NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Spin*, 2014 NSCA 1

Date: 20140108
Docket: CAC 408350
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Rudolph Joseph Spin

Respondent

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	September 16, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	William D. Delaney, Q.C., for the appellant Michael Taylor, for the respondent

Reasons for judgment:

Introduction:

[1] This is the second time that this case has been before this Court. Mr. Spin's original trial took place on March 29, March 30, May 21 and June 10, 2010. At the conclusion of that trial the trial judge acquitted him of impaired operation of a motor vehicle causing bodily harm, but convicted on the charge of operating a motor vehicle having consumed alcohol such that his blood alcohol level exceeded 80 milligrams of alcohol in 100 millimetres of blood and causing an accident resulting in bodily harm. He was sentenced to eight months imprisonment followed by a term of probation, along with orders with respect to DNA and a prohibition on driving.

[2] Mr. Spin appealed that conviction arguing the trial judge erred in failing to find a breach of his rights under s. 10(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the right to retain and instruct counsel without delay and to be informed of that right).

[3] By decision dated May 11, 2011 (*R. v. Spin*, 2011 NSCA 80) Mr. Spin's appeal was allowed on the basis that is s. 10(b) rights had been violated. The matter was remitted to the Provincial Court for a new trial before another judge.

[4] Mr. Spin was retried on April 18, 19 and June 28, 2012 before Judge Laurel Halfpenny-MacQuarrie. At the retrial, the Crown conceded Mr. Spin's s. 10(b) and s. 8 *Charter* rights (unreasonable search and seizure) had been violated but asked that the Certificate of Analysis evidencing Mr. Spin's blood alcohol level be admitted despite the *Charter* breaches.

[5] By decision dated September 27, 2012 (unreported), the trial judge excluded the Certificate of Analysis. Without the certificate there was no evidence on which Mr. Spin could be convicted and he was found not guilty.

[6] The Crown appeals arguing that the trial judge erred in excluding the Certificate under s. 24(2) of the *Charter*.

[7] For the reasons that follow, I would dismiss the appeal.

Background

[8] Like the first trial, the Crown's case on the retrial was called mostly within the context of a *voir dire*. The purpose of the *voir dire* was to challenge the admission of the Certificate of Analysis on the basis that Mr. Spin's rights under s. 10(b) and s. 8 of the *Charter* were infringed or denied.

[9] The evidence surrounding the circumstances of the accident, itself, is uncontested.

[10] On May 8, 2009, at approximately 6:30 p.m. Noelle Decoste was travelling east on a curved portion of Highway #4 in Monastery, Antigonish County. Mr. Spin was driving a 2002 Dodge Dakota pickup truck. He went left of centre and struck Ms. Decoste's vehicle head on. Ms. Decoste suffered a traumatic brain injury. Mr. Spin's injuries were relatively minor.

[11] Mr. Spin was identified to the police officer as the driver of the truck involved in the accident. He was approached by Constable Monteith of the Antigonish Detachment of the RCMP. They spoke for a very short period of time. Constable Monteith obtained Mr. Spin's name, date of birth and some particulars about the cause of the accident. Constable Monteith advised Mr. Spin to seek medical attention. At this point, Constable Monteith and Mr. Spin's evidence differ somewhat. Constable Monteith said he asked Mr. Spin to remain at the scene. Mr. Spin said that Constable Monteith told him that once he received medical attention from the paramedics that he was "good to go".

[12] Mr. Spin was checked by the paramedics and left the scene at approximately 7:20 p.m. and went to his mother's residence nearby.

[13] Constable Monteith had no difficulty in locating Mr. Spin. On arriving at Mr. Spin's mother's residence, Constable Monteith advised Mr. Spin that 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. Mr. Spin testified that he felt obligated to give

a statement due to Constable Monteith's comments. At the original trial, the trial judge found the statement was compelled by statute and it was not available for use by the Crown at the appellant's trial (as per **R. v. White**, [1999] 2 S.C.R. 417). The trial judge ordered the statement excluded on the basis that the admission would violate s. 7 of the *Charter*, the principle against self-incrimination.

[14] The circumstances surrounding the taking of the statement were important to Mr. Spin's challenge at trial to the admission of the certificate.

[15] Constable Monteith started taking the statement from Mr. Spin at 19:50. He finished at 20:20. Just prior to 20:11 Constable Monteith smelled alcohol coming from the direction of Mr. Spin which caused him to ask Mr. Spin whether he had been drinking to which Mr. Spin responded that he had had a couple of drinks.

[16] Mr. Spin was further questioned about when he had had his last drink and he replied that he had nothing to drink since the accident.

[17] Constable Monteith testified that near the conclusion of the taking of the statement at approximately 20:20, he formed the suspicion that Mr. Spin had been operating the motor vehicle with alcohol in his system and decided to have Mr. Spin blow into an approved screening device ("ASD"). He said at that time he made the decision that he was going to read the ASD demand to Mr. Spin but did not do so.

[18] Constable Monteith further testified that before he said anything to Mr. Spin, Mr. Spin blurted out: "If you don't believe me, I can blow on the breathalyzer if you want".

[19] Constable Monteith said that he was taken somewhat off guard by Mr. Spin's reaction and was surprised by the challenge.

[20] His response was to request Mr. Spin to follow him to the police car to which Mr. Spin agreed and followed the officer to the car.

[21] When they arrived at the police car Constable Monteith opened the right rear passenger side door and Mr. Spin got into the vehicle.

[22] At 20:37, Constable Monteith read the ASD demand to Mr. Spin. However, Constable Monteith did not have a device with him at the time of reading the demand, nor was he trained in the use of the device at that time.

[23] Constable Monteith then contacted Constable Reid who was at the accident scene. Constable Reid confirmed that he had an ASD and was a qualified operator of the device.

[24] Constable Monteith then drove Mr. Spin to the accident scene, a drive of about two minutes.

[25] Constable Reid met them there, opened the rear passenger side door, explained the ASD to Mr. Spin, and after several failed attempts a suitable sample was provided. The time was approximately 20:53.

[26] After discussing the results with Constable Reid, Constable Monteith placed Mr. Spin under arrest and informed Mr. Spin of his right to retain and instruct counsel to which his response was: "Not right now, no".

[27] He then read Mr. Spin a demand to provide samples of his breath pursuant to s. 254(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[28] They then left the accident scene to go to the Antigonish Detachment, stopping briefly for the appellant's asthma medication on the way, arriving at the Antigonish Detachment at approximately 9:45.

[29] Again, the evidence of Constable Monteith and Mr. Spin differ on what occurred when they arrived at the Detachment. Constable Monteith said on arrival he went to the booking counter and started filling out an "in-take sheet". An intake sheet is prepared for persons who are going to remain in the cells overnight. He says he asked Mr. Spin, informally, if he wanted to speak to counsel and that Mr. Spin said no.

[30] Mr. Spin's evidence was that when he arrived at the Detachment he was shown directly into a room with Constable MacPherson, the breathalyzer technician. Mr. Spin said that once he got to the Detachment, Constable Monteith did not deal with him; he simply turned him over to Constable MacPherson. He denied that Constable Monteith asked if he wanted to speak to counsel.

[31] Constable MacPherson administered the breath test and after the test was completed, he informed Mr. Spin that he had failed the test.

[32] Mr. Spin testified that after the breath test he went to the booking counter where he gave up his personal possessions before being placed in the cells.

[33] After Mr. Spin was in the cell, Constable Monteith came in and asked him some questions and then took him to another room where Constable Monteith read him his rights and asked him if he wanted to call a lawyer. Mr. Spin commented: "What's a lawyer going to do for me now?"

[34] Mr. Spin then called his wife because Constable Monteith had told him that once he completed the paperwork the appellant could go home.

[35] Mr. Spin was eventually released from custody at 8:30 or 9:00 a.m. the following morning.

[36] After hearing evidence, the trial judge reserved her decision. In a written decision dated September 27, 2012, as noted earlier, she excluded the certificate and acquitted Mr. Spin.

The Original Trial

[37] It is instructive to look at the findings of the trial judge in the original trial. At that trial, the judge found that the ASD demand was not in compliance with the requirements of s. 254(2) of the **Criminal Code**. Hence the results of the ASD could not be relied upon as a basis to give the subsequent breathalyzer demand. He found that the results of the breathalyzer were obtained contrary to s. 8 of the *Charter*. He then conducted the required analysis under s. 24(2) of the *Charter* to decide if the breath results should be excluded and determined they should not.

[38] The original trial judge did not find a breach of Mr. Spin's right to retain and instruct counsel under s. 10(b) of the *Charter*. The reason given was that Mr. Spin was not detained until after he left his mother's residence and was in the police car.

[39] On the first appeal, the Crown conceded the failure to comply with the informational and other duties triggered by the detention of Mr. Spin in the police

car was a violation of 10(b) of the *Charter*. The result was the matter was remitted for a retrial to carry out the s. 24(2) analysis in light of the s. 10(b) breach.

Issue:

[40] The Crown raises one issue on this appeal:

> Did the Provincial Court Judge err in law in excluding the evidence of the Certificate of the Qualified Data Master Technician under s. 24(2) of the *Canadian Charter of Rights and Freedoms*?

Standard of Review

[41] Where a trial judge has considered the proper factors pertaining to a s. 24(2) analysis and has not erred in principle, his or her ultimate determination should be reviewed in terms of a deferential standard (**R. v. Grant**, 2009 SCC 32, ¶86).

[42] This Court also had occasion to comment on the standard of review in **R. v. MacGregor**, 2012 NSCA 18 citing **R. v. Buhay**, 2003 SCC 30.

> 21 The issue of exclusion of evidence as a remedy under s. 24(2) of the *Charter* was considered by Justice Arbor in *R. v. Buhay*, 2003 SCC 30 (S.C.C.):
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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, 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, 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:
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> > 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" . . .

[43] The trial judge's decision will be reviewed on this standard.

Analysis

[44] In **R. v. Grant, supra**, the Supreme Court of Canada set out the analytical framework governing the exclusion of evidence. A court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to three lines of inquiry:

1. the seriousness of the *Charter*-infringing state conduct;
2. the impact of the breach on the *Charter*-protected interest; and
3. society's interest in the adjudication of the case on its merits.

[45] A court must determine whether, in all the circumstances, admission of the evidence would bring the administration of justice into disrepute after conducting these three lines of inquiry (¶57-87).

[46] The trial judge conducted the three lines of inquiry as mandated by **Grant**. However, in conducting the third line of inquiry, it is my view that she committed an error in principle which calls into question her ultimate conclusion on admissibility. Let me explain.

[47] In **Grant**, in discussing society's interest in the adjudication of the case on its merits, the Court said:

> [81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither

> the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute. (Emphasis added)

[48] The trial judge in her decision, when discussing that line of inquiry, concluded:

> [149] To allow the admission of the Certificate of the Qualified Data Master Technician in this case would both in the short term and the long term bring the administration of justice into disrepute. The evidence, although relevant, can in no way be considered reliable, nor serve the truth-seeking function of the justice system.

[49] This represents a clear error in principle on the part of the trial judge. There is nothing in this case to suggest that a breach of the respondent's *Charter* rights in any way undermined the reliability of the Certificate of Analysis.

[50] Having found that the trial judge was in error, it is my view that the proper disposition of this appeal requires me to undertake a new analysis under s. 24(2). There is no doubt that an appellate court has the requisite jurisdiction to carry out the analysis under s. 24(2) if the record is adequate to do so (**R. v. Spin**, ¶63). I am satisfied the record here is sufficiently adequate to allow the analysis.

[51] In conducting this analysis it is convenient to again review the factual findings in the original trial, and on the retrial.

[52] Starting first with the original trial, the trial judge found that the statement taken at Mr. Spin's mother's residence violated s. 7 of the *Charter* and excluded it on the basis that the admission would violate the principle against self-incrimination.

[53] The original trial judge also found that the police failed to meet the requirements of s. 254(2) of the **Criminal Code** relating to the ASD demand and as a result, those results could not be relied on as a basis for the subsequent breathalyzer demand. The original trial judge, therefore, found that the results of the breathalyzer were a breach of s. 8 of the *Charter* but allowed the evidence after conducting a s. 24(2) analysis.

[54] As noted earlier, this Court found that there was at least one breach of s. 10(b) of the *Charter*. At issue in the retrial was not whether a s. 10(b) *Charter* violation had occurred, but when it occurred. The Crown's position at trial was that the detention of Mr. Spin occurred only after being placed in a police vehicle and read the ASD demand. The Crown acknowledged that at that time his s. 10(b) rights were triggered and not complied with and, thus, there was both a s. 8 and s. 10(b) breach.

[55] Mr. Spin's counsel argued that the detention of his client commenced when he was being questioned by Constable Monteith at his mother's residence. The trial judge agreed and found that Mr. Spin was detained at his mother's residence when compelled to attend at the police vehicle for the purposes of an ASD demand. In making this determination, the trial judge had some blunt words about Constable Monteith's evidence:

> [123] In this case Constable Monteith's evidence was, and I struggled with a word to characterize it, without being unduly harsh, illogical in many regards and very confusing. That is not a term this Court uses lightly. Constable Monteith had difficulty not only recalling what he testified to in the first trial, but recalling what he testified to in earlier evidence the same day. ...

[56] She then concluded that she accepted Mr. Spin's evidence when it differed from Constable Monteith:

> [131] Where Mr. Spin's evidence differs from that of Constable Monteith, I accept Mr. Spin's evidence for the reasons just stated.

[57] The Crown did not appeal the trial judge's finding that Mr. Spin was detained at his mother's residence thus triggering his s. 10(b) rights at that time.

[58] I will now turn to the three avenues of inquiry mandated by **R. v. Grant**.

1. The seriousness of the *Charter*-infringing state conduct

[59] In *R. v. Grant* the Court held:

> [74] State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a

> wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[60] One cannot under estimate the seriousness of the *Charter* infringing conduct in this case. First, Constable Monteith breached Mr. Spin's s. 7 rights. Secondly, he detained Mr. Spin in his mother's residence without reading him his *Charter* rights thereby leading to a s. 10 breach.

[61] Constable Monteith did not understand the necessary grounds for the application of an ASD demand. He required Mr. Spin to accompany him to the police car. He then read the ASD demand to Mr. Spin in the police car without advising him of his s. 10(b) rights. Had he been advised of his right to retain and instruct counsel at that point, and had he exercised that right, Mr. Spin could have refused the ASD demand with impunity because it was not lawful under s. 254(2) of the **Criminal Code**.

[62] Mr. Spin's failure on the ASD led to Constable Monteith's belief that he had reasonable and probable grounds to read the breathalyzer demand.

[63] The Crown asks us to consider Constable Monteith's conduct as an innocent mistake made by an officer untrained in the ASD. With respect, I cannot agree. In my view, Constable Monteith's conduct, whether arising from ignorance or wilful blindness showed an utter disregard for Mr. Spin's *Charter* rights.

[64] Although the trial judge did not find a separate s. 10(b) breach for any failure on Constable Monteith's part in not following up with Mr. Spin of his right to counsel once they reached the detachment office, she did, however, implicitly accept Mr. Spin's recollection of what took place at the detachment by saying that she accepted Mr. Spin's evidence where it was in conflict with Constable Monteith. Constable Monteith said that he reminded Mr. Spin of his s. 10(b) rights at the detachment. Mr. Spin said that he did not.

[65] Constable Monteith's failure to follow up with Mr. Spin, given his equivocal response to his right to counsel in the police car "Not right now" may not be a separate 10(b) violation, however, it is a factor which can be taken into account in the delicate balancing process mandated by **R. v. Grant**. It speaks to

Constable Monteith's reliability and good faith in recognizing the importance of Mr. Spin's *Charter* rights.

[66] I agree with the trial judge that the following comments in **R. v. Grant** are directed at this type of situation:

> 75 ... "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, per Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, per Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion.

[67] I am of the view that the police conduct in this case, as I have outlined above, supports exclusion of the evidence.

Impact on the Charter-Protected Interests of the Accused

[68] Once again turning to **R. v. Grant**, the Supreme Court explains this inquiry:

> [76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter breach may range from fleeting and technical to profoundly intrusive. The more* serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
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> [77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to

> which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) — all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.
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> [78] Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

[69] In this case, we have a s. 7 *Charter* infringement (right to silence); a s. 8 infringement (unreasonable search and seizure); and s. 10(b) (the right to retain and instruct counsel and to be informed of that right).

[70] All of these breaches are fundamental to the *Charter*. They are neither fleeting nor technical. The s. 10(b) breach led to a s. 8 breach. As noted earlier, had Mr. Spin been informed of his right to counsel and exercised that right he could have refused the ASD demand with impunity. The breaches allowed the police to obtain evidence which they might not otherwise have had.

[71] I recognize that the taking of breath samples does not violate the personal integrity of a detainee. However, it must be kept in mind that Mr. Spin was only given the opportunity to speak to counsel after he had provided a sample into the ASD and produced a fail. His evidence was clear that he was of the understanding that he had no choice but to provide a sample of his breath once taken to the RCMP Detachment from the scene of the ASD test. Similarly, he testified, and the trial judge accepted, that he felt he had no choice with respect to going with Constable Monteith and providing the ASD sample. This misunderstanding may have been a result of the failure to provide Mr. Spin with his s. 10(b) rights.

[72] I agree with the trial judge that the breaches in this case have a degree of seriousness about them (¶144). It is my view that this line of inquiry also supports exclusion of the evidence.

2. Society's Interest in the Adjudication on the Merits

[73] It is not disputed that the Certificate of Analysis is reliable, the respondent concedes the point. However, the third line of inquiry does not mandate that, simply because the evidence is reliable, it should be automatically included. The Court must embark upon a balancing of interests. Again quoting from **R. v. Grant**:

> [80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, [1971] S.C.R. 272) is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.
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> ...
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> [82] The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, per Iacobucci J. The court must ask "whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, per Doherty J.A.
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> ...
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> [84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in Collins, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in

> seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[74] This is a case of an alleged operator of a motor vehicle with an illegally high blood level count that is involved in a motor vehicle collision which resulted in a significant injury. It is a serious case. Although the public may well have a heightened interest in seeing the case determined on the merits, that does not trump the vital interest of protecting the repute of the justice system over the long term.

[75] The trial judge had this to say about Constable Monteith's conduct when addressing this line of inquiry:

> [148] Sections 7, 8, 9, 10 and 11 of the **Charter** is the core of the **Charter** as it relates to the criminal justice system. In this case unfortunately, however, s. 8 and 10, which by necessity includes s. 9, were all but ignored by Cst. Monteith. He had little theoretical or practical knowledge of his role as a police officer as it relates to the approved screening device demand and how it is to be administered and how such then has serious consequences for an accused when the same is not followed.

[76] I agree with the trial judge's comments on Constable Monteith's conduct. To allow the admission of this evidence in light of the police conduct on the facts of this case would negatively impact the public's perception of the administration of justice. The *Charter* is designed to protect the rights of an accused. Although it is not a matter of adding up the *Charter* breaches in doing an analysis under s. 24(2), here we have multiple, inter-related breaches which ultimately led to obtaining the only evidence upon which Mr. Spin could be convicted.

[77] We also cannot ignore the finding, by the trial judge, of a lack of reliability and trustworthiness of Constable Monteith's evidence. I refer, again, to the trial judge's comments on Constable Monteith's evidence:

> [123] In this case Cst. Monteith's evidence was, and I struggled with a word to characterize it, without being unduly harsh illogical in many regards and very confusing. That is not a term this Court uses lightly. Cst. Monteith had difficulty not only recalling what he testified to in the first trial, but recalling what he testified to in earlier evidence the same day. Cst. Monteith was very difficult to follow in his evidence. I had the entire transcript from this trial typed and still it took me numerous readings of his evidence to try to determine exactly what his

> specific answer was to many questions. Cst. Monteith had no ability to recall this specific case. This is a serious case from both the Crown and defence perspectives. This officer clearly did not grasp that factor during his dealings with Mr. Spin, nor when providing evidence to the Court.
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> ...
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> [127] Cst. Monteith's evidence was very inconsistent and he was unable to recall even the simplest of details. His evidence was not reliable nor trustworthy.

[78] To allow the admission of the evidence, in this case, would, in my view, be a serious affront to fundamental *Charter* rights. It would effectively condone a variety of serious *Charter* violations in a situation where the police evidence was unreliable. Such a result would not instill confidence in the administration of justice and would seriously undermine its integrity.

[79] Balancing the **Grant** criteria, I am in agreement with the trial judge that the evidence ought to have been excluded under s. 24(2) of the *Charter*.

Conclusion

[80] I would dismiss the appeal.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.