C.A.C. No. 108237

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. MacLennan, 1995 NSCA 51

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - **JOHN WAYNE MacLENNAN** Respondent	Robert C. Hagell for the Appellant Curtis C. Palmer, Esq. for the Respondent Appeal Heard: January 30, 1995 Judgment Delivered: February 20, 1995

THE COURT: The appeal is allowed, the conviction restored. Notices of contention dismissed.

Freeman, J.A.:

While constable Karen Byrne of the Royal Canadian Mounted Police and her partner were patrolling in a police vehicle on Commercial Street in New Minas, Kings County, on the evening of June 21, 1993, they fell in behind a vehicle in which they saw the passenger putting on his seat belt. It is an offence under the Motor Vehicle Act for the passenger not to have been wearing it. Constable Byrne turned on her emergency lights and the vehicle pulled over at about 10:45 p.m.

Constable Byrne asked the respondent to accompany her back to the police cruiser. From her observations of him she concluded that he was impaired by alcohol and gave him the breathalyzer demand without requiring a test with an ALERT screening device. The driver subsequently failed the breathalyzer test.

The Issues

He was convicted of driving with an illegal blood alcohol level after trial in Provincial Court. His summary conviction appeal to the Supreme Court was allowed on the basis that he had been arbitrarily detained contrary to s. 9 of the **Canadian Charter of Rights and Freedoms**. His counsel had argued that his s. 8 right to be free of unreasonable search and seizure had been infringed.

The Crown has appealed on the ground that the summary conviction appeal court erred respecting arbitrary detention and the exclusion of evidence of the breathalyzer result under s. 24(2) of the **Charter**. The respondent has filed notices of contention alleging the trial judge erred in finding Constable Byrne had reasonable and probable grounds for a breathalyzer demand, and that the respondent's right to counsel under s. 10(b) of the **Charter** was infringed.

The major concern in the context of the alleged **Charter** infringements is that the police officer based her conclusions for the breathalyzer demand on observations made after she requested that the respondent accompany her from his own car to the police cruiser. The respondent argued this was a search contrary to s. 8 of the **Charter**.

The Facts

The respondent, John Wayne MacLennan, whom Constable Byrne had not known previously, was the driver of the vehicle. He pulled over in response to the emergency lights and opened the door as she approached his side of the car. She asked him if the window worked and he closed the door and opened the window.

"Immediately," she said, "I could detect the odour of alcohol quite strongly coming from the vehicle and I asked Mr. MacLennan where he had been and where he was going. He was a bit evasive about that."

Mr. MacLennan was entitled to remain silent. Questioning by police which might conscript the detained person against himself is improper at this stage, when the right to counsel under s. 10(b) of the **Charter** is suspended.

On cross examination she said that

"When I stopped Mr. MacLennan I could detect alcohol in, coming from the area of the vehicle, that's why I brought him back to the car so I could determine that that was not just from the vehicle as there had been beer spilled on the floor of the vehicle."

Once she got him back to the police car she was able to say there was an odour of alcohol coming from Mr. MacLennan. Constable Byrne gave Mr. MacLennan

the breathalyzer demand and then read him his rights to counsel under the **Charter** from a prepared form. This was at about 10:55 p.m.

She said she gave him the demand because she thought he had been impaired in his driving by alcohol:

> "I felt that he had been consuming alcohol excessively. I could smell the odour coming from him, that's why I brought him back to the police car. He also was very slow, speech and movements, when he was looking for his documents he was fumbling and I observed him to sway somewhat when he left his vehicle on the way to the police car."

They proceeded to the detachment, arriving at 11:02 or :03 p.m. and Constable Byrne asked Mr. MacLennan if he wanted to contact a lawyer. When he said he did not wish to do so. Constable Merrell, Constable Byrne's partner, administered the breathalyzer test.

Mr. MacLennan failed. Both his readings were 170 milligrams of alcohol in 100 millilitres of blood, more than twice the legal limit of 80.

Trial Result

On these facts Mr. MacLennan was convicted after trial in Provincial Court by Judge Crowell. Constable Byrne was the only witness to testify. Judge Crowell made a clear finding that she had reasonable and probable cause for making the demand.

Summary Conviction Appeal

The conviction was quashed by Justice MacDonald of the Supreme Court, sitting as a summary conviction appeal court judge. He found that Mr. MacLennan's

detention by Constable Byrne had been arbitrary and therefore infringed his rights guaranteed by s. 9 of the **Charter**, which provides:

> "9. Everyone has the right not to be arbitrarily detained or imprisoned."

Section 9 of the **Charter** had not been specifically argued at trial, but the defence had argued s. 8:

> "8. Everyone has the right to be secure against unreasonable search or seizure."

Justice MacDonald stated:

> "Counsel for the appellant argued that there was an improper search contrary to section 8 of the **Charter.** The trial judge answered this with the following comments at p. 24 of the transcript:
>
> > 'Defence further argues that **Rilling** does not apply here because of the **Charter** breach that is an improper search under Section 8 of the **Charter.** The Court is in agreement that **Rilling** is still good law unless there is a **Charter** breach. A **Charter** breach prior to the taking of the test would prohibit the introduction of the results of those tests.
> >
> > So the whole issue boils down to a very simple one of whether or not the officer had reasonable and probable grounds. I have already cited her basis for her opinion.'
>
> In this case, I do not believe that section 8 of the **Charter** can be answered without also examining section 9. In these circumstances there has to be a 'stopping' before a search can be initiated. A 'stopping' can be a detention and, if arbitrary, would be contrary to section 9. After a 'stopping' a search would begin when the constable looks into the detainee's motor vehicle and, without grounds would be unreasonable and contrary to section 8.

> On the evidence here, the learned trial judge did not give consideration to the potential application of section 9. It appears to me that the stopping of the appellant's motor vehicle was arbitrary and, therefore, the appellant was being 'arbitrarily detained' contrary to the **Charter.**
>
> It was from this arbitrary detention that the search (questions, requests and observations of the appellant) of the appellant was made, followed by the determination of the constable that there was 'reasonable and probable grounds' for the making of the demand.
>
> . . .
>
> The gravamen of the case for the defence herein is not whether the constable had reasonable and probable grounds for making the demand, but whether there was a breach of section 8 of the **Charter** because the search only took place following the arbitrary detention of the Appellant--a breach of section 9 of the **Charter**. The **Charter** argument, although not too precise, was introduced by the appellant and I believe that the introduction was sufficient to warrant a consideration of sections 9 and 24 by the court."

Justice MacDonald did not consider whether the arbitrary detention was justified under s. 1 of the Charter.

ALERT Considerations

The focus of inquiry in this appeal is on the period between the engagement of the police emergency lights and the decision whether or not to give the breathalyzer demand. While the issues were different in **R. v. Bernshaw** (S.C.C. Unreported--January 27, 1995) the same time period was relevant and the Supreme Court of Canada made a number of observations providing useful guidance. Not least of these is Justice Cory's compelling reminder of the reasons it is necessary to have strong drunk driving laws and an effective police presence on the highways:

> "Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in

> hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country. Statistics Canada recently noted:
>
> > Impaired driving is a serious crime. Every year thousands of Canadians are killed and many more injured in traffic-related accidents. Alcohol is a contributing factor in an average of 43% of these cases. ..."

The issues in **Bernshaw** arose from a decision of the British Columbia Court of Appeal rejecting the results of an ALERT test when the police officer had not waited for fifteen minutes before administering it to allow for the dissipation of mouth alcohol, which might result from a recent drink, burping or regurgitation, and which could cause an erroneous result.

Sopinka J., writing for a majority of the Court consisting of LaForest, Sopinka, Gonthier, McLachlin and Major, JJ., adopted the flexible approach proposed by Arbour J.A. of the Ontario Court of Appeal in **R. v. Pierman; R. v. Dewald**, (Ont. C.A., August 24, 1994), in which it was held permissible but not mandatory for police officers to wait fifteen minutes when aware of circumstances making the delay reasonable to ensure a proper analysis of the breath.

Sopinka J. acknowledged that the fifteen minute delay "unduly expands the detention without access to counsel" but stated:

> "Although there is no doubt that the screening test should generally be administered as quickly as possible, it would entirely defeat the purpose of Parliament to require the police to administer the screening test immediately in circumstances where the results would be rendered totally unreliable and flawed. The flexible approach strikes the proper balance between Parliament's objective in combatting the evils of drinking and driving, on the one hand, and the rights of citizens to be free from unreasonable search and seizure."

Cory J., writing with the concurrence of Lamer C.J.C. and Iaccobucci J., held there was no basis for a fifteen-minute delay in any circumstances:

> "Since **R. v. Thomsen**, supra, this Court has repeatedly held that if a driver is stopped by a police officer, that driver is detained for the purposes of s. 10(b) of the **Charter**. The driver, accordingly, has the right to retain and instruct counsel. ... In **R. v. Thomsen** it was recognized that although the absence of the opportunity to retain counsel violated s. 10(b) of the **Charter**, it was justified under s. 1 because it was urgent that the breath sample be obtained quickly in order to be effective. The right to retain counsel was incompatible both with the effective use of the ALERT device and with the purpose of demonstrating a police presence which would convince drinking drivers that there was a high probability that they would be quickly and readily detected. The section's use of the word 'forthwith' in the context of a roadside screening test clearly indicated that there was to be no opportunity granted to a driver to call a lawyer. The test was to be performed immediately and to fail it had no penal consequences. It is a testing device used to protect the public.
>
> . . .
>
> Quite simply, it is not possible to conduct a roadside test 'forthwith', that is immediately, and at the same time require the driver to be subject to a detention which is sufficiently lengthy to provide an opportunity to retain and instruct counsel under s. 10(b) of the **Charter.** A delay of that length without the right to instruct counsel might well not only be inconsistent with s. 10(b) of the **Charter** but also might be such that it could not be saved by s. 1.
>
> . . .
>
> An impaired driver is a potentially lethal hazard that must be detected and removed from the road as quickly as possible. The ability to administer the test immediately helps to protect the public by detecting those who may be a danger. The relatively rare occasions on which an ALERT test may be erroneous as a result of the driver consuming a very recent drink must be tolerated in the interest of the safety of the public."

Elsewhere in the decision, it was pointed out that if an ALERT test does result in an erroneous "fail", no penal consequences follow. The more accurate breathalyzer test will correct the ALERT error.

Cory J. continued:

> "This requirement to undergo the ALERT testing immediately should be regarded as one of the obligations that flows from the right to drive. In **Galaske v. O'Donnell**, [1994] 1 S.C.R. 670, at p. 686, it was noted that the driving of a motor vehicle is neither a God-given nor a constitutional right. Rather, it is a privilege granted by license. Attached to every right are concomitant duties, obligations and responsibilities. This is true of the licensed right to drive. One of the prime responsibilities of a driver is to see that reasonable care is exercised in the operation of the motor vehicle, and specifically, that it is driven in a manner which does not endanger members of the public. That duty or responsibility cannot be fulfilled by an impaired driver who, by definition, endangers others. In furtherance of the duty not to endanger others, there exists an obligation to comply with a police officer's reasonable request to supply a breath sample. Complying with a reasonable request to take an ALERT test is a very small price to pay for the privilege of driving."

While Constable Byrne did not find it necessary to give the ALERT demand in the circumstances of the present case, that was merely one of the options resulting from the same legislation and subject to the same rationale that were relevant in **Bernshaw**.

The Motor Vehicle Act

The ALERT demand is not the only price to be paid for the privilege of driving. It is also necessary to comply with the provincial motor vehicle legislation. Relevant provisions of the Nova Scotia **Motor Vehicle Act** R.S.N.S. 1989 c. 293 must be examined. It was first necessary for Constable Byrne to bring the respondent's motor vehicle to a stop. Her authority to do so is found in s. 83 (1) (formerly s. 74(1)) which provides:

> "83(1) It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer."

When this is read in the context of the common law authority of police to control traffic on the highways, other provisions of the **Motor Vehicle Act** and provisions of the **Criminal Code**, and note is taken of long standing customary practices, I am left in no doubt that s. 83(1) authorizes peace officers to require vehicles on the highway to come to a stop in response to an appropriate order, signal or direction.

Comparable provisions in other provinces have been held not merely to impose a duty upon drivers but to provide peace officers with a corresponding authority. S. 119 of the **Alberta HIghway Traffic Act** was considered by the Supreme Court of Canada in **R. v. Wilson**, [1990] 1 S.C.R. 1291, where it was argued that it did not grant statutory authority for random stops. The court did not accept that contention. That section reads:

> "119 A driver shall, immediately upon being signalled or requested to stop by a peace officer in uniform, bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires and shall not start his vehicle until he is permitted to do so by the peace officer."

The court held:

> "Though s. 119 imposes duties upon motorists rather than conferring powers on the police, the language of this section is broad enough to authorize random stops of motorists by police officers. In contrast to the legislative provisions considered in **Dedman v. The Queen**, [1985] 1 S.C.R. 2,],supra, s. 119 requires a driver not merely to surrender his licence on demand, but when 'signalled or requested to stop', to 'bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires'. Constable MacFarlane's actions in stopping the appellant were therefore statutorily authorized by s. 119 of the **Highway Traffic Ac**t."

While s. 83(1) of the Nova Scotia **Motor Vehicle Act**, which is under Part V of the **Act** respecting *Traffic on the Highway*, authorizes police officers to stop vehicles, it does not require drivers to furnish information. Once a vehicle comes to a halt further authorization must be sought elsewhere in the **Act**. It was held in **Baroni** (1989) 91 N.S.R. (2d) 295 at p. 301:

> "I do not find that, after a vehicle has effectively ceased to be part of the traffic moving on the highway and the driver has been detained, s. 74 can justify a requirement that the driver perform coordination tests which conscript him against himself through evidence other than a confession emanating from him."

While a randomly stopped driver cannot be conscripted against himself by way of statements or unauthorized tests, he or she can be properly asked to produce his license, permit and insurance. This provides an opportunity for a police officer to make observations of the indicia of impairment passively emanating from the driver.

Section 78 (2) of the **Motor Vehicle Act** provides:

> "78 (2) Every person shall have a valid driver's license in his immediate possession at all times when driving a motor vehicle and shall display the same at all reasonable times on demand of a peace officer. "

(A provision similar to s. 78(2) was considered in **Dedman** and found insufficient, in itself, to justify random stops. Ontario did not have a statutory provision similar to our s. 83(1) authorizing police to stop vehicles until the enactment of s. 189a(1) subsequent to **Dedman**.)

S. 18 of the **Motor Vehicle Act** is a similar provision with respect to vehicle permits. Proof that the driver carried liability insurance must also be produced. Police also have the right to stop a vehicle to check its equipment and mechanical condition.

In my view the authority of peace officers in Nova Scotia under ss. 83(1), 78(2) and s. 18 of the **Motor Vehicle Act** is equivalent to that of peace officers in Alberta under s. 119 of the **Highway Traffic Act**. Therefore I consider **Wilson** to be binding authority in Nova Scotia.

I am also of the view that the authority of peace officers under s. 83(1) is essentially similar to that flowing from Section 189a(1) of the Ontario **Highway Traffic Act**, which provides:

> "**189a(1**) A police officer, in the lawful execution of his duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop."

Therefore the pronouncements of the Supreme Court of Canada in such definitive cases as **Dedman v. R**, , **Hufsky v. R** [1988] 1 S.C.R. 621 and **Ladouceur v. R**. [1990] 1 S.C.R. 1257 are of binding authority with respect to the relevant provisions of the Nova Scotia **Motor Vehicle Act.**

Random Stopping

R. v. Dedman was decided a year prior to the enactment of s. 189a(1) and two years prior to the **Charter** but the statement of former Chief Justice Dickson defining arbitrary detention in his dissenting judgment is a convenient starting point for considering the laws as to random stops:

> Short of arrest, the police have never possessed legal authority at common law to detain anyone against his or her will for questioning, or to pursue an investigation.

He cited **R. v. Waterfield**, [1963] 3 All E.R. 659 (C.C.A.), as the case which is

> ". . . [O]ften relied upon as enunciating the test for the common law basis of police power. The English Court of Appeal stated at p. 661:
>
> In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.
>
> Waterfield has been applied by this Court in **R. v. Stenning,** [1970] S.C.R. 631 and **Knowlton v. The Queen,** [1974] S.C.R .443, and in two English cases of note, **Hoffman v. Thomas,** [1974] 2 All E.R. 233 (Q.B.D.), and **Johnson v. Phillips**, [1975] 3 All E.R. 682 (Q.B.D.)."

The majority in **Dedman** applied **Waterfield** in concluding that, in the context of Ontario's R.I.D.E. program there was a common law authority in police officers to stop vehicles at random. In the course of the court's analysis the following observation was made with respect to police powers:

> "It has been held that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property, from which is derived the duty to control traffic on the public roads. See **Rice v. Connolly**, [1966] 2 Q.B. 414, at p. 419; **Johnson v. Phillips**, [1975] 3 All E.R. 682, at p. 685; **Halsbury's Laws of England**, 3rd ed., vol. 30, para. 206, p. 129."

The headnote of the **Dedman** case describes the police activities that the court considered:

> "Appellant voluntarily complied with a police officer's request to stop his vehicle. There was nothing improper about his driving or the condition of his car. The stop was ordered as part of a spot check program, known as R.I.D.E., whose principal aim is to detect, deter and reduce impaired driving. The police go to a location where they believe there has been a high incidence of impaired driving and, on a random basis, request motorists to pull over and stop. **They then ask for a valid driver's licence and proof of insurance to initiate conversation with the goal of detecting the otherwise undetectable drinking driver."** (Emphasis added.)

In **Wilson** the court stated:

> "With regard to the second point, the appellant's arguments that the stopping was unconstitutional can be dismissed on two bases. First, if the stopping of the appellant's vehicle is considered to be a random stop then for the reasons given in **Ladouceu**r, *supra,* I would conclude that although the stop constituted an arbitrary detention, it was justified under s. 1 of the **Charter**.
>
> Second, in this case the stopping of the appellant was not random, but was based on the fact that the appellant was driving away from a hotel shortly after the closing time for the bar and that the vehicle and its occupants were unknown to the police officer. While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community. In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the **Charte**r."

In **Ladouceur** Cory J., writing for the majority, went considerably beyond the cautious approach expressed in **Wilson**. He stated the conclusion of the court:

> "While the routine check is an arbitrary detention in violation of s. 9 of the **Charter,** the infringement is one that is reasonable and demonstrably justified in a free and democratic society. As a result, s. 189a(1) of the **Highway Traffic Act** is a valid and constitutional legislative enactment. There is no need to read the section down as did Tarnopolsky, J.A. in the Court of Appeal or to qualify it in any way. Having come to this result, it is not necessary to deal with the arguments raised under s. 24(2).
>
> The answers to the constitutional questions posed are:

1. Is section 189a(1) of the **Highway Traffic Act**, R.S.O. 1980, c. 198, as amended by s. 2 of the **Highway Traffic Amendment Act**, 1981 (No. 3), S.O. 1981, c. 72, inconsistent with ss. 7, 8 and 9 of the **Charter of Rights and Freedoms** to the extent that it authorizes the random stop of a motor vehicle and its driver by a police officer acting without any reasonable grounds or other articulable cause to believe that an offence has been committed, when such stop is not part of an organized procedure such as the R.I.D.E. programme?

Answer:

Section 189a(1) of the **Highway Traffic Act**, R.S.O. 190, c. 198 as amended by s. 2 of the **Highway Traffic Amendment Act,** 1981 (No. 3), S.O. 1981, c. 72, is not inconsistent with ss. 7 or 8 of the **Canadian Charter of Rights and Freedoms** but is inconsistent with s. 9.

2. If the answer to question 1 lies in the affirmative, can s. 189a(1) of the **Highway Traffic Act** be justified pursuant to s. 1 of the Charter?

Answer:

Section 189a(1) of the **Highway Traffic Act** can be justified pursuant to s. 1 of the **Charter**."

Hufsky v. R. was considered in Cory J.'s judgment in **Ladouceur**:

"Hufsky had been randomly stopped by a police officer in Metro Toronto. The officer asked to see the appellant's driver's licence and proof of insurance and verified their validity. While speaking to Hufsky, the officer detected alcohol on his breath and noticed that his speech was slightly slurred. The officer asked Hufsky to accompany him to his police car to conduct a roadside breath test. But when the officer made the breath demand, Hufsky refused to comply. The officer then told Hufsky that he would be charged with failing to provide a breath sample and informed him of his right to retain and instruct counsel without delay.

Le Dain J., writing for a unanimous Court, held that the random stops conducted under the spot check program and authorized by s. 189a(1) of the **Highway Traffic Act** did not violate the **Charter**. He concluded that although the random stop constituted arbitrary detention in violation of s. 9 of the **Charter** it was justified under s. 1. He also held that the random stop did not constitute an unreasonable search and seizure in violation of s. 8 of the **Charter**. In holding that the random stops, though violating s. 9, were justified under s. 1, he stated at pp. 636-37:

> In view of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving, I am of the opinion that the limit imposed by s. 189a(1) of the **Highway Traffic Act** on the right not to be arbitrarily detained guaranteed by s. 9 of the **Charter** is a reasonable one that is demonstrably justified in a free and democratic society. The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case, remembering that the driving of a motor vehicle is a licensed activity subject to regulation and control in the interests of safety, is proportionate to the purpose to be served.

There are few distinctions between the random stop under consideration in the case at bar and the random stop dealt with by this Court in **Hufsky.** In both cases, the stop was conducted in order to check licences, insurance, mechanical fitness and, although never explicitly stated at the appellant's trial, the sobriety of the driver. In both cases, the police actions were authorized primarily by s. 189a(1) of the **Highway Traffic Act** which granted them absolute discretion to stop motorists if in the lawful execution of their duties. Finally, the respondent the Attorney General of Ontario relied on exactly the same extrinsic evidentiary material in each case to justify the random stops.

It might be sought to distinguish the **Hufsky** decision on the ground that it applied to an organized program of roadside spot checks, whereas this case concerns the constitutionality of completely random stops conducted by police as part of a routine check which was not part of any organized program. It might well be that since these stops lack any organized structure, they should be treated as constitutionally more suspect than stops conducted under an organized program. Nonetheless, so long as the police officer making the stop is acting lawfully within the scope of a statute, the random stops can, in my view, be justifiably conducted in accordance with the **Charter.**"

Cory J. referred to **Hufsky** again in considering whether a routine check random stop violates ss. 7, 8 or 9 of the **Charter**?

"In **Hufsky**, *supra*, Le Dain J. held that a random stop of a motorist for the purposes of the spot check procedure violated s. 9 of the **Charter**. He found that a motorist stopped at a check point was detained as that term was defined in **R. v. Therens, [**1985] 1 S.C.R. 613, and **R. v. Thomsen**, [1988] 1 S.C.R. 640. He stated at p. 632:

> 'By the random stop for the purposes of the spot check procedure the police officer assumed control over the movement of the appellant by a demand or direction that might have significant legal consequence, and there was penal liability for refusal to comply with the demand or direction.'

Le Dain J. also determined that the detention was arbitrary, since there were no criteria for the drivers to be stopped and subjected to the spot check procedure. He stated at p. 633:

> 'The selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise.'

The conclusions reached in **Hufsk**y, supra, determine the arbitrary detention issue raised in this case. Although the police officers differed as to whether the appellant would have been arrested if he had attempted to flee, there can be no question that he was detained. The police officers had assumed control over the movement of the appellant by a demand or direction. In addition, while the detention involved only traffic offences rather than violations of the **Criminal Code**, the maximum penalties which provide for a $2,000 fine or six months' imprisonment, demonstrate that the legal consequences of the detention were significant. The detention was arbitrary, since the decision as to whether the stop should be made lay in the absolute discretion of the police officers. There can thus be no doubt that the routine check random stop constituted an arbitrary detention in violation of s. 9 of the **Charter**.

The appellant's challenge under s. 8 is also governed by the decision in **Hufsky**. There Le Dain J. stated at p. 638:

> In my opinion the demand by the police officer, pursuant to the above legislative provisions, that the appellant surrender his driver's licence and insurance card for inspection did not constitute a search within the meaning of s. 8 because it did not constitute an intrusion on a reasonable expectation of privacy. Cf. **Hunter v. Southam**

> Inc., [1984] 2 S.C.R. 145. There is no such intrusion where a person is required to produce a licence or permit or other documentary evidence of a status or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege.

Section 8 might be brought into play in circumstances where the police, in the process of a random stop, found in the car marijuana or an item of stolen property. But the police in this case did no more than request the appellant's licence and insurance papers. The appellant quickly admitted that his licence was under suspension and as a result he was unable to produce these documents. It follows that it cannot be argued that a "seizure" within the meaning of s. 8 occurred. The action of the police in this case cannot be regarded as a violation of s. 8 of the **Charter**.

Since it has been determined that routine check random stops violate s. 9 of the **Charter**, it is unnecessary to decide whether these random stops infringe s. 7."

The conclusion the Supreme Court of Canada has consistently reached in the cases referred to above is that police are authorized, at least under the Alberta and Ontario legislation, to make random stops for the purposes of inspecting documents and with a view to detecting drinking drivers. These may be made within or without the context of publicized anti drunken driving campaigns, such as the Ontario R.I.D.E. program. Random stops are infringements of the s. 9 **Charter** right to be free of arbitrary detention, but they are saved by s. 1 of the Charter. If police do not go beyond what is reasonably justified for purposes of highway safety, s. 8 of the Charter is not infringed. I am satisfied that the Alberta and Ontario legislation is similar in material respects to that of Nova Scotia. Therefore the conclusions of the Supreme Court of Canada in the relevant cases have equal application in this province.

Anatomy of the Incident

Perhaps enough underlying principles have been stated to permit an examination of the anatomy of what the Crown described, with some accuracy, as a "routine" breathalyzer incident.

As in **Wilson**, Constable Byrne was justified in engaging her emergency lights and stopping Mr. MacLennan's vehicle both as a random stop and a stop made for an articulable cause. The observation of the passenger putting on his seat belt was sufficient to give them reasonable cause to believe an offence had been committed under s. 175(4) of the **Motor Vehicle Act**, which requires every passenger to wear a seat belt while a motor vehicle is being operated on a highway. There was nothing in the manner in which Mr. MacLennan himself was driving his vehicle to suggest to the police officers that anything was amiss. The police officers were not engaged in a publicized campaign to combat drunken driving such as the Ontario R.I.D.E. program. They were exercising a common law duty to control traffic on a highway coupled with a statutory authority to stop vehicles. They had the authority to stop Mr. MacLennan's vehicle. To the extent that the stop was random and arbitrary, it was an infringement of s. 9 of the Charter that was justified under s. 1.

From the moment the vehicle stopped the driver was detained, but he was not entitled to the right to counsel pursuant to s. 10(b) of the **Charter**. The necessity for this is explained in **Bernshaw**. This state of affairs, which must be kept as brief as possible, continues until the driver is either permitted to go on his way or is subjected to a breathalyzer demand, usually but not necessarily after failing an ALERT test.

This period breaks into two divisions. The second, which begins the moment the police officer has formed a reasonable suspicion that there is alcohol in the driver's

body, was the focus of **Bernshaw**. Then the ALERT demand must be made "forthwith" within flexible limits.

This presupposes an earlier time division beginning with the detention while the reasonable suspicion is taking shape in the officer's mind. During this incubation period the officer is able to keep the driver under observation while inspecting his or her driver's license, certificate of registration and proof of insurance. If the inspection and observation are related solely to the officer's duties to control traffic, which includes the detection of drinking drivers, no breach of s. 8 of the **Charter** occurs.

Mellinthin v. R [1992] 3 S.C.R. 615 illustrates how police powers at roadside may be exceeded. A vehicle driven by Mellinthin was stopped and police shone a flashlight into the interior, noting an open gym bag on the front seat. He was asked what it contained and replied that it was food. When police searched it, vials of cannabis resin were discovered. Cory J., writing for the majority, stated:

> "There can be no quarrel with the visual inspection of the car by police officers. At night the inspection can only be carried out with the aid of a flashlight and it is necessarily incidental to a check stop program carried out after dark. The inspection is essential for the protection of those on duty in the check stops. There have been more than enough incidents of violence to police officers when vehicles have been stopped. Nor can I place any particular significance upon the fact stressed by the appellant that the police only made use of a flashlight after the request had been made of the appellant to produce the necessary papers and not when the constable first approached the car. Although the safety of the police might make it preferable to use the flashlight at the earliest opportunity, it certainly can be utilized at any time as a necessary incident to the check stop routine.
>
> However, the subsequent questions pertaining to the gym bag were improper. At the moment the questions were asked, the officer had not even the slightest suspicion that drugs or alcohol were in the vehicle or in the possession of the appellant. The appellant's words, actions and manner of driving did not demonstrate any symptoms of impairment. Check stop programs result in the arbitrary detention of motorists. The programs are justified as a means aimed at reducing the terrible toll of death and injury so often occasioned by

> impaired drivers or by dangerous vehicles. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search."

In the present case Constable Byrne requested that Mr. MacLennan go to the police cruiser. This was a reasonable incident of her duty to check his papers and observe him for signs of impairment. It may be noted that police routinely check the validity of licenses by a radio call from their vehicles, and it was appropriate for him to be present. He had a passenger with him, and the Crown suggested it is police practice intended for their own protection to separate the driver with whom they have their commerce from others in the vehicle. This would seem to be a reasonable safeguard. Cory J.'s remarks as to use of the flashlight are apposite. The request was a perfectly proper one and while Mr. MacLennan was not obliged to comply with it, the fact that he did so can hardly be considered a breach of his rights.

It is true that Constable Byrne wished to observe Mr. MacLennan away from his

vehicle so she could tell whether the odour of alcohol was coming from him or the spilled beer in the car. She was entitled to ask him to come to the police vehicle, and there was nothing improper about her using that as a device to further her legitimate objectives. The jurisprudence cited above makes it clear the Supreme Court of Canada approves of police making use of the opportunities provided by their right to inspect documents to make the observations necessary to detect drinking drivers. No infringement of s. 8 occurred.

Observing Mr. MacLennan in the course of proper police procedures is a different matter from conscripting him to perform sobriety tests for the purpose of incriminating himself which was found objectionable in **Baroni**. There was no statutory or common law authority validating the sobriety tests. There is strong authority for the observation of indicia of impairment emanating from the respondent in the course of routine procedures during a roadside stop.

The indicia of Mr. MacLennan's impairment observed by Constable Byrne were passive emanations flowing from the fact he had had so much to drink that it showed it in his odour, his speech and his movements. In these circumstances there was no improper intervention by the officer in conscripting him against himself or which violated his reasonable expectations of privacy. He knew he could be asked to produce his documents if he drove his vehicle on a highway, and that in doing so he might be requested to attend at a police cruiser. Knowing that, he consumed the alcohol voluntarily and then chose to drive on a highway. Constables Byrne and Merrell protected Mr. MacLellan, his passenger and the public by alert police work.

In this case Constable Byrne did not give Mr. MacLennan an ALERT demand. She gave him the breathalyzer demand instead. There was nothing inappropriate about this. As noted above, there is an incubation period while a driver is observed during the inspection of documents when a police officer may form the reasonable suspicion prerequisite to the ALERT demand. There are two other possibilities. The usual one is that no suspicion of drinking may arise and the driver is free to leave. The other possibility is that during the incubation period the indicia of impairment strike the officer so forcefully that there is no need for the screening test; the officer forms a reasonable and probable belief that the driver is impaired and no further evidence is required. In that event either the driver is given the breathalyzer demand or arrested

for impaired driving. While the reasonable and probable grounds necessary to support the breathalyzer demand or an arrest are of a much higher standard than the reasonable suspicion needed for the ALERT demand, this is only a matter of degree. While the framework was created to permit screening tests with the ALERT machine as discussed in **Bernshaw**, an ALERT demand is not necessary to justify the preceding period of detention without the right to counsel. In most circumstances a failing result on the ALERT is all the evidence needed to support a breathalyzer demand, but the ALERT result is not a necessary part of the evidence if other grounds exist. In the present case Judge Crowell in his well considered judgment found himself to be "satisfied that the officer did in fact have reasonable and probable grounds for making the demand that she did." The evidence was sufficient to meet the test in **R. v. Yebes** [1987] 2 S.C.R. 168.

If he had not been able to make that finding he indicated that he would consider applying **Rilling v. R.** [1976] 2 S.C.R. 183, which was approved by Cory J. in **Bernshaw**. Absence of reasonable and probable grounds is a defence to refusing a breathalyzer demand, but when the test has been taken, proof of the existence of the grounds is not a necessary element of the Crown's case if there has been no **Charter** infringement. I am satisfied there was no **Charter** infringement in the present case.

The finding as to reasonable grounds disposes of the respondent's first ground of contention. The second, alleging an infringement of the s. 10(b) right to counsel, relates not to the initial incident at roadside but to the sufficiency of the right to counsel given him following the breathalyzer demand in light of the recent decision of the Supreme Court of Canada in **Bartle v. R.** (Unreported--1994 S.C.C.). While **Bartle** may well cause police to reexamine the form of information provided to accused persons under s. 10(b), it does not shift the burden from the accused to assert a

Charter infringement. This issue was not raised at the trial and I do not find it is properly before this court on the appeal.

Summary

Police in Nova Scotia are justified in stopping vehicles at random, independently of any articulable cause or publicized enforcement program, for the purpose of controlling traffic on the highway by inspecting licensing, registration and insurance documents, the mechanical condition of vehicles, and to detect impaired drivers. Random stops are arbitrary detentions which infringe s. 9 of the **Charter** but which are saved under s. 1.

The driver is not entitled to the right to counsel guaranteed by s. 10(b) of the **Charter** during the period, which must be as brief as possible, between detention which begins when the vehicle is stopped and the conclusion of the inspection of documents, when the driver must be released if no demand has been given.

If a police officer forms a reasonable suspicion under s. 254(2) the ALERT demand must be given forthwith, which is to be interpreted flexibly if there is reason to believe the ALERT test will not be accurate.

Observations of drivers made in the course of inspecting documents and reasonably incidental, or safety related, activities such as examining the interior of vehicles by flashlight or requesting drivers to attend at the police cruiser are relevant to the formation of a reasonable suspicion of the presence of alcohol in the driver's body sufficient to justify an ALERT demand under s. 254(2) of the **Criminal Code.** They may also result in the formation of a reasonable belief sufficient to justify a breathalyzer demand or arrest for impaired driving without the necessity of an ALERT test.

The suspension of the right to counsel and the guarantee against arbitrary detention under s. 9 of the **Charter** do not justify the taking of statements or searches unrelated to the control of traffic; i.e. the inspection of documents or mechanical condition and detection of drinking drivers.

Conclusion

In my view the summary conviction appeal court was in error in determining there had been an arbitrary detention in breach of s. 9 of the **Charter** which was not saved by s. 1. Accordingly I would allow the appeal on this ground and restore the conviction entered by Judge Crowell. There is therefore no need to consider s. 24(2) of the **Charter**. I would dismiss the notices of contention.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.