

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Stratton*, 2023 NSPC 37

Date: 20230626

Docket: 8546129, 8546130

Registry: Dartmouth, NS

Between:

His Majesty the King

v.

Brandon Stratton

LIBRARY HEADING

Judge: The Honourable Chief Judge Pamela S. Williams

Heard: In Dartmouth, Nova Scotia

Decision: June 26, 2023

Subject: The reliability of an Approved Screening Device (ASD) result which forms the sole basis for making the Breathalyzer Demand and whether the Breath results should be excluded from evidence because they are unlawfully obtained.

Summary: Police conduct a traffic stop on Mr. Stratton's truck and suspect he has consumed alcohol. A roadside demand is made; a breath sample is provided, which registers a 'Fail'. On this basis Mr. Stratton is arrested, a Breathalyzer demand is made, and he is given his Rights to Counsel. Mr. Stratton provides two samples of his breath, back at the station resulting in a 'Fail'.

Issues:

1. Are the breath samples admissible pursuant to section 320.28(1)(a)(i) of the *Criminal Code of Canada (the Criminal Code)*?
2. To answer this question, I must determine whether police have reasonable grounds to believe Mr. Stratton drives his truck with a blood alcohol content equal to or exceeding the legal limit. This turns on whether the Approved Screening Device (ASD) 'Fail', the sole basis for the breath demand, is reliable in providing reasonable grounds to make the Breath demand. More precisely, do police fail to consider recent alcohol consumption/the presence of residual mouth alcohol as affecting the reliability of the ASD reading?
3. Stated otherwise, does the officer's decision, not to delay administering the test to account for the possibility of recent alcohol consumption, make his reliance on the ASD result unreasonable, and therefore unlawful?
4. If the result of the ASD, the sole basis for the Breathalyzer demand, is unreliable, should the breath results be excluded from evidence pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms (the Charter)*?
5. Do police adequately explain Mr. Stratton's Rights to Counsel pursuant to s. 10 of the *Charter*?

Result:

The Breath demand is unlawful as it is based solely on an unreliable ASD reading. Accordingly, after having carefully weighed the *Grant* factors, in a s. 24(2) analysis, I conclude the Breath results must be excluded, and I find Mr. Stratton not guilty of failing the Breathalyzer.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEE

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Stratton*, 2023 NSPC 37

Date: 20230626

Docket: 8546129, 8546130

Registry: Dartmouth, Nova Scotia

Between:

His Majesty the King

v.

Brandon Stratton

DECISION

Judge: The Honourable Chief Judge Pamela S. Williams

Heard: May 1 and 29, 2023 in Dartmouth, Nova Scotia

Decision: June 26, 2023

Charges: Sections 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code of Canada*

Counsel: Sarah Lane, for the Crown
Alan MacDonald, for the Defence

By the Court:

Introduction

[1] Brandon Stratton is charged with driving his truck while impaired and failing the breathalyzer. The Crown agrees there is insufficient evidence he was impaired; that charge is dismissed.

[2] Police conduct a traffic stop on Mr. Stratton's truck and suspect he has consumed alcohol. A roadside demand is made; a breath sample is provided, which registers a 'Fail'. On this basis Mr. Stratton is arrested, a Breathalyzer demand is made, and he is given his Rights to Counsel. Mr. Stratton provides two samples of his breath, back at the station resulting in a 'Fail'.

[3] Mr. Stratton says the police do not have reasonable grounds to make the Breath demand and do not adequately explain his Rights to Counsel resulting in breaches of his *Charter* rights. He asks that the breath results be excluded from evidence and that he be acquitted. The parties agree, the evidence heard on the *Charter* motions, apply to the trial overall.

[4] **Issues:**

6. Are the breath samples admissible pursuant to section 320.28(1)(a)(i) of the *Criminal Code of Canada (the Criminal Code)*?
7. To answer this question, I must determine whether police have reasonable grounds to believe Mr. Stratton drives his truck with a blood alcohol content equal to or exceeding the legal limit. This turns on whether the Approved Screening Device (ASD) 'Fail', the sole basis for the breath demand, is reliable in providing reasonable grounds to make the Breath demand. More precisely, do police fail to consider recent alcohol consumption/the presence of residual mouth alcohol as affecting the reliability of the ASD reading?
8. Stated otherwise, does the officer's decision, not to delay administering the test to account for the possibility of recent alcohol consumption, make his reliance on the ASD result unreasonable, and therefore unlawful?
9. If the result of the ASD, the sole basis for the Breathalyzer demand, is unreliable, should the breath results be excluded from evidence pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms (the Charter)*?
10. Do police adequately explain Mr. Stratton's Rights to Counsel pursuant to s. 10 of the *Charter*?

General Principles:

Innocent Until Proven Guilty

[5] All accused persons are innocent until proven guilty.

Burden and Standard of Proof

[6] The Crown has the burden to prove all essential elements of the offence beyond a reasonable doubt. This however does not require proof to an absolute certainty or beyond any doubt.

[7] A reasonable doubt is based on reason and common sense that is derived from the evidence, or absence of evidence: *R. v. Lifchus*, [1997] 3 SCR 320 para 39.

Burden and Standard of Proof on Charter Motions

[8] The party raising a *Charter* violation has the burden to prove the breach on a balance of probabilities.

Issue 1: Are the breath samples admissible pursuant to section 320.28(1)(a) of the Criminal Code?

Law:

[9] Obtaining samples of a person's breath without reasonable and probable grounds [now reasonable grounds] is an unreasonable search and seizure contrary to s. 8 of the *Charter*: *R v. Bernshaw*, [1995] 1 S.C.R. 254 at paras. 51-53.

[10] The test for reasonable grounds includes both a subjective and objective component; the officer must have an honest belief that the detainee committed an offence under s. 253 of the *Criminal Code* [now s. 320.14] and there must be reasonable grounds for this belief: *Bernshaw* at para. 48.

[11] The objective reasonableness of relying on an ASD “Fail” result to form reasonable grounds for an arrest and Breath demand can be undermined by credible evidence known to the officer that the suspect had residual mouth alcohol at the time of testing: *R. v. Notaro*, 2018 ONCA 449 at para. 42.

[12] The totality of the circumstances should be considered in determining whether the officer had reasonable grounds to make the Breath demand. Relevant factors can include evidence of driving, appearance and conduct, and the judgement of the officer: *R. v. Shephard*, 2009 SCC 35.

Analysis:

[13] Police watch Mr. Stratton go through the ‘Drive-Thru’ at the Cold Beer Store without stopping to order anything. They stop him because of a suspected driving infraction – ‘running a red light’. There is no evidence of impairment based on Mr. Stratton’s driving.

[14] Constable Hansen detects a strong smell of alcoholic beverage when he approaches Mr. Stratton’s driver’s window and notes Mr. Stratton has glossy eyes. He does not say whether the odor is from the vehicle or Mr. Stratton’s breath. Mr. Stratton tells Constable Hansen he had one drink. On this basis, the ASD demand is

made. Mr. Stratton registers a 'Fail'. He is arrested, given the Police Caution and his Rights to Counsel, and is read the Breathalyzer demand.

[15] Provided the ASD result is accurate, I find that police have reason to arrest Mr. Stratton and demand he give samples of his breath.

Issue 2: Is the 'Fail' on the ASD reliable in providing reasonable grounds to make the breath demand or is there recent alcohol consumption/residual mouth alcohol which can impact the ASD result?

Law:

[16] Once an officer has reasonable suspicion that a person has committed an impaired driving offence, the officer may then make a demand for two samples of the person's breath by means of an ASD: Section 320.27(1)(b) of the *Criminal Code*.

[17] Although a Breath demand must be made "forthwith" [now "immediately"], a police officer can delay administering the ASD if there is a concern about an accurate analysis: *R. v. Dewald*, [1996] 1S.C.R. 68.

[18] There is no general police duty to inquire about recent alcohol consumption before administering the ASD. The mere possibility a driver has consumed alcohol within 15 minutes does not preclude the officer from relying on the accuracy of the ASD. Whether or not officers are required to wait before administering the ASD is

a fact-based inquiry determined on all the circumstances: *R. v. Mastromartino* (2004), 70 O.R. (3d) 540.

[19] Some factors the officer should consider when deciding whether it is necessary to wait before administering the ASD include:

- Whether the driver is seen leaving a bar
- The strength of the smell of the alcohol on the breath of the detainee
- The presence of alcohol in the vehicle and within reach of the detainee
- What the detainee says about recent consumption and whether this is believed by the officer: *R. v. Seivewright*, 2010 BCSC 1631 at para. 28.

[20] Even when the ASD is administered properly, that is, the officer has no reason to doubt the reliability of the result, I must determine if it is objectively reasonable, at the time he makes the Breathalyzer demand, to rely on the ASD 'Fail': *R. v. Turko*, 2016 BCSC 1336 at para. 21.

[21] To summarize, police do not need to make inquiries regarding recent consumption and residual mouth alcohol but if confronted with information that the driver consumed alcohol within the preceding 15 minutes, they should wait to give the ASD demand. If the officer depends on the reliability of results of the ASD to

make a breath demand, but thereafter is confronted with evidence of possible recent consumption, they cannot use the ASD results to form reasonable grounds (as the sole basis) for the demand.

Credibility and Reliability

[22] In determining whether there is evidence of recent consumption, which may affect the ASD reading, I must assess the credibility and reliability of the witnesses.

Credibility

[23] Credibility has to do with a witness's truthfulness. However, I am mindful that a credible witness may give unreliable evidence. They may be truthful in testifying, but may, however, be honestly mistaken.

[24] To assess credibility, I must consider a three-part test:

1. If I believe the evidence of the accused, I must acquit.
2. If I do not believe the accused but I am left with a reasonable doubt that their version of events could be true, I must acquit.
3. If I am not left with a reasonable doubt that their version could be true, I must then consider whether, on the remainder of the evidence before me, I am convinced of the guilt of the accused, beyond a reasonable doubt. *R. v. W. (D.)*, [1991] 1 SCR 742

Reliability

[25] Reliability has to do with the accuracy of a witness's testimony. It involves the witness' ability to accurately observe, recall and recount events in issue. One of the best ways to assess credibility and reliability is to carefully and repeatedly test the evidence to see how it compares on central points: *R. v. D.D.S.* 2006 NSCA 34 at para. 77.

[26] I must reflect on the effect of inconsistencies considering all the evidence presented. Minor inconsistencies may not unduly diminish the credibility of a witness whereas a series of inconsistencies may be significant and cause me to have reasonable doubt about the reliability of the witness's evidence: *R. v. B. (R.W.)* (1993), 40 W.A.C. 1 at pp. 9-10.

[27] I am entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I do accept.

Position of the Parties:

[28] The parties disagree on the reliability of the ASD result that forms the basis for the breath demand. The Crown maintains Constable Hansen has no reason to suspect the presence of mouth alcohol or that Mr. Stratton has consumed alcohol

within 15 minutes of the ASD demand. Therefore, he can rely on the 'Fail' as the basis for making the Breath demand.

[29] Mr. Stratton says he tells Constable Hansen, after the ASD "Fail" but before the Breath demand, that he had a beer 10 to 15 minutes earlier, causing the ASD reading to be unreliable.

Analysis:

[30] The sole basis for the Breath demand is the 'Fail' registered on the ASD. A strong smell of alcoholic beverage can indicate recent consumption. An empty beer container can provide some evidence of recent consumption. If the officer suspects residual mouth alcohol, the ASD demand should be delayed for 15 minutes. There is no mouth alcohol warning on the ASD to assist in this determination.

Constable Hansen's Evidence

[31] Though credible, I have concerns about the reliability of aspects of Constable Hansen's evidence for the reasons which follow.

Driver of Police Vehicle

[32] Constable Hansen says he is driving the police cruiser that pulls Mr. Stratton over. When shown the General Occurrence Report he admits to being the passenger,

not the driver. He assumes he is the driver as he is the officer who approaches Mr. Stratton's driver's window, as per his regular practice. This suggests he has no independent recollection, but instead relies on an assumption.

Smell of Alcoholic Beverage and Conversation

[33] Constable Hansen does not say whether the smell of alcoholic beverage is coming from the driver or the vehicle. When questioned by the Defense, he agrees it is important to note if the smell is coming from the driver or the motor vehicle. In this instance, either he is not able to say, or he does not recall. He recalls Mr. Stratton telling him he forgot his wallet at his friend's house (the reason for not stopping at the Drive-Thru) and that he had one beer.

Discovery of Empty Beer Can, the Timing of Breath Demand, Evidence of Recent Consumption

[34] On direct examination Constable Hansen makes no reference to finding an empty beer can in the driver's door of Mr. Stratton's truck. When prompted, by Defense counsel, he agrees to seeing an empty can of beer in the driver's door as Mr. Stratton gets out of his truck. He is not sure if he finds the beer can before or after Mr. Stratton's arrest but says it is before the Breathalyzer demand. He then

says he finds the can after he makes the Breath demand. This suggests he either does not remember or is confused about the sequence of events.

[35] When referred to paragraphs 4 and 5 of the Occurrence Report, Constable Hansen agrees:

- At 20:48 he reads the ASD demand.
- At 20:50 a 'Fail' is registered.
- Mr. Stratton is arrested and as he gets out of his truck, the officer sees the beer can.
- At 20:51 the Rights to Counsel and Police Caution are read.
- At 20:52 the Breath Demand is made.

[36] I conclude from Constable Hansen's evidence he does not turn his mind to the possibility of recent consumption, after discovering the empty beer can.

Statement about Recent Consumption

[37] Constable Hansen does not recall Mr. Stratton telling him, as he picks up the empty beer can, "Yeah, that's the beer I had 10-15 minutes ago". There is nothing in his notes to reflect this. Further he testifies he has no reason to suspect the presence of mouth alcohol.

[38] Constable Hansen does recall, that back at the police station, during the 15-minute observation period before the Breath tests, Mr. Stratton tells him he had one Budweiser beer about 15 minutes earlier at a friend's house, at 357 Portland Street. He agrees it is a five-to-seven-minute drive from Portland Street to where the truck is stopped.

[39] It is noteworthy that this encounter is on January 30, 2022, some 16 months prior to trial. Constable Hansen testifies to having been involved in more than 200 impaired driving investigations in his five plus years with the Halifax Regional Police. There is nothing particularly remarkable about this case. He relies on his notes for specific details, which is typical of this sort of investigation. There may be gaps in officer notes as evidenced here with respect to finding the empty can.

[40] Given Constable Hansen's inability to recall discrete details – including which officer is driving, whether the smell of alcohol is coming from the truck or the driver, and when beer can is found – I cannot rely on Constable Hansen's evidence that Mr. Stratton does not tell him, upon finding the empty can, he had a beer within 15 minutes of being stopped by police.

[41] I am mindful that Constable Hansen testifies it is not until Mr. Stratton is at the police station, during the 15-minute observation period before the breathalyzer

is administered, that he admits to recent consumption. The officer records this in his notebook but there is no evidence whether this note is made immediately after the admission, or whether it is simply made during the observation period when he may have the opportunity to catch up on his notes. This question is not put to the officer. Given the problems I have referenced above with respect to the reliability of Constable Hansen's memory, I am not able to conclude the notes are made immediately after the statement of recent consumption.

Constable Feltmate's Evidence

[42] Constable Jordan Feltmate's evidence is brief and relatively uneventful except on several points:

- He confirms being the driver of the police cruiser.
- During the traffic stop he goes to the passenger window and is not able to hear the exchange between Constable Hansen and Mr. Stratton.
- Unlike Constable Hansen, he recalls smelling a "strong smell of alcohol" in the police car and at the station.
- He agrees that open liquor, within the driver's reach, can indicate recent consumption.

[43] Constable Hansen either has no recollection of the smell of alcohol in the cruiser or at the station, or simply forgets to mention it. I accept there is a strong smell of alcohol both in the cruiser and at the station.

[44] Constable Feltmate's interactions with Mr. Stratton are minimal but his ability to recall events is good. Accordingly, I accept his evidence.

Brandon Stratton's Evidence

[45] Brandon Stratton has the burden of satisfying me on a balance of probabilities (more likely than not) that the ASD demand is unreliable because Constable Hansen should have waited before making the demand, based on recent consumption.

[46] I remind myself that Mr. Stratton has a vested interest in the outcome of these proceedings. There is much at stake – a substantial fine and a one-year driving prohibition. On the other hand, I cannot and do not conclude on this basis only, he is untruthful about the timing of the disclosure of recent consumption. I must consider the whole of the evidence.

[47] Mr. Stratton is a welder by trade. He has no criminal record and has never been arrested prior to January 30, 2022. I accept the day is memorable for him and that he has a good recall of events. I must now determine whether his evidence is worthy of belief.

Events of the Morning

[48] January 30, 2022, is a Sunday. During the morning, Mr. Stratton and a friend meet up with other friends and go for a hike in East Chezzetcook. Mr. Stratton has

three to four “late morning drinks” (Budweiser Beer) between 9:00 a.m. and noon. Early in the afternoon, his friend drops him off at home. This is not disputed.

Evening Drinking

[49] In the evening, according to Mr. Stratton, he drives to his friend’s home to hang out and drink beer. He arrives between 8:15 and 8:30 p.m. He has one beer in the parking lot by his truck; he notices the case is empty and decides to go to the Cold Beer Store for more. He sets the empty can in his driver’s door, instead of going up to his friend’s apartment to drop it off. In hindsight, to his credit, Mr. Stratton agrees with the Crown it is not a good decision to drink and go for more beer.

Police Stop

[50] The Cold Beer Store is a seven-to-eight-minute drive away. There is not much traffic. I accept that Mr. Stratton discovers, at the Drive-Thru, he does not have his wallet. He goes through the Drive-Thru without stopping and is pulled over by police within 100 to 200 meters.

[51] Mr. Stratton confirms that Constable Hansen approaches his driver’s window and asks how he is doing. The officer mentions smelling a strong odour of alcohol and Mr. Stratton says he was drinking prior to leaving his friend’s house. He agrees

the officer makes the ASD demand and he registers a “Fail”. He is arrested and Constable Hansen does a quick search of his truck – grabbing Mr. Stratton’s keys and shaking the empty beer can he finds in the driver’s door. This is not disputed.

Evidence of Recent Consumption

[52] Contrary to Constable Hansen’s evidence, Mr. Stratton says he tells Constable Hansen, as the officer picks up the empty can, that he had the beer between 10-15 minutes earlier. I find it hard to believe, according to Constable Hansen’s evidence, there is no conversation about the beer can, after its discovery. It makes sense there was some conversation about the empty can.

[53] The Crown argues that Mr. Stratton does not say anything about recent consumption until the observation period back at the Police Station, pointing to Constable Hansen’s evidence, supported by his notes. For the reasons given above, I cannot rely on this argument.

[54] That said, the Crown nonetheless urges me to reject Mr. Stratton’s version as to when he tells Constable Hansen of recent consumption. They argue that Mr. Stratton is inconsistent in his evidence about the loss of his wallet and that I should not find his evidence credible. I will now turn to that evidence.

The Missing Wallet

[55] Recall that Mr. Stratton drives past the Drive-Thru window of the Cold Beer Store because he cannot find his wallet. He thinks he left it at his friend's house and decides to go back to get it.

[56] The Crown asks Mr. Stratton why he thinks he left his wallet at his friend's house if he was only in the parking lot. Mr. Stratton replies spontaneously that he had been sitting at his friend's kitchen table for a couple of minutes before drinking the beer in the parking lot and that's why believes he may have lost it there. The Crown suggests this explanation is recently fabricated, convenient, and not worthy of belief. The Defense argues Mr. Stratton is nervous and simply forgets to mention this detail earlier.

[57] The evidence concerning the loss of the wallet is a collateral point, but I am nonetheless satisfied with Mr. Stratton's explanation for the apparent inconsistency. His response is automatic, sufficiently detailed, and logical. Sitting earlier at the kitchen table has nothing to do with the offence so I am not concerned that Mr. Stratton does not mention it earlier. In short, I am not concerned about his credibility on this point.

[58] There are no internal or external inconsistencies with Mr. Stratton's evidence on the issue of recent consumption and I am satisfied, on a balance of probabilities,

he communicates his recent consumption to Constable Hansen once the officer picks up the empty beer can, after the ASD “Fail” but before the Breath demand.

Subjective Reliability of ASD Result

[59] When Constable Hansen makes the ASD demand, the only indicia of consumption are glossy eyes and the smell of alcohol. I agree, at this point, there is insufficient evidence, on either a subjective or objective basis, to consider recent consumption or residual mouth alcohol. As in *Turko*, the ASD is administered properly, and Constable Hansen has no reason to doubt the reliability of the ASD result.

[60] However, following the ASD result Mr. Stratton tells Constable Hansen he drank a beer within the preceding 15 minutes. Subjectively, this should cause Constable Hansen concern about the reliability of the result, based on the discovery of the empty beer can in the driver’s door and the statement of recent consumption. The officer is trained on the ASD and the effects of recent consumption on the reliability of the test results. He should put his mind to this issue.

Objective Reliability of the ASD Result

[61] I am convinced the ASD result is obtained within 15 minutes of drinking, causing the result to be unreliable.

[62] Mr. Stratton finishes his beer, in the parking lot of 357 Portland Street, Dartmouth, puts the empty can in the driver's door, and drives to the Cold Beer Store Drive-Thru.

[63] It is a five-to-eight-minute drive from the parking lot to the Cold Beer Store; Constable Hansen suggests five to seven minutes whereas Mr. Stratton estimates it to be a seven-to-eight-minute drive.

[64] Mr. Stratton is stopped by police a minute or so later. There is a brief conversation, and the ASD is administered shortly thereafter.

[65] The discovery of the beer can in the driver's door, the admission of recent consumption and the evidence supporting recent consumption within 15 minutes of taking the ASD test satisfy me it is not objectively reasonable, at the time the Breathalyzer demand is made, to rely on the ASD 'Fail', the sole basis for the demand. The Breathalyser results are therefore an unreasonable and unlawful search and seizure, contrary to s. 8 of the *Charter*.

Issue 3: *Should the Breathalyzer results be excluded from evidence pursuant to section 24(2) of the Charter?*

Law:

[66] Section 24(2) requires that evidence obtained in a way that infringes the *Charter* rights of an accused be excluded from the trial if it is established that having regard to all the circumstances, its admission would bring the administration of justice into disrepute.

[67] The admissibility of evidence is approached by considering and balancing three factors:

- The seriousness of the *Charter*-infringing state conduct;
- The impact of the breach on the *Charter*-protected interests; and
- Society's interest in adjudication of the case on its merits: *R. v. Grant*, 2009 SCC 32.

[68] The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision: *Grant* at para. 140.

[69] The s. 24(2) analysis is an objective one, evaluated from the perspective of a reasonable person, and the burden to persuade a court that admission of the evidence would bring the administration of justice into disrepute rests on the party seeking exclusion: *Grant* at para. 68.

The three factors

[70] The first factor focuses on the extent to which the state conduct deviates from the rule of law: *R. v. McColman*, 2023 SCC 8 at para. 57. The graver the state's misconduct the stronger the need to preserve the long-term repute of the administration of justice by disassociating the court's processes from that misconduct: *R. v. Blake*, 2010 ONCA1 ap para. 23.

[71] The second factor assesses the impact of state conduct on the accused's *Charter*-protected interests: *McColman* at para. 59.

[72] The third factor addresses the truth-seeking function of the criminal trial process and whether it is better served by admission or exclusion of the evidence. I must consider both the negative impact of admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence: *Grant* at para. 79.

[73] It is the long-term repute of the administration of justice that must be assessed: *R. v. Harrison*, 2009 SCC 34 at para. 36.

[74] Courts should consider factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence: *Grant* at paras. 81-84.

[75] While the first two lines of inquiry typically work “in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion”: *R. v. Le*, 2019 SCC 34 at para. 141.

[76] The trial judge must consider and balance the cumulative weight of the first two lines of inquiry against the third line of inquiry when assessing whether the evidence should be excluded: *R. v. Lafrance*, 2022 SCC 32 at para. 90.

[77] State conduct that is not particularly serious may nonetheless heavily impact the accused’s *Charter*-protected interests. Conversely, egregious state conduct may minimally impact the accused’s *Charter*-protected interests. Courts are cautioned not to collapse the first two lines of inquiry into one, unstructured analysis: *McColman* at para. 59.

[78] As stated, the first two inquiries work in tandem, both pulling toward exclusion of the evidence. The more serious the state conduct and the greater the impact on the *Charter*-protected interests, the stronger the pull for exclusion.

[79] The third inquiry, society’s interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown’s case: *Harrison* at paras. 33-34.

[80] The third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: *R. v. McGuffie*, 2016 ONCA 365 at para. 63.

Seriousness of the Breach

[81] This first line of inquiry evaluates the state conduct itself. Constable Hansen has no reason to doubt the reliability of the ASD reading when the breath sample is provided. However, once he finds the empty beer can and is told about recent consumption, he cannot and should not rely on the result in making the Breathalyzer demand. Though not an act of ‘bad faith’ *per se*, the officer nevertheless acts without legal justification and should know better for the following reasons:

- He is a veteran officer with 18 years experience.
- He has been involved in more than 200 such investigations.
- He knows that recent consumption and residual mouth alcohol can render the results unreliable.
- He knows he should wait for an accused’s mouth alcohol to dissipate before making an ASD demand.

[82] Therefore, he should have put his mind to the evidence before him and acted accordingly. I categorize the breach as significant; not as minor as the Crown suggests but perhaps not as serious as the Defense maintains.

[83] I am reminded that in Nova Scotia, reliance on a faulty ASD result does have negative consequences - an automatic license revocation for at least seven days: *Nova Scotia Motor Vehicle Act*, RSNS 1989, c. 293 s. 279(c). Accordingly, officers must be diligent in their duty to not rely on an ASD result in the face of possible recent consumption.

[84] This factor moderately favours exclusion.

Impact of the Breach

[85] This factor addresses the concern that admitting evidence, obtained in violation of the *Charter*, may send the message to the public that *Charter* rights are of little importance. I must consider whether the breach is “fleeting and technical, profoundly intrusive, or somewhere in the middle of the spectrum”: *Grant* at para. 76.

[86] The Crown concedes the breach has a serious impact on Mr. Stratton’s *Charter*-protected rights. He is arrested and searched. His liberty is impacted as he is taken to the police station and is required to give samples of his breath. Moreover,

as indicated above, he is subject to an automatic license suspension for at least seven days.

[87] This factor strongly favours exclusion.

Society's Interest in Adjudication on the Merits

[88] The public has a heightened interest in a determination on the merits where the offence is serious, but there is also a vital interest in maintaining a justice system that is above reproach: *Grant* at para. 84.

[89] In my view, admitting the breath results in all the circumstances would damage the long-term repute of the administration of justice. First, although the evidence is crucial to the Crown's case, the fact remains that the ASD result, the only grounds on which to make the breath demand, is unreliable.

[90] Second, although impaired driving is a serious offence, the police do not have any other grounds upon which to make the Breath demand. There are no obvious signs of impairment, no poor driving, and no suspicious conduct on the part of Mr. Stratton.

[91] The third line of inquiry does pull in favour of inclusion, but not strongly so.

Balancing the Grant Factors

[92] In balancing the Grant factors, the cumulative weight of the first two lines of inquiry must be balanced against the third line of inquiry: *Lafrance* at para. 90.

[93] The first line of inquiry moderately favors exclusion of the evidence, and the second line of inquiry strongly favors exclusion. The third line of inquiry, although pulling in favor of inclusion, involves questionably unreliable evidence and does not outweigh the cumulative weight of the first two lines of inquiry that point to an officer acting without justification which has a significantly impact on Mr. Stratton.

Conclusion:

[94] The Breath demand is unlawful as it is based solely on an unreliable ASD reading. Accordingly, after having carefully weighed the *Grant* factors, I conclude the Breath results must be excluded, and I find Mr. Stratton not guilty of failing the Breathalyzer.

[95] Given the above finding, I will not address the section 10 *Charter* argument with respect to the Rights to Counsel. I will say, however, for the sake of clarity and transparency, there is nothing in Mr. Stratton's evidence about consulting a lawyer which causes me to question his credibility, on this point or anywhere else in his evidence. I accept that he is nervous and confused and may not fully understand the

information provided by police. That is not to say however, that the police do not adequately explain Mr. Stratton's Rights to him.

Chief Judge Pamela S. Williams, JPC