C.A.C. No. 02941

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Smith, 1994 NSCA 199
Matthews, Freeman and Pugsley, JJ.A.

BETWEEN:

FRED JOHN SMITH Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Craig M. Garson for the Appellant Kenneth W. F. Fiske, Q.C. for the Respondent Appeal Heard: September 23, 1994 Judgment Delivered: October 24, 1994

THE COURT: The Appeal is dismissed per reasons for judgment of Freeman, J.A.; Matthews and Pugsley, JJ.A. concurring.ENDFIELD

FREEMAN, J.A.:

The issues in this appeal involve brief but significant delays by a police officer between the detention of an accused, the respondent Fred John Smith, the giving of the A.L.E.R.T. demand for a breath sample, and the informing of Mr. Smith of his right to counsel under the **Canadian Charter of Rights and Freedoms.**

THE FACTS

At about 7:30 p.m. on November 20, 1991, Constable R.D.G.J. Bouchard of the Royal Canadian Mounted Police noticed that the driver and one of the passengers in a pickup truck on Argyle Street in Yarmouth, N.S. , were not wearing seatbelts. On stopping the truck he observed that Mr. Smith, the driver, was flushed with bloodshot eyes and a moderate smell of liquor on his breath.

Constable Bouchard did not have an A.L.E.R.T. screening device with him to administer a breath test. He asked Mr. Smith to go to the police car, and Mr. Smith did so. He called for an A.L.E.R.T. device and told Mr. Smith he was waiting for it and that he was going to give him an A.L.E.R.T. demand when "the box" arrived, which he said it did in about five minutes. Mr. Smith was then given the A.L.E.R.T. demand under s. 254(2) of the **Criminal Code**. When Mr. Smith blew into the machine it registered a "fail". Constable Bouchard then gave him the breathalyzer demand under s. 254(4) and read him his rights under the **Charter**. Mr. Smith failed the breathalyzer test with readings of 140 and 150, well in excess of the maximum legal level of 80.

Section 254(2) provides:

> Where a peace officer reasonably suspects that a

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

On cross-examination Constable Bouchard said he did not read Mr. Smith his **Charter** rights while they were waiting in the police car because one of Mr. Smith's passengers "came over to my vehicle and was giving me a hard time. Had placed his knee against my door so I couldn't get out. And for about . . . approximately seven or eight minutes this person was continually asking me to leave Mr. Smith go. . . . it's kind of hard to give somebody an A.L.E.R.T. demand when there's somebody else interfering with you the whole time".

Constable Bouchard acknowledged on cross-examination that it would "possibly" have been faster to take Mr. Smith to the R.C.M.P. detachment than to wait for the A.L.E.R.T. machine to arrive. After Mr. Smith failed that test and was read his right to counsel he called a number of lawyers from the R.C.M.P. detachment before finding one at home. After talking on the telephone for several minutes he agreed to take the breathalyzer test.

The technician's certificate was tendered in evidence. He was convicted of driving with an illegal level of blood alcohol on April 16, 1992, before a judge of the Provincial Court. The trial judge's findings established the following sequence of events:

19:29-- (7:29 p.m.)--Mr. Smith taken to police vehicle.

19:32--Constable Bouchard called for the A.L.E.R.T. machine.

19:40--Constable Bouchard gave Mr. Smith the A.L.E.R.T. demand.

He found Constable Bouchard was harassed by the passenger continually for a period of approximately eight minutes, and that this "prevented Constable Bouchard from giving the Section 10(b) rights to the accused during that eleven minute interval."

Constable Bouchard testified as to the further relevant times:

19:41--A.L.E.R.T. test performed.

19:44--Constable Bouchard read Mr. Smith the breathalyzer demand.

19:46--Constable Bouchard read Mr. Smith his **Charter** rights.

19:47--Constable Bouchard placed Mr. Smith under arrest for impaired driving and proceeded to the detachment.

19:55--Constable Bouchard and Mr. Smith arrived at detachment.

20:18--Mr. Smith, after nine previous tries, reached a lawyer and began speaking to him.

20:30--(estimated) Mr. Smith was turned over to Constable Muise for breathalyzer test.

21:00--(estimated) Mr. Smith was served with a copy of a qualified technician's certificate and an appearance notice.

Constable Bouchard testified that the A.L.E.R.T. device was delivered within five minutes of his request for it at 19:32.

FINDINGS OF TRIAL JUDGE

In convicting Mr. Smith, the trial judge made the following findings:

> Firstly I accept the evidence of Constable Bouchard that the A.L.E.R.T. demand not given to the accused until after he received the A.L.E.R.T. device. I find that this is distinguishable from the **Queen versus Grant** which the Defence cites. In the **Queen versus Grant** the demand was made one half hour before the A.L.E.R.T. was available, therefore ruling out "forthwith".
>
> I find therefore, the demand by Constable Bouchard is such as contemplated by Section 254(2) and therefore valid. . . .
>
> Therefore I find no breach of the accused's Section 10(b) rights to counsel, and this being the case I do not have to determine the issue of the exclusion of evidence.

SUMMARY CONVICTION APPEAL COURT

Mr. Smith appealed his conviction to the Supreme Court of Nova Scotia as summary conviction appeal court. The summary conviction appeal judge, like the trial judge distinguished **R. v. Grant** 67 C.C.C. (3d) 268 (S.C.C.), but on the ground that there had been a refusal in **Grant**. He rejected the trial judge's view that:

> . . . delay in administering the A.L.E.R.T. test, and the detention of the suspect for that purpose is inconsequential until the "demand" is uttered by the police officer. In other words, it argues that delay can occur only after "demand" and not from the time when the officer forms the "reasonable suspicion." In accepting that proposition, the Trial Judge made an error in law.
>
> In my view, that is not what the Legislature intended

> nor what the section requires. The clear intention is that both the demand will be given and the sample taken "forthwith" "**where a peace officer reasonably suspects** . . . ". Once the police officer makes that preliminary decision that there is a suspicion of alcohol, then in accordance with Grant **he must forthwith make the demand and take the sample**. If he does not do so, then his demand falls outside the parameters of that section and a refusal would not be an offence.

The summary conviction appeal court judge found that he could not accept the trial judge's conclusion that Constable Bouchard had been prevented from giving the Section 10(b) rights by the obstreperous passenger "as being a supportable inference from the evidence. . . Indeed, his conduct suggests to me that he had made a conscious decision not to make the demand and not to advise the accused that he was formally detained until he was in possession of an A.L.E.R.,T. machine so that the sample could be obtained 'forthwith' -- after the demand."

He concluded that because the A.L.E.R.T. demand was not given in accordance with s. 254(2) its results

> . . . cannot, therefore, provide the basis for reasonable and probable grounds for making a breathalyzer demand. The results of that test are, however, admissible unless it has been established that their reception in evidence could "bring the administration of justice into disrepute." The onus is on the Accused to establish on a balance of probabilities that such is the case. . . While I disapprove of what I perceive as a deliberate delay by the police officer in making the A.L.E.R.T. demand until the machine arrived, I cannot envision any way in which the Accused was prejudiced by the failure to promptly advise him of his right to counsel.

He applied **R. v. Rilling** (1975), 24 C.C.C. (2d) 81 to admit the breathalyzer results notwithstanding the irregular A.L.E.R.T. demand and the absence of reasonable and probable grounds.

In dismissing the appeal he found:

> The failure to advise the Accused of his right to counsel promptly did not affect the fairness of the trial and it has not been demonstrated that the admission of the evidence of the breath test results will bring the administration of justice into disrepute.

ANALYSIS

Section 10 of the **Charter** provides:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
> (b) to retain and instruct counsel without delay and to be informed of that right . . .

Section 1 of the **Charter** states:

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

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

LeDain J. explained the rationale:

> That there is to be no opportunity for contact with counsel prior to compliance with a s. 234.1(1) (now s. 254(2)) demand is, in my opinion, an implication of the terms of s. 234.1(1) when viewed in the context of the breath testing provisions of the Criminal Code as a whole. A s. 234.1 (1) roadside screening device test is to be administered at roadside, at such time and place as the motorist is stopped, and as quickly as possible, having regard to the outside operating limit of two hours for the breathalyzer test which it may be found necessary to administer.

At p. 13 of Thomsen LeDain J. said:

> The important role played by roadside breath testing is not only to increase the detection of impaired driving, but to increase the perceived risk of its detection, which is essential to its effective deterrence. In my opinion the importance of this role makes the necessary limitation on the right to retain and instruct counsel at the roadside testing stage a reasonable one that is demonstrably justified in a free and democratic society, having regard to the fact that the right to counsel will be available, if necessary, at the more serious breathalyzer stage.

LeDain J. considered the word "forthwith" in the s. 234.1(1) (now s.254(2)) demand, and quoted with approval from the decision of Finlayson, J.A., of the Ontario Court of Appeal in **R. v. Seo** (1986), 51 C.R. (3d) 1, who found the word meant "forthwith or as soon as practicable ... it does not mean 'immediately'."

Finlayson, J.A., held that s. 234.1(1)

> ... as drafted, does not permit a detained person, subject to a demand, to retain and instruct counsel before complying with such demand. The right to retain counsel is incompatible with the effective use of this device (the A.L.E.R.T.) on a random basis with the purpose of

> demonstrating a police presence so as to convince the driving public that there is a high probability of detection in the event they drive after drinking.

The word "roadside" has been deleted and there have been other amendments to the subsection since s. 238(2) was considered in **Thomsen**. In **Grant** Lamer C.J. deliberately avoided ruling on whether **Thomsen** applied to the amended s. 238(2) as it was numbered in 1991 prior to renumbering as s. 254(2), although he expressed this opinion:

> ...While I am inclined to agree with the reasoning of Matheson J. in the Supreme Court of Prince Edward Island that the key word in s. 238(2) is "forthwith" and that the reasons of this court in Thomsen are, therefore, directly applicable to the amended provision, I am of the view that it is not necessary to engage in a Charter analysis of s. 238(2) in disposing of this case.

Writing for a unanimous court consisting of Sopinka, Gonthier, Cory and Iacobucci JJs, He stated:

> The crucial point is that, unless the demand made by a police officer falls within the ambit of s. 238(2), the person to whom the demand is addressed is under no obligation to comply with the demand, and does not commit the offence under s. 238(5) if he refuses to do so. Nor is the provision available to authorize the absence of a s. 10(b) warning upon detention, and hence it cannot constitute a limitation on the s. 10(b) rights to counsel "prescribed by law" which would be capable of justification under s. 1. In other words, if the actions of the officer fell outside the purview of s. 238(2), those actions must be independently analyzed under s. 10(b) of the Charter without reference to the Code provision. The judgment of this court in Thomsen could only have application if the police action had fallen within s.

238(2).

> In my opinion, the actions of the officer in this case fell outside of the ambit of s. 238(2). The demand made was not the demand authorized by s. 238(2), that Mr. Grant provide a sample of his breath "forthwith". Instead, the demand made was a demand that he provide a breath sample when the required apparatus arrived, which turned out to be half an hour later.

In the present case, by waiting for the breathalyzer, Constable Bouchard was able to give a demand that appeared to fit the requirements of s. 254(2). He had ensured that Mr. Smith was able to comply with the demand to provide the breath sample "forthwith". It is to be noted that "forthwith" occurs only once in s. 254(2), creating a duty in the person to whom the demand is given to comply forthwith. There is no requirement that the police officer act "forthwith" after forming a reasonable suspicion the person has alcohol in his body.

However if a person is detained prior to the demand, the rationale in **Thomsen** does not apply. A person so detained is entitled to be informed of his rights under s. 210(b) of the **Charter** without delay, as Lamer C.J. remarked in the above citation:

> Nor is the provision available to authorize the absence of a s. 10(b) warning upon detention, and hence it cannot constitute a limitation on the s. 10(b) rights to counsel "prescribed by law" which would be capable of justification under s. 1.

In **Grant** the demand was invalid because the person upon whom it was

made could not comply with it "forthwith". In the present case the demand was not objectionable on that ground, but it had been made after Mr. Smith had been detained without being informed of his rights to counsel. The **Charter** issue, not the effectiveness of the demand, is the relevant consideration in the present case.

This creates a quandary for police officers who are not equipped with A.L.E.R.T. machines, and it may not be a solution to have the suspect accompany them to their detachment to enable a sample to be taken. There is no duty to accompany a police officer for this purpose until the demand has been given. And once the demand is given the breath sample is to be provided "forthwith" the summary conviction appeal court judge quoted the following note from **Martin's Annual Criminal Code**, citing **R. v. Cote** (unreported, January 7, 1992) Ont. C.A.):

> The demand did not comply with this subsection where the officer did not have the screening device with him and had to take the accused to the detachment. A total of 14 minutes elapsed between the making of the demand and the time when the device was ready. For the sample to be provided "forthwith" it must be provided immediately, meaning very shortly after the accused has been requested to accompany the officer for the purpose of providing the sample, usually at the side of the road or in the immediate vicinity.

The Ontario Court of Appeal recently considered 15 minute delays between the A.L.E.R.T. demand and the breath sample which police believed to be an operating requirement of the screening device used in the Ontario R.I.D.E. program in **R. v. Pierman** and **R. v. Dewald** (Unreported, August 24, 1994, Ont. C.A). The 15 minute interval was being allowed because of a concern results might be erroneously

high if the person being tested had consumed alcohol just before the demand. Grance and Galligan JJ.A. concurred with the analysis of Arbour J.A. in which she referred to **Thomsen**, **Grant** and **Cote** and stated:

> In light of that jurisprudence, it seems clear to me that although the section merely requires that the sample be provided "forthwith" after the demand is made, and does not require that demand itself be made "forthwith" after the person is stopped, it is implicit that the demand must be made by the police officer as soon as he or she forms the reasonable suspicion that the driver has alcohol in his or her body. This is the only interpretation which is consistent with the judicial acceptance of an infringement on the right to counsel provided for in s. 10(b) of the Charter. If the police had discretion to wait before making the demand, the suspect would be detained and therefore entitled to consult a lawyer. . . .
>
> In my view, a police officer cannot delay the taking of a breath sample, when acting pursuant to s. 254(2)of the Criminal Code, unless he or she is of the opinion that a breath sample provided immediately will not allow for a proper analysis of the breath to be made by an approved screening device. The officer is not required to take a sample that she or he believes is not suitable for a proper analysis. If there are facts which cause the officer to form the opinion that a short delay is required in order to obtain an accurate result, I think that the officer is acting within the scope of the section in delaying the taking of the breath sample. In such a case, as I indicated earlier, I do not think that it matters whether the officer postpones making the demand or postpones administering the test after having made the demand.

The onus of proving a **Charter** infringement is on the defence and Mr. Smith did not testify nor offer any evidence. However the whole of the evidence must be considered, and it is obvious that he was detained without being informed of his

right to counsel pursuant to s. 10(b). Constable Bouchard said he was delayed in giving the A.L.E.R.T. demand and the **Charter** rights by the obstreperous passenger, but in my view that is not sufficient to justify the failure to inform a detained person of his right to counsel. It is not necessary to speculate as to what advice might have been given if Mr. Smith had exercised his right to counsel before submitting to the A.L.E.R.T. test, although it may be noted that the law involved in his situation is rather intricate.

Lamer J. (as he then was) in the course of a detailed analysis of the operation of s. 24(2) of the **Charter** stated in **R. v. Collins** [1987] 1 S.C.R. 265 at p. 284:

> The trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s. 11(d) of the *Charter*. If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.
>
> It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. Our decisions in *Therens*, supra, and

> *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, are illustrative of this. The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded.

Mr. Smith's failure of the A.L.E.R.T. test followed the denial of his right to counsel. It created evidence emanating from himself of his impairment by alcohol that did not exist previously. He was no more or no less impaired after taking the test, but his failure provided the evidence necessary to enable the police officer to form the belief on reasonable and probable grounds necessary to justify a breathalyzer demand under s. 254(3) of the **Code**. He was conscripted to create evidence against himself following a violation of his **Charter** rights. Without the evidence of the A.L.E.R.T. failure there was no basis for the breathalyzer demand. The breathalyzer result, no less than the A.L.E.R.T. result, was evidence emanating from Mr. Smith which had been conscripted from him following an infringement of his right to counsel. There is no other evidence of Mr. Smith's blood alcohol level.

The final question to be determined is whether the Charter infringement goes to the fairness of the trial in such a manner that the results of both the A.L.E.R.T. and breathalyzer tests should be excluded from evidence. This determination is a particular responsibility of courts of appeal.

In **Duguay**, Lamer J. as he then was, delivered the judgment of a majority of the Supreme Court of Canada consisting of Dickson C.J. and McIntyre, Lamer, Wilson, LaForest and Sopinka JJ. (L'Herueux-Dube dissenting).

> It is not the proper function of this Court, though it has jurisdiction to do so, absent some apparent error as to the of law or a finding that is unreasonnable, to review findings of the Courts below under s. 24(2) of the Charter and substitute its opinion of the matter for that arrived at by the Court of Appeal.

The criteria for exclusion in **Collins** exist in the present case, and "generally" the evidence would be excluded. But these considerations do not exist in a vacuum and regard must be had to all the circumstances, which include consideration of the nature and seriousness of the breach.

It is important that the **Charter** infringement related only to the preliminary screening stage. An A.L.E.R.T. test does not, of itself, expose a suspect to the risk of prosecution. As LeDain J. remarked in **Thomsen**, the right to counsel guaranteed by s.10(b) of the **Charter** is a more important safeguard to liberty at the stage of the breathalyzer than of the screening device.

S. 24(2) of the **Charter** provides:

> (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 the 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 disprepute.

The delay in giving the A.L.E.R.T. demand resulted in a detention giving rise to s. 10(b) rights, but only with respect to a statutorily mandated investigative step which would not otherwise have enjoyed s. 10(b) protection (See **Thomsen**). The delay did not, as it did in the circumstances of **Grant**, give rise in itself to grounds for

refusing the demand. The demand itself was not improper, and counsel, if Mr. Smith had had opportunity to retain and instruct them, could not have told him otherwise. Any factors which might have justified refusal of the A.L.E.R.T. would have remained available to justify refusal of the breathalyzer after Mr. Smith actually had had the opportunity to consult with counsel.

The A.L.E.R.T. device was delivered in five minutes. Five minutes is a minor delay, the kind that is built into ordinary daily activities. From a practical standpoint it would make little difference for a person risking the consequences of drinking and driving whether an officer had an A.L.E.R.T. device with him, or was able to have it within five minutes. The actions of the unruly passenger on behalf of Mr. Smith played a part in delaying the actual demand for a total of eleven minutes from the time of detention. These delays were insufficient to significantly alter the dynamics of the roadside situation which LeDain J. discussed in **Thomsen**. In all the circumstances, Mr. Smith's situation was not worsened, nor his jeopardy increased, in any substantive way by the failure to give him his **Charter** rights at the time of detention.

The summary conviction appeal court judge, after considering the circumstances, said

> I cannot envision any way in which the accused was prejudiced by the failure to promptly advise him of his right to counsel. . . . The failure to advise the accused of his right to counsel promptly did not affect the fairness of the trial and it has not been demonstrated that the admission of the evidence of the breath test results will bring the administration of justice into disrepute.

In my view, as well, the admission of the evidence of the A.L.E.R.T. and

breathalyzer tests did not render the trial unfair and would not bring the administration of justice into disrepute. On the other hand to exclude evidence related to a matter of public safety, in the absence of any apparent increase in jeopardy resulting from what must be seen as a minor Charter infringement, could tend to bring the administration of justice into disrepute. I would not exclude the evidence under s. 24(2) of the Charter.

It follows therefore that the appeal must be dismissed.

J.A.

Concurred in: Matthews, J.A.

Pugsley, J.A.