NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Farrell***, 2009 NSCA 3

Date: 20090115
Docket: CAC 296075
Registry: Halifax

Between:

Della Marie Farrell

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Roscoe, Fichaud, JJ.A. and Murphy, J. (*ad hoc*)
Appeal Heard:	November 25, 2008, in Halifax, Nova Scotia
Held:	Appeal is dismissed. The Summary Conviction Appeal Court's order should be varied to provide that the matter be remitted to Judge Stroud for continuation of the trial, per reasons for judgment of Roscoe, J.A.; Fichaud, J.A. and Murphy, J. concurring.
Counsel:	Stanley W. MacDonald, Q.C. and Trevor McQuigan, Articled Clerk, for the appellant William D. Delaney, for the respondent

Reasons for judgment:

[1] The appellant Della Marie Farrell was charged with impaired driving (s.253(a)) and driving when her blood alcohol level exceeded .80 (s.253(b)). After her pre-trial application for exclusion of the analysis of her blood samples from evidence was allowed, she was acquitted by Provincial Court Judge Robert Stroud. See: [2007] N.S.J. No. 593(Q.L.). The Crown's summary conviction appeal was allowed by Justice J. Edward Scanlan. See: [2008] N.S.J. No. 175(Q.L.); 2008 NSSC 119. Ms. Farrell applies for leave to appeal and appeals from the Summary Conviction Appeal Court (SCAC) to this court, on a question of law pursuant to s. 839(1).

Background:

[2] On April 23, 2006 Ms. Farrell was involved in a single vehicle motor vehicle accident in Afton, Antigonish County, Nova Scotia around 10 o'clock in the morning. Her vehicle was overturned in a ditch. She was removed from the vehicle by members of the fire department. Constable Andy Harris, RCMP, arrived at the scene of the accident and observed Ms. Farrell being removed from the vehicle. Ms. Farrell's nephew told Constable Harris that his aunt had a history of drinking and driving. Constable Harris heard Ms. Farrell screaming that she was in pain as she was strapped to a backboard. One of the ambulance attendants gestured in a manner that Constable Harris interpreted to mean that Ms. Farrell had been drinking. Constable Harris approached Ms. Farrell and detected an odour of alcohol. He accompanied her in the ambulance as she was transported to hospital in Antigonish. The ambulance arrived at the hospital at 10:58 a.m.

[3] Constable Harris formed the opinion that there were sufficient grounds to demand that Ms. Farrell supply a sample of her breath or her blood. He was also of the opinion that Ms. Farrell would be at the hospital for some time while she was being examined and treated by medical staff. At 11:11 a.m. he read Ms. Farrell a demand for a blood sample and advised her of her right to counsel. She decided not to call a lawyer and at 11:24 a.m. the emergency room physician took a sample of Ms. Farrell's blood. The certificate of analysis entered at trial indicated a reading of 247 mg. of alcohol in 100 ml. of blood.

[4] At the trial, Judge Stroud found that Constable Harris did not have reasonable probable grounds to believe that the physical condition of Ms. Farrell

was such that it was impracticable to obtain a sample of her breath. He found that the blood sample evidence had been obtained as a result of an unconstitutional search and seizure which breached s. 8 of the **Charter**. He also concluded further to s. 24(2) of the **Charter** that the admission of the evidence would bring the administration of justice into disrepute. Therefore he excluded the evidence of the certificate of analysis.

[5] Judge Stroud found as a fact that Constable Harris formed the intention to make the demand for blood shortly after arriving at the accident scene and before he had any clear indication of the extent of Ms. Farrell's injuries. He also found that Constable Harris did not ask the attending physician if Ms. Farrell was able to provide a breath sample.

[6] In the SCAC, Justice Scanlan allowed the appeal and remitted the matter for a new trial. He determined that the trial judge asked himself the wrong question. Instead of focussing on the officer's opinion at the accident scene, he should have asked whether or not the officer had a proper basis to make the demand at the time the demand was given at the hospital. His analysis is apparent from the following passages:

> 4 In this case I am satisfied that the officer, while he may well have considered and formed the opinion at the scene of the accident that this was going to be a blood sample case, may well have changed his mind at any point in time from there on in. I refer to page 132 of the transcript where he was asked:
>
> > Q. And in fact, you already knew in the ambulance anyway that you were going to ask for a blood sample.
> >
> > A. Yes, that was my ... to the best of my knowledge, I was going to do that, yes, given the suspected injuries and whatnot."
>
> It may well be that as the officer viewed the situation, where the accused was in the ditch upside down, hanging by her seatbelt I guess, and had to be extricated with the jaws of life and placed on a backboard with her body immobilized, as he looked at that case he may well have been of the opinion that this is going to be a blood test case as opposed to a breath sample case. But I am satisfied that it would be wrong for the Judge to simply say that because he formed that opinion early on that the officer could not then go on to make a determination at the time that the demand was given that in fact both subjective and objective grounds existed for making a blood demand.

5 In this case what the officer was faced with was a situation where he had been in the hospital for some time after the ambulance ride and he had some evidence as regards to the time he thought the accident had occurred. I referred in the **MacFadden** case [2006] N.S.J. No. 46 to the fact that we would not expect officers to be hauling people out of ambulances or off backboards in this case or out of emergency rooms off to give a breath sample. The officer was entitled at the time that he gave the demand to assess the evidence that was before him at the time of the demand and that I am satisfied is the important moment in time. The Court must look at the provisions in the **Criminal Code** and say did the officer at that point in time have the subjective grounds to form a subjective basis for giving the demand. In this case it turned on the issue as to whether or not it would be impracticable for her to give a breath sample.

6 For the Trial Judge to have focused on the fact that the officer made up his mind or formulated an opinion that he suspected that he was looking at a blood sample case as opposed to a breathalyzer sample case is wrong. The Trial Judge should have asked himself the question as to whether or not the officer in fact had a proper basis to make the demand at the time the demand was given.

7 There are very substantial distinctions between the **MacFadden** case and this, the **Farrell** case. In the **MacFadden** case there was nothing in the conversation that occurs between the officers and the nurse as to what the injuries might be or even when the person might be assessed. In this case we had Ms. Farrell herself complaining of back injuries, hip pain, back pain. That is what the officer heard, he heard those complaints. She was very forceful, it would appear from the transcript, in terms of her complaints making it clear that she thought she had some serious injuries.

. . .

9. . . . Her injuries, or at least her complaints, were of her back and her hip. Those injuries meant that she could not leave the hospital. The doctor was asked about the treatment and said that it was going to be a while. The officer knew from experience that when he said it was going to be a while, and you had to get x-ray technicians in, that meant it was not going to be in the reasonably near future. I am satisfied that as noted in the **Wytiuk** case, as cited in the Crown's brief, that the two hour time limit is something that the officer would be entitled to consider. That does not mean, as pointed out by Mr. Stan MacDonald for the respondent, that the samples of the blood test could not be introduced, if obtained, at a later time. The officer was conscious of the benefits of having the blood taken within the two hours and that is why he thought, I have to make up my mind, is she in a position where she can be given the demand and go on from there. The

> question at that time for the officer is it formed the reasonable and probable grounds for giving the demand. I am satisfied that on reasonable grounds that she cannot give a breath test because she is stuck here in the hospital and I have given the blood demand. I am satisfied that was appropriate.

Issues:

[7] The appellant states the following grounds of appeal:

> 1. That the Summary Conviction Appeal Court Judge erred by substituting his view of the evidence for that of the Trial Judge;
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> 2. That the Summary Conviction Appeal Court Judge erred by concluding that the Trial Judge did not consider whether reasonable and probable grounds for a blood demand versus a breath demand existed at the time of the actual demand.

[8] As well, the respondent submits that if we agree that the SCAC judge erred, we should then proceed to consider whether the trial judge erred in excluding evidence of the analysis of the concentration of alcohol in the appellant's blood under s.24(2) of the **Charter**.

Standard of Review:

[9] Recently in **R. v. R.H.L.**, 2008 NSCA 100, Justice Saunders described the two standards of review in summary conviction matters, the first being the standard to be applied by the SCAC judge and the second being the standard applied to that decision by this court:

> [20] Not only are appeals under s. 839 restricted to questions of law "but the error of law required to ground jurisdiction in this court is that of the summary conviction appeal judge" per Oland, J.A. in **R. v. Travers (R.H.)**, 2001 NSCA 71 at ¶ 21, also making reference to **R. v. Shrubsall**, [2000] N.S.J. No. 26 (N.S. C.A.) at ¶ 7. Accordingly, for this appeal to succeed an error in law must be identified in the decision of Justice LeBlanc, sitting as the SCAC.
>
> [21] The standard of review that applied at the SCAC during its review of the trial judge's decision was explained by this court in **R. v. Nickerson**, [1999] N.S.J. No. 210 at ¶ 6:

> ... Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript. (Underlining in original)

[22] The standard of review we are to apply on an appeal from a SCAC was described in **R. v. C.S.M.**, [2004] N.S.J. No. 173 (C.A.):

> [26] Under s. 839(1), the issue is whether the SCAC has erred in "law alone". The Court of Appeal is considering an appeal from the SCAC, not a de novo appeal from the trial court. This Court must determine whether the SCAC erred in law in the statement or application of the principles governing the review by the SCAC of the trial verdict. **R. v. Travers (R.H.)** (2001), 193 N.S.R. (2d) 263; 602 A.P.R. 263; 2001 NSCA 71, at ¶ 21; **R. v. Cunningham** (P.R.) (1995), 143 N.S.R. (2d) 149; 411 A.P.R. 149 (C.A.), at ¶ 12, 21; **R. v. G.W.**, [1996] O.J. No. 3075, (C.A.) at ¶ 20; **R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C.C.A).

See as well **R. v. Hayes**, [2008] N.S.J. No. 100 (C.A.) per Hamilton, J.A. at ¶ 21-22.

Analysis:

[10] At the time of the offence in this case, subsections 254(3) and (4) of the **Criminal Code** stated:

> (3) 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)* where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,
>
> (i) the person may be incapable of providing a sample of his breath, or
>
> (ii) it would be impracticable to obtain a sample of his breath,
>
> such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples
>
> 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.
>
> (4) Samples of blood may only be taken from a person pursuant to a demand made by a peace officer under subsection (3) if the samples are taken by or under the direction of a qualified medical practitioner and the qualified medical practitioner is satisfied that the taking of those samples would not endanger the life or health of the person.

[11] It is well established that s. 254(3) requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief. In **R. v. Bernshaw**, [1995] 1 S.C.R. 254, Justice Sopinka, for the majority explained:

> 48 The **Criminal Code** provides that where a police officer believes on reasonable and probable grounds that a person has committed an offence pursuant to s. 253 of the **Code**, the police officer may demand a breathalyzer. The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254(3) of the **Code** requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief: **R. v. Callaghan**, [1974] 3 W.W.R. 70 (Sask. Dist. Ct.); **R. v. Belnavis**, [1993] O.J. No. 637 (Gen. Div.) (QL); **R. v. Richard** (1993), 12 O.R. (3d) 260 (Prov. Div.); and

> see also **R. v. Storrey**, [1990] 1 S.C.R. 241, regarding the requirements for reasonable and probable grounds in the context of an arrest.

[12] In addition to having reasonable and probable grounds to believe that an offence has been committed, prior to making a demand for a blood sample, the police officer must also have reasonable and probable grounds to believe that because of the person's physical condition, there is either an incapacity to provide a sample of breath, or it would be impracticable to obtain a breath sample. It is common ground on this appeal that the belief of the police officer that the person is incapable or it is impractical to obtain a breath sample must be held at the time the demand for blood is given.

[13] In my view, the SCAC judge erred by substituting his view of the evidence for that of the trial judge. Unfortunately, the judge did not refer to the standard of review and this omission may have led to the error in approach. The error here is similar to that made by the SCAC judge in **Nickerson**, *supra*,:

> 7. ... In the present case, the Summary Conviction Appeal Court judge, in effect, retried the case on the transcript of evidence. He substituted his views concerning the credibility and weight of evidence for those of the trial judge. This was done with respect to the trial judge's findings that he did not accept that Mr. Nickerson had been told the fishery was open or not closed, with respect to the trial judge's conclusion that MacKenzie Monitoring was not an agent of the government and with respect to whether there were other readily available sources of information about closures. In each instance, the Summary Conviction Appeal Court judge did not ask himself whether the findings of the trial judge were unreasonable or unsupported by the evidence but instead made findings of credibility and weight based on his review of the transcript. He applied the wrong test in conducting his appellate review and in doing so, he erred in law.

[14] The SCAC judge found that the trial judge erred by focussing on the fact that the officer had made up his mind at the accident scene to demand a blood sample as opposed to a breath sample. While it is apparent that the trial judge did consider the officer's belief at the time of the accident, he also went on to consider the situation at the hospital. At ¶ 12,(QL version) the trial judge commenced his analysis by properly stating the issue:

> 12 Did Const. Harris have reasonable grounds to believe that the physical condition of the accused was such that it was impracticable to obtain a sample of her breath?

[15] Next, he quoted the relevant section of the **Criminal Code** and recognized that the timing of the police officer's belief was important when he said:

> 14 Clearly, one of those pre-conditions must be satisfied to justify the taking of blood samples. Furthermore, the incapacity of a person to provide breath samples and the impracticability for the peace officer to obtain breath samples must relate to the condition of the person at the time of the demand for blood samples.

[16] The trial judge found as a fact that the officer did not consider giving a breath demand at any time (¶ 15). He concluded by once more referring to the police officer's frame of mind at the time of the demand:

> 17 Const. Harris based his grounds for giving the blood demand on his opinion that it was impracticable to obtain a breath sample. He stated that at the time he gave the demand he was conscious of the fact that, what he believed to be a two hour time limit under s. 254(3), was approaching. However, he had already made the decision to obtain a blood sample shortly after he arrived at the accident scene and made no attempts to comply with the requirements of s. 253(3)(b)(i) or (ii). [*sic* 254(3)(b)] In my view, his failure to do so resulted in an unconstitutional search and seizure and a breach of s. 8 of the **Charter**.
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> ...
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> 19 Even accepting those cases as persuasive authority, I am mindful of the fact that each case depends upon its own unique facts. In any event, I have no difficulty in the present case in concluding that the discretion in the peace officer to determine the impracticability of obtaining a breath sample does not extend to ignoring the requirements of s. 253(3)(b) [*sic* 254(3)(b)]. Furthermore, I do not believe Const. Harris' conclusion to obtain a blood sample was based upon reasonable observations at the accident scene.

[17] Although the trial judge concluded on the evidence that Constable Harris had made up his mind at the accident scene, it is clear that he also considered the officer's thinking at the time he made the demand.

[18] The SCAC judge's role was to review the evidence, re-examine and re-weigh it, but only for the purpose of determining whether it was reasonably

capable of supporting the trial judge's conclusion. The SCAC judge did not determine whether the evidence reasonably supported the trial judge's conclusions with respect to the police officer's reasonable grounds of belief at the time the demand was made. Instead, he in effect, retried the case on the transcript of evidence, as is clear from the passages quoted above. He assessed the evidence and made his own findings of fact. He erred by substituting his views concerning the credibility and weight of the evidence and inferences that could be drawn from the evidence, for those of the trial judge.

[19] As in **Nickerson**, *supra*, having found an error of law, it is necessary to consider its effect. Had the SCAC judge applied the correct legal test, would he have concluded that the trial judge's findings were reasonable and supported by the evidence?

[20] In my view, the trial judge's findings were reasonable and supported by the evidence. It is clear that the trial judge considered both the officer's thinking at the time of the accident and again at the hospital when the demand for blood samples was made. The finding that the officer never considered the possibility of Ms. Farrell providing a sample of breath is reasonable and consistent with the evidence. As well, the evidence supports the finding that Constable Harris did not ask the doctor if Ms. Farrell could provide a breath sample, he only asked her if she was capable of providing a blood sample. Nor did he ask Ms. Farrell if she thought she was capable of providing a breath sample. That Constable Harris made up his mind at the scene of the accident to seek a blood sample as soon as possible after arriving at the hospital and did not reassess the situation at the hospital is also a reasonable inference to draw from the evidence. Furthermore, the trial judge's finding that the officer's prime consideration was obtaining evidence before two hours passed, was also reasonable.

[21] The SCAC judge erred in law in failing to apply the proper appellate standard of review. The trial judge's finding that the police officer did not have reasonable and probable grounds to demand the blood sample should therefore be restored. The next issue is whether the trial judge's conclusion regarding the admissibility of the certificate of analysis contains an appealable error.

[22] The trial judge found there was a breach of s. 8 of the **Charter**, and that the admissibility of the evidence would bring the administration of justice into

disrepute, so the evidence should be excluded pursuant to s. 24(2) of the **Charter**. His reasons are as follows:

> 20 Following a breach under s. 8 of the **Charter**, it is necessary to determine whether the admission of the evidence obtained as a result of the breach would bring the administration of justice into disrepute. That leads to an analysis of the evidence and circumstances in relation to three factors: trial fairness, seriousness of the breach, and the effect of exclusion, as first described in **R. v. Collins**, [1987] 1 S.C.R. 265.
>
> 21 The provision of one's blood is clearly conscriptive evidence when compelled by agents of the State to create evidence of a criminal offence despite, the lack of the requisite grounds to issue a 254(3) demand.
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> 22 As a general rule the Court will conclude that the admission of conscriptive evidence, undiscoverable by alternative non-conscriptive means, will render the trial unfair and thereby bring the administration of justice into disrepute. (See **R. v. Stillman**, [1997] 1 S.C.R. 607 (S.C.C.).
>
> 23 Secondly, the taking of blood samples is a significant bodily intrusion. As such, the Crown has been held to strict compliance with the prerequisites of s. 254(3)(b). (See **R. v. Franklin**).
>
> 24 Finally, I have concluded that the admission of the certificate of analysis, absent compliance with the prerequisites of s. 254(3)(b), would bring the administration of justice into disrepute. Therefore, the evidence of the analysis of alcohol from the accused's blood will be excluded pursuant to s. 24(2) of the **Charter**.

[23] The Crown submits that the trial judge erred in law in excluding the evidence and that a proper s. 24(2) analysis should lead to the admissibility of the evidence. The appellant argues that the trial judge’s decision to exclude the evidence should be upheld.

[24] Sections 24(2) states:

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

[25] The standard review and the principles applicable to the s. 24(2) analysis are set out in **R. v. MacEachern**, 2007 NSCA 69:

> 25 In **R. v. Buhay**, [2003] 1 S.C.R. 631 the Court explained the standard of review and rationale for deference by a court of appeal to the rulings of a trial judge under s. 24(2):
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> > 44 In light of the above, a distinction has been drawn between the judicial adjudication of disrepute, which involves an appreciation of evidence in the exercise of discretion, and the judicial decision to exclude, which is a duty flowing from a finding of disrepute (see Sopinka, Lederman and Bryant, *supra*, at p. 423). Deciding whether each of the preconditions to exclusion is met requires an evaluation of the evidence and the exercise of a substantial amount of judgment which mandates deference by appellate courts (D.M. Paciocco and L. Stuesser, **The Law of Evidence** (3rd ed. 2002), at p. 276; see also **R. v. B.(C.R.)**, [1990] 1 S.C.R. 717, at p. 733). This Court has emphasized on numerous occasions the importance of deferring to the s. 24(2) **Charter** findings of lower court judges: see, e.g., **R. v. Duguay**, [1989] 1 S.C.R. 93, at p. 98; **Kokesch**, [1990] 3 S.C.R. 3, *supra*, at p. 19; **R. v. Greffe**, [1990] 1 S.C.R. 755, at p. 783; **R. v. Mellenthin**, [1992] 3 S.C.R. 615, at p. 625; **R. v. Wise**, [1992] 1 S.C.R. 527, at p. 539; **R. v. Goncalves**, [1993] 2 S.C.R. 3, at p. 3; **Grant**, [1993] 3 S.C.R. 223, *supra*, at p. 256; **R. v. Belnavis**, [1997] 3 S.C.R. 341, at para. 35; **R. v. Stillman**, [1997] 1 S.C.R. 607, at para. 68. It was recently recalled by this Court in Law, *supra*, at para. 32:
> >
> > > While the decision to exclude must be a reasonable one, **a reviewing court will not interfere with a trial judge's conclusions on s. 24(2) absent an "apparent error as to the applicable principles or rules of law" or an "unreasonable finding" ....**
> >
> > 45 This is also consistent with the recent decision of this Court in **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, 2002 SCC 33. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law as it involves the application of a legal standard to a set of facts. In **Housen**, at para. 37, Iacobucci and Major JJ., for the majority, held that "[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in

> principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law".
>
> 46 On the s. 24(2) issue as on all others, the trial judge hears evidence and is thus better placed to weigh the credibility of witnesses and gauge the effect of their testimony. Iacobucci J., dissenting in part in **Belnavis**, *supra*, at para. 76, explained cogently the rationale for deference to the findings of trial judges:
>
> > The reasons for this principle of deference are apparent and compelling. Trial judges hear witnesses directly. They observe their demeanour on the witness stand and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript, no matter how complete. Even if it were logistically possible for appellate courts to re-hear witnesses on a regular basis in order to get at this information, they would not do so; the sifting and weighing of this kind of evidence is the particular expertise of the trial court. The further up the appellate chain one goes, the more of this institutional expertise is lost and the greater the risk of a decision which does not reflect the realities of the situation.
>
> 47 The findings of the trial judge which are based on an appreciation of the testimony of witnesses will therefore be shown considerable deference. **In s. 24(2) findings, this will be especially true with respect to the assessment of the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency (Law, supra, at paras. 38-41)**. [Emphasis added in MacEachern]

26 In short, the Chief Justice's conclusion under s. 24(2) should be upheld unless he made an error in law or an unreasonable finding. To the same effect from this court: **R. v. Delorey**, [2004] N.S.J. No. 297, 2004 NSCA 95, at para. 34; **R. v. Skier**, [2005] N.S.J. No. 209, 2005 NSCA 86 at para. 9.

27 In **R. v. Law**, [2002] 1 S.C.R. 227, at para. 33, Justice Bastarache for the Court summarized the principles under s. 24(2):

> 33 In **Collins**, [1987] 1 S C.R. 265, *supra*, this Court grouped the circumstances to be considered under s. 24(2) into three categories: (1) the effect of admitting the evidence on the fairness of the subsequent trial, (2) the seriousness of the police's conduct, and (3) the effects of excluding the evidence on the administration of justice. Trial judges are under an

> obligation to consider these three factors. In general, it will be much easier to exclude evidence if its admission would affect the fairness of the trial as opposed to condoning a serious constitutional violation: **Collins**, *supra*, at p. 284.
>
> To the same effect **Buhay,** at para. 41; **R. v. Belnavis**, [1997] 3 S.C.R. 341, at para. 35; and **R. v. Stillman**, [1997] 1 S.C.R. 607, at para. 69.

[26] Therefore it will be necessary to defer to Judge Stroud's findings of fact, including any part of his ruling based on an assessment of the credibility of a witness, and his decision must be upheld unless there is an error of law or an unreasonable finding.

[27] Judge Stroud correctly cited **R. v. Collins** and analysed the circumstances in relation to the three relevant factors: trial fairness, seriousness of the breach, and the effect of the exclusion on the repute of the administration of justice. He found that the evidence was conscriptive and that generally the admission of conscriptive evidence, undiscoverable by alternative means, will render the trial unfair and therefore bring the administration of justice into disrepute. He found that the breach, failure to comply with s. 254(3)(b), was serious and that the admission of the certificate of analysis would therefore bring the administration of justice into disrepute. However, Judge Stroud either omitted finding that the evidence was undiscoverable by other means, or simply assumed that it was not discoverable by an alternative non-conscriptive method. If the evidence was discoverable by non-conscriptive means, the apparent finding that admission of the evidence would render the trial unfair is an error in the application of the law.

[28] The parties here agree that the evidence should be classified as conscriptive, but they disagree on what evidence is actually in question. The appellant submits that the evidence is the blood itself, whereas the Crown suggests it is the analysis of the blood alcohol content. It is necessary to decide this preliminary issue because of its impact on the issue of whether or not the evidence would have been discovered by alternative non-conscriptive means. The appellant presents no case law as authority for his proposition that the blood itself is the evidence in question. The vial of blood was not presented as an exhibit at the trial and certainly Judge Stroud was of the view that the analysis of the blood was the evidence in question. This is also consistent with cases relied upon by the Crown to support its s. 24(2) argument, for example **R. v. Knox**, [1996] 3 S.C.R. 199 and **R. v. Brown** (1991),

107 N.S.R. (2d) 349. In my opinion, when considering whether the evidence was discoverable by alternative non-conscriptive means, it makes sense to examine whether a blood alcohol content analysis was available by other means.

[29] The Crown submits that blood alcohol analysis could have been obtained through a breath sample. Judge Stroud found that Constable Harris had legal justification to demand a breath sample. I agree with the Crown's submission in this respect. It is a rational inference from the evidence that if Ms. Farrell was prepared to consent to giving a blood sample, that she would have consented to providing a breath sample if she were capable of doing so. Providing a breath sample is less intrusive than allowing a sample of blood to be drawn. There is support for this conclusion on the discoverability issue in **R. v. Brown**.

[30] In **R. v. Brown,** this court confirmed its previous decision in **R. v. Green** (1991), 100 N.S.R. (2d) 82 (later upheld by the Supreme Court of Canada: [1992] 1 S.C.R. 614) that the demand for the blood sample was improper because it did not contain the medical assurance. Hallett, J.A., after referring to the remarks of Chief Justice Lamer regarding trial fairness in **R. v. Collins**, said:

> [17] . . . The last sentence of Mr. Justice Lamer's remarks is very relevant on the facts of this case. The respondent had been advised of his s. 10(b) **Charter** right to counsel and had been given a breath and blood demand in the form used by police officers at the time. He consented to provide the blood sample. Had the **Green** demand been in use he would have had the comfort of knowing the blood sample would not be taken unless a doctor was satisfied it would not endanger his health and the sample would be taken by or under the doctor's supervision. Had the demand been made in post-**Green** terminology, the respondent would undoubtedly have provided the samples as he would have had less reason to refuse than to refuse a demand pursuant to the form that was in use at the time he was apprehended. Such a conclusion is not a matter of speculation but of rational inference.
>
> . . .
>
> [19] There is a rational inference that the blood analysis evidence, even although it emanated from the respondent and is self-incriminating, would have been obtained even without the presumed violation of the respondent's **Charter** right to be secure from unreasonable seizure. It was an error in law on the particular facts of this appeal for the Summary Conviction Appeal Court judge not to consider this factor. Considering the fact that the self-incriminating evidence would have been obtained had the post-**Green** demand been given, it

> should not have been excluded solely because it was self-incriminating. As the evidence obtained was pursuant to a demand that was in use at the time, coupled with the fact the respondent would in all likelihood have consented to providing a blood sample if the **Green** demand had been used, can it be said that the admission of the evidence would impair the fairness of the trial? In my opinion it would not.

[31] In this case, since the appellant agreed to provide a blood sample it is logical to assume that if she had been capable of providing a breath sample, she would have consented to that procedure. If Constable Harris had asked the doctor if Ms. Farrell was capable of providing a breath sample and the answer was “yes”, presumably he would have made arrangements for a breath sample to be taken. If the answer was “no” she was not capable because of her medical condition, the blood sample would have been legally provided in accordance with the legislation. In either case, if it was not practicable to obtain a sample of breath, the pre-conditions for obtaining a blood sample would have been met. I agree with the Crown’s submission that the evidence in question was probably discoverable in any event and therefore its admission would not offend against trial fairness.

[32] The second step in the **Collins** analysis is to consider the seriousness of the **Charter** violation. The seriousness of the violation is measured by the consideration of mitigating or aggravating factors surrounding the reasons for the breach. These factors include whether the violation was committed in good faith, whether it was motivated by urgency or necessity, and whether the breach was inadvertent or technical in nature.

[33] I agree with the Crown that Judge Stroud failed to consider whether there were mitigating factors in his s. 24(2) analysis. The appellant submits that the breach was serious and relies on **R. v. Poheretsky**, [1987] 1 S.C.R. 945, **R. v. Dersh**, [1993] 3 S.C.R. 768 and **R. v. Dyment** [1988] 2 S.C.R. 417. The respondent refers to **R. v. Hylkema** (1985), 70 N.S.R. (2d) 368 (C.A.) and **R. v. Baccardax** (1986), 75 N.S.R. (2d) 154 (C.A.) and submits that the breach was technical in nature.

[34] In my opinion the facts of this case fall somewhere between the serious breaches found in the cases relied on by the appellant and the technical breaches in the cases relied on by the Crown. Here the police officer did have reasonable and probable grounds for making a demand for a breath sample, there was no finding of bad faith on the part of police officer, and the accused consented to providing

the blood sample. The breach seems to have been founded in the officers mistaken belief in the time limit for obtaining a sample. These factors, taken together, tend to weigh in favour of admissibility of the evidence.

[35] The third step of the **Collins** analysis requires consideration of factors relating to the effect of excluding the evidence and whether excluding the evidence would bring the administration of justice into disrepute. Judge Stroud found that the admission of the evidence would bring the administration of justice into disrepute but did not provide reasons for his conclusion. Relevant factors that should have been considered include whether the breach was serious or trivial in nature and the public interest in having a determination on the merits in cases involving allegations of drinking and driving. Based on cases referred to by the Crown, **Knox**, **Brown** and **Bernshaw**, *supra*, the trial judge erred in law in failing to weigh these factors.

[36] In **Knox** a blood sample was obtained in violation of s. 8 of the **Charter** because no medical assurance had been given as required by s. 254(4). Chief Justice Lamer, when addressing the question of whether the admission of the blood analysis would bring the administration of justice into disrepute, wrote:

> 18 Of course, this leads to a crucial question: whether the results of the blood sample analysis can be used despite the **Charter** violation. Contrary to the appellant's submission, the Quebec Court of Appeal did not err by ordering a new trial instead of rendering a verdict of acquittal. The issue that needs to be addressed is whether the admission of the blood sample results could "bring the administration of justice into disrepute" under s. 24(2) of the **Charter**. As I have said on previous occasions, this is a determination appropriately left for the trial court, and I leave this issue to be decided by it. Nevertheless, I might point out that if an accused actually complies with a blood sample demand, in the absence of the medical assurances of s. 254(4), I cannot conceive how adducing the evidence of the blood sample could "bring the administration of justice into disrepute". This is particularly true when the conditions stipulated by the provision were in fact met. Subject to other considerations which are ultimately left to the trial court, the administration of justice is not harmed by the deficient demand when an accused actually complies under these circumstances. This is because a proper demand under s. 254(4) would only serve to encourage further compliance. [Emphasis added]

[37] In **Bernshaw**, Justice Cory addressed the public interest factor as follows:

16 Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country. Statistics Canada recently noted:

> Impaired driving is a serious crime. Every year thousands of Canadians are killed and many more injured in traffic-related accidents. Alcohol is a contributing factor in an average of 43% of these cases (Traffic Injury Research Foundation -- D. R. Mayhew et al. [**Alcohol Use Among Persons Fatally Injured in Motor Vehicle Accidents: Canada 1990**] 1992:33).

("**Impaired Driving -- Canada, 1991**" (1992), 12:17 **Juristat 1**, at p. 2.)

17 Statistics Canada has compiled a variety of figures with respect to motor vehicle accidents in general. Between 1983 and 1991, 41,000 individuals died in traffic accidents in Canada. A further 2.5 million people were injured: "**Impaired Driving -- Canada, 1992**" (1994), 14:5 **Juristat 1**. In 1992, the total number of deaths resulting from motor vehicle accidents was 3,289: **Causes of Death 1992** (1994), at pp. 246-51. This figure includes drivers, passengers, cyclists, and pedestrians. In 1987, motor vehicle accidents were responsible for injuries requiring 762,000 days of in-hospital medical treatment and causing 12 million days of lost activity and employment: **Accidents in Canada** (1991), at pp. 61-64.

18 Statistics Canada observed that alcohol is a contributing factor in 43 percent of those motor vehicle accidents which cause death and injury. Interpreting Statistics Canada's general motor vehicle accident statistics with reference to this 43 percent figure, it would seem that alcohol was a contributing factor in:

- some 17,630 individual deaths between 1983 and 1991;

- approximately 1,075,000 individuals injured between 1983 and 1991;

- about 1,414 additional deaths (including drivers, passengers, cyclists and pedestrians) in 1992;

- 327,660 days of in-hospital medical treatment in 1987; and

- 5,160,000 days of lost activity and employment in 1987.

> 19 These dry figures are mute but shocking testimony demonstrating the tragic effects and devastating consequences of drinking and driving. The social cost of the crime, great as it is, fades in comparison to the personal loss suffered by the victims of this crime through the death and injury of their loved ones. The gravity of the problem and its impact on Canadian society has been so great that **Criminal Code** amendments were enacted aimed at eliminating or, at least, reducing the problem.

[38] In my view the admission of the evidence of the blood alcohol analysis in this case would not bring the administration of justice into disrepute and it therefore should have been admitted. The trial judge erred in law in excluding it.

[39] I would therefore dismiss the appeal. The Summary Conviction Appeal Court reversed the appellant's acquittal and remitted the matter to the Provincial Court for another trial. That order should be varied to provide that the matter be remitted to Judge Stroud for continuation of the trial in a manner consistent with these reasons.

Roscoe, J.A.

Concurred in:

Fichaud, J.A.

Murphy, J.