NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Spin, 2011 NSCA 80

Date: 20110915
Docket: CAC 339874
Registry: Halifax

Between:

Rudolph Spin

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	May 18, 2011, in Halifax, Nova Scotia
Held:	Appeal is allowed and a new trial ordered per reasons for judgment of Beveridge, J.A., Fichaud and Farrar, JJ.A. concurring.
Counsel:	Michael S. Taylor, for the appellant William D. Delaney, for the respondent

Reasons for judgment:

INTRODUCTION

[1] The appellant was charged with two related drinking and driving offences arising out of an accident. The trial judge acquitted him of impaired operation of motor vehicle causing bodily harm, but convicted on the charge of operating a motor vehicle having consumed alcohol in such a quantity that his blood alcohol level exceeded 80 mg. of alcohol in 100 ml. of blood, and causing an accident resulting in bodily harm. The trial judge imposed a sentence of eight months imprisonment followed by a term of probation, along with orders with respect to DNA and a prohibition on driving.

[2] The appellant appeals from conviction. He argues the trial judge erred in failing to find a breach of his rights under s. 10(b) of the *Charter*. The appellant asks this Court to conclude the breach was made out, and a proper application of *Charter* principles under s. 24(2) would lead to an exclusion of the breath samples utilized by the Crown in establishing the appellant's blood alcohol level (BAL). He also argues that even if the breath results are admissible, the trial judge erred in relying on the opinion evidence tendered by the Crown to establish his BAL was in excess of the permissible level at the time of care or control.

[3] I agree that the trial judge should have found at least one s. 10(b) violation. As I will explain, this Court has the jurisdiction to conduct an analysis under s. 24(2) to determine if the breath results would nonetheless be admissible. However, in light of the record before this Court, and the lack of clear findings with respect to matters that could impact the analysis under s. 24(2), I would allow the appeal, quash the convictions and order a new trial. I do not agree that the trial judge erred as alleged with respect to his approach to the expert evidence and would dismiss that ground of appeal.

FACTS

[4] The Crown's case was called mostly within the context of a *voir dire*. The purpose of the *voir dire* was to challenge the admission of the breath samples on the basis that the appellant's rights under ss. 8 and 10(b) were infringed or denied.

[5] The evidence about the circumstances surrounding the accident were uncontested and straightforward. Much of the factual matrix was the subject of an Agreed Statement of Facts. Noelle DeCoste was a victim. She was driving on her side of the road at approximately 6:30 p.m. when her vehicle was struck head on by the appellant's truck. The appellant was the driver. She suffered a traumatic brain injury. The appellant's injuries were relatively minor.

[6] The appellant's brother and his wife were the first to arrive at the scene. They broke the rear window of the truck and helped the appellant get out of his vehicle. The appellant had a difficult time recalling what had happened. Emergency crews arrived, followed by the police.

[7] The appellant was identified to the police as the driver of the truck involved in the accident. Cst. Monteith approached him. They talked. Their conversation was not long. Name, date of birth and bare particulars about the cause of the accident were obtained. Cst. Monteith did not think the appellant was well, and advised him to seek medical attention from the paramedics. Monteith asked the appellant to remain in order that a witness statement could be taken from him. The appellant did not recall this request. He was checked by the paramedics, and then left the scene at 7:22 p.m. with his sister who took him to his mother's residence nearby.

[8] Cst. Monteith had no difficulty in learning where the appellant had gone or in finding him. Cst. Monteith told the appellant he had to get a statement from him about the motor vehicle accident pursuant to the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293. The appellant testified that he felt obligated to give a statement due to the comments by Monteith. Pursuant to the principles set out by the Supreme Court of Canada in *R. v. White*, [1999] 2 S.C.R. 417, the trial judge found the statement was compelled by statute and hence unavailable for use by the Crown at the appellant's trial. Utilizing the common law or s. 24(1) of the *Charter*, the trial judge ordered the statement excluded on the basis that admission would violate the principle against self-incrimination. The order of exclusion changed some of the admissions that had originally been the subject of the Agreed Statement of Facts. The consequences of that change will be addressed later.

[9] The circumstances, and what Cst. Monteith learned during the taking of the statement at the mother's residence are important to certain aspects of the appellant's challenge to the admission of the breath test results.

[10] Cst. Monteith started taking a statement from the appellant at 19:50. He finished at 20:20. The trial judge found that just prior to 20:11 Cst. Monteith smelled alcohol coming from the direction of the appellant, which led to the question, had the appellant been drinking that day. The response was: "Yeah, I had a couple of drinks." Further questions established when he had had his last drink, and that he had nothing to drink since the accident.

[11] Cst. Monteith said at that point he believed that he had the requisite grounds to make a screening device demand. The trial judge put this at 20:15. The statement ended at 20:20. The evidence about what happened next differed as between the appellant and Cst. Monteith. The appellant said the Constable made an informal request, along the lines of " If I wanted to put you on the roadside device, would you take it ?" The appellant said he would. However, according to Cst. Monteith, the appellant, just prior to him reading the approved screening device demand, challenged him by saying: " If you don't believe me, I can blow in the breathalyzer if you want." The trial judge did not decide which version was correct, if either, as he did not consider it to be particularly relevant. The trial judge did comment:

> [71] I would say that I don't consider that it makes much sense for the officer to have uttered the words that Mr. Spin alleges. He acknowledges he had grounds to make the demand, Constable Monteith does. His intention was to make it, and he carried through with that intention. Putting that in an informal way, as Mr. Spin suggests, really doesn't make sense to me.

[12] Cst. Monteith and the appellant went to the patrol car just outside the residence. At 20:37 Monteith read to the appellant the demand from a card. However, Cst. Monteith did not have the device with him. He knew he did not have it when he read him the demand. In fact, he was not even trained in the use of an approved screening device.

[13] Cst. Monteith called Cst. Reid, an officer still at the accident scene. He determined that Cst. Reid was a qualified operator of an approved screening device and had one. It was about a two minute drive to the accident scene. A few minutes

after arrival, Cst. Reid handed the device to the appellant. After several attempts a suitable sample was provided. The result was a fail.

[14] The fail on the device gave Cst. Monteith reasonable and probable grounds to give a demand under s. 254(3) of the *Criminal Code*.

[15] Six minutes after the fail result, Cst. Monteith informed the appellant of his right to retain and instruct counsel. The appellant responded "Not right now, no". He then read to the appellant a demand for breath samples pursuant to s. 254(3) of the *Criminal Code*. They went to the Antigonish detachment, stopping briefly for the appellant's asthma medication. On arrival at the detachment, Cst. Monteith and the appellant had differing versions of what exactly happened and when.

[16] Cst. Monteith says on arrival, he went to the booking counter and starting filling out what he called an "in-take sheet". He says he asked the appellant if he wanted to speak to counsel, and the appellant said no. The appellant testified that at the detachment, he was shown directly into a room with Cst. MacPherson, the breathalyzer technician. According to the appellants, there was no mention by Cst. Monteith, or by any police officer, of a phone book or list of lawyers, or lawyers at all. The appellant made no request to speak to counsel.

[17] The appellant testified that after he had failed the breath tests he went to the booking counter where he gave up his shoes, wedding ring, cell phone, and other personal possessions before being placed in cells. After he was in a holding cell, Cst. Monteith came and asked him some questions. He was taken to a room. It was then the appellant says he requested a phone call. Cst. Monteith asked if he wanted to call a lawyer. The appellant testified he asked Monteith what a lawyer was going to do for him now, to which he responded: "He's not going to get you out of here any faster". The appellant then called his wife. He made this call because Cst. Monteith told him that once he completed his paperwork, the appellant could go home.

[18] The evidence on the *voir dire* was heard March 29 and 30, 2010. Following submissions, the trial judge reserved his decision to May 21, 2010. On that date he gave oral reasons. These were later released to the parties in writing on January 25, 2011.

[19] The breath test results at 9:55 p.m. and 10:14 p.m. were 130 mg. in 100 ml. of blood. The Crown conceded that it could not rely on the presumption provided for in s. 258(1) of the *Criminal Code* that the appellant's BAL at the time of care and control at 6:30 p.m. was as reflected in these test results. To establish beyond a reasonable doubt that the appellant's ability to operate a motor vehicle was impaired, or that his BAL at the time of care and control was over 80 mg., the Crown relied on some aspects of the Agreed Statement of Facts. It also called opinion evidence by experts, Ms. Elizabeth Dittmar and Ms. Josette Hackett, and lay witness, John Cotie. The appellant did not testify nor call any witnesses on the trial proper.

[20] The trial judge accepted the evidence of the experts. With respect to Mr. Cotie, a friend of the appellant's, the judge was only prepared to accept some of his evidence. The two critical assumptions made by both experts were that the appellant had nothing to drink thirty minutes before the accident and nothing after. The experts gave varying ranges of the BAL of the appellant at the time of the accident depending on how much alcohol may have been consumed by the appellant in the half hour prior. The Agreed Statement of Facts still conceded that the appellant had nothing to drink after the accident.

[21] The evidence of Mr. Cotie raised the possibility that the appellant had consumed alcohol within 30 minutes of the accident. At issue was how much and when. The trial judge had every reason to be sceptical about the evidence of Mr. Cotie. It was rife with inconsistencies about times of consumption, and quantities consumed. This led the judge to conclude Cotie's evidence was biased in favour of the appellant, and unreliable.

[22] The trial judge was not prepared to find that the appellant had engaged in heavy drinking within the half hour prior to driving. However, the judge did have a reasonable doubt that the appellant's BAL was over 100 mg. per 100 ml. of blood at 6:30 p.m., and hence found that the Crown had not proved beyond a reasonable doubt that the appellant's ability to operate a motor vehicle had been impaired by alcohol. The trial judge nonetheless found that, in light of the absence of evidence that the appellant consumed the necessary large quantities of alcohol to bring his BAL to below or 80 mg. at 6:30 p.m., he was not prepared to speculate that this had occurred. He said he was satisfied beyond a reasonable doubt that the appellant's BAL was over 80 mg. at the relevant time.

[23] The trial judge referred to the possibility that the Crown might not need to establish a causal link between the operation of the motor vehicle with a BAL over 80 mg. and the occurrence of an accident causing bodily harm to satisfy the requirements of s. 255(2.1) of the *Criminal Code*. In any event, he was satisfied that the BAL of the appellant was not only a contributing cause beyond the *de minimus* range, but was prepared to say it was a significant contributing cause. The appellant does not complain about this aspect of the trial judge's decision.

[24] It is useful to set out the findings and analysis of the trial judge on the claimed for breaches of ss. 8 and 10(b) separately.

TRIAL JUDGE'S CHARTER ANALYSIS

[25] As already noted, the appellant was successful at trial in securing the exclusion of the appellant's statement to Cst. Monteith. The respondent takes no issue with the trial judge's ruling. Nothing more need be said about it. It is the ruling by the trial judge there was no violation of the appellant's right to counsel and subsequent s. 24(2) analysis that requires our attention.

[26] The trial judge found the delay from the formation of the required reasonable suspicion to give a demand under s. 254(2) to when the demand was actually given was 22 minutes, and at least two more minutes before the appellant was in the presence of an approved screening device. The trial judge referred to a number of authorities, including the decision by the Supreme Court of Canada in *R. v. Woods*, 2005 SCC 42, about the requirements that must be met for a s. 254(2) demand to be lawful. He concluded the demand by Cst. Monteith was not in compliance with the requirements of s. 254(2). Hence, the results of the screening device could not be relied upon as a basis to give the subsequent breathalyzer demand. The trial judge found that the results of the breathalyzer were obtained contrary to s. 8 of the *Charter*. The trial judge then conducted the required analysis under s. 24(2) of the *Charter* to decide if the breath results from the Datamaster should be excluded. He ruled they should not.

[27] The trial judge declined to find a breach of the appellant's right to retain and instruct counsel under s. 10(b). The reason he gave was that the appellant was not detained until after he left his mother's residence and was in the police car.

[28] The appellant also argued at trial that his s. 10(b) rights were infringed or denied by virtue of the claimed equivocal answer by the appellant to Cst. Monteith. Monteith read the formal words required regarding s. 10(b), and then asked the appellant if "he wished to call a lawyer now". The appellant's reply was: "Not right now, no". The trial judge referred to the evidence of the appellant that he understood he could call a lawyer, and he knew there were phones at the detachment, but did not ask to speak to a lawyer. Although the judge acknowledged there were decisions to the contrary, he did not accept that anything more was required of the police once the appellant responded as he did. Instead, he relied on the analysis and conclusion of the trial judge in *R. v. Boudreau*, 2009 NSPC 26. In that case, Derrick Prov. Ct. J. disagreed with the analysis of Doherty Prov. Ct. J. in *R. v. Liddell*, 2008 BCPC 143, and concluded that the utterance "no, not at this time" constitutes a clear waiver of the right to counsel. The appellant does not raise this issue on appeal. I therefore make no comment on the analysis or conclusion by the trial judge on this issue.

GROUNDS OF APPEAL

[29] The appellant sets out his grounds as follows:

1. The Learned Judge erred in ruling that the Appellant's rights under s.10(b) of the *Charter* to be informed of his right to counsel were not engaged as a result of the failure to make the s.254(2) demand forthwith.

2. The Learned Trial Judge erred in ruling the Appellant was not detained by the arresting officer until after he had left his mother's residence.

3. The Learned Trial Judge erred in not excluding the results of the breath samples provided on the Datamaster instrument.

4. The Learned Trial Judge erred in accepting the opinion evidence of the toxicologist called by the Respondent in order to extrapolate the breath readings of the Datamaster without the existence of a proper evidentiary foundation.

ANALYSIS

Opinion Evidence

[30] The complaint of the appellant on this issue does not depend on the admissibility of the Datamaster results. If this complaint is substantiated, there is no need to have a new trial to resolve the factual issues that would inform the requisite s. 24(2) analysis. It is therefore necessary to address this issue.

[31] The experts were Ms. Dittmar and Ms. Hackett, both Forensic Alcohol Specialists employed by the RCMP. Ms. Dittmar prepared a report dated August 11, 2009. Her report was tendered as part of the original Agreed Statement of Facts. It was her opinion that the appellant's BAL at 6:30 p.m. would have been 154 to 215 mg. per 100 ml. of blood. To arrive at this opinion she assumed an elimination rate of 10 to 20 mg. per hour, no alcohol consumption after 6:30 p.m. nor between 6:00 and 6:30. It was also her opinion that if the appellant had consumed six ounces of vodka (40% alcohol by volume) between 6:00 and 6:30 p.m., the appellant's BAL would have been 116 to 187 mg. of alcohol in 100 ml. of blood.

[32] The relevant portion of the original Agreed Statement of Facts provided:

> According to Elizabeth Dittmar, a forensic specialist-alcohol, Mr. Spin's blood alcohol level at the time of the motor vehicle collision (which is agreed occurred at approximately 6:30 p.m.) would have been between 154 to 215 mg of alcohol in 100 ml of blood. Ms. Dittmar's report of[*sic*] containing this opinion is attached hereto and will be presented to the Court by agreement and the Court will be asked to accept its contents as having been proven. It is agreed that the particular facts and assumptions that the[*sic*] Ms. Dittmar uses in making her calculations are part of this agreed statement of facts including the assumption that Mr. Spin had nothing of an alcoholic nature to drink in the half hour prior to the collision or after the collision and before providing his first breath sample. It is also agreed that based on the fact that Mr. Spin's blood alcohol level exceeded 100 mg% at the time of the collision, his ability to operate a motor vehicle was impaired.

[33] The trial judge raised with the parties what impact his ruling on the admissibility of the accused's statements might have on the facts that had been agreed upon. The appellant took the position that since the evidence from the

appellant's statement about the amount and pattern of his alcohol consumption relied upon by Ms. Dittmar was no longer available, the Crown would have to call evidence to substantiate the key assumption that the appellant consumed no alcohol in the half hour prior to 6:30 p.m., and if he had done so, the impact that would have on his BAL at the time of care and control.

[34] The Crown anticipated calling John Cotie and Ms. Dittmar. Mr. Cotie testified. I have already referred to the assessment made by the trial judge about the reliability of Mr. Cotie's evidence. The following excerpts demonstrate the soundness of the trial judge's assessment on the key issue of how much vodka the appellant consumed and when:

> A. I had a little bit of vodka and I had a couple of drinks.
>
> Q. All right. And do you recall roughly, I appreciate you won't have an exact memory, but do you recall roughly the time that you arrived at your home?
>
> A. I don't know if it was 5 o'clock or something, 4:30, I have no idea. 5:30 or something maybe.
>
> Q. Okay. Well give us a range, your best estimate of when you got to your house?
>
> A. Probably 5:30 or something maybe.
>
> . . .
>
> Q. All right. Now you said you had some vodka to drink?
>
> A. Yeah.
>
> Q. Okay. And where did that vodka - whose vodka was it?
>
> A. Mine, I had it in the shop.
>
> . . .
>
> Q. Okay. And the vodka that you had, that was in what, kind of a container?

A. A pint bottle.

. . .

Q. Okay. And what about Mr. Spin, did he have some?

A. He had something. I don't know what he had - I don't know, he had a little bit, I don't know how much.

Q. Okay. And what was he drinking?

A. Vodka.

Q. Okay. And was this the same vodka that you were drinking?

A. Yeah.

Q. All right. And do you recall what he was drinking out of?

A. A Styrofoam cup.

Q. Okay. Was this one of your Styrofoam cups?

A. Yeah.

Q. All right. And who poured his drink?

A. I think I poured it.

Q. Okay. Now do you recall how many cups or how many times you poured drinks?

A. I don't know what I poured him. I can't say for sure.

Q. Okay. Was Rudy Spin drinking anything but the vodka, at your place I mean?

A. He had some water.

Q. Okay. Anything else alcoholic apart from the vodka?

A. No.

. . .

Q. Okay. Now you're, you say it was a pint vodka bottle?

A. M-hm.

Q. Was this a new pint vodka bottle or was it...

A. No it was one I had kicking around the shop.

Q. Okay. And can you say how much was in the vodka bottle when you started pouring?

A. It wasn't very much, I don't know how much.

Q. Okay. Give us an estimate of how much was in the bottle?

A. It might have been a quarter of a pint maybe or something.

Q. Okay. A quarter of a pint?

A. Yeah, maybe somewhere around that.

Q. Okay. And could it have been a little bit more?

A. Could have been.

Q. Was it more than half or less than half?

A. Oh it was less than half I think, I'm thinking.

Q. Okay. Now...

A. But I don't really, like I said, I don't know.

Q. All right. Well just tell us what you do know. And I've asked you for the estimate.

A. It's hard to give an estimate.

Q. All right.

A. Like I don't know.

Q. Do you know if this bottle was full?

A. No I don't think it was full.

Q. Okay. And as best you can recall where was it in the bottle?

A. I don't really know because when I got there we talked for a little bit and I went and I grabbed a drink.

Q. M-hm.

A. And I just, I asked Rudy if he wanted a drink.

Q. Okay. And in terms of half though, or more than half or less than half, are you able to say that?

A. Honestly, no.

Q. All right. And your best estimate would be what?

A. It could have been around half. Look I don't know.

. . .

Q. Okay. Now you gave a couple of different times in terms of your estimate of when you got there. You said 4:30, 5:00 or 5:30 but you settled on 5:30, is...

A. Yeah, it was probably around 5:00 or 5:30 somewhere, I don't know.

Q. Is that in your range, 5:00, 5:30 is that what you're saying?

A. Yeah, somewhere probably.

Q. Okay. And do you recall how long Rudy Spin stayed at your place of residence?

A. It would have been a half hour or somewhere around that I think.

Q. All right. And do you know the time that he left or can you estimate the time that he left?

A. It must have been shortly after 6:00 probably, or somewhere, I don't know.

[35] In cross-examination, Mr. Cotie was equally vague. He was uncertain if the appellant had less or more of the available vodka or the size of the drinks being poured. It could have been as late as 6:30 that the appellant left in his truck. When he did leave, it was Cotie's opinion that the appellant appeared fine to him, and not intoxicated in any way.

[36] Ms. Dittmar had already testified when there was no apparent dispute about what and when the appellant last consumed alcohol prior to the accident. When the trial re-commenced, the Crown called another expert, Ms. Josette Hackett. She was qualified to offer opinion evidence on the absorption, distribution and elimination of alcohol in the human body, and on the calculation and interpretation of BAL, and the impairing effects of alcohol on the ability to operate a motor vehicle. Her expertise was uncontested. The opinion of Ms. Hackett was that an individual with a BAL of 130 mg. in 100 ml. at 9:55 p.m. would have a BAL of between 164 and 198 mg. at 6:30 p.m. This was based on the same assumptions of no alcohol in the half hour prior to 6:30 and nothing after that time. She explained why her opinion on the range of BAL differed from the opinion of Ms. Dittmar. It is immaterial to any issue on this appeal why they differed.

[37] It was always appreciated that consumption of alcohol in the half hour prior to 6:30 p.m. would impact on the opinion evidence about the appellant's BAL at 6:30 p.m. In Ms. Dittmar's report, she set out her opinion that if 6 ounces of vodka was consumed in the half hour prior to the accident, and none of it was absorbed, the BAL would be 116 to 187 mg. per 100 ml. of blood. She testified to the same effect earlier in the trial.

[38] Ms. Hackett gave evidence that a pint of alcohol contains 375 ml., or approximately 13.2 ounces. She was asked to assume consumption of 6.6 ounces

in the half hour prior to 6:30 p.m. She also assumed that none of that alcohol had been absorbed and distributed into the person's bloodstream. This was the most favourable assumption. That person's BAL would be between 70 and 104 mg. per 100 ml. of blood at 6:30 p.m. If the consumption was 3.3 ounces, the BAL at 6:30 p.m. would be 117 to 150 mg. To reach 80 mg. or less at 6:30, the person would have had to consume between 5.9 ounces and 8.3 ounces of alcohol in the preceding 30 minutes. Again, this assumed it was consumed just prior to 6:30, so that none of that alcohol was absorbed into the bloodstream at 6:30.

[39] The opinions of both Ms. Dittmar and Ms. Hackett assumed the vodka that Mr. Cotie talked of consuming with the appellant was 40% alcohol by volume.

[40] The appellant argues that the trial judge erred in how he dealt with the notion of bolus drinking by the appellant in the half hour prior to the accident, and in relying on the opinion evidence when those opinions were based on the assumption that the vodka being consumed by the appellant was 40 % alcohol by volume.

[41] The appellant does not say what kind of error he alleges was committed by the trial judge. If it is a question of admissibility or how the evidentiary or persuasive burdens are assigned, those are matters upon which the trial judge must be correct. If it is how he assessed the evidence, absent material misapprehension, the trial judge must have committed palpable and overriding error to permit interference by this court. In my opinion, even reviewed on a standard of correctness, I see no error by the trial judge. I will explain.

[42] The trial judge accepted the evidence of both Ms. Dittmar and Ms. Hackett. He acknowledged the difference in their respective opinions, and utilized the opinion of Ms. Hackett as it was more favourable to the appellant.

[43] The appellant says the trial judge accepted there had been bolus drinking by the appellant, but then fell into error by making an educated guess about how much. With all due respect, the trial judge did not accept there had been bolus drinking. His reasoning on this was as follows:

> [52] A Court does not have to divorce itself from the application of common sense when considering circumstances like this. Bolus drinking, namely, consuming large amounts of alcohol in a short period, followed immediately by

> driving a motor vehicle, can occur. However, such behaviour can fairly be described as abnormal or highly unusual. The reasons why it would be unusual are logical and obvious.
>
> [53] There is no evidence of bolus drinking by the defendant here. There was a witness to the defendant's drinking, Mr. Cotie. He said nothing about such a pattern of alcohol consumption, despite demonstrating his willingness to be favourable to the defendant in his testimony. One would think that something unusual, like the defendant consuming a large amount of alcohol just before leaving in his truck, would be more likely to stick in Mr. Cotie's mind.
>
> [54] In the absence of any evidence of bolus drinking, I'm not prepared to engage in speculation that the defendant could have drank such a large volume of alcohol so shortly before driving that his blood alcohol level at 6:30 was actually at or below eighty milligrams of alcohol in one hundred millilitres of blood. To speculate that something that unusual could have happened and then to use such speculation as a basis for doubt about the defendant's blood alcohol level would not be reasonable, and thus should not be used as a foundation for reasonable doubt about an element of the offence.

[44] In my opinion, there was really no evidence at all that the appellant actually consumed any vodka between 6:00 and 6:30 p.m. let alone almost a full half of a pint. The only evidence of consumption came from Mr. Cotie. He did not describe any consumption in that time period, let alone large quantities in a short period. His evidence did not allow for any more vodka to be consumed between him and the appellant than one half pint. Obviously, the trial judge was concerned there was more alcohol consumed than what Mr. Cotie was prepared to acknowledge. But it was only alcohol consumed after 6:30 or in the half hour prior that was germane.

[45] The appellant stuck to his Agreed Statement of Facts that no alcohol was consumed after 6:30, and the evidence of Mr. Cotie, at best, raised the **possibility** of consumption of alcohol in the half hour prior to leaving. To bring the appellant's BAL to 80 mg. or below at 6:30, the appellant would have had to have consumed almost 6 ounces of vodka in that half hour, none of which was absorbed by 6:30 p.m. The evidence simply did not support such a scenario. I see no error by the trial judge in his analysis or conclusion.

[46] There was no specific evidence about the alcohol percentage of the vodka consumed by Mr. Cotie and the appellant. Forty percent was referred to in Ms.

Dittmar's report, which had been tendered by consent for the truth of its contents as part of the Agreed Statement of Facts. That agreement was recanted in part. The extent of the recantation was the subject of considerable discussion between the parties. It is at least arguable that the recantation included Ms. Dittmar's reference to the vodka being 40 % alcohol by volume. Ms. Hackett does refer to this issue in her evidence. The following was her evidence in cross-examination:

Q. Does it matter what kind of vodka you're doing your calculations in relation to?

A. I calculate, well for this particular calculation in today's matter I used a 40 percent, alcohol at 40 percent, or liquor at 40 percent alcohol by volume.

Q. Okay. That's not information you were provided by Mr. Murray is it?

A. No that was not.

Q. That's just a figure that you used on your own?

A. Yes it is.

Q. And there are other alcohols that are not 40 percent per volume?

A. No, that's correct.

Q. Correct?

A. Yes.

Q. Okay. There are other alcohols that are higher in alcoholic volume, correct?

A. There are, yes.

Q. Homemade alcohol for one, correct?

A. Yes.

Q. You weren't given the name of a brand of vodka in this particular case were you, you were just told that it was vodka, correct?

A. That's right.

Q. Okay. So if the alcohol that was consumed was something other than a commercial brand 40 percent per volume your calculations would, could be changed dramatically, correct?

A. They could be changed, yes.

[47] In re-direct, Ms. Hackett elaborated:

Q. The 40 percent alcohol by volume, can you or do you know or can you express an opinion with respect to vodka that's commercially available, what the alcohol content of that tends to be or is or in most cases?

A. I believe in most cases for any type of hard liquor, commercially available hard liquor the alcohol concentration is 40 percent by volume.

Q. All right.

A. It's a number that we use. We have a number that we use for beer also and for wine.

[48] The trial judge dealt with this issue as follows:

> [57] This was Mr. Cotie's vodka. He didn't say there was anything special or out of the ordinary about it. Considering this vodka to be forty percent alcohol by volume is reasonable on the part of Ms. Dittmar and Ms. Hackett. Acceptance of that alcohol concentration by me is supported by logical and permissible inferences from the evidence before me.

[49] While obviously it may have been clearer had the Crown established from Mr. Cotie the brand of vodka or its alcohol concentration, I see no error by the trial judge in relying on the opinion of Ms. Hackett that the vodka that might have been consumed in the half hour prior to 6:30 p.m. was 40% alcohol by volume.

[50] The reasonable inference to be drawn from Ms. Hackett's evidence is that commercially available vodka is 40% alcohol by volume. That is the percentage that she and other experts use in formulating their opinions. There was no evidence that Mr. Cotie's vodka was anything other than one that was

commercially available. In these circumstances, the trial judge was entitled to rely on Ms. Hackett's opinion, including her reliance on 40% as the appropriate alcohol percentage.

Charter Issues

[51] For ease of reference, I will repeat the complaints by the appellant. They are:

> 1. The Learned Judge erred in ruling that the Appellant's rights under s.10(b) of the *Charter* to be informed of his right to counsel were not engaged as a result of the failure to make the s.254(2) demand forthwith.
>
> 2. The Learned Trial Judge erred in ruling the Appellant was not detained by the arresting officer until after he had left his mother's residence.
>
> 3. The Learned Trial Judge erred in not excluding the results of the breath samples provided on the Datamaster instrument.

[52] The stated grounds clearly raise related issues. If the trial judge erred as suggested in failing to find a s. 10(b) violation, this impacts the analysis under s. 24(2) on whether the breath samples should be excluded or admitted into evidence.

[53] The first time Cst. Monteith informed the appellant of his right to retain and instruct counsel was at 20:59, some six minutes after the appellant had registered a fail on the screening device. The interval between the screening device demand just outside his mother's residence at 20:37 and 20:59 raises the issue about the delay in providing to him his rights under s. 10(b), specifically the right to be advised thereof "without delay". If the appellant was detained for a period that involves a delay within the meaning of s. 10(b) during that time, it follows that his rights were infringed or denied.

[54] The question of what constitutes a detention within the meaning of s. 10(b) was authoritatively determined in *R. v. Grant*, 2009 SCC 32. McLachlin C.J. and Charron J. wrote the majority judgment. They explained the test for detention within the meaning of s. 10(b) as follows:

[28] The general principle that determines detention for *Charter* purposes was set out in *Therens*: a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (*per* Le Dain J., at p. 644). This principle is consistent with the notion of choice that underlies our conception of liberty and, as such, shapes our interpretation of ss. 9 and 10 of the *Charter*. When detention removes the "choice to do otherwise" but comply with a police direction, s. 10(*b*) serves an indispensable purpose. It protects, among other interests, the detainee's ability to choose whether to cooperate with the investigation by giving a statement. The ambit of detention for constitutional purposes is informed by the need to safeguard this choice without impairing effective law enforcement. This explains why the extremes of formally asserted control on the one hand and a passing encounter on the other have been rejected; the former restricts detention in a way that denies the accused rights he or she needs and should have, while the latter would confer rights where they are neither necessary or appropriate.

. . .

[30] Moving on from the fundamental principle of the right to choose, we find that psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated. The rationale for this second form of psychological detention was explained by Le Dain J. in *Therens* as follows:

> 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. [Emphasis added]

> [31] This second form of psychological detention – where no legal compulsion exists – has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police. As discussed in more detail below and summarized at para. 44, the focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.
>
> [32] The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police "good faith" may become relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a *Charter* breach is found.) While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

[55] To provide guidance, the majority referred to the spectrum of interactions between the police and individuals. They then summarized the approach to be applied:

> [44] In summary, we conclude as follows:
>
> 1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or

> demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[56] The question of infringement or denial of a *Charter* right is a question of law. Generally, questions of law are reviewed on a standard of correctness. A trial judge is required to identify and apply the correct legal principles. See: *R. v. R.E.W.*, 2011 NSCA 18. However, an appellate court owes appropriate deference to a trial judge's factual findings (*R. v. Grant*, *supra*, at para. 45).

[57] There are at least two aspects of the trial judge's ruling on the issue of s. 10(b) that are problematic. The first is that he declined to definitively resolve the assertion by the appellant that, while in his mother's residence, he felt compelled to go with Cst. Monteith. The second is that once in the police car, the approved screening device demand was formally given to the appellant. According to the principles set out in *Grant* he was then detained within the meaning of s. 10(b). Ordinarily, the requirement to comply with s. 10(b) where an individual is detained pursuant to an approved screening device demand under s. 254(2) is excused by virtue of the saving provision of s. 1 of the *Charter* (see *R. v. Thomsen*, [1988] 1 S.C.R. 640).

[58] The trial judge determined that the demand was not authorized by s. 254(2). The appellant was under no legal obligation to comply with it. That is something he did not know. He was told that he was required to comply with it under pain of being charged with refusal. On appeal, the Crown conceded that the failure to comply with the informational and other duties triggered by that detention was a violation of s. 10(b). It is an appropriate concession.

[59] The trial judge referred in a general way to the interplay between a faulty demand under s. 254(2) and s. 10(b) rights, but declined to find any violation. He reasoned as follows:

> [95] As the case law points out, if a 254(2) demand is not made forthwith, or a breath sample cannot be provided forthwith as required, there is usually a corresponding breach of s. 10(b).
>
> [96] The suspect is normally detained at roadside even before a 254(2) demand, and would also be detained after such a demand.
>
> [97] If circumstances allow for consultation with counsel, and such consultation is not permitted, or the s.10(b) rights are not read at all, then a 10(b) breach also occurs.
>
> [98] The circumstances here are different, however. The defendant was not detained until given the 254(2) demand after leaving his mother's residence and entering the patrol car. If the 254(2) demand had been given as soon as the officer had grounds to give it, and then the officer and the defendant had remained at the residence and completed the statement then, of course, the 10(b) analysis here would be much different.
>
> [99] However, in the circumstances, I do not conclude that there was a 10(b) breach related to the approved screening device demand and the way that it was given here.

[60] With all due respect, the trial judge erred in law in failing to find a breach of the appellant's rights under s. 10(b) of the *Charter*. It has long been clear that the only basis for not complying with a number of *Charter* requirements is the necessity for the demand to be in compliance with s. 254(2). As pointed out by Gillese J.A. in *R. v. George* (2004), 187 C.C.C. (3d) 289:

> [27] Before turning to *Cote* and *Latour*, it is useful to recall the parameters established by the decisions of the Supreme Court of Canada in this matter. To begin, it is accepted that where a roadside breath demand is made, the driver is detained and his or her s. 10 rights under the *Charter* are *prima facie* triggered. However, if the demand is validly made pursuant to s. 254(2) of the *Criminal Code* in that it is made "forthwith", the police officer need not advise the detainee of his or her s. 10(b) rights because, although s. 254(2) violates s. 10(b), it is a reasonable limit prescribed by law and justified under s.1 of the *Charter*. See *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411 (S.C.C.).

[61] Fish J., in *R. v. Woods*, *supra*, emphatically stressed the need for police to be in compliance with s. 254(2). The respondent in that case was given a screening device demand and refused. Arrest and right to counsel followed. After speaking with counsel, he intimated that he then wanted to provide a breath sample. He did so. A fail result led to a breathalyzer demand. The breath samples showed his BAL to be over the permissible level. Fish J. wrote:

> [14] The constitutional obstacle is no easier for the Crown to overcome. Section 254(2) depends for its constitutional validity on its implicit and explicit requirements of immediacy. This immediacy requirement is implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample "forthwith".
>
> [15] Section 254(2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. But for its requirement of immediacy, s. 254(2) would not pass constitutional muster. That requirement cannot be expanded to cover the nature and extent of the delay that occurred here.
>
> . . .
>
> [28] But neither prosecutorial discretion nor the right of any person, detained or not, to volunteer self-incriminating evidence warrants extension of a statutory scheme beyond the constitutional boundaries within which it was meant to operate: see, for example, *R. v. Thomsen*, [1988] 1 S.C.R. 640; *R. v. Grant*, [1991] 3 S.C.R. 139, at p. 150; *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at paras. 72-75.
>
> [29] The "forthwith" requirement of s. 254(2) of the *Criminal Code* is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the *Charter*. In interpreting the "forthwith" requirement, this Court must bear in mind not only Parliament's

> choice of language, but also Parliament's intention to strike a balance in the *Code* between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.

[62] The appellant asks this Court, if we were to find a s. 10(b) violation, to carry out a new analysis under s. 24(2). Such an analysis, he argues, should lead to an exclusion of the breathalyzer results. He has not relied on some of the language by Fish J. in *R. v. Woods* that would seem to suggest admission of breath samples depends on whether the police properly had reasonable and probable grounds to make the breathalyzer demand (see paras. 3, 7 & 8). The Crown argues that even if a s. 10(b) violation occurred, a proper analysis under the three lines of inquiry set out by the Supreme Court of Canada in *R. v. Grant* would lead to the admission of the evidence.

[63] There is no doubt that an appellate court has the requisite jurisdiction to carry out the analysis under s. 24(2) if new or additional *Charter* violations are declared on appeal. (see for example: *R. v. Grant*, *supra*, *R. v. Reddy*, 2010 BCCA 11; *R. v. Strilec*, 2010 BCCA 198; *R. v. Caputo* (1997), 114 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Squires*, 2005 NLCA 51; *R. v. Chehil*, 2009 NSCA 111, *R. v. Morelli*, 2010 SCC 8). If the record is adequate to do so, it is preferable that the appeal court perform the s. 24(2) analysis. However, there may well be instances where the record is deficient in some way that prevents or impedes a proper analysis. In those circumstances, the appropriate remedy is a new trial (see *R. v. Timmons*, 2011 NSCA 39).

[64] I am reluctantly of the opinion that a new trial is the appropriate remedy. I will explain. The trial judge found no s. 10(b) violation. He erred in that conclusion. Hence his s. 24(2) analysis only referred to the violation of s. 8 of the *Charter*. There are a myriad of factors that inform a proper analysis under s. 24(2). All the circumstances must be taken into account. The court is required to consider the seriousness of the state conduct, the impact on the *Charter*-protected interests of the accused, and society's interest in adjudication of the case on its merits.

[65] The evidence at trial reveals a disturbing lack of appreciation by Cst. Monteith about the interplay between police powers and the rights of a suspect. The trial judge referred to this (paras. 6 and 72). This impacts on the issue of good faith, or lack thereof. In addition, there was a marked difference between the

evidence of Cst. Monteith and the appellant over what happened following the taking of the statement and later.

[66] Cst. Monteith finished the statement at 20:20. They arrived in the police car at 20:37. There was no clear explanation in the evidence as to what was transpiring during that period. Monteith testified that he had decided to give the appellant the approved screening device demand in the residence, and was reaching for his notebook when the appellant preempted him by the challenge "If you don't believe me, I can blow in the breathalyzer if you want." The appellant's evidence was that was not the way it happened at all. Cst. Monteith asked, "If I wanted to put you on the roadside, would you take it ?" He agreed to take it because he felt he had to. He was then taken outside and put in the rear of the police car. He did so, because he was told by Monteith to do so.

[67] With respect to this difference in what happened, the trial judge declined to resolve, as he did not consider it to be particularly relevant. The judge did comment that, in his view, it did not make much sense for the officer to have uttered the words alleged by the appellant since he intended to make the demand anyway. On the other hand, Cst. Monteith was obviously very unclear about the *Code* provisions dealing with the approved screening device and related matters. In my opinion, it is relevant which version of events transpired. If the events unfolded as alleged by the appellant, he was detained much earlier, and in circumstances where he had easy access to a phone to exercise his right to counsel.

[68] Other factual matters that were not really resolved include such things as whether Cst. Monteith followed up with the appellant the equivocal response to his right to counsel given in the police car "Not right now, no". Again, the trial judge declined to definitively resolve the factual dispute. Even if the judge was correct in finding no additional s. 10(b) violation at the detachment (on which I make no comment), if Cst. Monteith's version is accepted, it speaks well of his respect for the rights of the appellant, which is a factor that could play a role in the delicate balancing process mandated by s. 24(2).

[69] In my opinion, trial judges have a duty to make factual findings based on the evidence they have heard. Appeal courts are ill equipped to try to resolve conflicting versions of events. It is far from ideal that a new trial must be held, but

it is better than having this Court carry out the important s. 24(2) analysis without a sufficient record.

[70] I would therefore allow the appeal and direct a new trial before another provincial court judge.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.