

# Court of Queen's Bench of Alberta

**Citation: R. v. Jackson, 2005 ABQB 268**

**Date:** 20050502  
**Docket:** 040450454S1  
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

Respondent

- and -

**Stephen Jacob Jackson**

Appellant

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**Reasons for Judgment  
of the  
Honourable Mr. Justice R.P. Marceau**

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Appeal from the Conviction of  
The Honourable Judge S.R. Creagh  
Dated the 9<sup>th</sup> day of December, 2004

## **I. Introduction**

[1] On December 9, 2004 Provincial Judge S.R. Creagh convicted the Appellant of operating a motor vehicle with excess blood alcohol content (s. 253(b) *Criminal Code*). The Appellant appeals from this decision.

[2] While other grounds of appeal were argued, I will deal principally with one argument that is dispositive of the appeal. Essentially, the focus of this decision is whether there was

sufficient evidence of a proper demand for a breathalyzer test to satisfy one of the two conditions precedent for the admissibility of breath test results by way of Certificate of Analyses.

## **II. Facts**

[3] Constable Breker was the sole witness for the Crown. He was one of the police officers conducting a Check Stop campaign and he testified about the following events.

[4] On April 18, 2004, at 1:09 a.m., the Appellant operator pulled his motor vehicle into Constable Breker's Check Stop. Constable Breker determined that the Appellant's breath smelled of alcohol and Constable Breker made a demand for an alcohol screening test. The wording of that demand was read into evidence:

“I am a peace officer and pursuant to the provisions of the *Criminal Code* I demand that you provide a sample of your breath forthwith suitable for analysis by an approved screening device. Failure or refusal to comply will result in your being charged accordingly under the *Criminal Code*. Will you comply with this demand?”

[5] The Appellant complied with the demand and a “fail” result was registered. Constable Breker was then satisfied that he had reasonable and probable grounds to believe the Appellant had committed the offence of operating a motor vehicle while impaired by alcohol and he arrested the Appellant for impaired driving.

[6] Constable Breker then advised the Appellant of his *Charter* rights. The Appellant waived his right to counsel. Constable Breker then cautioned the Appellant. I note that the officer used a specific formula for both the advice with respect to *Charter* rights and the police caution.

[7] The crux of this case turns on what Constable Breker testified to concerning the breathalyzer demand. The relevant portions of the transcript of the officer's evidence are:

Page 10, lines 6 to 9

“A ...I subsequently arrested him for impaired operation of a motor vehicle and made a subsequent demand of – to provide a sample of breath on a – a subsequent breath demand.”

Page 13, lines 18 to 27

“A Then the police warning I read to him at 0132 hours after having given the breath demand at 0131 hours.

Q Okay. And what happened after – after you read him those, what happened next?

A The – after the – sorry, the charter, breath demand and police warning, I escorted him to the – the Check Stop van for the purposes of giving the – having the – turning him over to a breath tech to have the two tests done. The van was on site and we could just walk there from the police vehicle.”

[8] There was a later reference that at 0133 hours the officer turned the Appellant over to the breath technician who was in the Check Stop van.

[9] The transcript contains the following further evidence:

Page 15, lines 1 to 5

“A Once we were at the van, I turned him over to Constable Krull for – who is a breath technician.

Q Okay.

A And at that time he performed two tests and advised me of the results.”

[10] Other evidence made it clear that Constable Breker did not in fact see the two tests performed.

[11] There is then a question and answer that are something of a red herring because to that point there was no evidence of a second demand:

Page 15, lines 15 to 18

“Q Thank you. And he was taken to the breath tech, do you recall what time that second demand was made?

A Referring to my notes I can give you that time. That time was 0136 hours.”

[12] In any event, the words that were used to make the “breath demand” were never elicited from Constable Breker.

[13] I have carefully reviewed the transcript, particularly the arguments of counsel and the decision of the trial judge.

[14] It is clear that defence counsel cited *R. v. Hruby* (1980), 19 A.R. 230 (C.A.) for the proposition that in an over .08 breathalyzer case, the conditions precedent to the admissibility of a Certificate of Analyses completed by the breathalyzer technician are (1) that samples of breath be taken and (2) that they be taken pursuant to a demand under s. 235(1) [now s. 254(3)].

[15] The argument on the admissibility of the Certificate of Analyses centred mainly on whether the trial judge could infer from all of the evidence that samples were taken, despite the fact that there was no evidence from Constable Breker that he had seen the samples taken. The decision of the trial judge on that point is:

Page 60, lines 8 to 19

“THE COURT: And having read Hruby and looked at it, I am going to find that there is a sufficient factual matrix before me from which I can draw the inference that samples were taken. That factual matrix is that at 0132 the accused or the detainee, I suppose, at this point, was turned over to the breath technician in the breath tech van and my note refers to the technician to take two tests and that at 1:36 a second demand was read and that at sometime between then and 2:10 a certificate was produced. From those facts I infer that the two samples – I draw the conclusion and infer that the two samples were taken.”

[16] There followed decisions on other points and then the following exchange took place between the trial judge and counsel for the defence:

Page 62, lines 14 to 24

“THE COURT: And, unless you have further argument, I will admit the certificate as an exhibit in the proceedings.

MR. PRITHIPAUL: Are you finding that there was a demand – the demand was read, an evidential demand was made?

THE COURT: Of which demand?

MR. PRITHIPAUL: An evidential demand?

THE COURT: That the demand – the first demand?

MR. PRITHIPAUL: A demand at all.

THE COURT: Yes, I am finding that.”

The Certificate of Analyses was then marked as an exhibit.

[17] It is not clear to me that the trial judge addressed her mind to the precise evidence of the breath demand, although defence counsel seemed to have that in mind. I say “seemed to have

that in mind” because defence counsel does not specifically make the point that evidence of a “breath demand”, without more, is not evidence from which a court can infer that a demand of the kind contemplated by s. 254(3)(a) of the *Criminal Code* was made. I set out s. 254(3)(a) and s. 258(c)(ii), (iii) and (iv) of the *Criminal Code*.

**Section 254(3)(a)**

Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

- (a) such samples of the person’s breath as in the opinion of a qualified technician, or
- (b) . . .

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person’s blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

**Section 258(c)**

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

- (i) (not proclaimed),
- (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
- (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
- (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the

blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses.

[18] The corresponding section numbers referred to in *R. v. Hruby* are s. 235(1) and s. 237(1)(c) (ii), (iii) and (iv) of the *Criminal Code*.

### **III. Case Law**

[19] I turn now to an analysis of the cases submitted to me with particular reference to facts of each case.

[20] *R. v. Hruby* is a decision of the Alberta Court of Appeal. The point in issue in *R. v. Hruby* was whether the Crown must prove that the samples were taken as soon as practicable in order to admit the Certificate of Analyses into evidence. The Court in *R. v. Hruby* simply stated that the only two conditions precedent to admissibility of a certificate are proof that samples were taken and proof of a demand for breath samples pursuant to now s. 254(3). The Court did not specifically discuss what evidence would satisfy these two requirements. It simply stated that any other conditions required to support the inference that the readings obtained were representative of the percentage of alcohol in the blood of the accused could be proved by the Certificate.

[21] The following passage from *R. v. Hruby* is of interest:

**17** Upon proof of those two elements - that is, the making of a demand and the taking of breath samples pursuant thereto - the prosecution is then in a position to tender the certificate in evidence and if it appears regular on its face, in that it contains all the statements dictated by s. 237(1)(f), it becomes admissible. This proposition, in my view, is confirmed by the logic of the following quotation from the reasons for judgment given for the Court of Appeal of Ontario by Gale, C.J.O., in the Pickles case, at p. 215:

At the moment, we are inclined to agree with the proposition that the certificate cannot be admitted in evidence until those two conditions, namely, that a sample of breath of the accused was taken and that it was taken pursuant to a demand, under s. 235(1) have been proved apart from the contents of the certificate. Putting it another way those two conditions may have to be shown without reference to the certificate; and, of course, if that is so, the certificate cannot prove them. This point is not discussed in the Teague judgment.

In this case, however, we do not have to decide that point, for it is our view that, apart from the contents of the certificate, there was evidence from which any Court could logically conclude that this accused received a demand pursuant to s. 235(1) and that a sample of his breath had been taken. According to the stated case, a demand was made by Officer Doidge to the accused, at approximately 4:15 a.m., requiring him to deliver a sample of his breath into a breathalyzer machine. Doidge then took the accused to the London Detachment office and handed him over to the custody of Police Constable Berdan, who was described by Doidge as a breathalyzer operator. At the conclusion of the testimony of Constable Doidge, the Crown ‘tendered a certificate of the breathalyzer operator, pursuant to section 237(1)(f) of the Criminal Code’. Having regard to the special type of operator and the form of certificate that is contemplated by s. 237 of the Criminal Code, this was a significant circumstance with respect to this issue. Thus, we are of the opinion that on the evidence before Judge Carson, and at the stage when the certificate was tendered to him, the only logical inference which could be drawn was that a breath sample had been taken from the accused and that it was taken pursuant to a demand proved to have been made under s. 235(1). That being so, then, in our view, the certificate ought to have been admitted in evidence; and once admitted, it therefore follows from what I said earlier that it was evidence of the statements contained in it, which statements permit the application of the rebuttable presumption created by s. 237(1)(c) ... .

To use the words of Davey, J.A., at p. 194 in *R. v. Teague*, with reference to (c), (f), the certificate “is evidence of the truth of the statements contained in the certificate dealing with matters enumerated in subparas. (i), (ii) and (iii) of that paragraph, ...”. Similarly Gale, C.J.O., in the *Pickles* case at p. 214 said:

In the first place, it is not necessary, before such a certificate is received, to prove by extraneous evidence those matters set out in s. 237(1)(c)(ii), (iii), (iv); and secondly, once a certificate is admitted, it does prove more than that which is deemed to be proved by virtue of s. 237(1)(f)(ii).

[22] I have set out the quotation from *R. v. Pickles* (1973), 11 C.C.C. (2d) 210 (Ont. C.A.) because it supports the trial judge’s conclusion that an inference can be drawn from a factual matrix that samples were taken, absent a precise statement from the arresting officer that he or she saw the suspect blow into the instrument. I confess, however, that I have some problem with a certificate, the admissibility of which has not yet been proved, being relied upon as part of the factual matrix that supports the inference that samples of breath were taken.

[23] *R. v. Pickles*, however, is not helpful in deciding what evidence is required to prove that a demand contemplated by s. 254(3)(a) was made. In *R. v. Pickles*, the stated case, according to the passage quoted, indicated that “a demand was made by Officer Doidge to deliver a sample of

his breath into a breathalyzer machine”. The Court did not comment on the sufficiency of that statement. I also note that in *R. v. Pickles*, the demand was for “the delivery of a sample of his breath into a breathalyzer machine”, as opposed to the evidence in the case before me, which is a simple averment that a breath demand was made.

[24] The only cases cited to me that focus directly on the point at issue are *R. v. Mandeville* (1985), 60 A.R. 340 (Q.B.) and *R. v. Hopkins* (18 January 1994), Peace River 9309 0011 S4 0101(Alta. Q.B.), a decision of Fruman J. (as she then was).

[25] In *R. v. Mandeville*, Quigley J. specifically considered what evidence would be sufficient to allow the Court to infer that a demand contemplated by then s. 235(1) had been made. The sole evidence on point seemed to be the following (at para. 2):

The evidence at trial consisted of the testimony of one police officer. During the course of his testimony, the witness testified:

“I observed normal signs of impairment: bloodshot eyes, breath smelled of alcohol, so I read the accused a demand for a breathalyzer test.

Q. You read him the demand, and did he agree to take the test with you?

A. Yes, he replied ‘Yes’.”

[26] Justice Quigley wrote (at paras. 6-10):

The certificate and the statements contained therein become evidence by virtue of s. 237(f) of the Code. The admissibility of such certificate is restricted to those cases “where the samples of breath of the accused have been taken pursuant to a demand made under subsection 235(1)”. It is essential then, that the Crown lead sufficient evidence to enable the Court to make a reasonable finding of fact that the demand was one which satisfied the requirements of s. 235(1).

In making such demand, there are no particular words that must be used, but a wise police officer will simply employ the words used in the section. Indeed, words and circumstances may be sufficient to enable a Court to draw a reasonable inference that a proper demand was made. That however, is for the trier of fact to determine. Pure speculation or unwarranted assumptions cannot be converted into valid legal inferences.

In those cases where the charge is failing to comply with a demand, the nature of the demand itself becomes all important, and the trier of the fact should carefully weigh the evidence before drawing any inferences. In the present case the record

discloses that the appellant did submit to a breathalyzer test, administered by a qualified technician within the statutory time period and in the presence of the Crown witness. Even in the face of these facts however, the trial Judge was not automatically entitled to conclude that whatever words the police officer spoke to the appellant they comprised a demand within the meaning of s. 235(1).

It is not infrequent that a police officer, testifying in a voir dire on the question of the admissibility of statements made by an accused, merely testifies that he administered “a caution” to the accused before taking the statement. In my view it is then necessary for Crown Counsel to examine the witness further and elicit from him the words actually spoken in order to establish whether the so called “caution” or “warning” was the kind envisaged by the Judge’s rules. Without being facetious, failing any other evidence the caution or warning itself might contain a threat or a promise, such as: “Give me a statement or I’ll shoot your ears off”; or “If you don’t give me a statement I won’t be able to have the charge against you dropped”.

In *R. v. Humphrey* (1977), 38 C.C.C. (2d) 148 the Crown witness testified that the accused was given “a demand in regards to a breathalyzer test”. The trial Judge held that such testimony failed in law to constitute evidence of a demand pursuant to s. 237(1)(f) and 235(1) of the Criminal Code. On appeal, the majority (2-1) held that the evidence of the police officer that the accused “was given a demand in regards to a breathalyzer test” was some evidence that he made a demand on the appellant pursuant to the Code. In dissent, Dubin J.A. said at p. 151:

... it is for the trial Judge to first determine whether there is evidence before him that the demand required by s. 235 had first been made.

and again:

The evidence of the police officer was merely a conclusion made by him, and was not evidence upon which the trial Judge could determine whether what was done by way of an alleged demand complied with the statutory requirements. It is not for a police officer to make that determination.

[27] Justice Quigley agreed with the analysis of Dubin J.A. in *R. v. Humphrey* and concluded that the evidence given by the police officer was insufficient to establish a proper demand, noting that it is a simple matter for Crown counsel to lead from its witness testimony as to the words used in making the demand.

[28] *R. v. Mandeville* was referred to by Fruman J. in *R. v. Hopkins*, along with *R. v. Hruby*, *R. v. Teague* (1972), 11 C.C.C. (2d) 191 (B.C.C.A.) and *R. v. Pickles*. I cite the unparagraphed portion of the judgment at pages 2 and 3.

I will deal first with the evidence of a demand under section 254(3) of the Criminal Code. In the case of R. v. Hruby (1980), 4 M.V.R. 192, the Alberta Court of Appeal accepted the reasoning of the British Columbia Court of Appeal in R. v. Teague (1973), 20 C.R.N.S. 297, and the Ontario Court of Appeal in R. v. Pickles (1972), 20 C.R.N.S. 301. At 199, Haddad, J. A. stated:

Simply stated s. 237(1)(f), when analyzed, commences by providing in clear language two conditions precedent to the admission of a certificate of analyses.

Firstly: that samples of breath be taken;

Secondly: that they be taken pursuant to a demand made under s. 235(1).

There are two separate elements. The section does not recognize the element of time.

Upon proof of those two elements – that is, the making of a demand and the taking of breath samples pursuant thereto – the prosecution is then in a position to tender the certificate in evidence and if it appears regular on its face, in that it contains all the statements dictated by s. 237(1)(f), it becomes admissible.

In the case at bar, counsel for the Appellant suggests that one of the preconditions for admissibility for the certificate of analyses has not been met and the certificate is inadmissible. Accordingly, there is no evidence upon which the learned trial Judge could convict the Appellant.

The only evidence in respect of the demand for a breath sample was the testimony of Constable Mann, who made the following statement: “At 3:33 in the morning, Mr. Hopkins was read – read the breath demand and same was explained to him.”

It is clear from the case law that no particular form of words need be used in order to constitute a demand which meets the requirements of the section. “It is essential ... that the Crown lead sufficient evidence to enable the Court to make a reasonable finding of fact that the demand was one which satisfied the requirements ...” of section 254(3). R. v. Mandeville (1985), 31 M.V.R. 63 at 65) In the Mandeville case, the Crown witness did not disclose in his testimony the actual words used by him when he read the breath demand. Although the defence did not object, the trial Judge concluded that he could not make a finding of fact that the demand was of the requisite kind and without such finding the chemical analyses of the breath samples taken pursuant to such an alleged demand could not be proved by tendering the certificate.

I have reviewed in some detail all of the cases cited by the Appellant and the Respondent and have considered the evidence of Constable Mann and I find that it is only by speculation and assumption that the words “read the breath demand” can be converted into a legal inference that the demand complied with section 254(3). A “breath demand” could refer equally to a screening device breath demand made under section 254(2). There is no evidence as to the words actually used. There is also no suggestion that the word “breathalyzer” was used, which might be sufficient to distinguish a demand under the two sections.

[29] In the result, Justice Fruman held that there was insufficient evidence from which the Court could have concluded that the tests were administered pursuant to a demand under s. 254(3).

[30] The Crown relied on *R. v. Crozier* (27 October 2003), Edmonton 021072426-P1 (Alta. Prov. Ct.), in which Judge Bridges made the following finding of fact at page 206:

“At 00:51 hours, the investigating police officer gave a demand for a sample of breath in the usual form and asked the accused if he would comply.”

[31] The Crown argues that *R. v. Crozier* is authority for the proposition that in the circumstances of the case at bar, an inference could be drawn that the “breath demand” referred to by Constable Breker could only mean a proper breath demand under section 254(3)(a) of the *Criminal Code*. I do not read the decision in that way: Judge Bridges only dealt with the question of whether, in the absence of direct evidence from the investigating officer (on those facts) and without relying upon the Certificate, he could on other evidence conclude that the accused had given samples of his breath. He came to the conclusion he could do so based largely on the quotation from the *R. v. Pickles* cited by our Court of Appeal in *R. v. Hruby*. Judge Bridges accepted that this inference could be made both as to whether a proper demand was made and whether samples of the accused’s breath were taken pursuant to that demand.

[32] Given his finding, Judge Bridges was not required to examine the sufficiency of the evidence of the demand given; nonetheless, I perused the transcript in *R. v. Crozier* with respect to the evidence of the investigating officer. At page 78 of the transcript it is clear that a demand in the precise words of the section was made. The exact wording is:

Page 78, lines 17 to 27 and then Page 79, lines 1 to 4

Q Okay. And do you have the reading of the breath demand that you read to him?

A Yes, I do.

In accordance with the provisions of the Criminal Code, I demand that you provide such samples of your breath as are necessary in the opinion of a qualified technician to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol

in your blood and that you accompany for that purpose. You will be charged under the provisions of the Criminal Code if you do not comply. Will you comply with this demand?

[33] There is one additional case worthy of comment that was not cited by either counsel. **R. v. Hall**, 2003 ABPC 124 is a decision on a *voir dire* regarding the admissibility of a Certificate of Analyses. One of the issues raised was whether there had been a proper demand. The arresting officer testified that he read the accused a breath demand from a card, but the officer did not have the card with him at trial.

[34] Judge Fradsham engaged in a detailed and careful analysis of the requirements for proving a proper demand. He first considered **R. v. Humphrey**, in which the Ontario Court of Appeal held that the evidence of the police officer that the accused was given “a demand in regards to a breathalyzer test” was some evidence that he made a demand pursuant to the relevant section. Judge Fradsham noted that **R. v. Humphrey** must be considered in light of the fact that it involved a directed verdict application; as a result, the majority decision does not stand for the proposition that reference to a breathalyzer demand will invariably be sufficient, but that the matter remains for the trial judge to determine on the facts of each case.

[35] Judge Fradsham went on to considered a number of additional cases, including **R. v. Pickles**, **R. v. Mandeville** and several others. He also addressed a comment made in **R. v. Ouellette**, [1994] B.C.J. No. 1505 (B.C.S.C.) that inferences can more easily be drawn in over .80 cases than in cases dealing with an accused’s refusal to comply with a demand, because in over .80 cases, the accused actually provides samples. Judge Fradsham disagreed, stating in Note 6 of his decision:

With respect, I cannot agree with that logic. The fact that an accused provided breath samples does not provide any evidence that the demand with which he or she complied was a lawful demand which complied with the Criminal Code. It is simply evidence that the accused provided samples. The Criminal Code requires that the samples be provided pursuant to a demand under section 254(3). If the simple provision of samples were enough, then the additional requirement that the samples be provided pursuant to section 254(3) would not appear in section 258(1)(c).

[36] Judge Fradsham then provided the following summary of the law in Alberta (at para. 38):

1. The Crown must prove that a section 254(3) breath sample was made. The matter cannot be proven by simply referring to the Certificate of Analyses; the proof must be found in evidence apart from the Certificate.
2. The Court need not be provided with the actual words used by the peace officer, but evidence must be provided to the Court which will permit the Court to conclude that there was a section 254(3) breath demand. Whether the Crown has

proven that a proper breath demand was made is a matter for the trial judge to determine based on the evidence before him or her in a particular case.

3. Testimony from the peace officer which amounts to no more than a conclusion (eg., “the accused was given a demand in regards to a breathalyzer test”) is insufficient. It is not evidence upon which a trial judge can determine whether what was done by way of an alleged demand complied with the statutory requirements.
4. The Court may not take judicial notice of what is contained in “a standard demand”.
5. The demand need not specifically refer to the section under which it is made.

[37] The evidence before the Court in *R. v. Hall* was that the officer read a demand from a card, but the officer did not give evidence as to what was contained in the demand. Judge Fradsham concluded (at para. 40):

I cannot take judicial notice of what is contained in breath demand cards issued by the Calgary Police Service. Further, the fact that the contents of the particular card used in this case have gone unchallenged in other cases is of little comfort. I do not know how many cases are being referred to, or if the issue was ever raised in any of the cases. I must decide on the evidence before me whether the demand was in compliance with section 254(3) and in my view, there is not enough to allow me to conclude that a proper demand was made.

[38] I agree that Judge Fradsham’s decision properly reflects the current state of the law in Alberta.

#### **IV. Decision**

[39] What then is sufficient evidence that a breath demand was made that conforms with s. 254(3)(a) of the *Criminal Code*?

[40] The following elements appear in s. 254(3)(a) with respect to the taking of breath samples:

1. the peace officer must have reasonable and probable grounds for belief that a person is committing or within the preceding three hours has committed as the result of consumption of alcohol an offence under s. 253 of the *Criminal Code*;
2. the demand for breath samples must be made forthwith or as soon as practicable;

3. the demand must require that the person:
  - (a) provide forthwith or as soon as practicable;
  - (b) such samples of the person's breath;
  - (c) as in the opinion of a qualified technician are necessary to enable a proper analysis to determine the concentration, if any, of alcohol in the person's blood;
  - (d) and to accompany the peace officer for the purpose of enabling such samples to be taken.

[41] It is evident from the case law that direct proof of all of the foregoing elements is not necessary to prove that a proper demand has been made; a trial judge is entitled to consider the words and circumstances of any particular case and draw a reasonable inference that a proper demand was made.

[42] It is also clear, however, that while the cases from other jurisdictions appear to be more lenient, the Alberta authorities have consistently held that a police officer's testimony that a breath demand was given is insufficient to establish that the demand complied with the statutory requirements. In *R. v. Mandeville*, Justice Quigley held that evidence of the demand consisting solely of the words "I read the accused a demand for a breathalyzer test" was insufficient. Similarly, in *R. v. Hopkins* Justice Fruman held that the words "At 3:33 in the morning, Mr. Hopkins was read – read the demand and same was explained to him" were insufficient. Finally, in *R. v. Hall*, Judge Fradsham held that the arresting officer's testimony that he read the accused the breath demand from a card was insufficient.

[43] The evidence in this case mirrors that in the three cases cited above. The only evidence before the trial judge with respect to the demand was that a "breath demand" was given.

[44] The Crown argues that given the evidence that the Appellant was read the demand after a fail on the roadside screening device and shortly before "turning him over to the breath tech to have the two tests done", the trial judge could properly infer that the demand must have been made pursuant to section 254(3)(a) of the *Criminal Code* and that it was properly worded. I am of the view, as Justice Quigley was, that it is dangerous for judges to infer in a criminal prosecution that what is usually done by police officers in a particular situation must have been done in every situation.

[45] We are still a long way from accepting evidence that the accused "was chartered" as evidence from which an inference can be made that the *Charter of Rights and Freedoms*, as far as the right to counsel is concerned, was complied with. Similarly, evidence that a standard police caution was given, without more, is not evidence from which a trial judge can infer that a detainee realized that he or she did not have to make a statement to an investigating officer.

[46] There is some attraction to the argument that given the widespread use and knowledge of the breathalyzer to determine the concentration of alcohol in one's blood, any indication that a

breath test is required is sufficient to support the inference that a proper demand was made, however, I agree with Judge Fradsham's conclusion in *R. v. Hall* that the Court may not take judicial notice of what is contained in "a standard demand".

[47] While the cases I have reviewed seem to focus on whether the demand is one that compels the person to provide samples of his or her breath, it seems to me that the rest of s. 254(3)(a) is important as well; that is, that the samples be such as in the opinion of a qualified technician are necessary to enable a proper analysis to determine the concentration, if any, of alcohol in the person's blood. It is my view that at the very least, a person subject to a demand under s. 254(3)(a) should be advised that samples of his or her breath are required to be given to a qualified person who can determine the concentration of alcohol in his or her blood. I do not think that persons unfamiliar with breathalyzer cases would be prepared to infer that being given a "breath demand" carries with it the assurance that a qualified person will do the tests.

[48] While I realize the argument with respect to the demand arose from the evidence presented and could not have been foreseen by the defence, I am not certain the trial judge was clearly apprised of this particular defence argument, because despite his efforts, counsel for the defence did not clearly focus the trial judge's attention on the inadequacy of Constable Breker's evidence of the demand. Furthermore, in fairness to the trial judge, the three Alberta cases that were arguably binding upon her were not brought to her attention.

[49] I conclude that there was insufficient evidence from which the trial judge could reasonably infer that a proper demand for a breathalyzer test in accordance with s. 254(3)(a) had been made. As a result, one of the conditions precedent for admissibility of the Certificate of Analyses was not met and the Certificate should not have been admitted.

[50] While the foregoing finding is sufficient to dispose of the appeal, I also note that in this case, the trial judge not only inferred that a proper demand was made, but also that samples were in fact taken. The trial judge reached this conclusion based on the "factual matrix" that the accused was turned over to the breath technician in the breath tech van, a second demand was read, and a Certificate was then produced.

[51] Given my finding that there was insufficient evidence before the trial judge to infer that a s. 254(3) demand had been made, one of the facts relied upon by the trial judge is missing. I also seriously question whether the fact that a Certificate was produced can be used to infer that breath tests were taken. This seems to be deciding upon admissibility of the Certificate by using the certificate as evidence of a condition precedent to its admissibility.

[52] The appeal is allowed and the conviction is quashed.

Heard on the 31<sup>st</sup> day of March, 2005.

**Dated** at the City of Edmonton, Alberta this 2<sup>nd</sup> day of May, 2005.

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**R.P. Marceau**  
**J.C.Q.B.A.**

**Appearances:**

Robert A. Fata  
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for the Respondent

Ravi S. Prithipaul  
(Gunn & Prithipaul)  
for the Appellant