Date: 2001-11-02
Docket: 2001 NSPC29

PROVINCIAL COURT OF NOVA SCOTIA
[Cite as R. v. Hall, 2001 NSPC 29]

Williston, J.P.C.

HER MAJESTY THE QUEEN

versus

VINCENT ALEXANDER HALL

DECISION

Counsel:	Ronald J. MacDonald, for the Prosecution William J. Burchell, Q.C. for the Defendant
Heard:	June 13th , 2001, July 5th , 6th , 2001, September 4th, 2001, October 26th, 2001 at Sydney, Nova Scotia
Decision Delivered:	November 2, 2001

WILLISTON, J.:

[1] On the 25th day of June, 2000, Constable Gregory Livingstone, a member of the Cape Breton Regional Police Service was parked alone in a marked police vehicle in the parking lot of Holy Family Church in an area commonly known as MacKay's Corner section of Glace Bay, Cape Breton Regional Municipality, Province of Nova Scotia. At approximately 2:45 a.m. he observed a truck heading toward Reserve in a westerly direction. Constable Livingstone, who testified he had over 22 years experience as a police officer, noted that the vehicle was driving unusually slow and partially left of centre. He estimated the vehicle to be travelling between 25 - 30 kph in a 50 kilometre zone. Although the vehicle was not completely left of centre, the officer observed the driver's side wheels were somewhat left of centre.

[2] Constable Livingstone pulled out behind the vehicle, a silver grey extended cab Toyota truck with striping on the side and activated his overhead lights. The vehicle continued on for eight pole lengths before it pulled over. The Constable approached the driver's side of the vehicle and identified the driver as the accused, Vincent Hall. He asked Mr. Hall to produce his driver's license, permit and insurance and as he spoke to him he detected a strong smell of alcohol on his breath. He also noted that his eyes were watery and his speech was slurred, being somewhat thick and he asked the accused to step down from the vehicle. As Mr. Hall exited the vehicle, the officer noticed he was somewhat unsteady on his feet and observed him place his hand against the side of the truck as if to steady himself. Constable Livingstone asked Mr. Hall to step back to his police vehicle and observed him stagger as he walked.

[3] As a result of these observations with respect to the driving and physical observations, Constable Livingstone formed the opinion that Mr. Hall's ability to operate a motor vehicle was impaired by alcohol. As Mr. Hall stood by the police vehicle, Constable Livingstone told him he was under arrest for impaired driving and gave him a breathalyzer demand, at 2:49 a.m.. The accused replied "Please don't do this to me.". At 2:50 a.m.

Constable Livingstone advised Mr. Hall of his right to counsel informing him that if he couldn't afford a lawyer one would be provided to him through the provincial legal aid program. Mr. Hall replied that he understood and was then placed in the rear of the police vehicle. They proceeded to the East Division Police Station, arriving there at 2:52 a.m.. Constable Livingstone escorted Mr. Hall to the interview room and again advised him of his rights, although not as formally as the first time. He told Mr. Hall he had a right to call a lawyer and made the telephone available to him. Mr. Hall said "Please don't do this to me, can you just drive me home?". Constable Livingstone advised him it would be in his best interest to phone a lawyer and left the interview room to allow Mr. Hall to use the telephone. The accused denied that he was informed of his right to counsel by Constable Livingstone or anyone else that morning. I accept the evidence of the police officer that he did in fact inform Mr. Hall of his right to counsel by the words that the officer stated he used at the back of the police vehicle.

[4] The defence has argued on the evidence presented that the officer did not inform Mr. Hall of the availability of a duty counsel through a 1-800 number and therefore violated his rights under s. 10(b) of the **Charter of Rights and Freedoms** and that the evidence regarding the calls to Chief MacLeod and the certificate of analysis should not be entered into the evidence. The defence cites R. v. Pozniak (1995) 92 C.C.C. (3d) 472 (S.C.C.) in support of its contention. On that day of September 29th, 1994, the Supreme Court of Canada released Pozniak and several other decisions dealing with the issue.

R. v. Bartle (1995) 92 C.C.C. (3d) 289

R. v. Cobhan (1995) 92 C.C.C.(3d) 333

R. v. Harper (1995) 92 C.C.C.(3d) 423

R. v. Matheson (1995) 92 C.C.C.(3d) 434

[5] These cases followed and expanded the law on the informational component of s. 10(b) rights as pronounced in the earlier decision of R. v. Brydges (1990) 53 C.C.C. (3d) 330 (S.C.C.)

[6] These cases have made it clear that the constitutionally entrenched right to counsel involves the corresponding duty on the detaining authority, not only to inform the detainee of that right but also the duty to advise of the

existence and availability of legal aid and duty counsel. This case goes on to explain that this incremental duty entails,

> "...now to access available services which provide free, preliminary legal advice..."

[7] The obligation upon police to furnish the required information concerning legal services is, today, unconditional except in cases of waiver or urgency.

[8] Upon detention the police have a duty to advise the detainee of his or her right to retain and instruct counsel without delay.

[9] The informational component of s. 10(b) goes further than its mere recital. It must include advice and information:

> (1) about access to counsel free of charge when an accused meets the financial criteria set by Provincial Legal Aid (R. v. Bridges);
>
> (2) about duty counsel providing immediate and free legal advice regardless of the financial means of the detainee;
>
> (3) to services actually available within the jurisdiction (R. v. Harper, R. v. Bartle);
>
> (4) of a toll free number to reach such counsel (R. v. Pozniak, R. v. Prosper, r. v. Bartle)

[10] Mr. Hall testified that he was never informed of the availability of duty counsel nor given a 1-800 number to access counsel.

[11] Constable Livingstone testified there were notices posted on the walls of the room which he pointed out in Exhibit 9 (Booklet of Photographs taken on October 18, 2001). Officer Livingstone testified that upon arriving at the police station and entering the interview room he told Mr. Hall more informally about his right to a lawyer and pointed out a sheet of paper on the wall which contained the 1-800 number for free duty counsel. He stated that Mr. Hall did not respond in any way when he pointed this out to him.

[12] Mr. Hall testified that there were no signs in the room that he noticed.

[13] The Crown called Constable Pat Reid who testified that the notices seen in the booklet of photographs (Exhibit 9) were present since at least November, 1999.

[14] In any event, although I accept the evidence of Constable Livingstone that Mr. Hall was formally advised of his right to counsel at the original scene and more informally upon arrival at the police station, the manner in which

the officer referred to the notice on the wall would not have clearly conveyed to the detainee his right to duty counsel and access free of charge to a 1-800 number. The letter itself which is marked as Exhibit 11 is not directed to detainees but to the police.

[15] Exhibit 13 which was not present in the room and contains a facsimile of what could be used to bring such information to a detainee's attention would meet these requirements.

[16] The defence has satisfied me on the onus required that Constable Livingstone did not fully meet the informational component required in s. 10(b) by making it clear that the detainee had access to a 1-800 duty counsel number and assisting him in availing that service.

[17] Having found a breach of s. 10(b) I must now go on to consider whether the evidence of the telephone calls to the Chief of Police and the certificate of analysis should be excluded under s. 24(2).

[18] Section 24 of the **Charter** states as follows:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[19] A violation of s. 10(b) does not automatically result in the exclusion of evidence. I am required to weigh the three sets of factors set out in R. v. Collins (1987) 33 C.C.C. (3d) 330 (S.C.C.) in arriving at a determination whether the evidence should be excluded under s. 24(2).

[20] In this case, I find that there was no deliberate, willful or flagrant conduct in the actions of Constable Livingstone regarding his treatment of Mr. Hall and his right to counsel. He does not give the Court any impression of his taking advantage of Mr. Hall. To the contrary, his actions reflect that he encouraged Mr. Hall to contact legal counsel. Mr. Hall was given ample time to contact counsel and in fact spoke with two lawyers before he was administered the breathalyzer test. The decision to call Chief Edgar

MacLeod was self induced by Mr. Hall and in no way was as a result of any police action or inaction.

[21] In this case the accused did in fact consult counsel after the telephone calls to Chief MacLeod. Officer Livingstone did nothing to impair Mr. Hall's exercise of his right to a lawyer and encouraged it. Bartle, Prosper and Pozniak are all essentially directed at a breach of the right to counsel under s. 10(b). None of the defendants in those cases contacted legal counsel.

[22] In this case I am satisfied that the fairness of the trial has not been affected by the s. 10(b) breach and that the administration of justice would not be brought into disrepute by admitting evidence of the calls to Chief MacLeod and the certificate of analysis. I accordingly rule that the defence has not satisfied the Court that the evidence should be excluded.

[23] At 2:56 a.m. Mr. Hall came out of the room and told Constable Livingstone the phone was for him - "It's Edgar" and when Constable Livingstone picked up the phone it was Police Chief Edgar MacLeod on the other end. After speaking with Chief MacLeod, Constable Livingstone again asked Mr. Hall if he wanted to call a lawyer and he replied "yes" that he wanted to call Joe Rizzetto, at 2:59 a.m.. Constable Livingstone closed the door and observed Mr. Hall through the glass glancing through the telephone book and making some calls. At 3:17 a.m., Constable Livingstone knocked on the door and asked Mr. Hall if he was nearly finished his call. He replied that he was still talking to his lawyer. The officer closed the door to let him continue.

[24] At 3:23 a.m. Mr. Hall came out of the room and handed the phone to Constable Livingstone telling the officer that it was his lawyer, Patrick Murray. After a brief conversation with Mr. Murray, the officer handed the phone back to Mr. Hall and he finished that call at 3:26 a.m.. As a result of the phone conversation it was Constable Livingstone's understanding that another lawyer from Mr. Murray's firm would be calling back to speak with Mr. Hall. At 3:23 a.m. lawyer Glen Gouthro called and was permitted to speak with Mr. Hall in privacy in the same room. At 3:49 a.m. Constable Livingstone knocked on the door and asked Mr. Hall if had finished with the call. Mr. Hall replied "sure" and came back out at 3:52 a.m. and gave the phone to the police officer. Constable Livingstone then had a brief conversation with Mr. Gouthro and at 3:54 a.m. Mr. Hall finished his call.

[25] At 3:55 a.m. Mr. Hall requested to go to the washroom and was accompanied by Constable Livingstone who kept him under observation and

returned him to the breathalyzer room at 3:56 a.m. introducing him to the breathalyzer technician, Constable Wayne Pitcher.

[26] Mr. Hall asked if his lawyer would be present for the test and on being told that Mr. Gouthro said he would not be, Mr. Hall requested that it be noted on the record that he wasn't comfortable taking the test unless his lawyer was present. Constable Livingstone complied and noted it in his notebook. Constable Livingstone informed him he had the right to refuse to take the test if he desired but that he would be charged accordingly. Mr. Hall replied that he was not refusing and would take the test. After the first test was completed Mr. Hall went to the washroom again accompanied by Constable Livingstone and then returned to the breathalyzer room where a second test was conducted.

[27] An identical copy of the Certificate of the Qualified Technician was served on Mr. Hall at 4:55 a.m. in the presence of his lawyer. The original certificate was introduced as Exhibit 1 and indicates readings at 0412 hours and 0432 hours of 120 milligrams of alcohol in 100 millilitres of blood and 100 milligrams of alcohol in 100 millilitres of blood respectively.

[28] The defence submits that the certificate is not signed and should not therefore be admitted into evidence. A certificate of a qualified technician would, but for the statutory exemption provided in the **Criminal Code**, be inadmissible hearsay.

[29] However, s. 258(1)(g) of the **Criminal Code** provides that:

> (g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician...
>
> is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

[30] Given that it is an exceptional and obviously convenient method for the Crown to prove an accused's blood alcohol level, the Crown will be held to strict account of its compliance with the statutory regime.

[31] Mr. Burchell, for the defence, in an eloquent argument submitted that the Certificate (Exhibit 1) in the present case ought to be rejected as not constituting a proper "certificate". The defence submits that the name of the technician at the bottom of the certificate is "block printed" as is the rest of

the certificate. The Court is asked to compare this to the written signature of Constable Pitcher on the Breathalyzer Check Sheet (Exhibit 2) and find that the Certificate reveals **NO** "signature" as that word is commonly understood.

[32] "Signature" is defined by **Black's Law Dictionary** (7th Ed.) as:

> "1. A person's name or mark written by that person or at the person's direction.
> 2. Commercial Law. Any name, mark or writing used with the intention of authenticating a document."

[33] **Wharton's Law** (Lexicon 11th Ed.) defines "signature" as"

> "A sign or mark impressed upon anything, a stamp, a mark; the name of a person written by himself either in full or by initials as regards his Christian name or names , and in full as regards his surname or by initials only or by mark only, though he can write."

[34] During the trial, Constable Wayne Pitcher testified that the Certificate of a Qualified Technician marked as Exhibit 1 was the document that he did on June 25th and that it related to Vincent Hall.

[35] I find that the printed name "Wayne Pitcher", as it appears at the end of the Certificate (Exhibit 1), above the line in the space designated "Qualified Technician" and in the same hand as appears on the rest of the Certificate, is sufficient to satisfy the requirements of a signature within the parameters of s. 258(1)(g) of the **Code**.

[36] Counsel for Mr. Hall has also tendered evidence on the "evidence to the contrary" defence, the so-called Carter defence based on the Ontario Court of Appeal decision in **Regina v. Carter** (1985) 19 CCC (3d) 174 (Ont. C.A.).

[37] Finlayson, J.A. stated at p. 178:

> "Clearly, since the breathalyzer instrument is intended to measure the quantity of alcohol in the person being tested, any evidence as to how much alcohol the person tested had in fact consumed is relevant evidence and if accepted can raise a doubt as to the accuracy of the breathalyzer reading. If, for example, an accused person faced with evidence of a breathalyzer reading well in excess of the permissible maximum, testified that he did not drink on any occasion and had nothing to drink prior to being tested, then the trial judge must either disbelieve

the accused or accept that, for some reason or other the breathalyzer reading is wrong."

[38] And at p. 179

"In the case at bar the reading came from a blood sample, not a breath sample, but once again, if the appellant's evidence is accepted, the blood sample reading must be wrong, and the appellant is not obliged to speculate where the error might have occurred..."

[39] In **Regina v. Dubois** (1991) 62 CCC (3d) 90 (Que. C.A.) Fish, J.A. stated at p. 92

"...a breathalyzer result cannot support a conviction under s. 253 if there is contrary evidence which raises a reasonable doubt or suggests a reasonable possibility of innocence or might reasonably be true."

[40] In **Regina v. Andrews** (1984) 8 CCC (3d) 519 (NSCA) MacDonald, J.A. said at p. 522:

Once a certificate of analysis of a qualified technician is admitted in evidence pursuant to s. 237(1)(f) of the Code it becomes prima facie proof that the accused had the certified proportion of alcohol in his blood at the time of the alleged offence. Not being absolute proof it can be displaced by evidence that the proportion of alcohol in the blood of the accused was within the permitted limit at the relevant time. In R. v. Proudlock (1978), 43 C.C.C. (2d) 321, [1979] 1 S.C.R. 525, 5 C.R. (3d) 21, the Supreme Court of Canada affirmed that the rebutting evidence required to displace a prima facie case need only raise a reasonable doubt.

[41] Briefly, the defence evidence on the "Carter" defence is this. The accused testified that on the 24th and 25th of June, 2000 he drank four (4) bottles of lite beer with 4% alcohol by volume between 11:15 p.m. and 2:15 a.m. at the Guildwood Lounge in Glace Bay. Brad Finlayson, who accompanied the accused to the Guildwood, testified that the accused consumed four (4) beer. Timothy Tucker, who met the accused at the Guildwood, testified that Vince Hall consumed three to four (3 - 4) beer. Dr. Gerald MacKenzie, an expert in the absorption, distribution, metabolism and elimination of alcohol and the effects of alcohol on human behaviour and performance, and in the calculation of blood alcohol analysis, gave evidence that the amount and pattern of drinking presented by Vince Hall would have revealed a blood

alcohol level of 32 milligrams of alcohol in 100 millilitres of blood at the time of driving. He stated that the accused would have had to consume six or seven bottles of beer to reach the blood alcohol level of 100 to 120.

[42] Elizabeth Dittmar, a Forensic Alcohol Specialist, with the Royal Canadian Mounted Police, called by the Crown as an expert on the absorption, distribution and elimination of alcohol in the human body as well as on the theory and operation of the Borkenstein Breathalyzer, testified on cross examination by the defence, that given the amount and pattern of drinking by the accused, the blood alcohol level at the time of driving would have been 47 milligrams of alcohol per 100 millilitres of blood at the time of driving.

[43] The evidence led by the defence on the authority of **Carter** and other cases is capable of amounting to evidence to the contrary and must be assessed in that light.

[44] As is obvious from the recitation of the evidence, resolution of these issues depends almost entirely upon the facts that are found. In turn, the finding of facts requires me to assess the credibility of all witnesses, both Crown and Defence and determine whether I accept or reject any particular witness' evidence or whether in considering the totality of the evidence led, that the evidence led by the defence presents a reasonable doubt. All the defence has to do is raise a reasonable doubt to rebut the statutory presumption of accuracy of the breathalyzer analysis contained in s. 258(1)(g).

[45] Constable Livingstone testified that the accused Vince Hall exhibited signs of impairment - a strong smell of alcohol on his breath, red, watery eyes, slurred speech, and unsteadiness on his feet.

[46] Elizabeth Dittmar, in relation to her work as an expert on the effects of alcohol on the human body, personally conducted observations of between 800 to 1,000 subjects who had consumed alcohol. She testified that all of those outward symptoms relating to the accused, although depending on the individual involved, would not necessarily be relatable to a blood alcohol concentration as low as 32 milligrams percent. Ms. Dittmar testified that such symptoms are symptoms of intoxication because they are outwardly seen and are usually associated in a social drinker with blood alcohol concentrations of approximately 100 - 120 milligrams of alcohol per 100 millilitres of blood.

[47] Mr. Hall testified that he had consumed four beer and felt perfectly fine to operate his vehicle, although he was physically tired. He testified he told Constable Livingstone, when the officer approached him, that he had had a "couple" of drinks. Chief Edgar MacLeod of the Cape Breton Regional Police testified that Vince Hall called him at home just before 3:00 a.m. from the police station, telling him that he only had two beer. Mr. Hall in his testimony stated that when he said he only had a couple of beer, it was "more of a phrase...kind of thing" and that it was a traumatic situation where he didn't have time to piece everything together. He indicated that once the first night ended, the next night he made notes and "pieced the puzzle together" as best he could.

[48] In **R. v. G. (M.)** (1994) 93 C.C.C. (3d) 347 Mr. Justice Galligan, speaking for the majority of the Ontario Court of Appeal, had this to say at p. 354/355:

> "Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness ... But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.
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> I do not think the principle is different whether there is one or several inconsistencies. What is of importance is the significance of the inconsistency. If the inconsistency is a significant one then the trial judge must pay careful attention to it when assessing the reliability of the witness' testimony."

[49] The inconsistency between what Mr. Hall told the arresting officer and Chief MacLeod within the first half hour or so of his apprehension concerning what he had to drink and what he testified to at trial is a significant one. So too is the difference in terms of the time when Mr. Hall stated he tried to call at least three lawyers before he made the first telephone call to the Chief of

Police. Mr. Hall stated he called Chief MacLeod because he was having difficulty getting in touch with a lawyer and merely called him for advice as to what to do.

[50] Constable Livingstone testified that they arrived at the police station at 2:52 a.m. and Mr. Hall was taken to a room where he was allowed to use the phone to call a lawyer. According to Constable Livingstone, Mr. Hall emerged from that room four minutes later indicating that the phone was for the officer. The officer took the phone and spoke with Chief MacLeod.

[51] Yet the accused testified that he telephoned Chief MacLeod because of difficulties getting a lawyer and that he had time to go through the telephone book in attempting to call three lawyers before making the call to Chief MacLeod. He stated that he let the phone ring for two of the lawyers and left a voice mail message for the third. After that he stated he had a conversation with Chief MacLeod. It is difficult to reconcile all of that activity within such a short time span.

[52] All of this impacts on the weight to be given to the evidence of Mr. Hall.

[53] I had the opportunity to hear and see each witness as they testified. I observed the testimony of the accused carefully as to what he had to say. No doubt he found himself confronted by a traumatic situation which caused him to panic and call the Chief of Police not once, but two times. His assertion that he only had two drinks was false even according to his own testimony. When he stated unequivocally on the witness stand that he only consumed four beer, because of the amount of money that was spent and because he was limiting himself to one drink an hour, I find that he was trying to "reconstruct" at best in hindsight what he had to drink and that he was at least mistaken in that regard. I find as a fact that the accused under-estimated the amount he consumed during the period in question. I also find the evidence of the two friends of the accused to be of little or no assistance in this regard. The number of drinks that a person is drinking over the course of a social evening is not something that generally burns its way into one's mind as other events might. Moreover, it is admitted that all of the defence witnesses in this case were drinking more than the accused on the evening in question and consequently their powers of observation and recollection would have been affected.

[54] I also had the opportunity to hear and observe Constable Greg Livingstone. Constable Livingstone impressed me as a credible witness. There were no

significant inconsistencies in his evidence. His powers of observation were unaffected by intoxicants and he gave his evidence fairly and frankly in a way that struck me as being a real effort to tell all the truth as he saw it on the evening in question.

[55] Constable Livingstone observed signs of impairment in respect to the accused which were consistent with a person having a blood alcohol reading higher than 80 milligrams of alcohol in 100 millilitres of blood. Nether Mr. Tucker nor Mr. Finlayson saw any such signs from the accused, Vincent Hall. I am convinced that their powers of observation were affected by their own consumption of alcohol. I am unable to accept the evidence of the accused and his two friends as to the amount of alcohol consumed by Mr. Hall. Accordingly, I reject the defence evidence in support of the tendered evidence to the contrary. In the circumstances there is no evidence to the contrary and the "presumption of accuracy" of the readings continues to apply.

[56] The defence also challenged Constable Wayne Pitcher, the breathalyzer technician, on his experience and record keeping regarding the use of the Borkenstein Breathalyzer. However, there is no probative evidence before the Court in relation to the operation of the breathalyzer which raises any reasonable doubt about the accuracy of the instrument or its manner of operation on the occasion in question. There is no direct evidence with regard to the operation of the instrument by the technician other than that the proper procedures were followed and no errors were apparent from the standard alcohol solution test. There is no evidence to the contrary to show an inaccuracy in the breathalyzer or in the manner of its operation to such a degree and nature that it could affect the result of the analysis and leave any doubt as to the blood alcohol content of the accused being over the allowable minimum.

[57] There being nothing to raise a reasonable doubt in regard to the presumption of accuracy, the readings and the certificate should apply to the time of the alleged offence as evidence for the Crown in this case.

[58] Accordingly, on the evidence which I have accepted in this case, I find the Crown has proven beyond a reasonable doubt that the accused

> "...on or about the 25th day of June, 2000 at or near Glace Bay, Cape Breton Regional Municipality, in the County of Cape Breton, Province of Nova Scotia,

> having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, did operate a motor vehicle, contrary to Section 253(b) of the Criminal Code of Canada."

and I find the accused guilty of count number one.

Dated at Sydney, Nova Scotia, this 2nd day of November, 2001.

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Brian D. Williston, J.P.C.