which Angry Beaver carried on business. They hold Ontario Liquor Licence No. 27116.

They stand charged in ***Provincial Offences Act*** Information No. 120050 with violations under the ***Ontario Liquor Licence Act, R.S.O. 1990, c. L-19*** and its regulations, **R.R.O. 1990, Reg.719** flowing from the evening's events.

Specifically, it is alleged that they:

(a) encouraged immoderate consumption contrary to s. 20(1);

(b) permitted drunkenness on Licenced premises contrary to s. 45(1);

(c) permitted the use of narcotics on Licenced premises contrary to s. 45(2);

(d) sold and served liquor outside prescribed hours contrary to s. 25(1);

(e) served liquor to an apparently intoxicated person contrary to s. 29; and,

(f) permitted the supply of alcohol free of charge contrary to s. 20(2).

Although that Information is before this Court, it is not for trial. Rather it, at least in part, forms the foundation for the more serious allegations advanced by the Crown of manslaughter.

The Crown submits that by the breaches of one or more of these provisions of the ***Ontario Liquor Licence Act,*** the accused have committed culpable homicide by means of an unlawful act which caused the deaths of Korin Howes and Shaina Harrison within the meaning of section 222(5)(a) of the ***Criminal Code***, or, alternatively, the offence of criminal negligence causing death contrary to section 220 of the ***Criminal Code***.

Although much of the evidence was either agreed between counsel or not substantially contested, the issue of committal on any criminal charge has been vigorously contested from the outset.

These Reasons address the issue of committal and although out of necessity will refer to the factual foundations of the Provincial Offences charges, are not meant to be taken as a determination of guilt or innocence on those charges.

The evidence was heard in this matter from April 22nd, 2013 to April 25th, 2013 and Argument was heard May 7th, 2013. I have had the advantage of, and have read and reviewed the detailed and thorough Factums, cases and arguments of counsel.

The evidence and issues have been most capably and efficiently presented and I am indebted to counsel for their assistance.

PART II - EVIDENCE:

I am mindful of my role in a preliminary inquiry and do not assess or make any findings of credibility on any direct evidence and to a limited extent, evaluate inferences to be drawn, or capable of being drawn from any circumstantial evidence and only to the extent that I would determine whether such inference is capable of

being drawn by a trier of fact from the factual foundations presented.

The Angry Beaver Bar and Grill is located at the junction of Vermilyea Road and Wallbridge-Loyalist Road in Quinte West. Wallbridge-Loyalist Road is a Highway 401 interchange and the bar's location is approximately three to four kilometres north of 401.

The location of the bar is properly described as rural with some nearby farm and residential homes. The bar itself is relatively small to medium size with a parking lot out front serving the bar and an adjacent convenience store as well as a few parking spots to the rear. There is only one public entrance at the front to the Angry Beaver and an exit at the rear primarily for staff. There is no public transit to the area but taxis are available. The closest municipal centres would be the City of Belleville at approximately 10 to 12 kilometres to downtown Belleville to the southeast and the City of Trenton approximately 15 kilometres to its downtown to the southwest.

It is agreed that the principal owners and operators of Angry Beaver are the two accused.

Kelly Workman, an employee and inspector with the Alcohol Gaming Commission of Ontario (A.G.C.O.) testified that the initial application to Licence

the Angry Beaver pursuant to the ***Liquor Licence Act*** was initiated in July 2009. She met Mr. Sztejnmiler on site for the initial inspection on September 3rd, 2009 and the licence was approved for approximately a two year term. The licence was later renewed in September 2011 and intended to continue until September of 2014.

From the time of the license issue until its suspension and termination after the incident in February 2012, Ms. Workman attended the bar for inspections on 13 occasions. She was also aware of periodic "walk throughs" being conducted by the Quinte West Ontario Provincial Police who have jurisdiction in this location.

She related three infraction concerns during that time. Two were a failure to have a liquor menu available and the third was a question of over capacity. She indicated that she spoke with the owners on these occasions and the matters were addressed or rectified. No enforcement actions were ever taken against the owners or the establishment.

The licence application, Exhibit 11, indicates that neither accused here has any criminal record.

Ms. Workman testified she was not aware of any history of after-hours serving occurring at the Angry Beaver.

She reviewed the various information and material packages provided to the operators and agreed that the licence is held by the numbered company.

Ms. Workman also confirmed that legal operating hours for the Angry Beaver were 11:00 a.m. to 2:00 a.m. daily unless special exemptions were granted; for example, early opening hours during the World Cup and annually for closing on New Year's Eve.

It is admitted that the normal operating hours were in effect on February the 5th and 6th, 2012 and that alcohol could not be served free or otherwise after that time.

The evidence also disclosed that both accused here, operated as well a second bar on the waterfront in the City of Belleville called the Beaver Dam. It appears that this was a seasonal bar from Spring to Fall which opened in 2011. Some of the employees make reference to working at one or both of these establishments but it is clear that the Beaver Dam was closed at least for the season in February 2012.

It is not contested that the Angry Beaver was encouraging patrons to attend the bar to eat, drink and watch the Super Bowl on Sunday, February the 5th. The evidence would also permit the conclusion that special patrons, employees

and past employees might anticipate that the bar, although officially to close at 02:00 o'clock might well remain open for an "after hours" party for those select few. The evidence of many of the witnesses would clearly support the fact that after hours parties were not uncommon at both the Angry Beaver and the Beaver Dam, although the frequency of such events may be less clear.

The evidence as well would clearly permit a Trier of Fact to conclude that alcohol was served at these after hours events, with the expressed or implicit permission of one or both of the accused, although the payment or manner of payment for such alcohol was debatable.

It is not in dispute that the deceased Korin Howes had been an employee of the accused. She apparently began work at the Angry Beaver as a cook in late 2010 and also worked at the Beaver Dam in 2011 until things got slow and her hours were cut back. Ms. Howes had taken a culinary course at Loyalist College which is also located on Wallbridge-Loyalist Road approximately two kilometres south of Highway 401. It is apparent that Ms. Howes would obviously be familiar with the roads at issue here.

In the Fall of 2011 Ms. Howes obtained a job at Sears in Belleville and no longer worked at either bar. She did however continue to attend at the Angry Beaver as a patron on at least three

or four occasions between October 2011 and February 2012. On February 5th, 2012 she and some friends had made reservations for dinner and the Super Bowl events at Angry Beaver.

Jessica Hunt, Christina O'Neill and Korin Howes apparently met at Jessica's residence about 5:00 p.m. on February the 5th and then drove to the Angry Beaver. Christina O'Neill and Jessica Hunt drove together and Ms. Howes, who anticipated staying later, drove her own car. She told the others at that point that she would take a cab home.

At the Angry Beaver they were joined by Matt MacKay, the boyfriend of Christina and his brother John, who arrived in their own vehicle. Matt was the driver.

At the peak of the evening, estimates were that between 25 to 50 people were in the Bar and Grill. Sztejnmiler and Stoll were working either in the kitchen or helping out at the bar. As one might expect, there was a party atmosphere surrounding the football game which started at approximately 6:00 p.m. and wrapped up around 10:00 p.m. There is evidence that during the football game's Half Time, there was a minor drinking contest in which Mr. Stoll was involved where teams of people consumed alcohol through a straw. There is evidence that Ms. Howes participated and that it involved a small cup or

one-third to one-quarter of a glass of some form of alcohol or beer, which each team member consumed once. It was estimated that this event occurred at approximately 8:00 p.m.

Over the course of the evening, Ms. Howes consumed food and alcohol. Jeanette Rodrigues was her server. Ms. Rodrigues was acting restaurant manager from time to time at the Angry Beaver and also had worked at the Beaver Dam and knew Ms. Howes as a prior employee.

Ms. Rodrigues clearly recalled that the total bill for Ms. Howes was $60.00 including food. She had had three to four Bud Lite Lime and a Caesar over the course of the evening and had participated in the Half Time contest.

Ms. Rodrigues left work sometime between 11:30 and 12:00 p.m. Some time, just prior to leaving, she made the observations that Ms. Howes appeared fine. She paid her bill through debit without difficulty and stated to Jeanette that she would catch a cab or get a ride home with friends.

There is no evidence that Ms. Rodrigues knew Ms. Howes had come by car.

Ms. Howes' friends left much earlier than Korin. Jessica Hunt was apparently the first to leave at about 9:00 p.m. She states that Korin had consumed four beer plus a quarter cup of beer

during the contest over the three and a half hours that she was there. She described Ms. Howes as appearing fine and no signs of impairment were observed.

Ms. Hunt, Christina O'Neill and Korin had a conversation outside the bar as Jessica was leaving. Ms. Hunt offered to return to the bar to get Korin. Ms. Howes said she would take a cab or if need be, call Jessica.

Matt MacKay was to be the driver and consumed only two beers over the time at the bar. He believes Ms. Howes had consumed a total of five beer and one or two Caesars. He indicates that he left with Christina and his brother between 10:30 and 11:00 p.m. He was unaware that Korin had driven to the bar. He understood her plans were to spend the night at the bar.

Christina O'Neill confirms that she left with Matt and his brother after the game was over. She believes by that time Ms. Howes had consumed "five or six" beer and "one other drink". When Christina left Ms. Howes advised that she was going to stay on and would take a cab or get a ride home with people. Ms. O'Neill advised Ms. Howes that if need be, she would return to get her.

Matt and Christina both indicated that Ms. Howes did not introduce them to any of her prior co-workers who were at the bar that evening.

As might be expected, the bar began to thin out after the football game. The evidence would support the finding that the bar was "locked up" to the public at, or even before, the official closing time of 2:00 a.m. There are various estimates of how many and who remained but it is apparent that about 10 to 12 people remained at that time.

Ms. Howes apparently left sometime between 08:30 and 09:30 on the morning of the 6th of February driving away in her red Hyundai Accent.

Mr. Stoll was still present at the bar when she left. Mr. Sztejnmiler's status at the bar is far less clear. There is evidence he left approximately midnight or when the bar was locked and/or in a cab the next morning. Suffice it to say, it is open to a trier of fact to conclude that Mr. Sztejnmiler was at the bar up until at least the start of the after hours party and further to conclude that he took a cab home the morning of the 6th, but clearly, prior to the departure of Ms. Howes from the bar.

There is very little evidence regarding Ms. Howes between midnight and her departure on the morning of the 6th. There is evidence she consumed

alcohol and socialized. There is evidence that during the after hours events, such as these, patrons (some of whom were employees or past employees) could serve themselves. There is also evidence that a former employee, Mike Bancroft, served drinks from the bar after hours. Apart from assumption, there is no direct evidence of either accused serving any drinks to anyone, including Ms. Howes, after hours.

Ali Naheed Ramji (Ali) was a frequent patron of the Angry Beaver and would attend the bar approximately three to four times per week since it opened with the exception of a year earlier when he was away from the area. He knew the owners well. He had met Ms. Howes once before.

Ali had made reservations to attend Angry Beaver on February 5th with Mike Bancroft. Mr. Bancroft had worked for the Angry Beaver since it opened as both a bartender and server. He had been laid off a few months prior to February but still worked an occasional shift.

Both Bancroft and Ali were present throughout the afternoon of February the 5th and both were still present at the bar when Ms. Howes left the next morning.

Ali indicated that he gave the owners $100.00 to cover the evening's consumption and that he served himself after hours. During the course of

the evening, he had some interaction with Ms. Howes regarding the football game. She was wearing a New England jersey and they exchanged some football talk. She was with friends and he participated in the Half Time drinking events as did she which was run or assisted in by Mr. Stoll. He was unsure whether Korin took part. Ali describes the after hours party as socializing, playing pool and video games and consuming alcohol. Ali admits consuming a substantial quantity. He states that over the course of the evening, he spoke to Ms. Howes occasionally and they exchanged small talk. He saw Mike Bancroft serving alcohol at times. He saw Ms. Howes consuming alcohol but was not sure if she was serving herself or not.

He estimates that Ms. Howes left between 8:30 and 9:00 in the morning. For some time prior to her departure, he and Mr. Stoll were playing a video game. He stated that Stoll had slept for a couple of hours after the bar had been closed.

Ali states as well that he went to the front door to unlock it for Ms. Howes when she went to leave.

He stated that Korin told him she was going to her car to sleep. He said she did not appear to be staggering or stumbling, her speech was fine, and as indicated in his statement to the police, she appeared to be "totally functional".

Mike Bancroft had come to the Angry Beaver that night to party along with Ali. He stated that he often served alcohol to select patrons and employees who stated after hours. Usually there would be no payments but sometimes a "bucket" may have been available for contributions.

On this evening, Mr. Bancroft was not working but did serve people after hours. He was drinking heavily himself. He knew Ms. Howes as a former employee and patron of the bar but he does not recall serving Korin but said it was possible that he did.

He indicates that Ms. Howes left the bar through the back door and advised him she was going to her car to sleep. He was aware that she often slept in her car on other occasions and that she had a blanket in her car.

Jason Coughlin was an employee of the Angry Beaver and worked the morning of February the 5th. He had the night off. At some point in the evening, Ms. Howes sent him a text message wondering why he wasn't at the bar. He too was a Patriot's fan and knew Korin.

Mr. Coughlin arrived at the Angry Beaver for work the next morning, February the 6th, at approximately 07:45 in the morning. He indicated that Sztejnmiler was present and waiting for a

cab which pulled up as they spoke. He indicates that about nine people were still present, including Ms. Howes.

Mr. Coughlin observed that Korin was drinking rye and orange juice that Mike Bancroft had provided. Mr. Coughlin also got a drink. He describes Ms. Howes as loud and pretty drunk. They both continued to drink two or three drinks more.

Mr. Coughlin observed that Dave Stoll was playing a video game with Ali. Ms. Howes indicated she was going to leave at which point Mike Bancroft offered to pay for a cab or call "Big John". She indicated she was going to sleep in her car. Ms. Howes asked Mr. Coughlin if she could crash at his house and when he declined, Mike Bancroft advised her that "Big John" was on his way.

Mr. Coughlin did not see her leave but someone told him later that they had seen her drive away. He estimated the time of her departure at between 9:00 and 9:30.

In cross-examination, Mr. Coughlin stated that he spoke with Korin for more than a half hour and that she carried on a normal conversation. She appeared to understand his questions and was responding appropriately to him and other than her loudness; he noted no other signs of intoxication or drunkenness.

Steven Pulver was an employee of Angry Beaver as well and had met Korin at Loyalist College. He and Korin had worked in the kitchen together at Angry Beaver.

Mr. Pulver was working in the kitchen on the evening of February the 5th, 2013. After the kitchen wound down around 10:00 p.m., he joined the party.

Mr. Pulver confirms that the doors to the bar were locked at approximately 2:00 a.m. and that alcohol continued to be served. He had at least two beers himself. He did not pay for them. He advises that he took a nap on one of the couches in the bar for three or four hours and was awakened by Mr. Coughlin's arrival sometime between 7:00 and 8:00 in the morning.

He observed Korin drinking at the bar. He described her as drunk and talkative but coherent. They had no discussion about her departure and when Mr. Pulver left the bar, she was still there. He believes he left the bar sometime "before 10:00 a.m."

There was a significant amount of evidence as well about the practice of the bar regarding transportation issues; Ms. Howes' knowledge of them and Ms. Howes' normal behaviour.

John Pulver is a friend of Mike Bancroft and a non-drinker. The evidence clearly establishes that "Big John", as everyone referred to him, would attend the bar, if he was not there already, and drive people home without charge.

Every single employee or past employee called to testify, including some patrons, indicated that patrons and employees alike were aware of "Big John's" service to the bar.

Several witnesses testified that Ms. Howes had used "Big John" to get home previously.

"Big John" was, in fact, present the evening and morning of this event. He drove Ali and Bancroft to and from the bar; was in and out during the evening; drove Eric Fournier home approximately 2:00 to 3:00 a.m. and when Mr. Coughlin declined Korin's request to crash at his place, Mike Bancroft informed her that "Big John" was on his way.

John Pulver was not called as a witness.

Cab service is available to the bar and at least two cabs took patrons or employees home that night. Ms. Howes was offered a cab. She indicated to several people her intention to take a cab home.

Several witnesses testified that Ms. Howes carried a blanket in her car and had, on a number of occasions previously, slept in her car. Without exception, the witnesses testified that Korin was very cautious and concerned about drinking and driving and was not known to operate a motor vehicle after consuming alcohol.

There was evidence that the bar had couches where people could sleep and apparently at least three or four people resorted to those couches during the currency of the events of February 5th and 6th.

Ms. Howes left the Angry Beaver sometime after 8:30 on the morning of February the 6th, 2012. She was driving her red Hyundai. Exhibit Two contains the statements of more than 40 people who observed Ms. Howes operating her car on Highway 401. A few gave ***viva voce*** evidence.

At one point she was observed to be parked on the median-side paved shoulder facing westbound in the eastbound lane of Highway 401. Her car was observed to be running.

One witness described this at a location 75 to 100 yards east of the Wallbridge-Loyalist interchange and another witness gave a similar recounting placing her at or near the Glen Miller interchange with Highway 401.

In fact, the collision occurred some distance east of that interchange.

At approximately 09:45 on February 6th, 2012 Ms. Howes was operating her Hyundai automobile heading westbound in the eastbound passing lane of Highway 401 when she collided head on with the vehicle driven by Shaina Harrison. Both women died on the scene.

The blood alcohol level of Ms. Howes at the time of driving was clearly in excess of 200 milligrams percent. She was also found to have a "recreational use" level of methamphetamine in her system.

Ms. Chow, the Toxicologist from the Centre of Forensic Sciences, indicated that it was not possible to say whether the drug was consumed within the preceding 24 hours. Apart from one witness observing the consumption of marijuana (not by Ms. Howes) outside the bar that evening, there is no evidence of any drug consumption at the bar during the currency of the event.

Mr. Chow also testified that at the levels of alcohol Ms. Howes would have had while at the Angry Beaver bar, Ms. Chow would have expected signs of impairment including imbalance, lack of motor coordination and decreased consciousness.

She agreed however, in cross-examination, that the observable effects would depend on the deceased's tolerance and that if she was highly tolerant she may speak coherently, carry on conversations and display no balance issues. It is possible, she admitted, that Ms. Howes could appear entirely functional.

PART III - LAW:

The Crown seeks committal of both accused for manslaughter and criminal negligence causing death. They argue:

(a) that the accused violated one or more of the ***Liquor Licence Act*** provisions or regulations and thereby committed an unlawful act which caused the death of Korin Howes and Shaina Harrison, contrary to section 222 (5)(a) of the ***Criminal Code***; and,

(b) that they committed the offence of criminal negligence causing death contrary to section 220 of the ***Criminal Code***.

(a) Law -Unlawful Act Manslaughter

The decisions of **R. v. *DeSousa*** [1992] S.C.J. No. 77 and **R. v. *Creighton*** [1993] 3 S.C.R. 3 are clearly the seminal cases in the area of unlawful act manslaughter. That being said, and I will return more specifically to those and other

cases, Mr. Justice Watt's review of the law in this area in the case of ***R. v. Worrall*** (2004) 189 CCC (3d) 79 is a most concise and authoritative articulation of the law as I have reviewed it. I can do no better than to repeat it here and give credit to its source.

Quoting from paragraphs [5] through [25]:

"A. ***The Crime of Unlawful Act Manslaughter***

1. ***Introduction***.

[5] An unlawful killing that is not murder or infanticide is manslaughter. Traditionally, we divide the crime of manslaughter into two categories:

(i) voluntary manslaughter; and,

(ii) involuntary manslaughter

despite the absence of any statutory warrant for doing so.

[6] Voluntary manslaughter is mitigated murder. Despite proof that an unlawful killing was murder, we designate it manslaughter if it occurred in defined mitigating circumstances. Under the ***Criminal Code***, the only mitigating circumstance that reduces an unlawful killing, which is otherwise murder, to manslaughter is

provocation, as defined in section 232 of the ***Criminal Code.***

[7] Involuntary manslaughter is an unlawful killing without proof of the mental element required to make that killing murder. Unlawful act manslaughter falls within the category of involuntary manslaughter.

[8] Unlawful act manslaughter requires proof of both conduct and consequences. The conduct requirement is met by proof that the Defendant committed an unlawful act. The consequences requirement, as in all crimes of unlawful homicide, is met by proof that the Defendant's conduct caused another person's death. This nexus between conduct and consequences is usually described as a causation requirement.

2. ***The Unlawful Act Requirement.***

A. ***An Overview***

[9] Fundamental to unlawful act manslaughter is an unlawful act. In practice, the unlawful act is usually an assault, or some offence against the person of another. But it is not always and does not have to be so. In addition to any mental element that may be involved in the unlawful act itself; there is a mental element, a foresight requirement, which must be satisfied in all cases of unlawful act manslaughter.

B. ***The Unlawful Act***

[10] Unlawful act manslaughter depends upon and requires proof of a predicate offence. The predicate offence, as defined in the legislation creating or punishing it, will have its own essential elements, which consist of external circumstances and a mental or fault element. The predicate offence must involve a dangerous act (an act likely to injure another), and not be an offence of absolute liability or constitutional deficiency. (***R. v. Creighton*** 1993 CanLii 61 (SCC), 61 (SCC), (1993), 83 C.C.C. (3d) 346 (S.C.C.) at p. 371, per McLachlin J.)

[14] Under ***R. V. Creighton***, above, the unlawful act must be objectively dangerous. To state this requirement in another way, the unlawful act must be likely to injure another person.

C. ***The Mental Element***

[16] Unlawful act manslaughter, like other crimes, consists of external circumstances (the unlawful act) and a mental or fault element. The mental or fault element in a lawful act manslaughter is objective foreseeability of the risk of bodily harm which is neither trivial nor transitory in the circumstances. The prosecution is not required to prove actual foresight of the described risk, or foreseeability, whether

objective or subjective, of death. Provided a reasonable person in an accused's circumstances would foresee a risk of bodily harm of the nature described, thought not necessarily the precise form that occurred, the required mental element has been established.

[17] In ***R. v. Creighton***, above, McLachlin J. described the mental element in manslaughter in these terms at pages 371 to 372:

"The cases establish that in addition to the ***actus reus*** and ***mens rea*** associated with the underlying act, all that is required to support a manslaughter conviction is reasonable foreseeability of the risk of bodily harm. While section 222(5) (a) does not expressly require foreseeable bodily harm, it has been so interpreted. The unlawful act must be objectively dangerous, that is, likely to injure another person. The law of unlawful act manslaughter has not, however, gone so far as to require foreseeability of death. The same is true for manslaughter predicated on criminal negligence; while criminal negligence requires a marked departure from the standards of a reasonable person in all the circumstances, it does not require foreseeability of death".

She then concluded at pages 372-373:

"This court in ***R. v. DeSousa***, confirmed that a conviction for manslaughter requires that the risk of bodily harm have been foreseeable. After referring to the statement in ***Larkin,*** supra, that a "dangerous act" is required, Sopinka J. stated that English authority has consistently held that the under-lying unlawful act required for manslaughter requires "proof that the unlawful act was likely to injure another person" or in other words, "put the bodily integrity of others at risk". Moreover, the harm must be more than trivial or transitory. The test set out by Sopinka J. for the unlawful act required by s. 269 of the ***Criminal Code*** is equally applicable to manslaughter:

"...the test is one of objective foresight of bodily harm for all underlying offences. The act must be both unlawful as described above and one that is likely to subject another person to danger or harm of injury. This bodily harm must be more than mere trivial or transitory in nature and it will in most cases involve an act of violence done deliberately to another person. In interpreting what constitutes an objectively dangerous act, the courts should strive to avoid attaching penal sanctions to mere inadvertence. The contention that no dangerous requirement is required if the unlawful act is criminal, should be rejected".

So the test for ***mens rea*** of unlawful act manslaughter in Canada, as in the United Kingdom, is (in addition to the ***mens rea*** of the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory in the context of a dangerous act. Foreseeability of the risk of death is not required.

3. ***The Causation Requirement***.

A. ***An Overview***

[18] To succeed in a prosecution for unlawful act manslaughter, the prosecution must prove something more than an unlawful act. And something more than the death of a human being. The "something more" is a nexus, or connection, between the defendant's unlawful act and the victim's death. The defendant's unlawful act must cause the victim's death.

B. ***The Statutory Provisions***

[19] Manslaughter is a crime of culpable homicide, the killing of another human being to which the criminal law attaches blame. Under our law, a person commits homicide, an essential element of culpable homicide, when she or he, directly or indirectly, by any means, causes the death of a human being. Where the allegation is

one of unlawful act manslaughter, the defendant must cause the death of a human being by means of an unlawful act. (See, ***Criminal Code*** section 222(5)(a)).

C. ***The Standard of Causation***.

[20] Causation is a requirement in all homicide, whether culpable or not culpable. The requirement is imposed by the expansive language in section 222(1): "directly or indirectly, by any means, he causes the death of a human being". Where the crime alleged is unlawful act manslaughter, the "by any means" of section 222(1) must be "an unlawful act" because of section 222(5)(a). The conjoint operation of section 222(1) and (5)(a) requires the prosecution to prove that, directly or indirectly, the Defendant's unlawful act caused the victim's death.

[21] The ***locus classicus*** of the causation standard in unlawful act manslaughter cases is the decision of the Supreme Court of Canada in ***R. v. Smithers*** (1977) 34 C.C.C. (2d) 427 at pages 435 and 436 Dickson J. wrote:

"The second sub-question raised is whether there is evidence on the basis of which the jury was entitled to find that it had been established beyond a reasonable doubt that the kick caused the death. In answer to this question it may be shortly said that there was a very substantial

body of evidence, both expert and lay, before the jury indicating that the kick was at least a contributing cause of death, outside the ***de minimis*** range, and that is all that the Crown was required to establish. It is immaterial that the death was in part caused by a malfunctioning epiglottis to which malfunction the appellant may, or may not, have contributed. No question of remoteness or of incorrect treatment arises in this case".

An unlawful act remains a legal cause of the victim's death even if the unlawful act, by itself, would not have caused the victim's death provided that it (the unlawful act) contributed in some way to that death.

[22] In ***R. v. Nette*** 2001 SCC 78 (CanLii) 158 C.C.C. (3d) 486, the Supreme Court of Canada affirmed the continued vitality of the causation standard expressed in ***R. v. Smithers***, as well as its application to all forms of homicide.

[23] In some prosecutions for unlawful homicide, there may be difficulty in establishing a single, conclusive medical cause of death. There may be conflicting medical evidence about what caused the victim's death, at least from a medical point of view. It does not follow as a legal conclusion in these circumstances, however, that there were multiple operative causes of death. In ***R. v. Nette***, Arbour J. explained at page 518:

"The difficulty in establishing a single, conclusive medical cause of death does not lead to the legal conclusion that there were multiple operative causes of death. In a homicide trial, the question is not what caused the death or who caused the death of the victim but rather, did the accused cause the victim's death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence. It will be significant, and exculpatory, if independent factors, occurring before or after the acts or omissions of the accused, legally sever the link that ties him to the prohibited result".

[24] It is important to remember that causation is a legal rule based on concepts of moral responsibility. It is not some mechanical or mathematical exercise.

D. ***The Unlawful Act.***

1. ***Introduction***

[25] The essential first step in proving the crime of unlawful act manslaughter is proof that an accused principal did an unlawful act. For without an unlawful act, proven with the necessary degree of certainty, there can be no conviction for unlawful act manslaughter. And

even with adequate proof of an unlawful act, a conviction of unlawful act manslaughter is by no means inevitable."

PART IV: ANALYSIS:

(a) ***Unlawful act manslaughter***:

(i) What can constitute a predicate act?

In the case before me, the unlawful acts are all violations of the ***Ontario Liquor Licence Act*** and its regulations. They are, that the accused:

(a) encouraged immoderate consumption, contrary to section 20(1) of the Liquor Licence Act;

(b) permitted drunkenness on licenced premises contrary to section 45(1);

(c) sold and served liquor outside prescribed hours contrary to section 25(1);

(d) served liquor to an apparently intoxicated person contrary to section 29; and

(e) permitted the supply of alcohol free of charge contrary to section 20(2).

I do not include consideration of section 45(2) permitting the use of narcotics on licenced premises since the Crown quite fairly

acknowledged that at least for purposes of this hearing, there was no evidence to support that here.

The relevant provisions of the ***Liquor Licence Act*** are as follows:

Sale to intoxicated person

Section 29. "No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated".

Section 20(1). "The holder of a licence to sell liquor shall not engage in or permit practices that may tend to encourage patrons' immoderate consumption of liquor".

(2) "Without restricting the generality of subsection (1), the licence holder shall not advertise the availability of complimentary liquor and may supply complimentary servings of liquor only in circumstances that are consistent with not encouraging the immoderate consumption of liquor and only for the purpose of customer relations".

Section 25(1) "Except for December 31, liquor may be sold and served only between 11 a.m. on any day and 2 a.m. on the following day".

Section 45(1) "The licence holder shall not permit drunkenness, unlawful gambling or riotous, quarrelsome, violent or disorderly conduct to occur on the premises or in the adjacent washrooms, liquor and food preparation areas and storage areas under the exclusive control of the licence holder".

Section 61 of the ***Liquor Licence Act*** provides for offences.

Section 61(1) "A person is guilty of an offence if the person,

(a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act;

(b) knowingly fails to comply with a court order under subsection 38(2); or

(c) contravenes any provision of this Act or the regulations.

(2) A director or officer of a corporation who caused, authorized, permitted or participated in an offence under this Act by the corporation is guilty of an offence.

(3) An individual who is convicted of an offence under this Act is liable to a fine of not more

than $25,000 or to imprisonment for a term of not more than one year or both.

(4) A corporation that is convicted of an offence under this Act is liable to a fine of not more than $100,000".

The Crown submits that the unlawful act, as required by section 225(5)(a) is met by the violation of any of the sections or regulations listed; that they are not offences of absolute liability; and that they are constitutionally sufficient.

The Defence submits that:

(1) It is not constitutionally permissible for the unlawful act to be provincially defined, either by statute or regulation;

(2) That the unlawful act must be criminal, or at least a violation of a Federal statute with penal consequences; and

(3) That the offences here are ones of absolute liability and therefore not eligible.

Despite the thorough and capable arguments on Points (a) and (b), in my view, they are clearly answered in ***DeSousa***, as adopted by ***Creighton*** and, in fact, applied in **R.v.*Curragh*** (1993) N.S.J. No. 401, Prov. Ct., the only case provided to me and

that I could find, involving Provincial statute or regulation.

In ***DeSousa***, Mr. Justice Sopinka, spoke for a unanimous Court, in a case which was, in fact, a constitutional challenge where the Trial Judge had allowed a motion to quash section 269 of the ***Criminal Code*** because the term "unlawful" there could result in a conviction based on any action which violated a Federal or Provincial statute including an offence of absolute liability. In upholding the Ontario Court of Appeal, and the validity of s. 269, Mr. Justice Sopinka concluded that the basis for the term "unlawfully" could include Federal and Provincial statutes as long as they were not offences of absolute liability or otherwise constitutionally deficient.

Shortly thereafter in ***Creighton***, a case of unlawful act manslaughter before the full Court, both Madam Justice McLachlin (as she then was) for the majority, and Chief Justice Lamer for the minority, although disagreeing on the issues of foreseeability of death and the subjective standard of care to be applied, agreed that an unlawful act could be based on a Provincial offence.

Madam Justice McLachlin stated at page 42:

"The structure of the offence of manslaughter depends on a predicate offence of an unlawful act

or criminal negligence coupled with homicide. It is now settled that the fact that an offence depends upon a predicate offence does not render it unconstitutional, ***provided that the predicate offence involves a dangerous act***, is not an offence of absolute liability, and is not unconstitutional". (Emphasis added)

And Chief Justice Lamer at page 20 states:

"What then is the constitutionally required fault element with respect to unlawful act manslaughter? In this regard, the recent decision of this Court in ***DeSousa*** is instructive. At issue in that case was the constitutional sufficiency of the offence of unlawfully causing bodily harm. The unanimous Court, speaking through Justice Sopinka, found that a fault requirement based on objective foreseeability of the risk of bodily harm, coupled with the fault element requirement of the predicate unlawful act (which in itself must be constitutionally sufficient), satisfies the principles of fundamental justice".

In the case of ***Curragh***, in the Nova Scotia Provincial Court in 1993, Justice Curran was faced with an application brought by three accused executives of Westray Mines. They were charged, along with other offences, of unlawful act manslaughter by violating several provisions of the provincial ***Coal Mines Regulation Act***,

R.S.N.S. 1989, c.73 and the Provincial ***Occupational Health and Safety Act***, R.S.N.S. 1989, c.320. Of note was the fact that the Provincial charges for those offences were not possible due to the expiry of a limitation period relating to them.

Justice Curran concluded at paragraph 6:

"Can a breach of a Provincial statute constitute an unlawful act for purposes of section 222(5)(a) of the ***Criminal Code***?"

In the case of ***R. v. DeSousa***, The Supreme Court of Canada decided that the term "unlawfully" in the offence of unlawfully causing bodily harm contrary to section 269 of the ***Criminal Code***, included breaches of both Federal and Provincial statutes other than those of absolute liability. In ***Creighton***, Madam Justice McLachlin held, at page 6 of her decision, that the test set out in ***DeSousa*** for the unlawful act required by section 269 was equally applicable to the unlawful act manslaughter. A Provincial offence, therefore, can be the basis of unlawful act manslaughter."

Defence counsel have argued that I am not bound by the conclusion in ***Curragh*** and that the comments of Justice Sopinka in ***DeSousa*** were obiter. Dealing with the last point first and being mindful of Mr. Justice Binnie's comments in ***R. v. Henry*** [2005] S.C.J. No. 76 at paragraphs 56

and 59, I respectfully disagree. Justice Sopinka's statements were integral to his decision and in ***Creighton***, Justice McLachlin referred to it as settled law. In the context of Justice Curran's decision, given the nature of the offences, his conclusions in my view, were both persuasive and appropriate.

If further support were needed, it is found in the academic acceptance of this conclusion.

University of Toronto Professor Kent Roach in his text ***Criminal Law*** at page 429 states:

"The unlawful act can include any federal or provincial offences provided that it is not an absolute liability offence and it is objectively dangerous".

University of Windsor Law Professor Larry Wilson in his article entitled ***"Rethinking Canadian Homicide Law***: Beatty, J. F., and the ***Law of Manslaughter*** states at paragraph 28:

"Since the unlawful act for unlawful act manslaughter may be any offence other than an offence of absolute liability, a provincial strict liability offence would qualify".

In my assessment, there is no reason in law, or logic, why a Provincial statute or regulation should not qualify as an unlawful act ***provided***

the act is objectively dangerous as required. The fact that the act need not be criminal is borne out in ***DeSousa*** and cited with approval in the **Worrall** case where the courts were clear that the contention that "no dangerous requirement is needed if the act is criminal" was soundly rejected. (See ***Creighton*** page 371 and ***Worrall*** at paragraph 14).

(3) Are the offences here ones of absolute liability?

I have reviewed the sections at issue here and the general legislative and regulatory scheme of the ***Liquor Licence Act***. I have also considered the evidence of enforcement practices provided by Ms. Workman and as observed in the cases.

In the case of ***Sin City*** [2009] O. J. No. 1553 in the Ontario Court of Appeal, was specifically tasked to decide whether the term "permits" in the Act and regulations imported an element of fault or ***mens rea***, such that proof would be required that the licencee knew or ought to have known of the drunkenness.

The Court clearly held that the word "permits" would require the Alcohol Gaming Commission Board to consider the mental element of the licencee thus, in my view, qualifying such worded offences as other than absolute liability.

It is confusing however that in the Divisional Court decision of ***Rejeanne's Bar and Grill***, the majority declines to apply that decision. It is of interest to note their reasoning at paragraph 14:

"[14] The licencee submits the Board should have considered whether it exercised due diligence. I reject this submission. Due diligence is not a defence in matters before the Alcohol and Gaming Commission. In ***Shooters 222 Restaurant Ltd. v. A.G.C.O.*** Justice Cunningham concluded at paragraphs 1 and 2:

"As to the submissions that the defence of due diligence ought to be available at the liability stage of proceedings before the Board, we are of the view that the issue was fully determined in ***Gordon Capital v. OSC***, which considered ***R. v. Wigglesworth***]1987] 2 S.C.R. 541, and the clear distinction between criminal/quasi criminal offences and proceedings to regulate the conduct of those licenced to carry on business".

In the present case, no licencee is thus charged with an offence. Having voluntarily entered into a regulatory scheme, the main purpose of which is to maintain standards of conduct and regulate conduct, the defence of due diligence at the liability stage, is not available. This has been expressed in numerous Divisional Court decisions dealing with proceedings under the C.C.A.".

It also adds perspective to note that although both cases involved "permitted drunkenness" neither case suggested such acts were dangerous and both were dealt with by either fine or administrative suspension or both.

Given the decision of the Court of Appeal in ***Sin City***, I am bound to conclude that if the offence contains the provisions of "permit" or "allow" then it would not be an absolute liability offence.

On that basis, only the violation under section 25(1) of Regulation 719 here would be precluded from consideration as an "unlawful act".

(ii) Is the predicate act objectively dangerous?

The fact that the violation of a Provincial offence or regulation (or, for that matter, a Federal or criminal offence), ***qualifies*** as an unlawful act, is really only the beginning. The Courts have made it clear, and repeatedly stressed, that the act itself ***must*** be objectively dangerous.

Of significance, in my role, is that this consideration is a question of law. In ***Creighton***, supra at page 25:

"The second element of unlawful act manslaughter involves a determination as a question of law of whether the predicate unlawful act is objectively dangerous".

In ***DeSousa***, Mr. Justice Sopinka carefully considered the history and meaning of "objectively dangerous" at paragraphs 24 through 28:

"The case law interpreting the use of this term in similar provisions has focused on the offence most commonly known as unlawful act manslaughter. While manslaughter is not the offence at issue in this appeal, the case law which seeks to interpret the term "unlawful" in that context is instructive.

[25] The leading English authority on the issue of the meaning of "unlawful" in this area is ***R. v. Larkin*** (1942), 29 Cr. App. R. 18, where the Court of Criminal Appeal held at page 23 that:

"Where the act which a person is engaged in performing is unlawful, ***then if at the same time it is a dangerous act, that is, an act which is likely to injure another person***, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.

English authority has consistently held that the underlying unlawful act required by its manslaughter offence ***requires proof that the unlawful act was "likely to injure another person" or, in other words, put the bodily integrity of others at risk.*** This position has also been adopted by most Canadian courts. In ***R. v. Adkins*** (1987) 39 C.C.C. (3d) 346, Hutcheon J.A., speaking for the British Columbia Court of Appeal, indicated that the words "unlawful act" have never been taken literally in the law pertaining to manslaughter. He noted that it is not every unlawful act by which death is caused that can support a finding of culpable homicide. The act must be one which meets the test referred to in ***Larkin***, supra".

[26] Despite ample authority that the underlying act must be objectively dangerous in order to sustain a conviction which is now section 222(5)(a), the law in this area is not entirely free from doubt. In ***Smithers v. The Queen***, [1978] 1 S.C.R. 506, Dickson J. (as he then was) adopted certain comments made by G. Arthur Martin in a short case note on the English ***Larkin*** case. The adopted comments including the follows:

"There are many unlawful acts which are not dangerous in themselves and are not likely to cause injury which, nevertheless if they cause death, render the actor guilty of culpable homicide..."

In the case of so-called intentional crimes where death is an unintended consequence, the actor is always guilty of manslaughter at least.

This passage appears to raise doubt as to whether ***the "unlawful act" must be inherently dangerous to sustain a manslaughter conviction.*** This issue was not addressed in ***Smithers***, however, as the assault which occurred in that case was clearly an intentional dangerous act. As well, ***Smithers*** was a case concerns with the issue of causation and not the meaning of the term "unlawful act". Finally, ***Smithers*** was not argued under the Charter. In the absence of a more definitive statement or more extensive analysis of the issue, I am reluctant to freeze the meaning of "unlawful" for the purposes of section 269 based on the 1943 comments of even as persuasive a source as G. Arthur Martin. More telling, and also more considered authority was provided by Martin J.A. in ***Tennant***, supra, which predates ***Smithers*** but was not discussed by Dickson J. in the latter decision. In ***Tennant***, a Court of Appeal panel composed of Gale C.J.O., Brooke and Martin JJ.A rendered a ***per curiam*** judgment which concluded at page 96 that:

"When death is accidentally caused by the commission of an unlawful act ***which any reasonable person would inevitably realize must subject another person to, at least the risk of***

some harm resulting therefrom, albeit not serious harm, that is manslaughter".

The court later noted that:

"...if death was caused by the accidental discharge of the firearm in the commission of such unlawful act and if the jury were satisfied beyond a reasonable doubt that the unlawful act was such as any reasonable person would ***inevitably realize must subject another person to the risk of at least some harm***, albeit not serious harm, the death would amount to manslaughter".

The Court thus substantially adopted the English position as articulated in ***Larkin***.

[27] In accordance with the English law and in furtherance of the developing Canadian case law, the most principled approach to the meaning of "unlawful" in the context of section 269 is to require that the unlawful act be at least objectively dangerous. This conclusion is both supported by the meaning given to the words "unlawful act" by virtually all of the lower Courts and also in accord with the emerging jurisprudence of this Court in regard to personal fault.

[28] Objective foresight of bodily harm should be required for both criminal and non-criminal

unlawful acts which underlie a section 269 prosecution. I can see no reason why there should be a difference between these two categories of acts. There is no need to differentiate between criminal and non-criminal unlawful acts when one unifying concept is available. Thus, the test is one of objective foresight of bodily harm for all underlying offences.

The act must be both unlawful, as described above, and one that is likely to subject another person to danger of harm or injury. This bodily harm must be more than merely trivial or transitory in nature and will, in most cases, involve an act of violence done deliberately to another person. In interpreting what constitutes an objectively dangerous act, the Court should strive to avoid attaching penal sanctions to mere inadvertence. The contention that no dangerous requirement is required if the unlawful act is criminal should be rejected. The premise on which the proposition is based is that most, if not all, criminal acts are inherently dangerous. This premise is an overstatement in as much as a large part of the criminal law is concerned with offences against property and other interests which are not inherently dangerous. But even if the premise were accepted, the difference between the two positions would be simply one of semantics. ***To maintain the correct focus it is preferable to inquire whether a reasonable person would inevitably realize that the underlying***

unlawful act would subject another person to the risk of bodily harm rather than getting sidetracked on a question regarding the classification of the offence". (Emphasis added)

In ***Creighton***, Mr. Justice Lamer discussed it in terms of "conduct which is inherently risky to life or limb..." that any reasonable person would inevitably have foreseen the risk of likely injury. (See page 22)

McLachlin J. in the same case expressed it in this way at page 43:

"The unlawful act must be objectively dangerous that is likely to injure another person"

Similarly, speaking for the majority in **R. v. *Gossett*** [1993] 3 S.C.R.76 at paragraph 58, Justice McLachlin classified it as "a risk of danger that all reasonable people would inevitably recognize".

In ***Worrall***, Justice Watt described it as "an act likely to injure another". (See paragraph 10)

In ***R. v. K.T.***, [2005] MBCA 78, Mr. Justice Hamilton, speaking for the Manitoba Appeal Court, was dealing with a young offender appeal from a conviction of unlawful act manslaughter where a 13 year old threw a metal shovel at a car travelling between 80 to 90 kilometres per hour

with a 14 year old boy's head sticking out of the window. The boy was struck by the shovel and killed.

In overturning the conviction and entering an acquittal, the Court found that the Trial Judge erred in concluding that that predicate crime of mischief, in the circumstances, was manifestly dangerous.

The Reasons for this decision are not entirely clear and it is in the context of a young offender who was only 13 years of age so I place little reliance on it but it does confirm that the issue of "objectively dangerous" is a matter of law.

What are the predicate offences that could be found here?

The evidence would clearly permit a trier of fact to conclude that Ms. Howes became intoxicated at the Angry Beaver and that the accused, as licencees supplied her with alcohol.

There also is some evidence which one might argue shows immoderate consumption was encouraged by a contest participated in by Ms. Howes and permitted by the accused.

Finally, there is some evidence that a Trier of Fact might conclude that the accused permitted drunkenness or intoxication on the premises.

Are any of these acts singularly or collectively "objectively dangerous"?

In my assessment, they are clearly not.

First, the unlawful acts here are regulatory in nature and their violations are dealt with as the cases demonstrate by administrative processes. With rare exceptions, they go before the Alcohol Gaming Commission Board. As Ms. Workman noted, any decision to lay charges would have to go through her superior and then to a Ministry legal team. The preferred course is not to lay charges but rather, to proceed with administrative processes. There is nothing that would support the conclusion that any of these acts are dangerous ***per se***.

Second, in the case of ***Stewart v. Pettie*** [1995] S.C.C., Justice Major, speaking for a unanimous court, dealt with the issue of civil liability of a commercial host who permitted the Defendant driver to drink to excess. An accident occurred causing serious injury to a passenger and the establishment, among others, were sued. Mr. Pettie, the driver, had a blood alcohol reading of approximately 200 milligrams percent one hour

after the accident. The Court concluded that he was clearly intoxicated.

In the course of addressing the issue of the civil standard of care, Justice Major stated at paragraph 6:

"...the fact of over serving Pettie is an innocuous act".

Third, logically, the act of serving alcohol before or after an arbitrary time of day, or the act of providing alcohol free of charge (as a social host would do), or permitting someone to be drunk ***on your premises*** does not, in any articulable way, constitute an "objectively dangerous act". Although the intoxication of a patron may well give rise to issues of civil liability, as in ***Stewart vs. Pettie***, it falls well short, in itself, of constituting an "objectively dangerous" act.

Given my conclusion on this issue, I need not consider under unlawful act manslaughter the issues of ***mens rea*** and causation.

(b) ***Law - Criminal Negligence Causing Death:***

The Crown did not argue nor advance a committal for manslaughter based on criminal negligence contrary to section 222(5)(b). I do not consider that here.

Section 219 of the ***Criminal Code*** states:

"Subsection (1) Every one is criminally negligent who,

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows a wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law".

Section 220 states:

"Every person who by criminal negligence causes death to another person is guilty of an indictable offence..."

In ***R. v. Titchner*** [1961] O.R. 606 ONCA, Mr. Justice Morden rendered a judgment in the case of criminal negligence causing death when the Defendant was speeding at the time of the collision. In overturning conviction, he stated at paragraph 3:

"An accused's breach of duty, whether imposed by statute or common law, which causes injury, is not, by itself alone, enough to found criminal liability".

And further at paragraphs 5 and 6 he continues:

"5. A Judge in explaining to a jury the meaning of criminal negligence would derive much help from the cases mentioned above. In ***R. v. Bateman***, Lord Hewart, C.J., said at pages 11 and 12:

"In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted to a crime, judges have used many epithet, such as "culpable", "criminal", "gross", "wicked", "clear", "complete". But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability, the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment".

Continuing at paragraph 6:

In ***Greisman***, Middleton, J.A., used this language at pages 177 and 178:

"I think the great weight of authority goes to show that there will be no criminal liability unless there is gross negligence, or wanton misconduct. To constitute crime, there must be a certain moral quality carried into the act before

it becomes culpable. In each case it is a question of fact, and it is the duty of the Court to ascertain if there was such wanton and reckless negligence as in the eye of the law merits punishment. This may be found where a general intention to disregard the law is shown or a reckless disregard of the rights of others".

On that point, I pause simply to mention that in the application for licence made by both of the accused's in this matter, it is indicated that neither of them have any criminal convictions. And further, as Ms. Workman pointed out, there were no charges of offences laid during the currency of their licence at the Angry Beaver.

In ***R. v. LeBlanc*** [1977] 1 S.C.R.339 the Supreme Court of Canada reiterated the position that the mere breach of a statute did not necessarily prove the "wanton or reckless disregard" required by the definition of criminal negligence. In that case, the accused pilot had done an illegal low level pass over two pedestrians, striking and killing one. His conviction was upheld.

Two more recent cases of the Supreme Court of Canada, although dealing with dangerous driving causing death, are instructive.

In ***R. v. Beatty*** [2008] 1 S.C.R. 49, the accused was charged with dangerous operation of a motor vehicle causing death under section 249(4) of the

Criminal Code. The accident that gave rise to these charges occurred when the accused's pick up truck, for no apparent reason, suddenly crossed the solid centre line into the path of an oncoming vehicle killing all three occupants. Witnesses driving behind the victim's car observed that the accused's vehicle was being driven in a proper manner prior to the accident. An expert inspection concluded that the accused's vehicle had not suffered from any mechanical failure. Intoxicants were not a factor. The accused stated he was not sure what happened but that he must have lost consciousness or fallen asleep and collided with the other vehicle. The question that divided the courts below was whether this momentary act of negligence was sufficient to constitute dangerous operation of a motor vehicle causing death.

The accused was acquitted at trial and the Court of Appeal for British Columbia ordered a new trial. In reinstating the acquittal, Madam Justice Charron for the majority stated at paragraph 6:

"In my respectful view, the approach advocated by the Crown does not accord with fundamental principles of criminal justice. Unquestionably, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, it is important not to

conflate the civil standard of negligence with the test for penal negligence. Unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. ***Fundamental principles of criminal justice require that the law on penal negligence concern itself, not only with the conduct that deviates from the norm which establishes the actus reus of the offence but with the offender's mental state. The onus lies on the Crown to prove both the actus reus and the mens rea. Moreover, where liability for penal negligence includes potential imprisonment as is in the case of section 249 of the Criminal Code, the distinction between civil and penal negligence acquires a constitutional dimension".*** (Emphasis added)

Further, she quoted with approval the following excerpt from ***R. v. The City of Sault Ste. Marie*** at page 22:

"The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element; namely, that the accused who committed the prohibited act, did so intentionally or recklessly with knowledge of the facts constituting the offence or with wilful blindness toward them. ***Mere negligence is excluded from***

the concept of the mental element required for conviction". (Emphasis added)

After reviewing the Supreme Court decisions in **R. v. *Tutton*** [1989] 1 S.C.R. 1392 **R. v. *Waite*** [1989] 1 S.C.R. 1436 and **R. v. *Hundal*** [1993] 1 S.C.R. 867 regarding ***mens rea*** required for criminal negligence, Madam Justice Charron goes on to state at paragraphs 34 to 36:

"The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. aptly put it in ***R. v. Creighton***, "The law does not lightly brand a person a criminal". In addition to the largely automatic and reflexive nature of driving, we must also consider the fact that driving, although inherently risky, is a legal activity that has social value. ***If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely*** and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of their liberty. (Emphasis added)

In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done.

Also, the mental state or lack thereof of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

For that reason, the objective test, as modified to suit the criminal setting, requires proof of a marked departure from the standard of care that a reasonable person would observe in all the circumstances. As stated earlier, it is only when there is a marked departure from the norm that objectively dangerous conduct demonstrates sufficient blameworthiness to support a finding of penal liability".

And finally, at paragraph 40 she continues:

"The standard against which the conduct must be measured is always the same. It is the conduct expected of the reasonably prudent person in the circumstances. ***The reasonable person, however, must be put in the circumstances the accused found himself in when the events occurred*** in order to assess the reasonableness of the conduct". (Emphasis added)

The Supreme Court of Canada again considered these issues in ***R. v. Roy*** [2012] 2 S.C.R. 60: There,

"...in late November 2004, Roy was driving home from work with a passenger. Visibility was limited due to fog and the unpaved back road they were on was relatively steep, snow-covered, and slippery. The driver of an oncoming tractor-trailer testified that Roy stopped before proceeding onto the highway, and then drove onto the highway and into the path of a tractor-trailer. In the resulting collision, Roy's passenger was killed. Roy survived, but the collision left him with no memory of either its circumstances or of the surrounding events. Roy was convicted of dangerous driving causing death and his appeal to the Court of Appeal was dismissed".

In allowing the appeal and entering an acquittal, Mr. Justice Cromwell, speaking for the unanimous Court, stated at paragraphs 1 and 2:

"[1] Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct - operating a motor vehicle in a dangerous manner resulting in death - and a required degree of fault - a marked departure from the standard of care that a reasonable person would observe in all the

circumstances. ***The fault component is critical, as it ensure that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence***. (Emphasis added)

[2] Defining and applying this fault element is important but also challenging given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of criminal law to those responsible".

What is the application of these principles in the case at bar?

It is significant to note that these decisions were both in the context of the lesser offence of dangerous driving causing death; involved the actual drivers; and, that the defendant's acts themselves were considered objectively dangerous.

It is also important that in determining fault, the trier of fact, as a matter of law, must consider the "circumstances that the accused found themselves in when the events occurred".

It is clear here that the acts or conduct of the accused which gave rise to the consideration of criminal negligence were not objectively dangerous. To that, one must add the following:

1. There is no direct evidence of any contact between either of the accused and Ms. Howes. At best, there would be an inference that at some point during the evening, they would have interacted with her to some unknown extent.

2. There is no evidence that Mr. Sztejnmiler was present when Ms. Howes departed nor that he was ever made aware of concerns.

3. There is no evidence Mr. Stoll observed Ms. Howes depart or her state prior to her departure nor that he was made aware of anyone's concerns.

4. There is no evidence that either accused knew Ms. Howes was intoxicated, nor observed any signs of her intoxication.

5. There is no evidence that either accused knew Ms. Howes had a vehicle at the bar.

6. There is evidence that cabs were available and had been offered to Ms. Howes.

7. There is evidence that the Angry Beaver Bar utilized a free and available designated driver.

8. There is evidence that Ms. Howes had used the designated driver before and was informed of his availability in fact shortly before she left.

In my view, it would simply not be open to a "reasonable jury properly instructed" to conclude that either accused was guilty of a "marked departure" from the norm let alone the higher standard of "wanton and reckless disregard for the safety of others" required for criminal negligence

Given this conclusion, it is unnecessary to consider the issue of causation or intervening act relating to the offence of criminal negligence causing death.

PART V - CONCLUSION:

In conclusion, I paraphrase the statement of the Trial Judge in ***R. v. Beatty***, Madam Justice Smith in saying:

This tragic accident occurred and ended the lives of two individuals. There is nothing a Court can do or say that will adequately redress the loss suffered by the victim's families in such circumstances. However, in assessing criminal culpability, it is not the consequences of the possibly negligent act that determines whether an accused's conduct is objectively dangerous or criminal.

For the reasons given, both accused are discharged.

The Honourable Mr. Justice Stephen J. Hunter