IN THE PROVINCIAL COURT OF NOVA SCOTIA
**Citation:** R. v. CLARKE, 2004 NSPC 39

**Date:** 20040309
**Docket:** Case Number 1264255;
Case Number 1264256
**Registry:** Halifax

**Between:**

Her Majesty The Queen

v.

Hugh Arthur Clarke

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| **Judge:** | The Honourable Judge Michael B. Sherar |
| **Heard:** | March 9, 2004 in Halifax, Nova Scotia |
| **Written Decision:** | May 31, 2004 |
| **Counsel:** | Mr. Paul Carver, for the prosecution<br>Mr. Donald Presse, for the defence |

**By the Court:**

[1] This *voir dire* is in regards to a *Charter* challenge by the Defence as to the admissibility of the results of a roadside screening device administered by a peace officer upon the defendant, Hugh Arthur Clarke. Evidence was heard over three days: November 27, 2003; December 9, 2003, and finally January 12, 2004. At the Court's request, counsel presented written submissions, the latest being received on March 1, 2004.

[2] A review of the transcript of evidence reveals the following facts.

[3] Constable Stephen McCormack was on general police patrol duty in the Western Division of the Halifax Regional Municipality on the evening of December 11, 2002. He received a dispatch complaint of a motor vehicle driving incident around 1900 hours or 7:00 p.m. He proceeded to the parking lot of the Kent Building Supply Company in the Bayers Lake Park located in Halifax, arriving around 7:10 p.m.

[4] Upon arrival, the officer spoke with a bus driver and the driver's supervisor. He was informed that Mr. Clarke was the driver of a motor vehicle who had incident with their bus and its passengers. These persons indicated that they could smell a strong smell of alcohol coming from Mr. Clarke.

[5] The officer said he then spoke to Mr. Clarke for five to ten minutes until approximately 1920 hours.

> I spoke with him at first, keeping in the back of my mind the complainant's allegation in regards to the smell of alcohol... I just noticed some...a strong smell of mint gum.

[6] He noted Mr. Clarke was talking very fast and he also noted that Mr. Clarke slurred some of his words.

At p.15:

> ...when I was speaking with Mr. Clarke, I observed a somewhat, a moderate slight to moderate smell of alcohol on him, but I could smell a strong smell of mint.

The alcohol smell appeared to be coming from Mr. Clarke's breath. The peace officer returned to the bus driver and his supervisor and was informed that Mr. Clarke had not been chewing gum before, so Constable McCormack concluded that Mr. Clarke had just started chewing gum upon the officer's arrival.

At p. 16:

> I went back and spoke with Mr. Clarke in regards to the incident and informed him of the suspicion and that I would like him to take a roadside screening device test.

[7] The officer testified later that upon advising Mr. Clarke of his suspicion, he escorted Mr. Clarke back towards the police vehicle and read the roadside screening demand.

[8] Constable McCormack placed Mr. Clarke in the police vehicle upon making the demand and Mr. Clarke was cooperative, and was effectively detained from that time since he could not get out of the police vehicle without the assistance of the officer.

[9] Constable McCormack did not have a roadside screening device with him, and at 1923 hours he made a request to the police dispatcher to have a machine delivered to the site.

[10] Conversation occurred between Constable McCormack and Mr. Clarke and the Crown did not attempt to put any responses of Mr. Clarke into evidence.

At p.19:

> Q. In terms of your decision with respect to making a roadside screening device demand what, if any, influence did those questions and answers inside the police vehicle have upon that decision?
>
> A. They didn't have any. My suspicion was already made when I requested the SLII before I was in the police vehicle.

[11] Constable McCormack indicated that that time of day, and at that location, it would take approximately eight minutes to transport Mr. Clarke to the West Division Police Station located off the Bedford Highway in Halifax.

[12] As previously indicated, Constable McCormack called the police station requesting an SLII - an approved roadside screening device - to be sent out to the scene.

At p.4 (January 12, 2004 Transcript):

Q. At the time these events were unfolding, did you have any sense of the time it would take for a device to arrive to you?

A. No. It really depends upon where the actual officers were situated at the time that the request is made.

Q. Did you have any sense whether it would take longer to go to the station or to wait for a device one...one longer than the other?

A. No. I...due to the fact that the officers had just recently logged on they would have been in the immediate area, after logging on. And I thought that it was likely the case that an officer was in the area and it would take longer for me to actually go back and...and get the device.

Q. What, if any, influence did the presence of the bus and the supervisors and the driver have on your decision? Did that factor in your decision to wait for a device or go to the station at all?

A. No, it didn't. No.

[13] On cross-examination, the officer gave a somewhat different response.

Q. So at the time when you're making this call and waiting for the machine to come in, you never gave any consideration to actually taking Mr. Clarke to the station; you were simply going to wait for the roadside screening device to arrive, correct?

A. That is correct, yeah.

At p.10:

> I guess the initial question was, would it have been quicker for me to actually take him back to the station and administer the test there. It never crossed my mind whether I was going to do that or not. I was quite comfortable with my decision at that time and still am.

[14] In any case, Constables Strickland and McNeil responded to the request for the SLII from Constable McCormack at 1923 hours and arrived on scene at 1926 hours.

[15] Constable McCormack left Mr. Clarke in his police vehicle and he approached the other officers, and they had a conversation and Constable McCormack gave them "a brief overview in regards to the incident."
p.19

> Q. How long did that take?
>
> A. It took approximately eight to ten minutes by the time I explained who was involved and, you know, what the outcome was and what my wishes were.
>
> Q. And what were your wishes at that stage?
>
> A. My wishes were for Constable Strickland and Constable McNeil to further interview any other witnesses that would have took place.

[16] He was asked why he spent the eight to ten minutes explaining the situation to the officers rather than taking the device and making the demand and test on Mr. Clarke who was being detained.

[17] His response was to the effect:

> A. Just because I wanted the officers to become involved in the incident as well to see if there were any further information that I missed in the short time that I interviewed the witnesses.
>
> At p.43:
>
> Later on cross-examination:
>
> Q. Just to clarify Constable McCormack, you indicated that you spoke with the officers you said in your evidence you wanted them to speak to the other witnesses or to take statements from the other witnesses.

A. Speak to the other witnesses, yes.

Q. Was that after you advised them of the results of the roadside screening device?

A. No. No they were speaking with them before the test was administered.

Q. Okay, and how do you know that?

A. Because I remember asking them to do so and I was the one dealing with Mr. Clarke in regards to the SLII demand.

Q. So you didn't see what the other officers were doing, did you?

A. Yeah, they were in my line of view. I was pointing towards the bus. They were speaking with witnesses at that time.

[18] Constable McCormack was recalled later by Crown counsel and was asked why did he have the other officers take the statements and not do it himself.

A. No, because the test has to be administered at the first possible time and due the fact that officers were on scene at that time they were able to...to take statements from the appropriate witnesses while I...while I took care of Mr. Clarke.

Q. Did it occur to you to take statements yourself after administering the device, the demand?

A. No it didn't.

[19] The implication would seem to be that Constable McCormack had taken the time to brief the other officers so they could continue the investigation allowing him to deal as expeditiously as possible with Mr. Clarke.

[20] When asked what the substance of the conversation was:

A. I briefed them. I then administered the roadside screening device on Mr. Clarke. I informed them of the fail and asked them to take the appropriate action with the witnesses.

At p.39:

Q. But they weren't going to question the witnesses, were they, unless there was a fail on the SLII...on the roadside screening device?

A. No I actually requested that they speak with the witnesses while I prepared the test....

[21] This is consistent with Constable Strickland's testimony that:

When we arrived I gave Constable McCormack the SLII screening device. He gave us a brief rundown on the situation and his reason for the device. He then introduced us to two possible witnesses which we spoke with while Constable McCormack spoke with the suspect.

[22] Constable Strickland estimated that the briefing took five minutes or less.

[23] Constable Strickland further stated:
At p.6:

Constable McCormack then came back and asked if we would obtain statements. The only reason we would obtain statements would be if the result was a failure....

Q. I'm sorry. Okay, Constable McCormack had done the roadside screening device test and got a result before he got you to take statements from Mr. McNeil [the bus driver]?

A. Yes. That's correct.

p.40

Q. Constable [McCormack], what did you think your duty was as far as obtaining the breath samples for the roadside screening device from Mr. Clarke once you had delivered him in the back of the car and ordered the device and as it had been delivered to you?

A. My duties, I felt at that time, were I answered the questions of the officers which I felt was important and then proceeded, after I spoke with the officers that arrived on the scene to take samples from Mr. Clarke. I was comfortable with my actions at that time.

[24] The court:

> Q. You don't think that you should have done it the other way around?
>
> A. I guess looking at it from this way in I can see the argument there possibly. It could have been done that way, yes. It may have been a better way to go about, but at that time I felt I was comfortable with my decision.

[25] Finally, under defence questioning of Constable McCormack:

> Q. So in that case there was really no reason to brief the other officers on what you...about the need to take statements from the bus driver and the supervisor until you had actually...had got a result from the roadside screening device, correct?
>
> A. Again they asked me questions in regards to the incident. I was informing and briefing them on the incident. I wasn't instructing them at that time to take statements.
>
> At p. 11 (January 12, 2004 Transcript):
>
> Q. But couldn't you have simply told them wait a sec fellows; I want to do the roadside screening device and get it done at the first possible time, then if I need your help...would depend upon what the result is. Could you have done that?
>
> A. Yes. That is one option, yeah.

[26] After briefing the other officers for up to ten minutes, Constable McCormack returned to his vehicle and asked Mr. Clarke to spit out his gum. He noted the smell of alcohol again and at 1936 hours, he demanded that Mr. Clarke comply with a roadside screening breath analysis. At 1938 hours, Mr. Clarke registered a fail.

[27] The wording of the demand is at p.23:

> I demand that you forthwith provide a sample of your breath suitable for analysis by an approved screening device and to accompany me to the rear portion of my police vehicle for the purpose of obtaining a sample of your breath. Should you refuse this demand you will be charged with the offence of refusal.

> Q. And what sort of sample did he provide?
>
> A. It came back as fail at that time. I then placed him under arrest for impaired driving and read rights and caution as well as the breath demand.

[28] Mr. Clarke was advised of his *Charter Rights*, including the right to counsel and other cautions for the first time at 1940 hours and he was given a demand to provide a sample of his breath for analysis to determine the concentration of alcohol, if any, in his blood at 1941 hours. Constable McCormack then informed the other officers as to which witnesses he wanted statements taken from.

[29] It took approximately two minutes to administer the roadside screening test. Ten minutes to brief the other officers beforehand and eight minutes to get to the police station. The officer having left the scene at 1950 hours and arrived at the West Division Police Station at 1958 hours. In Constable McCormack's opinion:

> Eight minutes is the approximately the standard time that it could take from the location of the incident to where the data master technician was at the West Station.

[30] Mr. Clarke was later provided access to legal counsel at the police station and complied with the demand for the breath test analysis.

[31] Exhibit one - a Certificate of a Qualified Technician - was tendered into evidence. At 2020 hours the test result was 150 milligrams of alcohol per 100 millilitres of blood, and at 2043 hours the second sample was a 140 milligrams of alcohol in a 100 millilitres of blood.

[32] Constable MacCormack was aware that a suspect for a roadside screening analysis need not be advised of his or her rights to seek and instruct counsel. He felt that right to counsel only occurred if the person under suspicion took the roadside screening test and produced a failed result. The officer in those circumstances would then have grounds to arrest the suspect and make a demand for a breath analysis in front of a qualified technician. At that point, the suspect would be transported for the purpose of taking the test and be advised of his or her rights to get advice from a qualified legal counsel.

[33] In the facts of this case the officer, it is clear, though only eight minutes away from a police station where access to legal counsel would be available, did not

consider whether it would be as expeditious to take the suspect to the police station as to wait for the roadside screening device at the scene of the investigation.

[34] It turns out fortuitously that the device did arrive within three minutes, but nonetheless, the officer did not turn his mind to the consideration of whether it would have been quicker to take the suspect to the police station rather than detain him without counsel at the scene.

[35] The officer requested a device be delivered. He specifically indicated that the presence of potential witnesses at the scene did not enter into his determination as to whether to stay or to go. Upon arrival of the roadside screening device, he did not immediately proceed with the test. While he articulated that the test should be administered immediately on the suspect, he instead briefed other officers for some ten minutes. He had already made up his mind before the arrival of the officers and the device that he had grounds to suspect that Mr. Clarke had earlier ingested alcohol. He did not have to investigate that aspect of the case any longer.

[36] In fairness, there seems to be some confusion between the questioning of witnesses and the taking of statements from witnesses. During the ten minute briefing by Constable MacCormack of officers Strickland and McNeil, it appears that Constable MacCormack wanted the others to speak to the witnesses on site as he gave the SLII Demand to Mr. Clarke. However, all the officers ultimately agreed that no statements would be taken unless and until Mr. Clarke had registered a failure on the roadside screening device. It turns out that the demand compliance and the result of the testing took far less time to complete than the time spent briefing other officers before the test. During all this time Mr. Clarke was being detained and had not been provided with any advice as to his rights, including the right to seek and instruct legal counsel.

[37] The Law:
Under s.254(2) of the *Criminal Code* it states in part:

> Where a peace officer reasonably suspects that a person who...has the care and control of a motor vehicle...whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

Section 10 of the *Charter of Rights and Freedoms* indicated:

Everyone has the right on arrest or detention:

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right....

Section 1 of the *Charter* further indicates:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[38] As noted in *R. v. Smith* [1994] N.S.J. No 485 at paragraph 19:

*The Supreme Court of Canada* held in R. v. Thomson (1988) 63 C.R. (3d) 1, that an ALERT demand which complies with s.254(2) of the *Criminal Code* is within the "reasonable limits prescribed by law" in s.1 of the *Charter*, and therefore constitutes an exception to the rights guaranteed by s.10(b) to retain and instruct counsel without delay and to be informed of that right.

[39] Additionally, the onus of proving a *Charter* violation or infringement lies on the party purporting the infringement; here, it is upon the defence. It is common ground that both the roadside screening results and the breathalyzer analysis results are not real evidence, but evidence emanating from and conscripted from an accused person.

*R. v. Collins* [1987] 1 S.C.R. 265 @ p.284

The use of self incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded.

[40] The Crown relies upon the *Nova Scotia Court of Appeal* decision in *R. v. Smith*, *supra* for the proposition that an accused person - who is the subject of an ALERT or roadside screening device demand - does not have the right to be advised of legal counsel prior to the demand being carried out, and cannot refuse the demand on account of not having an ability to seek and instruct legal counsel prior to being obligated to comply with that demand.

[41] The facts in *R. v. Smith* can briefly be stated as follows. A police officer stopped a motor vehicle containing a driver and one passenger. The officer noted signs of alcohol impairment emanating from the driver. He called for an ALERT machine and it arrived in five minutes. The officer did not forthwith demand the driver provide a sample of his breath because the vehicle's passenger was harassing the officer. Finally, eight minutes after the request for the ALERT device, the officer made a demand for the sample. Only after the driver complied with the roadside screening device demand did the officer advise the driver of his s.10(b) *Charter Rights*.

[42] As in the case at Bar, the officer in *Smith* acknowledged that it would possibly have been faster to take the driver to the police station than to wait for the ALERT machine to arrive at the scene.

[43] I quote at length from the head note of the decision:

> Both the ALERT and breathalyzer results were evidence that emanated from the accused after an infringement of his right to counsel. The *Charter* infringement related only to the preliminary screening stage. An ALERT test did not expose a suspect to the risk of prosecution. The delay in giving the ALERT demand resulted in a detention that gave rise to a violation of his section 10(b) rights but only with respect to a statutorily mandated investigative step that would not have enjoyed section 10(b) protection. The delay did not give rise in itself to grounds for refusing the demand. The demand itself was not improper and if the accused had the opportunity to retain counsel he would have been advised to take the test. Any factors which might have justified refusal of the ALERT test would have remained available after the accused actually had the opportunity to consult counsel. In all of the circumstances the accused's situation was not worsened, nor was his jeopardy increased, in any substantive way, by the failure to give him his Charter rights at the time of detention. Therefore, the admission of the test results did not render the trial unfair and did not bring the administration of justice into disrepute. To exclude this evidence, which related to public safety, in the absence of any apparent increase in

> jeopardy that resulted from a minor Charter infringement would bring the administration of justice into disrepute.

[44] In *R. v. Dewalt* (1994) 92 C.C.C. (3d) 160 Madame Justice Arbour - then of the *Ontario Court of Appeal* - concluded that a peace officer cannot delay the taking of a breath sample for the purposes of a roadside screening device and s.254(2) for a person of 15 minutes in order to obtain a reading, unless the officer is of the opinion in the particular circumstances that a breath sample taken immediately will not allow a proper analysis by the screening device.

[45] At p.165:

> Although the section merely requires that the sample be provided "forthwith" after the demand is made and does not require that the demand itself be made forthwith after the person is stopped, it is implicit that the demand must be made by a peace officer as soon as he or she forms a reasonable suspicion that the driver has alcohol in his or her body. This is the only interpretation which is consistent with the judicial acceptance of an infringement of the right to counsel provided for in s.10(b) of the Charter. If the police had discretion to wait before making the demand, the suspect would be detained and therefore, entitled to consult a lawyer.

She continues on:

> ...it follows, in my view, that the section to maintain its constitutional integrity, we must assume it also contemplates that there is no opportunity for the suspect to consult counsel before the demand is made.

[46] On appeal to the *Supreme Court of Canada* Justice Sopinka declared at (1996) 103 C.C.C. (3d) 382, also found [1996] 1 S.C.R. 68:

> We agree with Arbour, J.A. that the delay in demanding an A.L.E.R.T. test in this case was not in compliance with s.254(2) of the *Criminal Code* as interpreted in this court's decision in *R. v. Bernshaw* [1995] 95 C.C.C. (3d) 193.

[47] In *R. v. Dallago* [2001] O.J. No.5683 Mr. Justice Beaman of the *Ontario Court of Justice* excluded the results of a roadside screening device where there had been a 13 minute delay between the officer formulating a suspicion that the defendant was driving while his ability to do so was impaired by alcohol.

[48] Mr. Justice Beaman determined where there is a delay between the formulation of the suspicion and the demand being given:

> At para 23:
>
> The central concern is whether there is a justifiable reason for it and if so what are the circumstances surrounding it that are at issue, not where in the process the demand is made.
>
> Further at para 25:
>
> The court must examine how the events surrounding the police/driver interaction actively unfolded to determine whether then there has been any opportunity prior to the sample being taken for the defendant to consult counsel...

[49] In that case there was, as indicated, a 13 minute delay in making the demand from the time the officer suspected the defendant had been operating a motor vehicle while impaired by alcohol and the time the demand had been given. The officer did not contemplate giving the accused an opportunity to consult counsel during that time. It was also determined it would have been open to the officer to drive the defendant directly to a police station within five to ten minutes where he could have consulted counsel.

[50] His Lordship concluded:

> At para 30:
>
> I find that there was in fact a realistic opportunity for the applicant to consult counsel prior to the administering of the breath test. As the demand made was not "forthwith" the applicant's s.10(b) rights were not limited by s.254(2). This would mean that the breath demand fell outside of s.254(2) rendering it to be an invalid demand. The subsequent arrest based upon improperly obtained information, was also invalid. It follows that any evidence gathered thereafter was illegally obtained.

[51] The defendant also cites the case of *R. v. King* [2003] O.J. No. 2634 which dealt with a 16 minute delay between the formulation of a suspicion by a peace officer and the making of a demand. The Court held that a peace officer who stops a driver under provincial highway legislation will be afforded a reasonable opportunity to make a demand under s.254(2).

> Para 21:
>
> As long as the delay between the stopping and the demand is, in fact, required and is, in fact, used to advance the investigation leading to the officer being able to conclude whether a reasonable suspicion exists or not....
>
> The Crown must be able to demonstrate that each portion of the delay was reasonably required to advance the investigation of reasonable suspicion.
>
> Para 26:
>
> ...failure to establish this will be fatal to a successful prosecution for such offence...

[52] It is interesting to note that the *Nova Scotia Court of Appeal* in *Smith* considered Madame Justice Arbour's decision in *R. v. Pierman* and *R. v. Dewald* [1994] O.J. No.1821

> When considering a delay in making the demand to Mr. Smith at para 31the Court states:
>
> The onus of proving a Charter infringement is on the defence and Mr. Smith did not testify nor offer any evidence. However, the whole of the evidence must be considered, and it is obvious that he was detained without being informed of his right to counsel pursuant to s.10(b). Constable Bouchard said he was delayed in giving the ALERT demand and the Charter rights by the obstructous passenger but in my view that is not sufficient to justify the failure to inform a detained person of his right to counsel. It is not necessary to speculate as to what advice might have been given if Mr. Smith had exercised his right to counsel before submitting to the ALERT...

[53] The Court in *Smith* does not condone or stand for the proposition that in Nova Scotia a peace officer can delay in making a demand under s.254(2) of the *Criminal Code*. One must look at the circumstances of any delay on a case by case basis. Unaccountable or inexcusable delay in advising of s.10(b) rights can lead to a *Charter* breach consistent with the other cases cited.

[54] The Court in *Smith* obviously concluded that even in that rather convoluted situation even where the actions if not of the defendant, but misguidedly on behalf of the defendant, lead to a delay in making the demand, there was still a *Charter* infringement of s.10(b) rights.

[55] In the case at Bar, the investigating officer had very early into the situation determined that he suspected the defendant had been impaired by alcohol when the defendant had had care and control of a motor vehicle.

[56] The officer took the defendant to his police vehicle between 1920 and 1923 hours. He had formed the requisite suspicion and had detained the defendant and ordered a breath screening device to be delivered. He did not contemplate giving the defendant an opportunity to consult counsel. He never contemplated the alternative of taking the defendant to the police station rather than waiting for the machine to arrive. The presence of the other witnesses was not a consideration, he stated, for remaining at the scene. When the machine arrived at 1926 he acquired the same, but instead of making the demand on the accused, spoke to the other officers for up to ten minutes. The consultation with the other officers was not for the purpose of determining whether he had a suspicion of alcohol ingestion by the defendant, but rather to prepare the officers to take potential witness statements if, and only if, the defendant failed the roadside screening demand test. The officer agreed on the stand that he could have made the demand before instructing the other officers to examine the witnesses, and also indicated he knew that it was his duty to attend expeditiously to making the demand on the defendant.

[57] The demand was only made at 1936 hours. It might be argued that the officer could reasonably wait for the arrival of the machine at 1926 hours before making the demand. His further delay, however, was not for the purpose of determining whether he could suspect the defendant had been impaired by alcohol while in the care and control of a motor vehicle. He had already made that suspicion prior to 1923 hours. The officer indicated that he requested the defendant to expectorate his gum prior to taking the test in order not to interfere with the test, but did not purport that that was delaying the taking of the roadside screening test due to the presence of the gum in the defendant's mouth. He proceeded forthwith with the demand that the defendant comply with the test immediately thereafter.

[58] Accordingly, with respect, there was a sufficient delay caused in this case by the actions of the peace officer during which the defendant was detained and the defendant ought to have been accorded his rights under s.10(b) of the *Charter*.

[59] The defendant thus has met the burden of proving that his s.10(b) rights were violated in the obtaining of the result of the roadside screening test.

[60] Ought the result to be excluded from the evidence pursuant to s.24(2) of the *Charter of Rights and Freedoms*?

[61] If the result of the roadside screening test "fail" is excluded, it follows that the other admissible evidence the peace officer had before him at the time was not sufficient on an objective basis for him to form the reasonable and probable grounds to make a demand on the defendant under s.254(3) of the *Criminal Code*.

> Section 24(2) of the *Charter* states:
>
> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in proceedings would bring the administration of justice into disrepute.

[62] In *R. v. Bartle* [1994] 3 S.C.R. 173 Chief Justice Lamer, as he then was, stated:

> In my view, the Crown should bear the legal burden (the burden of persuasion) of establishing on the evidence, that s.24(2) applicant would not have acted any differently had his s.10(b) rights have been fully respected, and that as a consequence, the evidence would have been obtained irrespective of the s.10(b) breach.

[63] It is the conclusion of this Court that *R. v. Smith supra* leaves it open to a trial court to determine on a case by case basis whether the roadside screening results should be excluded under s.24(2).

[64] Here the officer never considered whether he ought to transport the defendant to the police station in order to provide him with the opportunity to seek legal counsel. He apparently determined that he could detain the defendant without benefit of counsel until a roadside screening device arrived. The officer did not consider it necessary to remain at the scene for a collateral investigative purpose such as to preserve the crime scene or secure the witnesses.

[65] While of the opinion he had to deal with the detained defendant expeditiously, he, the officer, decided to continue to deal with other officers rather than with the

defendant. He admitted that it would have been reasonable for him to have done the reverse. The officer made that decision outside of any other external pressure.

[66] The Crown may argue that the police officer acted in good faith. This Court adopts the reasoning of Mr. Justice Iacobucci for the majority in *R. v. Elshaw* [1991] 3 S.C.R. 24:

> ...the bad faith of the police may strengthen the case for exclusion because, as Lamer J. points out in Collins, supra, it may tend to show a "blatant disregard for the Charter". However, the good faith of police will not strengthen the case for admission to cure an unfair trail. The fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her right to fair criminal process.

[67] To underscore for the police authorities the necessity of allowing a detained person the ability to seek and instruct counsel upon detention, except in the most circumscribed of conditions, any conscripted evidence obtained from a detainee in violation of section 10(b) rights ought to be excluded.

[68] It is the opinion of this Court that a reasonable member of the public, fairly informed of the Law and circumstances, may conclude that to do otherwise could bring the administration of justice into disrepute. Chief Justice Lamer, as he then was, interpreted the word "would" in section 24(2) to be the word "could"in the case of *R. v. Collins supra*.

[69] While a roadside screening device has been termed a mere investigative tool, it is no different than peace officers conducting any other type of search for "real" evidence. If a search is conducted without authorization by common law or judicial authority, the results can be subject to *Charter* scrutiny and may be excluded. An even stronger case can be made for self-conscripted evidence emanating from a *Charter* violation.

[70] Accordingly, the roadside screening evidence result is excluded from evidence. Without that result the officer did not have sufficient admissible evidence to amount to reasonable and probable grounds to make a demand under section 254(3) of the *Criminal Code*.

[71] Nonetheless, the officer did obtain a data-master reading in excess of the legal allowable limit of 80 milligrams of alcohol in 100 millilitres of blood.

[72] In *R. v. Rilling* (1975) 24 C.C.C. (2d) 81 the *Supreme Court of Canada* decided that while a lack of reasonable and probable grounds may be a defence for a charge of refusal of a breath demand, the lack of reasonable and probable grounds did not render inadmissible the breath results from a person who complied with the demand.

[73] In *R. v. Bernshaw* [1995] 1 S.C.R. 254 Cory J. on behalf of the *Supreme Court of Canada* held that while *Rilling* was still good law and that lack of reasonable and probable grounds did not automatically result in the exclusion of breath test results, the decision must be viewed in light of the proclamation of the *Charter of Rights and Freedoms*.

[74] At paragraph 41 he states:

> In my view, the Court of Appeal erred in taking this position. Certainly the Charter is relevant. An accused may be able to establish on the balance of probabilities that the taking of breath samples infringed his Charter rights. For example, it might be contended that the requisite reasonable and probable grounds for making the breathalyzer demand were absent, and that, in the circumstances, the admission of those breathalyzer results would bring the administration of justice into disrepute. In those circumstances, the breathalyzer evidence might well not be accepted. Yet, where an accused complies with the breathalyzer demand, the Crown need not prove as part of its case that it had reasonable and probable grounds to make that demand. Rather, I think, the onus rests upon the accused to establish on the balance of probabilities that there has been a Charter breach and that, under s.24(2), the evidence should be excluded. There should not be an automatic exclusion of the breathalyzer test results.

> At paragraph 42:

> Several provincial appellate courts have taken the position that the Rilling case is still applicable in appropriate circumstances. That is to say where breath samples are obtained without reasonable and probable grounds for the demand, the evidence should only be excluded upon an application by the accused to exclude it pursuant to s.24(2) of the Charter. See R. v. McNulty (1991), 35 M.V.R. (2d) 27 (Ont. C.A.);

R. v. Linttell (1991), 64 C.C.C. (3d) 507 (Alta. C.A.); R. v. Dwernychuk (1992), 77 C.C.C. (3d) 385 (Alta. C.A.), leave to appeal refused, [1993] S.C.C.A. No. 30, [1993] 2 S.C.R. vii; R. V. Marshall (1989), 91 N.S.R. (2d) 211 (C.A.); R. v. Langdon (1992), 74 C.C.C. (3d) 570 (Nfld. C.A.); R. v. Leneal (1990), 68 Man. R. (2d) 127 (C.A.). This, I think, is the approach that should be adopted.

[75] In this case the Defence has established on a balance of probabilities that there has been a breach of his *Charter Rights* under s.10(b). To admit the breath data-master results into evidence would render the trial unfair and under the provisions of s.24(2) of the *Charter*, that evidence is excluded.

Order accordingly,

Michael B. Sherar
Judge of the Provincial Court