CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H. 74166**

IN THE COUNTY COURT
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

KEITH J. DEMPSEY,

Appellant

John L Scott, Esq., solicitor for the respondent.
Mark F. Dempsey, Esq., solicitor for the appellant.

1992, July 13, Anderson, J.C.C.:- This is an appeal from a conviction by a Provincial Court Judge that the appellant did

> have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, contrary to Section 253(b) of the Criminal Code.

On conviction he was ordered to pay a fine of $500.00, costs of $50.00 and a Victim Fine Surcharge of $75.00 and in the alternative was ordered to be imprisoned in the county jail for thirty days, and was prohibited from driving anywhere in Canada for a period of six months commencing March 26, 1991.

The three grounds of appeal as set forth in

the notice of appeal had been redefined, as set forth in the brief of counsel and to quote

> The Appellant respectfully submits that the issues to be deterimined are as follows:
>
> 1. Did the Learned Provincial Court Judge err in law in holding that the unilingual information was amendable to allow compliance by the Crown with Section 841(3) of the Criminal Code of Canada?
>
> 2. Did the Learned Provincial Court Judge err in law in holding that the breath tests taken from the Appellant were taken as soon as practicable as required by the Criminal Code?
>
> 3. Did the Learned Provincial Court Judge err in law in holding that the Defence request for the test and reference ampoules was not a reasonable one?

FACTS

On October 6th, 1990 Constable Mario Gallant, R.C.M.P. was driving on the Purcell's Cove Road in the Herring Cove area, when a vehicle coming the opposite direction forced him off the road to avoid a collision. This vehicle was well over the center line in Constable Gallant's lane. Constable Gallant turned and followed the vehicle observing the same vehicle going over the center line and going around turns he estimated the vehicle's speed in excess of 100 kilometers per hour, well above the posted signs of 70 and 50 kilometers per hour. When the vehicle was stopped the accused Dempsey was the sole occupant of the vehicle. There was a strong odour of alcohol coming from his breath, his speech was slurred and his movements were slow. When asked to produce

a driver's license he gave the officer first a business card and then an MSI card. He was arrested for impaired driving, given his **Charter** rights at 9:20 p.m. and was given a breathalyzer demand at 9:28 p.m. After waiting for a tow truck to remove his vehicle, the accused was taken to the Halifax Detachment of the R.C.M.P. where he was given the right to use the telephone. In fact the officer, because of the accused's state, called a number requested by the accused. The accused agreed to take the test and two readings were obtained; 140 milligrams of alcohol per 100 millilitres of blood at 10:33 p.m., and 120 milligrams of alcohol per 100 millilitres of blood at 10:53 p.m.

Issue No. 1: Did the learned Provincial Court Judge err in law in holding that the unilingual information was amendable to allow compliance by the Crown with s.841(3) of the **Criminal Code of Canada?**

A case in the County Court, **The Queen v. Goodine**, dealt with the matter of unilingual informations and counsel agreed that because the **Goodine** case went to the Court of Appeal of Nova Scotia that it would perhaps be well to wait their decision before deciding issue No.1.

In a letter of May 19, 1992 counsel for the appellant Dempsey indicated 'that the decision in Goodine has been rendered with the ruling being that a unilingual Information is not fatal and does not render the Information null and void under Section 841(3) of the Criminal Code. Obviously, Your Honour's ruling on this issue will follow the Goodine decision and so that leaves the other two issues in the Dempsey appeal to be determined.'

The second issue: Did the learned Provincial Court Judge err in law in holding that the breath tests taken from the Appellant were taken as soon as practicable as required by the **Criminal Code**? The appellant submits that the 18 minutes spent waiting for a tow truck after the demand was made to the appellant to provide a sample of his breath but prior to transporting the appellant to the police station for the purpose of providing that sample violated the requirement of s.254(3) that the test was given as soon thereafter as practicable, and he quotes **R. v. Phillips** (1988), 42 C.C.C. (3rd) 150, Ont.C.A. The Court considered this issue and stated:

> The test of practicality is reasonableness. The Court must be satisified that the conduct of the police in the interval between the arrest and the breathalyzer test was reasonable...It will be for the Judge at the new trial to determine whether it was reasonable for the police to delay taking the Appellant to the police station by waiting for a tow truck.

The trial judge made a finding of fact and said 'I do find that an 18 minute delay was reasonable and did not prevent the breath test from being given in the proper time'. In light of **R. v. Russell** 98 N.S.R. (2d), p.33, I would not find that the trial court judge erred in this regard and find that there is no merit in the second ground.

The third issue - Did the Learned Provincial Court Judge err in law in holding that the Defence request for the test and reference ampoules was not a reasonable one? The appellant submitted that the trial judge erred in law in holding that the defence requests for the test

and reference ampoules was not reasonable, and made an argument pursuant to s.7 of the **Canadian Charter of Rights and Freedoms** and sought the remedy of the exclusion of the evidence re the results of the breath test. Both counsel rely on the decision in **R. v. Eagles** (1989), 68 C.R. (3d) 271, 47 C.C.C. (3d) 129:

> One of the cardinal cornerstones of our system of criminal justice is that an accused person is entitled to a fair trial. Inherent in such principle is the substantive right to make full answer and defence to criminal allegations. This right has been expressly guaranteed by the Criminal Code since its initial enactment in 1892...
>
> The right to make full answer and defence is subsumed in the right guaranteed by s.7 of the Charter not to be deprived of life, liberty and the security of the person except in accordance with the principles of fundamental justice.

The appellant goes on, at p.13 of his brief, quoting from the **Eagles** case

> In the present case...there was no factual foundation or other basis shown indicating that the production and examination of the representative ampoule would have any meaningful capacity to advance the defence. I am not suggesting that defence counsel, before being entitled to production, has to establish that an examination of a representative ampoule of the reagent used would establish tha the later was defective. Rather, in my opinion there has to be some basis for the request for the production of the ampoule that ... lends an air of reality to it - otherwise the request

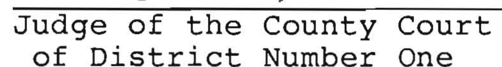
> is really for nothing more that a 'fishing expedition'. Such expeditions are to be discouraged not encouraged.

The trial judge had before her the evidence of Mr. Fromm, who gave his expert opinion on the matter of the usefulness of the ampoules. The trial judge found that it was nothing more than wishful speculation amounting to, I would suggest, a similar term to a fishing expedition. Macdonald, J.A., in **Eagles**, considered **R. v. Bourget** (1987), 54 Sask.R. 178; 35 C.C.C. (3d) 371, Sask.Court of Appeal, where he states

> ...Rather, in my opinion there has to be some basis for the request for the production of the ampoule that, as in **Bourget**, lends an air of reality to it - otherwise the request is really for nothing more than a "fishing expedition". Such expeditions are to be discouraged - not encouraged.

The trial judge had the evidence of Mr. Fromm, she had the authority of **Eagles** and **Bourget**, and I am of the opinion that she made the correct decision with regard to s.7 that there was no breach and therefore no error in law and this issue must also fail.

Therefore the appeal is dismissed and the decision and sentence of the trial court confirmed.



Judge of the County Court
of District Number One

C A N A D A
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ON APPEAL FROM

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HER MAJESTY THE QUEEN

Respondent

- and -

KEITH J. DEMPSEY,

Appellant

HEARD BEFORE: Her Honour Judge Sandra Oxner

PLACE HEARD: 5250 Spring Garden Road, Halifax, Nova Scotia

DATES HEARD: January 28, 1991 and March 26, 1991