

In the Provincial Court of Alberta

Citation: R. v. Angell, 2005 ABPC 287

Date: 20051213
Docket: 040372310P101001;002
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Nelson Angell

Decision of the Honourable Judge M.G. Allen

[1] The applicant alleged that the investigating officer infringed his *s. 8* and *s. Charter 10(b)* rights. Let me summarize in bullet form the submissions of the applicant, as I understand them.

- When the officer arrived at the applicant's house the officer ought to have accorded the applicant his *s. 10(b) Charter* rights. Until the police complied with their duties under *s. 10(b)*, any statements made by the applicant to the officer were an infringement of the applicant's *s. 10(b) Charter* rights. These statements could not be used by the officer as a basis for reasonable and probable grounds for a demand made pursuant to *s. 254(3)* of the *Criminal Code*.
- The officer did not have reasonable and probable grounds to make a proper demand pursuant to *s. 254(3)* of the *Criminal Code*. Specifically the applicant alleged that the officer did not have reasonable and probable grounds that the applicant was the operator of a motor vehicle; nor did the officer have reasonable and probable grounds that the operator had committed an offence under *s. 253* of the *Criminal Code* as the result of the consumption of alcohol; nor did the officer have reasonable and probable grounds of the operation of a motor vehicle within the three hours preceding the demand. Accordingly, the seizures of breath samples were unreasonable seizures and an infringement of the applicant's *s. 8 Charter* rights.

- The officer did not demand for breath samples from the applicant “forthwith or as soon as practicable” as required by *s. 254(3)* of the *Criminal Code*. Since the officer did not make his demand in compliance with that *Code* section the seizure of the applicant’s breath was an unreasonable seizure and an infringement of *s. 8* of the *Charter*.
- The admission of breath samples provided by the applicant to the breath technician would bring the administration of justice into disrepute; hence, this evidence ought to be excluded pursuant to *s. 24(2)* of the *Charter*.

[2] Hereafter, any references to a section number without the mention of a statute mean *Criminal Code* sections.

Summary of Relevant Evidence

[3] Let me briefly summarize the relevant evidence led in the *Charter voir dire*.

[4] On March 20, 2004, the applicant’s vehicle, which was driving fairly fast, collided with the rear of a vehicle operated by Ms. Morrison, whose vehicle was then propelled into the rear of a vehicle operated by Ms. Jones. Both of the vehicles operated by the women were stopped at a red light at the intersection of 97 st. and 127 ave. The damage to the applicant’s vehicle was slight; the other vehicles received minor damages to their bumpers.

[5] Ms. Morrison testified that the collision occurred at approximately 6:20 p.m. Ms. Morrison asked the applicant for his driving documents; he produced them without difficulty. Ms. Jones also approached the applicant; she saw the applicant briefly and formed the opinion he was impaired by alcohol. Ms. Jones informed Ms. Morrison of her suspicions, telephoned the police and asked Ms. Morrison to inform the applicant that the police had been alerted. Ms. Morrison then noted signs of impairment from the applicant: slurred his words, glossy eyes, and a pretty strong smell of alcohol was coming from the applicant’s vehicle. When Ms. Morrison questioned the applicant he did not respond to simple questions or repeatedly told her he was a good man. She spoke to the police and gave them a description of the applicant.

[6] Ms. Jones estimated the time of the collision was 5:30 p.m. Ms. Jones only spoke to the applicant for a few seconds. She knew the applicant was impaired because she smelled a strong odour of alcohol coming from the applicant’s vehicle, his eyes were bloodshot, and he was incoherent or slurring his words. Moreover, the applicant did not get out of his vehicle to determine if anyone else was hurt. Ms. Jones used her cellular telephone to call the police dispatcher. She told the dispatcher of her concern; the dispatcher instructed her to inform the applicant not to leave the scene, and to get the applicant’s vehicle license number. She went to the back of the applicant’s vehicle and conveyed this to the dispatcher. She told the applicant to stay at the scene; he said he would.

[7] As Ms. Jones was at the rear of the applicant's vehicle, he backed his vehicle, then edged his vehicle into traffic without looking or using signal lights; the applicant's vehicle moved in a jerky but slow fashion; an approaching van stopped abruptly to avoid a collision. The applicant then stopped and awaited the change in the red signal light and drove away. The police arrived some fifteen minutes after the collision; Ms. Jones told them what happened.

[8] Neither witness knew the applicant.

[9] Cst. Bryan Niehaus responded to the collision scene for a brief time. He received the license number of the person who left the scene, a description of the man, and a description of the direction of travel of the vehicle. He also received information that the person had been involved in a motor vehicle collision, witnesses noted signs of impairment, and he fled the scene. The information came from another officer who spoke to witnesses at the collision scene, or from the dispatcher. He queried his computer relating to the license number and received an address. The officer arrived at 6:05 p.m.; he saw a vehicle with a matching license plate number in the driveway. Thereafter, he knocked on the door of the residence; the applicant answered the door; the applicant matched the description of the driver who left the scene. The officer asked the applicant if he had been involved in a collision at 127 st. and 97 ave. He responded he was. The officer made no notes of this conversation in his notebook nor in his police report. He testified that the applicant had red flushed skin, bloodshot eyes, and his speech was slurred or mumbled. Then the officer asked the applicant for identification. The applicant walked unsteadily towards the kitchen. The applicant produced his driver's license but did not produce other documents; apparently, those were left at the collision scene. Cst. Niehaus formed the opinion that the applicant's ability to operate a motor vehicle was impaired by alcohol. The applicant was placed under arrest in the residence and was asked by the officer to accompany him to his police vehicle. The officer estimated that the arrest occurred at 6:10 p.m. At 6:16 p.m., when the applicant was seated in the police vehicle, the officer once more told the applicant he was under arrest. The officer read him a *Charter* warning relating to counsel. The applicant responded that he wished to contact counsel. Then the officer informed him that he had the right to remain silent; the applicant responded he did not wish to make any statements. Despite the applicant's request to contact a lawyer, the constable questioned him further between 6:19 p.m. - 6:22 p.m. The notes of this conversation were recorded verbatim in the officer's notebook. The conversation was:

“Q. You were driving your vehicle?

A. Yes, yes, I was.

Q. Were you involved in a motor vehicle collision at 127 street and 97 street? (verbatim)

A. Yes, I did, I will agree to that.”

[10] The officer conceded that these quotes were virtually identical to the earlier questions posed by the officer to the applicant when he answered the door. However, Cst. Niehaus testified it was not possible that there were two conversations at the police vehicle. At 6:22 p.m. the

officer transported the applicant to the police station; they arrived at 6:31 p.m. At 6:36 p.m. the officer read a demand pursuant to *s. 254(3)*; the applicant indicated he would comply. The officer conceded that it was an oversight on his part that he did not read the applicant the demand until that point. At 6:38 p.m. the officer read the applicant a waiver of his right to counsel; the applicant told the officer he waived his rights. The applicant was placed in cells. At 6:54 p.m. a second demand was made for breath samples. The applicant was brought into a room where there was an intoxilyzer 5000 C. Cst. Niehaus was a qualified technician and the applicant provided breath samples to him.

[11] Cst. Niehaus agreed that the applicant was polite and co-operative throughout, that he could understand the questions posed to him, and his responses to any questions were appropriate.

Section 10(b)

[12] *Section 10(b)* of the *Charter* provides:

“Everyone has the right on arrest or detention

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

Detention

[13] Mr. Prithipaul, as is his custom, phrased his argument related to *s. 10(b)* carefully. He conceded that Cst. Niehaus had the right to respond to the applicant’s residence based upon the information provided to him. He submitted that the officer was under an obligation to provide the applicant with his *s. 10(b)* *Charter* rights when the applicant answered the door.

[14] The rights accorded an individual pursuant to *s. 10(b)* are procedural rights arising “on detention or arrest.” The duties imposed upon the police do not arise until the point of detention or arrest.

[15] In the case at bar, the officer testified that the applicant had a short conversation with him at the door of his house and admitted he was involved in motor vehicle collision at 97 st. and 127 ave. After he observed the applicant retrieve his driver’s license the officer placed him under arrest at approximately 6:10 p.m. The applicant submitted to the arrest and accompanied the officer to his vehicle. An arrest occurs when the police actually seize or touch someone; alternatively, an announcement of arrest accompanied by a submission constitutes an arrest: *R. v. Whitfield*, [1970] 1 C.C.C. 129 (S.C.C.) at p. 130.

[16] The police duties could arise upon detention. Was the applicant detained prior to his arrest? In *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.) (*Therens*) Le Dain J. explained that the meaning of “detention” as the term is used under *s. 10(b)* is reached by exploring the purpose of that section. At pp. 503-4 he wrote:

“In determining the meaning that should be given to the word "detention" in s. 10 of the Charter it is necessary to consider the purpose of the section. This is the approach to the interpretation and application of the Charter that was affirmed by this Court in *Hunter v. Southam Inc.*, supra, in which Dickson J. (as he then was) said at p. 106 C.C.C., pp. 650-1 D.L.R., p. 157 S.C.R.:

Since the proper approach to the interpretation of the Canadian Charter of Rights and Freedoms is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing the search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

The purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 -- arrest and detention -- are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct, counsel. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

In addition to the case of deprivation of liberty by physical constraint, there is, in my opinion, a detention within s. 10 of the Charter when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.”

[17] In obiter dicta *Le Dain* acknowledged that there was a third type of detention which resulted from psychological constraint occurring where persons find themselves in situations where they do not believe themselves to have a choice to comply with police demands. At p. 505 he wrote:

“Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the

reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.”

[18] Hence three types of detention were recognized in *Therens*: (1) physical constraint by the authorities; (2) assumption of control over the movement by demand or direction by the authorities which may have significant legal consequences and prevents or impedes access to counsel; and (3) psychological compulsion by the authorities which causes the detainee to submit or acquiesce in the deprivation of liberty where the detainee reasonably believes that the choice to do otherwise does not exist.

[19] In *Therens* the Court found that a demand by an officer to comply with a breath sample was a legal compulsion, i.e., that a refusal to comply could give rise to a *Criminal Code* offence.

[20] In *R. v. Moran* (1986), 36 C.C.C. (3d) 225 (Ont. C.A.) the accused accompanied the police to the police station where he was interviewed. At pp. 258-9 Martin J.A. set factors relevant to determining detention in circumstances where an accused was brought to a police station:

“1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home; 2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request; 3. whether the accused left at the conclusion of the interview or whether he or she was arrested; 4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused; 5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated; 6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt; 7. the subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be

considered in determining whether he had a subjective belief that he was detained.”

[21] In *R. v. Nolan* (1987), 34 C.C.C. 289 (S.C.C.) at p. 300 Chief Justice Dickson recognized that there is a strong element of psychological compulsion when an individual is confronted with a demand by a peace officer, quoting with approval the comments of Le Dain J. from *Thereens*.

[22] In *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411 (S.C.C.)(*Thomsen*) Le Dain J. restated his analysis in *Thereens* in point form at pp. 417-8:

“I venture to restate what I perceive to be the essentials of those reasons, as they appear in my judgment in *Thereens*, as follows:

1. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

2. In addition to the case of deprivation of liberty by physical constraint, there is a detention within s. 10 of the Charter, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.

4. Section 10 of the Charter applies to a great variety of detentions of varying duration and is not confined to those of such duration as to make the effective use of habeas corpus possible.”

[23] In *Thomsen* the Court recognized that a demand for an approved screening device resulted in the detention of the accused which gives rise to right to counsel. Nevertheless, the suspension of the accused’s s. 10(b) Charter rights was justified by s. 1 of the Charter for the short period of time required for the accused to provide for an approved screening sample.

[24] The Courts have recognized that not every interaction between an individual and a police officer gives rise to an individual being detained.

[25] In *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.) Krever J.A. observed:

“The Charter does not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact may be.”

[26] Likewise, in *R. v. Simmons* (1988), 45 C.C.C. (3d) 296 (S.C.C.) Dickson C.J.C. observed at p. 315:

“I am not persuaded by the argument made before us by the Crown that if a strip search is considered a detention, all travellers passing through customs must be seen to be detained and therefore, to have a right to counsel. In *Therens*, supra, Justice Le Dain stated that not all communication with police officers and other state authorities will amount to detention within the meaning of s. 10(b) of the Charter. This statement is equally valid with respect to the customs situation. I have little doubt that routine questioning by customs officials at the border or routine luggage searches conducted on a random basis do not constitute detention for the purposes of s. 10. There is no doubt, however, that when a person is taken out of the normal course and forced to submit to a strip search, that person is detained within the meaning of s. 10.”

[27] *R. v. Schmautz* (1990), 53 C.C.C. (3d) 556 (S.C.C.) (*Schmautz*) the police were investigating a hit-and-run collision where yellow paint was left on the damaged bronze vehicle. The police received information and went to the accused’s residence which was near the collision scene. They checked his yellow vehicle and found recent damage and bronze paint on it. The officers knocked on the door of the residence; the accused answered; the police immediately gave the accused a s. 10(b) Charter warning. Later they read a demand for breath samples. The officers did not reiterate his Charter rights at that time. Gonthier J. held that when the officers attended at his house he was not detained (it should be noted that was conceded by counsel): see p. 568. However, Gonthier J. found that after the breath demand the accused was detained because he was subject to a statutory compulsion to comply. Gonthier J. held that if the warning is closely factually connected to the detention, this is sufficient compliance with s. 10(b): see pp. 574-5.

[28] In *United States of America v. Alfaro* 75 C.C.C. (3d) 211 (Que. C.A.) LeBel J.A., writing in dissent, summarized the jurisprudence related to detention accurately and at length. At p. 237 he observed:

“It will be acknowledged that the mere fact that conversations took place between some police officers and an individual does not in itself constitute a detention (*R. v. Grafe* (1987), 36 C.C.C. (3d) 267 at p. 274, 60 C.R. (3d) 242 (Ont. C.A.)): “The Charter does not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact may be.”

Nor is it necessarily a detention when a police officer who suspects someone of committing a crime, without having sufficient grounds to detain that person, goes and meets him at his residence: *R. v. Esposito* (1985), 24 C.C.C. (3d) 88, 49 C.R.

(3d) 193, 20 C.R.R. 102 (Ont. C.A.). Merely agreeing to accompany police officers to the police station does not imply a detention: *R. v. Boutin* (1989), 49 C.C.C. (3d) 46, [1989] R.L. 216, 7 W.C.B. (2d) 234 (Que. C.A.); *R. v. Smith* (1986), 25 C.C.C. (3d) 361, 26 D.L.R. (4th) 666, 49 C.R. (3d) 210 (Man. C.A.). And this is so even where the police officers harboured some suspicions in regard to that person: *R. v. Bazinet* (1986), 25 C.C.C. (3d) 273, 51 C.R. (3d) 139, 54 O.R. (2d) 129 (Ont. C.A.); *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.), and *R. v. Thompson* (1989), 52 C.C.C. (3d) 569, 36 O.A.C. 225 (Ont. C.A.).”

[29] In *R. v. Ellerman*, [2000] 6 W.W.R. 704 (Alta. C.A.) the accused was detained in a police car after being stopped for a traffic incident. Fruman J.A. held that it was permissible to ask a detained driver about alcohol consumption without providing him with the right to counsel. This was part of the preliminary screening procedures related to impairment justified by s. 1 of the *Charter*.

[30] In *R. v. Mann* (2004), 185 C.C.C. (3d) 308 (S.C.C.) the Supreme Court dealt with an individual who was detained for investigative purposes by police officers. Iacobucci J., writing for the Court, dealt with detention at para. 19:

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so."

[31] At para. 22, Iacobucci J. specifically declined to deal with the need to provide s. 10(b) *Charter* rights where an individual is detained for investigative purposes. He inferred a s. 10(b) right may be required where an individual is detained for a lengthy period:

“Section 10(b) of the Charter raises more difficult issues. It enshrines the right of detainees "to retain and instruct counsel without delay and to be informed of that right". Like every other provision of the Charter, s. 10(b) must be purposively interpreted. Mandatory compliance with its requirements cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration. Other aspects of s. 10(b), as they arise in the context of investigative detentions, will in my view be left to another day. They should not be considered and settled without the benefit of full consideration in the lower courts, which we do not have in this case.”

[32] Mr. Prithipaul submitted that the applicant's *s. 10(b) Charter* rights were triggered at his residence earlier than they might have been in the typical drinking and driving investigation where the detainee is encountered on the roadside. As a basis for this position Mr. Prithipaul relied upon *R. v. Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.)(*Feeney*). Certainly, in *Feeney*, Sopinka J. ruled that the police violated the accused's *s. 10(b) Charter* rights when they did not inform him of his *s. 10(b)* rights or give him an opportunity to exercise them within his trailer. However, it must be remembered that Sopinka J. found that Feeney was detained when the police shook Mr. Feeney awake and ordered him to rise: see paras. 55-59. *Feeney* does not stand for the proposition that a person questioned within his residence by a police officer is detained; rather, the case stands for the proposition if the police detain an individual within his residence they have duties under *s. 10(b)* they must fulfill.

[33] In my view, the applicant was not detained by the police officer when he arrived at the residence door and spoke to him. The detention occurred at the same time the arrest occurred. He was not kept at the side of the road or in a police vehicle and required by law to give a breath sample for approved screening device purposes. The applicant was asked to respond to a few questions of a screening nature related to his possible involvement in a motor vehicle collision. He was free to move about his residence. There was no evidence that he requested access to counsel nor that an inference could be drawn that he was denied access to counsel. The officer did not assume control over him by demand or direction. Nor was there any evidence that he was required to submit or acquiesce to the deprivation of his liberty. The presence of the officer at the applicant's door may not have been his desire, but that does not mean he was detained at that time for the purposes of *s. 10(b)* of the *Charter*. This type of interaction between the police and the applicant did not support an inference that he was detained. The law does not support the position that a contact of any kind between a police officer and an individual is a detention. There was no significant psychological or physical restraint of the applicant at the doorway. In my view the contact between the applicant and the officer was similar to the contact in *Schmautz* where the Supreme Court held that the applicant was not detained.

[34] Since the applicant was not detained at the door when he spoke to the officer then the police had no imposed duties pursuant to *s. 10(b)* of the *Charter*.

Proof of the Statement

[35] During the *Charter voir dire* Cst. Niehaus was rigorously cross-examined as to whether the applicant made any admissions at the door of his residence. The officer acknowledged that he made no notes of that conversation and he questioned the applicant in an identical manner in the police vehicle and received later in his police vehicle. The officer clearly and forcefully asserted that he remembered that conversation because it was important to his investigation. Mr. Prithipaul asserted that the officer's testimony was not reliable on this point. He pointed out that the officer seemed inexperienced. For instance, the officer was a qualified breath technician but he had difficulty responding to questions concerning the significance of an air blank, and other procedural matters concerning his duties as a breath technician.

[36] Mr. Prithipaul made the following written submission:

“In the instant case, the obligation is on the Crown to establish the chronology according to which Constable Niehaus formed the requisite belief: a reasonably-held opinion that the accused’s ability to drive was impaired or his blood alcohol level exceeded the permitted limit, and that the accused had either driven or had the care or control of a motor vehicle within the preceding three hours. This Honourable Court must be satisfied beyond a reasonable doubt that the accused made his admission of driving before Constable Niehaus arrested him in his residence, or regardless of whether he was under arrest, before he was detained. Unless the Crown can satisfy the Court that the accused’s admission was properly receivable, then it ought not to be considered as probative of reasonable and probable ground.”

[37] The position taken by the applicant raises an issue related to the onus of proof, if any, on the Crown to prove that the applicant made the statement.

[38] Obviously, proof beyond a reasonable doubt is a higher standard than proof based upon a balance of probabilities. The Crown must meet the former standard where they are attempting to prove an element of an offence; proof of an element on the balance of probabilities would not suffice: *R. v. Lifchus* (1997), 118 C.C.C. 1 (S.C.C.). At common law, the Crown must prove that the accused made a confession, or admission to the police freely and voluntarily beyond a reasonable doubt prior to its admission. Generally, this more rigorous standard does not apply to *Charter* issues. In most circumstances the applicant must prove that his or her *Charter* rights have been infringed on the balance of probabilities. This would include his or her rights pursuant to *s. 10(b)*. Although the applicant bears the ultimate burden, as a practical matter the evidentiary burden may shift to the Crown in certain circumstances. *Section 10(b)* imposes certain duties upon the police. Because of the imposition of these duties, where an issue arises as to the compliance of the police with their duties, the onus shifts to the Crown to prove that compliance to avoid a finding of *s. 10(b)* breach: *R. v. Luong* (2000), 149 C.C.C. (3d) 571 (Alta. C.A.) per Berger J.A. at para. 12. In *Charter* applications where the Crown bears an onus the standard is on the balance of probabilities: *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.) per Lamer J. at p. 14.

[39] In *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.)(*Oickle*) Iacobucci J., writing for the majority, explained that procedural differences existed between *Charter* rights and the common law rules related to confessions. At paras. 29-31 he wrote:

“In *Hebert*, supra, McLachlin J. interpreted the right to silence in light of existing common law protections, such as the confessions rule. However, given the focus of that decision on defining constitutional rights, it did not decide the inverse question: namely, the scope of the common law rules in light of the *Charter*. One possible view is that the *Charter* subsumes the common law rules.

But I do not believe that this view is correct, for several reasons. First, the confessions rule has a broader scope than the Charter. For example, the protections of s. 10 only apply "on arrest or detention". By contrast, the confessions rule applies whenever a person in authority questions a suspect. Second, the Charter applies a different burden and standard of proof from that under the confessions rule. Under the former, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the latter, the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary. Finally, the remedies are different. The Charter excludes evidence obtained in violation of its provisions under s. 24(2) only if admitting the evidence would bring the administration of justice into disrepute: see *R. v. Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193, *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, and the related jurisprudence. By contrast, a violation of the confessions rule always warrants exclusion.

These various differences illustrate that the Charter is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the Charter. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the Charter. While obviously it may be appropriate, as in *Hebert*, *supra*, to interpret one in light of the other, it would be a mistake to assume one subsumes the other entirely.”

[40] *Oickle* was silent whether the Crown need prove that the statement was made during the *voir dire* process. Earlier jurisprudence dealt with this issue.

[41] In *R. v. Gauthier* (1976), 27 C.C.C. (2d) 14 (S.C.C.) Pigeon J., wrote at p. 20:

“It should first be noted that the Court of Appeal correctly held that, on the *voir dire*, the trial Judge did not have to decide whether the statement that the prosecution sought to introduce in evidence had actually been made, and whether it was true. In a trial by jury, it is for the jury to answer such questions. Consequently, the Judge who hears the evidence on the *voir dire* gives a final ruling only on the admissibility of the statement in question: *R. v. Mulligan* (1955), 111 C.C.C. 173, [1955] O.R. 240, 20 C.R. 269 (Ontario Court of Appeal). When there is no jury and the same Judge has to rule on both the admissibility of the evidence and its probative value, he must necessarily withhold his conclusion on the second point until the end of the trial. In fact, with regard to the question as to whether the statement was actually made and whether it is true, the Judge presiding over a *voir dire* in a trial by jury is required to decide only whether there is evidence to be submitted to the jury; it is not for him to weigh such evidence.

There is no provision authorizing a Judge sitting alone to do otherwise or to make a final ruling on these questions before hearing the entire case.”

[42] He added at p. 21:

“Of course, the result will be that he [a trial judge sitting alone] will also have to decide at the end of the trial whether the confession was actually made, after previously deciding it was admissible in evidence.”

[43] In subsequent decisions the Supreme Court has adopted and approved this same approach: *Erven v. The Queen* (1978), 6 C.R. (3d) 97 (S.C.C.) at p. 103; *R. v. MacKenzie* (1993), 78 C.C.C. (3d) 193 (S.C.C.) at pp. 216-217. So too has the Alberta Court of Appeal: *R. v. Reburn* (1980), 55 C.C.C. (3d) 419 (Alta. C.A.) [leave to appeal refused 37 A.R. 179 (S.C.C.)].

[44] In my view the nature of the onus and the party who is faced with the onus is dependent upon the issue to be determined and the stage of the proceedings. This onus may shift from one party to the other. In the *Charter voir dire*, the applicant had the onus of proving that the applicant was detained or arrested on the balance of probabilities. Once arrest or detention has been proved, the onus shifts to the Crown to prove that the police complied with their duties pursuant to *s. 10(b)* on the balance of probabilities. In the *Charter voir dire* all evidence related to the issue is explored including any conversation between the authorities and the applicant.

[45] In the case at bar the applicant suggested that the Crown must prove that the statement was made beyond a reasonable doubt in the *Charter voir dire*. The jurisprudence does not support that view. Certainly, the Crown has an obligation to prove the voluntariness of a statement beyond a reasonable doubt during a *voir dire* prior to the admission of a statement. However, the Crown is not obligated to prove the making of the statement during the *voir dire*; rather, the Crown need only prove there is some evidence of the making of the statement prior to admission in evidence. The onus on the parties in a *Charter voir dire* is generally on the balance of probabilities, a lesser standard than required for voluntariness of confessions. It would be inconsistent to make the Crown prove the actual making of the statement beyond a reasonable doubt for a *Charter voir dire*. In my view, in most instances in a *Charter voir dire* it is only necessary for the Crown that there is some evidence that the statement was made by the applicant. This is certainly the standard to be applied where the issues in the *voir dire* were determining the point where the applicant was detained or arrested and the police duties attendant thereupon. The onus upon the Crown may become greater thereafter. For instance, if the Crown wishes to use the statement in the trial itself, and making of the statement is in issue, it must prove that the statement was made beyond a reasonable doubt. In this instance, the Crown wishes to use the admission of the applicant as a basis for the police officer's reasonable and probable grounds. As will be explained later reasonable and probable grounds must be demonstrated on an objective basis. Hence, the standard that must be met by the Crown to allow the trial judge to use the statement as a basis for the officer's grounds is one of objective reasonable probability.

[46] If I am in error in this view I wish to make it clear that I am convinced beyond a reasonable doubt that the statement was made. I found the officer answered all the questions to the best of his ability and was candid about what he remembered. For instance he admitted that he forgot to make a demand at the residence. The officer demonstrated an inability to respond to some questions related to the operation of the approved instrument. Doubtless, this may affect his value as an expert; however, it does not support a view that his memory is unreliable. Certainly, the admission at the door is virtually identical to the admission the officer received from the applicant in the police car. The repetition of this important information is understandable. The officer felt it was important to him that he arrest the culprit who left the collision scene. The officer clearly remembered the admission made at the door of the residence, and was unshaken despite vigorous cross-examination. I find that his memory on that point was reliable. Hence, I have no hesitation in finding that the applicant made those admissions at the door of the residence beyond a reasonable doubt.

The Police *S. 10(b)* Charter Duties

[47] The police do have duties pursuant to *s. 10(b)* upon arrest or detention.

[48] These duties were summarized by Chief Justice Lamer in *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.)(*Bartle*) at p. 301:

“(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

The first duty is an *informational* one which is directly in issue here. The second and third duties are more in the nature of *implementation* duties and not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel.” [Italics in the original.]

[49] In my view the applicant was clearly arrested and detained in his residence. Thus, the police were required to provide him with *10(b)* Charter rights and to do so without delay. The officer did inform the applicant of his Charter rights a short time after his arrest within the residence. Upon being informed of the right to counsel the applicant clearly indicated his desire to have counsel. Despite this, the officer continued questioning the applicant, thus, the officer failed in his duty to refrain from eliciting evidence from the detainee, infringing the third duty as described in *Bartle*. Admissions from an accused person are clearly conscriptive evidence, the admission of which would affect the fairness of the trial. As such, the admissions should not be

used for any purpose, including use to support the objective reasonable grounds required for a *s. 254(3)* demand.

Reasonable and Probable Grounds

[50] In *R. v. Catling*, [2001] 8 W.W.R. 716 (Alta. Prov. Ct.) (*Catling*) I explored issues related to *s. 8* where the Crown is relying upon a *s. 254(3)* demand. As I will explain below my reasoning in *Catling* applies to the case at bar and disposes of the issues presented.

[51] I will reiterate, in summary form, the meaning of my decision in *Catling* and its application to reasonable and probable grounds. Taking a breath sample from an individual is a seizure. *Section 8* of the *Charter* guarantees everyone security against unreasonable seizures. Seizures from individuals without a prior judicial authorization is a warrantless seizure; warrantless seizures are *prima facie* unreasonable and an infringement of *s. 8* of the *Charter*. Where the seizure is made without judicial authorization or warrantless the onus is upon the Crown to prove on the balance of probabilities that the seizure was reasonable. A seizure will be reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the seizure was carried out was reasonable. In many impaired operation and related prosecutions the Crown relies upon a demand made by a peace officer pursuant to *s. 254(3)* to justify the compulsion of the accused to provide breath samples. In *Catling* and in the case at bar the applicant made no submissions that the law was unreasonable; rather, the applicant based their submissions upon the manner that the breath samples were obtained. The Crown must prove that the seizure was obtained in a reasonable manner. To prove this the Crown must prove compliance with the prerequisites set out in *s. 254(3)*. *Section 254(3)* requires that the demanding officer “believe on reasonable and probable grounds that a person is committing or at any time within the proceeding three hours has committed, as a result of the consumption of alcohol, an offence under *s. 253*.”

[52] It is extreme importance to understand that the term reasonable and probable grounds imports a subjective and objective component. The officer must honestly believe he or she has reasonable and probable grounds and the reasonable basis for these grounds must be objectively demonstrated. However, reasonable and probable grounds do mean the officer must have a *prima facie* case or constitute proof beyond a reasonable doubt: *R. v. Storrey* (1991), 53 C.C.C. (3d) 319 (S.C.C.) per Cory J. at pp. 324-324; *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 193 (S.C.C.) per Sopinka J. at para. 48.

[53] I reviewed the jurisprudential meaning of the terms “reasonable and probable grounds” in another reported decision: *R. v. Cuthbertson*, [2004] 8 W.W.R. 162 (Alta. Prov. Ct.) (*Cuthbertson*). At paras. 45-46 I wrote:

“The existence of reasonable and probable grounds entail a subjective and objective component. The officer must subjectively believe that the grounds exist; moreover, these objective grounds must exist.

The grounds must be examined from the viewpoint of the knowledge of the peace officer at the time the demand was made. Subsequent actions are of no consequence, nor are the observations of others. The Court examining the reasonable and probable grounds must focus upon the knowledge and understanding of the peace officer who made the demand. That officer's understanding may be based upon hearsay and even a misperception of the actual evidence. The Court does not look over the shoulder of the officer to see whether or not the circumstances understood by the officer are true. The Court must weigh the circumstances as understood by the officer to determine their reasonableness and probability. It is an error in law to test individual pieces of evidence; rather, the evidence as a whole must be considered in determining whether the facts support a standard of objective reasonableness. Clearly, the determination is dependent upon the understanding of the officer in the individual circumstances under litigation. Reference to other reported cases is helpful in understanding what may constitute reasonable and probable grounds."

[54] While the police can rely upon third party information conveyed to them, in some circumstances, the officers may need other evidence so that they have sufficient grounds to meet the test of objective reasonableness. The jurisprudence provides examples where this is necessary: *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.)(*Debot*); *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.)(*Golub*).

[55] In *Debot*, the accused was charged with possession of methamphetamine for the purpose of trafficking. A police officer received information from a confidential informant, who the police officer considered reliable, that the accused and two other persons were completing a drug transaction of four ounces of speed at the residence of one of the suspects with a named supplier. The informant claimed that he had learned of this from a conversation with one of the co-accused. The police officer contacted the head of the local detachment who ordered that all three be put under surveillance. During the surveillance, the officers arrested Debot after the commanding officer told them to do so and they searched the accused during his arrest. The trial judge found the search unreasonable. The Ontario Court of Appeal allowed the Crown appeal and ordered a new trial. The accused's appeal to the Supreme Court was dismissed. The majority agreed with Lamer J. who in turn agreed on most aspects of the legal analysis of Wilson J.

[56] In *Debot*, Wilson J. emphasized that the "reasonable and probable grounds" of the detachment commander, the officer who made the decision to make the search must be examined: see p. 214. His reasonable and probable grounds were based upon information from a confidential source; "the value of the evidence in establishing the reasonable and probable grounds must take into account the credibility of the informant": see p. 215. At p. 218 Wilson J. added:

"In my opinion, it should not be necessary for the police to confirm each detail in an informant's tip so long as the sequence of events actually observed conforms

sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. As I noted earlier, however, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater. Having regard to the quality of the information and the reliability of the informant in this case, I am satisfied that the police surveillance yielded sufficient corroborative evidence to warrant the belief that a drug transaction had occurred.”

[57] In *Golub*, the police received a complaint from a witness who had spent the night with the accused. The accused told a witness that he was going to “get even” with bar staff where the accused had received service. The accused showed the witness a firearm which the witness described as “an uzi submachine gun.” Based on this information the police arrested the accused and entered his home without a warrant. The trial judge ruled that by so doing the police infringed the accused’s *s. 8 Charter* rights. The evidence of the police finding a rifle inside the residence was excluded pursuant to *s. 24(2)* of the *Charter*. The Ontario Court of Appeal allowed the Crown appeal and ordered a new trial. Doherty J.A. wrote the Court’s decision.

[58] At paras. 18-22 Doherty J.A. wrote:

“Mr. Harris' reliance on the search warrant cases is misplaced. Both a justice and a arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

The justice asked to issue a search warrant based on information provided by a police source is in a very different position than the police officer who is face to face with the complainant. The justice asked to issue a search warrant based on information provided by a police source cannot assess the reliability of that secondhand information without additional information from the officer pertaining to the reliability of the officer's source. The police officer faced with a complaint from a witness to events has information from a firsthand source and can question that source, if necessary. To the extent that the position of the justice and the arresting officer can be compared at all, the officer acting on a complaint

from a witness to the relevant events is in a similar situation to a justice who acts on firsthand information provided by the police officer.

The police power to arrest under s. 495 of the Criminal Code was considered in *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.). Cory J., for the court, said at p. 324:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.

In deciding whether reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonably permit. The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable: *R. v. Storrey*, supra, at pp. 423-24; *Chartier v. Attorney-General of Quebec* (1979), 48 C.C.C. (2d) 34 (S.C.C.) at 56; *R. v. Hall* (1995), 39 C.R. (4th) 66 (Ont. C.A.) at 73-75; *R. v. Proulx* (1993), 81 C.C.C. (3d) 48 (Que. C.A.) at 51.

In this case, the police had a specific and detailed complaint from a witness to the events. Mr. Hepworth contacted the police, identified himself, and made no claim to anonymity. The officers had a firsthand opportunity to assess Mr. Hepworth's reliability. They had no reason to discount his information. Certainly, counsel for the respondent at trial did not suggest that the officers should have disregarded Mr. Hepworth's information.”

[59] Here, Cst. Niehaus made the demand so his reasonable and probable grounds for so doing must be examined. The officer based his detention of the applicant upon a belief that the applicant had committed an offence under s. 253(a), i.e., impaired operation. The reasonable and probable grounds then include the following components in the case at bar:

- that the applicant was identified as the operator of the motor vehicle;
- while doing so, the applicant's ability to operate or have care or control of a motor vehicle was impaired by alcohol; and

- that the impugned operation or care or control took place within the three hours preceding the officer's demand.

[60] I will examine components set out in each of these bullets in turn.

Reasonable Grounds as to the Identity of the Operator

[61] The officer was given specific information. He had a description of a vehicle involved in a motor collision that left the scene and the licence number for that vehicle. When he used his police computer, information was given to him of the home address of the applicant, who was the registered owner of the vehicle with that plate number. When he arrived at the applicant's residence, he saw that vehicle with the licence plate parked in the driveway; the hood of the vehicle was warm and some damage to the front end was observed. The description of the culprit who left the scene of the collision was also specific: a fifty year old slim male with grey hair and a moustache who was intoxicated. The applicant opened the door; he matched the description.

[62] In my view this information was sufficient to provide the officer with reasonable and probable grounds that the applicant was the driver.

[63] In addition, the applicant admitted at the doorway of his residence he was the driver of the vehicle involved in the collision. This admission can be used to support the officer's reasonable and probable grounds.

[64] The applicant made the same statement to the officer in the motor vehicle; this latter admission cannot be used to support the officer's reasonable and probable grounds. That statement was obtained when the officer did not comply with his *Charter* duties and infringed the applicant's *s. 10(b)* rights.

[65] In *Cuthbertson* at para. 57 I explained and reiterate that breath samples are conscriptive evidence; generally where there has been an infringement of an accused's *Charter* rights, such evidence is excluded pursuant to *s. 24(2)* of the *Charter*:

“Clearly, breath samples that are taken pursuant to a demand are self incriminatory or conscripted evidence. Admission of such evidence will tend to make a trial unfair subject to rare exceptions: *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.) per Cory J. at para 73. Admission of breath samples which are conscripted by infringing an accused's *Charter* rights generally ought to be excluded pursuant to *s. 24(2)* because their admission would affect trial fairness: *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.); *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.); *R. v. Cobham* (1994), 92 C.C.C. (3d) 333 (S.C.C.); *R. v. Pozniak* (1994), 92 C.C.C. (3d) 472 (S.C.C.).”

[66] As I held earlier in *R. v. Sanche*, [2003] 11 W.W.R. 357 (Alta. Prov. Ct.) the judge determining whether the officer had reasonable and probable grounds may have to excise tainting facts. This includes evidence obtained as a result of a *Charter* infringement that should be excluded by *s. 24(2)* of the *Charter*. Therefore, the statement to the officer in the vehicle cannot be used in determining an objective basis for the reasonable and probable grounds.

Reasonable and Probable Grounds Relating to Impaired Operation

[67] The officer in this situation needed to have reasonable and probable grounds that the applicant's ability to operate a motor vehicle was impaired by alcohol. He could rely upon the information conveyed to him, i.e., that the driver appeared intoxicated. However, intoxication was simply a conclusion reached by others without any details as to how the conclusion was reached. In this instance it was necessary for the officer to make his own observations to verify the information he received so that he could have a basis for a intoxilyzer demand. Cst. Niehaus saw that the applicant had red bloodshot eyes, his speech was slurred and mumbled, and was unsteady in his walk. While these observations were made some time after the collision they are sufficient for me to conclude that the officer had reasonable and probable grounds to make his subsequent demand.

Reasonable and Probable Grounds Relating to Time

[68] The two civilian witnesses differ as to the time of the collision. Ms. Jones testified that the approximate time of the collision was 5:30 p.m.; Ms. Morrison believed that the collision was at 6:20 p.m. Cst. Niehaus testified he arrived at the applicant's residence at 6:05 p.m. Clearly Ms. Morrison is mistaken. In my view Ms. Jones' memory of the time of the collision is more reliable.

[69] Cst. Niehaus made a demand for breath samples at 6:38 p.m.; the demand was made approximately an hour after the applicant was operating the motor vehicle. This factual finding does not assist. As I have previously indicated the onus is upon the Crown to prove that the officer was acting reasonably by making the demand by complying with the prerequisites contained in *s. 254(3)*. It is the officer who must address his or her mind to the basis for a proper demand at the time it was made. One of the prerequisites of a proper demand relates to time, i.e., reasonable and probable grounds that the accused was committing a *s. 253* offence within the preceding three hours. Indeed, the very demand read by the officer compelled him to address his mind to the time of the alleged offence. Here, I have no evidence from the officer that he addressed his mind to this issue; nor is there any evidence from which I could infer he did so. I find that the Crown has not met their onus to justify the warrantless seizure of breath samples, therefore, I find that the seizure of breath samples from the applicant in these circumstances was unreasonable and an infringement of the applicant's *s. 8 Charter* rights. This is the same result in *Catling* following the same analysis.

Forthwith or Soon as Practicable

[70] *Section 254(3)* provides that the demand must be made “forthwith or as soon as practicable.” Since this is a warrantless seizure the onus is upon the Crown to prove compliance with this prerequisite contained in the section. In *Catling* I explored at some length the meaning of these alternative terms. At para. 46 I wrote:

“The meaning to be given to that term in the context of s. 254(3) is best explained by those decisions relating to the section because of the alternative term used in the context of the s. 254(3) “or as soon as practicable.” As the Supreme Court has recently said in *R. v. Sharpe, supra* a term should be given its ordinary meaning. Forthwith when considered in the context of s. 254(3) should be given the meaning that the act is to be within a reasonable time. The alternative term “as soon as practicable” should be given its easily understood ordinary meaning. If meaning of the phrase needs any explanation then the terms such as “within a reasonably prompt time in the circumstances” are applicable: *R. v. Mudry, supra*. The subjective and objective factors of the officer making the demand can also be taken into account in determining the reasonableness of the timing of the demand: *R. v. Van Der Veen, supra*.”

[71] In *Catling* I found that the officer had not made the demand in a manner that was forthwith or as soon as practicable as required by the section.

[72] In the case at bar, the officer made the demand approximately thirty-three minutes after he arrived at the applicant’s house. He testified that it took him approximately five minutes to form the reasonable and probable grounds; at 6:36 p.m. the officer read he first *s. 254(3)* demand. On cross-examination he conceded this was an oversight. In my view the demand was not made “forthwith or as soon as practicable” as set out in the jurisprudence. This to is one of the prerequisites contained within *s. 254(3)*. Since the officer did not comply with that prerequisite he was not acting reasonably when he demanded the applicant provide breath samples. Therefore, for that reason also, I conclude that the applicant’s *s. 8 Charter* rights were infringed.

Section 24(2)

[73] In *Cuthbertson* I wrote at para. 57:

“Clearly, breath samples that are taken pursuant to a demand are self incriminatory or conscripted evidence. Admission of such evidence will tend to make a trial unfair subject to rare exceptions: *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.) per Cory J. at para 73. Admission of breath samples which are conscripted by infringing an accused’s *Charter* rights generally ought to be excluded pursuant to *s. 24(2)* because their admission would affect trial fairness: *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.); *R. v. Prosper* (1994), 92 C.C.C. (3d)

353 (S.C.C.); *R. v. Cobham* (1994), 92 C.C.C. (3d) 333 (S.C.C.); *R. v. Pozniak* (1994), 92 C.C.C. (3d) 472 (S.C.C.).”

[74] In my view the evidence related to the taking of the breath samples must be excluded; this includes the certificate of the breath technician.

Conclusion

[75] The Crown has the burden of justifying the warrantless seizures of breath samples is justified; otherwise, the seizures were unreasonable. To meet this burden the Crown must prove that the officer who made the *s. 254(3)* demand met the prerequisites found within the section. I find that the Crown has not met that burden. The Crown has not proven that the officer had “reasonable and probable grounds to believe that the applicant was operating a motor vehicle in the preceding three hours.” Moreover, the officer did not make his demand to the applicant “forthwith or as soon as practicable.” Accordingly, I find that the applicant’s *s. 8 Charter* rights have been infringed. Evidence of the breath samples is conscriptive evidence that affects the fairness of the trial and I order the exclusion of evidence relating to the readings taken from the applicant are inadmissible.

Dated at the City of Edmonton, Alberta this 13th day of December, 2005.

M.G. Allen
A Judge of the Provincial Court of Alberta

Appearances:

Mr. R. Beck
for the Crown

Mr. R. Prithipaul
for the Accused