

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Straiton-Garety*, 2020 NSPC 7

**Date:** 20200127

**Docket:** Provincial Court No. 8335266, 8335267

**Registry:** Dartmouth

**Between:**

Her Majesty the Queen

v.

James Straiton-Garety

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**LIBRARY HEADING**

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**Judge:** The Honourable Chief Judge Pamela S. Williams

**Heard:** January 6, 2020 in Dartmouth, Nova Scotia

**Written Decision:** January 27, 2020

**Subject:** Impaired operation of a conveyance and operating a conveyance with more than 80 mg in 100 ml of blood contrary to sections 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code of Canada*

**Summary:** Police performed a traffic stop due to the nature of the driving – weaving back and forth within the lane, crossing the lane once and overcorrecting and making a “hard lane” change without signalling. The officer formed reasonable grounds to believe the driver was impaired by alcohol given the strong smell of alcoholic beverage, the blank stare, the slow response time and his dishevelled appearance. He arrested the accused, gave his *Charter* rights and caution and the breath demand. The accused provided two samples, each 140 mg of alcohol in 100 ml of blood.

**Issues:** (1) Did police effect a lawful traffic stop?

- (2) Did police have reasonable grounds to make a breath demand?
- (3) Did police promptly inform the accused of the reason for his arrest?
- (4) If the detention was arbitrary, the search unreasonable or the reason for the arrest not provided promptly, should all evidence be excluded due to breaches of the accused *Charter* rights?
- (5) Was the accused impaired, to any degree, while he operated his car?

**Result:**

The traffic stop was lawful. Police had reasonable grounds to make a breath demand. The accused was promptly told the reasons for his arrest. There were no breaches of the accused's *Charter* rights. The accused was found guilty of driving while his blood alcohol levels exceeded the legal limit. A judicial stay of proceedings was entered on the impaired driving charge.

<p><b><i>THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.</i></b></p>
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**Judge:** The Honourable Chief Judge Pamela S. Williams,

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**Decision** January 27, 2020

**Charge:** Sections 320.14(1)(a) & 320.14(1)(b) of the *Criminal Code*

**Counsel:** Matthew Kennedy, for the Nova Scotia Public Prosecution  
Service

Laura McCarthy, Defence Counsel for Mr. Straiton-Garety

**By the Court:**

**Introduction:**

[1] During the early morning hours of April 23, 2019, police observed James Straiton-Garety driving his vehicle on a multi-lane highway in Dartmouth. They performed a traffic stop due to the nature of the driving. Sergeant Burt spoke with Mr. Straiton-Garety, and immediately formed grounds to arrest him for impaired driving. Mr. Straiton-Garety was arrested, given his *Charter* rights and caution and taken back to the police station where he blew two readings each of 140 mg of alcohol in 100 ml of blood.

[2] Mr. Straiton-Garety was charged with two offenses:

1. Operating a car while his ability was impaired by alcohol contrary to section 320.14(1)(a) of the *Criminal Code*; and
2. Having within two hours of driving, a blood alcohol concentration exceeding 80 mg of alcohol in 100 ml of blood contrary to section 320.14(1)(b) of the *Criminal Code*.

[3] The Defence filed a *Charter of Rights and Freedoms (Charter)* Notice of Application alleging violations of sections 8,9, 10 (a) and 24 of the *Charter*. The parties agreed to a blended *voir dire* where the evidence would be applied to the trial proper.

**Issues:**

1. Did police effect a lawful traffic stop?
2. Did police have reasonable grounds to make a breath demand?
3. Did police promptly inform Mr. Straiton-Garety of the reason for his arrest?
4. If one or more of Mr. Straiton-Garety's *Charter* rights were infringed - arbitrary detention – section 9, unreasonable search and seizure – section 8, failure to promptly inform him of the reason for his arrest – section 10(a), should all evidence, *viva voce* and physical, obtained after the police stop, be excluded?

5. Was Mr. Straiton-Garety impaired to any degree by alcohol while he drove his car?

**Position of the Parties:**

The Crown

[4] The Crown says the traffic stop was lawful, the police had reasonable grounds to make a breath demand, and police promptly informed Mr. Straiton-Garety of the reason for his arrest. If the Court finds there were one or more *Charter* violations, section 24(2) favours inclusion of the evidence. The Crown contends the evidence has established that Mr. Straiton-Garety was operating his vehicle while impaired by alcohol.

The Defense

[5] Mr. Straiton-Garety argues the police had insufficient grounds to make a motor vehicle stop; police did not have the required reasonable and probable grounds to arrest him or make a breath demand; and failed to promptly inform him of the reason for his arrest. Mr. Straiton-Garety therefore seeks an order to exclude the results of the breathalyzer tests and all evidence obtained after the police stop. He also says there was insufficient evidence to conclude he was operating his vehicle while impaired by alcohol.

**Charter Issues:**

[6] The burden of proof for a *Charter* violation rests with the Applicant on a balance of probabilities.

Issue 1: Did police effect a lawful traffic stop?

Facts

[7] Sergeants Burt and Bourdages noticed Mr. Straiton-Garety's vehicle in front of them while travelling south on Highway 111 near Mic Mac Mall, in Dartmouth, Nova Scotia just before 1:37 a.m. on April 23, 2019. The car weaved back and forth within its lane and crossed the lane once before over-correcting. The vehicle then made a "hard lane" correction swerving from one lane to another, without signalling. Weather conditions were clear, the pavement was dry, and there were no road obstructions. Traffic was light; in fact, the police SUV and Mr. Straiton-

Garety's vehicle were the only two vehicles in the vicinity. As a result of these motor vehicle infractions, police made a traffic stop to determine if there was something wrong with the driver or the vehicle.

### Law and Analysis

[8] Section 9 of the *Charter* protects Canadians from arbitrary detention.

[9] The traffic stop, pursuant to the *Motor Vehicle Act* was a "detention" but it was neither arbitrary nor unlawful, given the manner of driving police observed. Even if there were insufficient grounds to stop the vehicle, and the detention was arbitrary, it would be saved by section 1 of the *Charter* according to both the Supreme Court of Canada in **R. v. Mellenthin**, [1992] 3 SCR 615 at para. 15 and our Court of Appeal in **R. v. MacLennan**, [1995] N.S.J. No. 77 at para 60:

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 by s. 1.

[10] The traffic stop was therefore lawful.

Issue 2: Did police have reasonable grounds to make a breath demand?

### Facts

[11] At 1:37 a.m. Sergeant Burt, a 21-year veteran with the Halifax Police Service, stopped the vehicle being operated by Mr. Straiton-Garety. Mr. Straiton-Garety was the sole occupant of the vehicle. As Sergeant Burt was telling him the reason for the police stop, the officer immediately detected a strong smell of alcoholic beverage coming from Mr. Straiton-Garety's mouth. Mr. Straiton-Garety had a blank stare on his face, was slow to respond and was somewhat dishevelled (his pants zipper was down, and his pants were ripped in the crotch). Sergeant Burt testified that he formed reasonable grounds to believe these were indicia of impairment and arrested Mr. Straiton-Garety at 1:38 a.m. for impaired operation of a motor vehicle. He read, from his card, the *Charter* rights and caution and demanded breath samples. Sergeant Burt indicated that Mr. Straiton-Garety appeared to understand.

[12] Mr. Straiton-Garety was asked to exit his vehicle, placed in handcuffs and transported to the police station at 7 Mellor Ave., Dartmouth in the back of a police cruiser. At the station, Mr. Straiton-Garety spoke with duty counsel and then provided two samples of his breath, both registering 140 mg of alcohol in 100 ml of blood. Mr. Straiton-Garety was charged with impaired operation and failing the breathalyzer, issued his paperwork and released.

## Law

### *Warrantless Search*

[13] The seizure of Mr. Straiton-Garety's breath samples was warrantless. The Crown has the burden of proving, on the balance of probabilities, that the search and seizure was reasonable: **R. v. Collins**, (1987) 33 CCC (3d) 1 (SCC) at page 278.

[14] Section 8 of the *Charter* protects citizens from unreasonable search and seizure. The Supreme Court of Canada in both **Collins**, supra and **R. v. Caslake**, [1998] 1 S.C.R. at para. 10 and 12, found that for a search to be reasonable under section 8, there are three pre-requisites:

1. the search must be authorized by law; that is to say,
  - it must be authorized by specific statutory authority or common law rules,
  - it must be carried out in accordance with procedural and substantive requirements of the law, and
  - it must not exceed its scope as to areas and objects of search under the law.
2. the law itself must be reasonable; and
3. the search must be conducted in a reasonable manner.

[15] There is no suggestion here that the law is unreasonable or that the search was conducted in an unreasonable manner. The question is whether the officer had reasonable grounds to believe Mr. Straiton-Garety's ability to drive was impaired by alcohol.

### *Reasonable Ground as to Belief of Impairment*

[16] By virtue of section 320.28(1)(a)(i) of the *Criminal Code*, a peace officer, who has reasonable grounds to believe that a person has driven while their ability to operate was impaired to any degree by alcohol, may by demand, made as soon as practicable, require the person to provide as soon as practicable, samples of breath for analysis by means of an approved instrument [Emphasis added].

[17] In December 2018, section 320.28(1)(a) replaced section 254(3) which provided where a police officer believes on reasonable and probable grounds that a person has committed an offence of driving while impaired, the police officer may demand a breathalyzer. The new provision differs in that the officer must have reasonable grounds (the words “and probable” having been removed) and the officer’s belief must be that the impairment is to any degree.

[18] Alternatively, an officer, who has reasonable grounds to suspect that a person has alcohol in their system, may, if a demand was not made to take a breathalyzer, make a roadside screening test demand under section 320.28(3).

[19] I take the view that, despite the change in wording of the section, the law on reasonable grounds has not changed. The reasonable grounds test still requires both an objective and subjective component as stated by the Supreme Court of Canada in **R. v. Bernshaw** [1995] 1 S.C.R. at para. 48. Accordingly, the officer must hold an honest belief that the driver is impaired by alcohol, and there must exist reasonable grounds for the belief.

### *Consideration of the Totality of the Circumstances*

[20] In my analysis of the evidence I must consider the “totality of the circumstances” known to the officer at the time to determine whether the evidence rationally supports the officer’s belief. I am guided by the principles extracted by caselaw and set out by the Nova Scotia Court of Appeal in **R. v. Schofield**, 2015 NSCA 5 at para. 33-35:

33 . . . The officer may infer or deduce, draw on experience and ascribe weights to factors. Parliament expects the officer to do this on the roadside according to a statutory timeline, while informed by the available circumstances, but without either the benefit of trial processes to test the accuracy of his or her belief or “the luxury of judicial reflection”. The officer must identify the supporting circumstances at the *voir dire*. But the officer was not expected to apply the rules of evidence at the roadside. So the support may be based on hearsay. The supporting connection must be reasonable at the time, but need not be proven correct at the later *voir dire* that considers s. 254(3).



34 The judge should not segregate the officer's criteria for piecemeal analysis, then banish each factor which might have a stand-alone explanation. From the officer's roadside perspective, the factors may have had corroborative weights that together formed a sounder platform for an inference of impairment. The reductive approach denies that corroborative potential...

35 There is no minimum period of investigation, mandatory line of questioning or legally essential technique, such as a roadside screening. The judge should not focus on missing evidence. Rather the judge should consider whether the adduced evidence of circumstances known to the officer reasonably supported the officer's view.

## Analysis

[21] For the following reasons I find, from the totality of the circumstances, that Sergeant Burt held an honest belief that Mr. Straiton-Garety's ability to operate a vehicle was impaired by alcohol and there existed reasonable grounds for this belief:

1. Sergeant Burt is a seasoned police officer with 21 years of experience in detecting indicia of impairment including:
  - (a) dealing with people under the influence of alcohol in the downtown core of Halifax
  - (b) performing traffic stops as a member of the traffic division and conducting impaired driving investigations, and
  - (c) undertaking training and being a qualified Datamaster technician having performed over 400 breathalyzer tests.

Given his experience, he knew the indicia to look for and noted several signs within seconds.

2. Sergeant Burt drew on his experience in assessing the totality of his observations which led him to the honest belief that Mr. Straiton-Garety was impaired by alcohol. He did not need to administer a roadside screening device. His observations included:
  - (a) the manner of driving, that is, weaving from side to side in the lane, crossing the lane and over-correcting for no apparent reason, and making a hard lane correction swerving from one lane to another without signalling
  - (b) the strong odour of alcoholic beverage coming from Mr. Straiton-Garety's breath

- (c) the blank stare on Mr. Straiton-Garety's face when told about his erratic driving
- (d) the slowness of Mr. Straiton-Garety's responses, and
- (e) his dishevelled state, with pants zipper down and ripped crotch.

A roadside screening demand would have been appropriate if Sergeant Burt had mere suspicion that there was alcohol in Mr. Straiton-Garety's system. He clearly testified however that his observations gave him grounds to believe Mr. Straiton-Garety was impaired.

- 3. These observations were confirmed by Sergeant Bourdages, the passenger in the police SUV driven by Sergeant Burt.
- 4. The initial stop was for a *Motor Vehicle Act* infraction, but during the very brief interaction between Sergeant Burt and Mr. Straiton-Garety, a minute at most, Sergeant Burt was able to make the observations he did and formed the grounds that the erratic driving was due to impairment by alcohol. As stated in **Schofield**, supra, there is no minimum period of investigation, mandatory line of questioning or need for a roadside screening device demand.
- 5. Objectively, the totality of the circumstances before Sergeant Burt, which have not been refuted, provide reasonable grounds to believe that Mr. Straiton-Garety's ability to operate his motor vehicle was impaired by alcohol. There is no other evidence to explain the erratic driving. There were no road obstructions, the night was clear and there was no other traffic on the road. The driving along with the strong smell of alcoholic beverage on the driver's breath, the blank stare, the slow response and dishevelled appearance were cumulative factors leading to the formation of reasonable grounds.

[22] Because Sergeant Burt had the requisite reasonable grounds to arrest Mr. Straiton-Garety for impaired operation of a conveyance, I find that the detention, roadside, on route to the police station and at the police station was no longer than reasonably necessary to obtain samples of Mr. Straiton Garety's breath. The traffic stop occurred at 1:37 a.m. The arrest was affected at 1:38 a.m. *Charter* rights and police caution were administered, and they left the scene at 1:42 a.m. for the police station, arriving at 1:50 a.m. Police attempted to contact duty counsel on three occasions, having left two voice mail messages at 1:57 a.m. and 1:58 a.m. Mr.

Straiton-Garety spoke with duty counsel at 2:02 a.m. for three minutes. At 2:08 a.m. Mr. Straiton-Garety was taken to the breath room for a period of observation with two tests being administered – the first at 2:31 a.m. and the second at 2:52 a.m. Constable Mandru then advised Sergeant Burt of the readings and Sergeant Burt issued the paperwork and released Mr. Straiton-Garety. Based on the evidence before me, Mr. Straiton-Garety was detained no longer than necessary to complete the breath tests and resulting paperwork.

Did police promptly inform Mr. Straiton-Garety of the reason for his arrest?

[23] Mr. Straiton-Garety was promptly informed of his reason for arrest. The evidence establishes that Sergeant Burt arrested Mr. Straiton-Garety at 1:38 a.m. for impaired driving and read him his *Charter* rights and caution and the breath demand immediately thereafter.

Section 24 Analysis

[24] I need not embark on a section 24 analysis as I have concluded the evidence was obtained without infringing on *Charter* rights. However, should I be in error, I conclude that the evidence should nonetheless be admitted as its admission would not bring the administration of justice into disrepute.

[25] The framework for a section 24(2) analysis under **R. v. Grant**, 2009 SCC 32 requires the Court to examine the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the protected interest of the accused and society's interest in the adjudication of the case on its merits.

[26] Sergeant Burt acted in good faith, having formulated his subjective grounds for detention and having detained Mr. Straiton-Garety for only as long as necessary to affect the breath tests. The search of a bodily substance, is an intrusive measure, but it was brief and minimally invasive. Impaired driving is unfortunately a very prevalent occurrence which compromises public safety -- sometimes leading to significant injury and death. Society has an interest therefore in these cases being decided on their merits.

[27] All evidence, including the officers testimony and the results of the breath samples are admitted into evidence. Based on the results of the breath samples, I find Mr. Straiton-Garety guilty of having within two hours of driving, a blood alcohol concentration exceeding 80 mg of alcohol in 100 ml of blood contrary to section 320.14(1)(b) of the *Criminal Code*.

Was Mr. Straiton-Garety impaired to any degree by alcohol while he drove his car?

[28] The following evidence establishes that Mr. Straiton-Garety was impaired by alcohol:

1. The breath tests were nearly two times the legal limit, that is 140 ml each.
2. The indicia of impairment noted by Sergeant Burt at roadside included a strong smell of alcoholic beverage coming from his mouth, a blank stare, slow response and dishevelled appearance (pants zipper down and crotch ripped).
3. Sergeant Bourdages, in observing Mr. Straiton-Garety exit his vehicle, noted he was slow and somewhat unsteady on his feet.
4. Sergeant Burt noted that Mr. Straiton-Garety was unsteady on his feet when walking from the holding cell to the breath room, at the police station.
5. Constable Mandru's observed Mr. Straiton-Garety in the breath room. He noted blood-shot and glossy eyes, speech slightly slurred and a moderate smell of alcoholic beverage when Mr. Straiton-Garety spoke.
6. Mr. Straiton-Garety admitted to having consumed a fair quantity of vodka – 3 to 4 drinks prior to driving.

[29] However, having found Mr. Straiton-Garety guilty of failing the breathalyzer, I enter a stay of proceedings on the charge of impaired driving given the well-accepted law in **R. v. Kienapple** [1975], 1 S.C.R. 72 and the rule against multiple convictions, endorsed by our Nova Scotia Court of Appeal in **R. v. Mills**, 2015 NSSC 213 at para. 14-17.

Pamela Williams, JPC