PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Colley*, 2023 NSPC 52

Date: 20230925
Docket: 8475636
Registry: Truro

Between:

His Majesty the King

v.

Brennen Colley

Judge:	The Honourable Judge Alain Bégin,
Heard:	September 25, 2023, in Truro, Nova Scotia
Charge:	320.14(1)(b) Criminal Code of Canada
Counsel:	Thomas Kayter, for the Crown Attorney Peter Lederman, for the Defendant

By the Court: (All emphasis added)

[1] This was a criminal trial. The Crown had the onus of establishing beyond a reasonable doubt that on August 28, 2020, Mr. Colley operated his conveyance while impaired by alcohol, and that his blood alcohol concentration exceeded 80 mg of alcohol in 100 ml of blood. This was a Summary Conviction matter.

[2] There is a claim of a s.8 *Charter* breach by the police, and an application that as a result of this *Charter* breach that all evidence obtained following that breach be excluded pursuant to s. 24 of the *Charter*. Defence claims that the police officers had exceeded their implied invitation to knock because they were immediately involved in an investigation of the accused upon their arrival at his residence.

[3] At issue is whether the police were 'conducting an investigation' immediately upon arrival at Mr. Colley's home.

[4] The onus of proof never switches from the Crown to the accused. Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities. Mere probability of guilt is never enough in a criminal matter.

[5] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?

> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[6] In ***R. v. W.D.*** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[7] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may only convict the accused of offenses proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[8] If I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[9] Further, I adopt the recent restatement of these principles by the Nova Scotia Court of Appeal in ***R. v. N.M,* 2019 NSCA 4** where the Court adopted a reframed statement of the ***WD*** factors as expanded by the Supreme Court of Canada in the case of ***R. v. JHS*, 2008 SCC 30**. The restatement was as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
> Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.
> Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.
> Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.

[10] The process I must follow is first to determine whether I believe the Defendant's evidence or, if I do not believe it, whether it raises a reasonable doubt as to his guilt. If I am left in either of those states of belief by his evidence, I must acquit him. If I do not believe his evidence and it does not raise a reasonable doubt, I must go on to consider whether on the whole of the evidence, and considering the application of the ***Villaroman*** principles, the Crown has proven his guilt beyond a reasonable doubt.

[11] Mr. Colley did not testify, as is his right, and no evidence was called on behalf of Mr. Colley.

[12] A criminal trial is **not** a credibility contest.

[13] On the issue of credibility, I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal

demeanour of the particular witness carried conviction of the truth. In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[14] Or as stated by our Court of Appeal in ***R. v. D.D.S.*** [2006] NSJ No 103 (NSCA), "Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?"

[15] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take in considering the demeanour of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in ***D.D.S.***, demeanour can be taken into account by a trier of fact when testing the evidence but standing alone it is hardly determinative.

[16] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[17] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[18] The relationship between reliability and credibility was explained in ***Cameco Corporation v. The Queen***, 2018 TCC 195:

> [11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In ***R. v. Norman***, 1993 CanLII 3387 (ON

CA), [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

> …The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount...

[19] As well, the Ontario Court of Appeal in ***R. v. G(M)*** [1994] 73 OAC 356 stated at paragraph 27:

> 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 on the testimony of a witness who has demonstrated carelessness with the truth.

[20] And at paragraph 28,

> …it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…

[21] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to

have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[22] A credibility assessment is not a science. As noted in ***R. v. Gagnon***, 2006 SCC 17 (S.C.C.), para.20, it is not always possible to,

> articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...

[23] And in ***R. v. M. (R.E.),*** 2008 SCC 51 (S.C.C.), para. 49 the Court noted that,

> [A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[24] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: ***Novak Estate, Re***, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence.

[25] A trier of fact is 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 have accepted.

[26] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

> …There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt.

[27] And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.)*** which stated:

> I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a Complainant and the denial of the accused,

> that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgement I noted the gender-related stereotypical thinking that led to assumptions about the credibility of Complainants in sexual assault cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of Complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

[28] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> …W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[29] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is **not** on the Defence to disprove anything.

My Analysis of the Evidence

[30] I have reviewed all the evidence that was presented at the trial. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts. Further, any quotes that I attribute to a witness may not be an exact quote, but paraphrases and captures the essence of their testimony.

Constable Dorrington

[31] Cst. Dorrington is a member of the RCMP for the past 8 years, and he testified that on August 28, 2020:

- At 20:39 there was a dispatch as a result of a call to 9-1-1 that a vehicle was unable to maintain its lane.
- The call was made by the son of an RCMP officer so he felt that he had no reason to doubt the complaint. They are advised that the vehicle was inconsistent in speed, and with keeping in its lane.
- He proceeds towards Hwy 104, as does Cst. Patton who was also on patrol that evening.
- He is provided the residential address where the vehicle was located as the complainant had followed the vehicle, and he proceeds to Forest Park Road.
- Upon arrival he finds a grey ½ ton truck with a large decal on the back, which was identical to how it was described by the complainant.
- Cst. Dorrington exits his marked cruiser and observes that the suspect vehicle was dry to the touch whereas other vehicles in the area had a build-up of condensation, indicating to Cst, Dorrington that the vehicle had been recently used. He also notes that the hood was very warm, and almost hot, to the touch, which was another indication of recent use.
- Cst. Dorrington had <u>not</u> been provided a description of the driver of the truck.
- The residence is a trailer home and Cst. Dorrington and Cst. Patton proceed to the trailer.
- Cst. Patton knocks on the door and Mr. Colley is observed by Cst. Patton through the bathroom window beside the door using the bathroom, and he appears unsteady on his feet.
- Mr. Colley is asked to exit the trailer.
- Mr. Colley exits the trailer voluntarily and Mr. Colley is informed that there was a public complaint with regards to the vehicle that was in the driveway.
- Mr. Colley is asked "Who was the driver?" and Mr. Colley responds that he was the driver, and the only occupant in the vehicle.
- Cst. Dorrington then notes:
    - a "strong odour of alcohol"
    - "slurred speech"
    - A "compromised ability to stand"
- **Mr. Colley is asked if he had anything to drink and he advises that he would have consumed 4 or 5 beers since arriving home one hour prior. The claim of being home one hour by Mr. Colley was inconsistent with the actual time that had elapsed from the time of the call to the police to the time of police arrival at the trailer of only 20 minutes.**

- Cst. Dorrington felt that Mr. Colley was lying to him.
- **Mr. Colley had been asked to come outside so that the police could complete their investigation of a drunk driving complaint.**
- Mr. Colley was then cautioned by Cst. Dorrington that he would be conducting an ASD test.
- Cst. Dorrington then makes the ASD demand from the police-issued card
- Cst. Dorrington also reads the police caution to Mr. Colley from the police-issued card and Mr. Colley responds "yes" when asked if he understood.
- Mr. Colley responded "yes" when he was read the ASD demand.
- Cst. Dorrington retrieved the ASD from his police vehicle and explains the ASD to Mr. Colley.
- The ASD registers a "fail" and it is calibrated to read "fail" for readings above .100.
- Cst. Dorrington arrests Mr. Colley for impaired operation of a conveyance and he reads the breath demand to Mr. Colley from the police-issued card
- Mr. Colley is transported to the police detachment where he is placed in a room so that he can contact counsel.
- Mr. Colley provides two successful samples for the test administered by Cst. MacDonald.
- The readings, which would have been taken 1 hour and 30 minutes after the initial call to police while the driver was still operating the vehicle are, pursuant to Exhibit #1, **.200 at 21:53 and .220 at 22:14.**
- **The readings provided blood-alcohol levels that would have been well in excess of the alcohol consumption claimed by Mr. Colley of 4 or 5 beers.**
- Mr. Colley is issued with an Appearance Notice and a 90-day driving suspension.

<u>Cross-Examination</u>

[32] On cross-examination Cst. Dorrington testified that:

- He was receiving updates on the location of the suspect vehicle from Mr. O'Brien thru dispatch.
- The driver was not identified.
- He and Cst. Patton were in separate cars .
- Cst. Dorrington's police cruiser was behind the truck in the driveway.
- **It was Cst. Patton who looked into the window to see Mr. Colley and this was done for reasons of officer safety.**

- Mr. Colley told the police that he would be right out.
- It was Cst. Patton who asked Mr. Colley to exit the trailer.
- Mr. Colley told the police that there was no one else in the trailer when he was asked when exiting the trailer.
- **The police did <u>not</u> assume that Mr. Colley was the driver when they arrived at the trailer, and when Mr. Colley was asked to come outside.**
- **It was Mr. Colley who told them that he was the driver, and it was <u>only then</u> that the police knew that Mr. Colley was the driver and the investigation of Mr. Colley for possible impaired driving would have commenced.**

[33] There was no other evidence called by the Crown, and the Defence did not call any evidence.

<u>The Defence Argument for a s.8 Charter Breach Allegation</u>

[34] Defence counsel relies primarily on the case of ***R. v. Rogers*** 2016 SKCA 105 which has the following:

> [3] Mr. Rogers was acquitted at trial of both counts. The trial judge found that the officer had knocked on his apartment door for the purpose of obtaining evidence against the occupant. The trial judge found that this constituted an unreasonable breach of s. 8 of the *Charter* (*R v Rogers*, 2012 SKPC 42, 394 Sask R 302 [*Voir dire Decision*]).[1] When the trial resumed, the Crown made no submissions as to whether any of the evidence should be excluded under s. 24(2) of the *Charter* and the defence referred only briefly to *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*]. The trial judge excluded all of the evidence and entered not guilty verdicts.
>
> …..
>
> [13] In the alternative, relying on ***R v Evans***, 1996 CanLII 248 (SCC), [1996] 1 SCR 8 [*Evans*], the trial judge held that Cst. Dechief exceeded the implied licence to knock that the common law confers on the police. He summarized Cst. Dechief's evidence in this manner:
>
> > [7] … The constable testified he was going to the apartment as part of his investigation for a motor vehicle accident to see if the defendant had been the driver and to see if he was the driver, whether his ability to operate a motor vehicle was impaired.

From this, he found that Cst. Dechief approached Mr. Rogers's door "for the purpose of searching and obtaining evidence against the occupant"

…..

[20] On the second limb of the trial judge's approach to s. 8, the appeal court judge found the officer's actions were compatible with the implied licence to knock:

> [128] … [Mr. Rogers] was not arrested in his dwelling. Cst. Dechief approached Mr. Rogers' home in order to communicate with him regarding a collision and a report of a possible impaired driver. His actions were compatible with the implied licence to knock. He did not conduct any unauthorized activity which could be considered an invasion of Mr. Rogers' privacy. Observing the condition or demeanour of the person who answers the door is a non-invasive technique that is not conscriptive. In these circumstances, such police action could not be considered a "search".
>
> …..

[21] Relying principally on ***R v Van Wyk (H.W.)*** 104 OTC 161 at para 33 (Sup Ct), affirmed [2002] OJ No 3144 (QL) (CA) Doherty J.A. [*Van Wyk*], the appeal court judge interpreted the law as follows:

> [129] … where the sole purpose of the police officer is to ask questions of the home owner, no evidence is gathered until the occupant chooses to speak. Investigative questioning does not exceed the bounds of the implied right to approach and knock and is not trespassory or in breach of s. 8 of the *Charter*.
>
> …..

[29] The investigation of the crime of drinking and driving, or a similar offence, necessarily entails the potential to obtain evidence from conversing with or observing the person answering the door. Nonetheless, based on my review of the authorities, I have concluded that if a trial judge finds on all of the evidence a police officer knocked on the door to a residence *for the*

purpose of securing evidence against the occupant, the officer is conducting a search within the meaning of s. 8 of the *Charter*. This principle applies equally to drinking and driving offences as well as to other offences where observing the person opening the door will give visual, auditory and olfactory clues about the person's participation in the crime under investigation. ***Evans*** remains the leading authority on point, and nothing in the jurisprudence extends the principles articulated by the majority in that decision as far as Crown counsel suggests.

[32] In ***Evans***, Sopinka J. discussed the importance of determining what the police intend when they knock on someone's door. The officer's intention in knocking on someone's door determines whether the police are engaged in a search:

> Despite the difficulties involved in proving police "intention" when they approach a person's home, I disagree with Major J. that the intention of the police is irrelevant in assessing the legality of their actions. As stated above, the implied licence to knock extends only to activities for the purpose of facilitating communication with the occupant. Anything beyond this "licensed purpose" is not authorized by the implied invitation. … **where the police, as here, purport to rely on the invitation to knock and approach a dwelling for the purpose, *inter alia*, of securing evidence against the occupant, they have exceeded the bounds of any implied invitation and are engaging in a *search* of the occupant's home. Since the implied invitation is for a specific purpose, the invitee's purpose is all-important in determining whether his or her activity is authorized by the invitation**.

[33] Sopinka J. supported his analysis by referring to what he found to be sound policy reasons to focus on the police officer's purpose or intention in deciding to approach the door to someone's home:

> [T]here are sound policy reasons for holding that the intention of the police in approaching an individual's dwelling is relevant in determining whether or not the activity in question is a "search" within the meaning of s. 8...

[34] He went on to hold that "where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the accused through "knocking on the door", the police have exceeded the authority conferred by the implied licence to knock"…

…..

[38] In answering the question of whether the second officer's actions constituted a search, the majority in ***MacDonald*** referred to ***Evans*** as a "leading case on what constitutes a search for the purposes of s. 8" (at para 25). **The majority affirmed that knocking on the door of a residence will not be considered an invasion of privacy constituting a search *if the purpose is to communicate with the occupant*:**

> [26] There is no question that individuals have a reasonable, indeed a strong, expectation of privacy in their homes (***R. v. Godoy***, 1999 CanLII 709 (SCC), [1999] 1 S.C.R. 311, at para. 19; ***R. v. Feeney***, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13; ***R. v. Silveira***, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297), as well as in the approaches to their homes (***Evans***, at para. 21).
> However***, Evans* also established that the police have an implied licence to approach the door of a residence and knock. Doing so will not be considered an invasion of privacy constituting a search if the purpose of the police is to communicate with the occupant…**
>
> …..

[42] In ***Petri***, after receiving a tip of erratic driving, the police attended at the home of the registered owner of the vehicle. They knocked on the door and a male person answered it. After confirming that he was the registered owner of the truck, the police officers entered his house. One of the officers noted symptoms of impairment and asked the accused if he had been the driver of the truck. Upon receiving an affirmative response, he placed the accused under arrest. The trial judge found a breach of s. 8 of the *Charter*. Kroft J.A., for **the Court of Appeal, was satisfied, however, that the police had approached the home in the normal course of their work "out of a legitimate desire to communicate with its occupant (if any), and not for the purpose of securing evidence against the accused"** (at para 8).

[43] In ***Grotheim***, this Court found that the officer went to the door "for the purpose alone of talking to the occupants about the apparent accident" and not for the purpose of making an arrest or of conducting a search (at para 25). Unlike in this appeal, where the officer's testimony indicates that his purpose was not just to investigate but to determine whether Mr. Rogers was impaired, in ***Grotheim***, the officer's intention was to ask about the accident, making his presence on the driver's doorstep lawful.

…..

[44] In ***Van Wyk***, witnesses told the police that a large truck caused an accident in which an individual was seriously injured. The police connected Mr. Van Wyk to the truck by motor vehicle registration records. They attended at his home without a search warrant. Before they knocked on the door, they inspected the truck with a flashlight…The police asked Mr. Van Wyk some questions about the accident, which he answered. The police then told him they had witnesses who said he caused the accident, and arrested him. **The trial judge found the police wanted to speak to Mr. Van Wyk "to determine the identity of the person driving the truck and trailers at the time of the accident under investigation" (at para 23). He found nothing objectionable in what the police did at the door of the residence.** In doing so, he wrote the following:

> [33**] Where the sole purpose of the police officer is to ask questions of the homeowner, nothing can be gathered by the government, in the sense of unwitting disclosure by the occupant, until he or she chooses to speak. The police intent of facilitating communication, even investigative questioning, does not exceed the bounds of the implied right to approach and knock and is, accordingly, not trespassory or in breach of s. 8 of the *Charter*.**
>
> …..

[46] There are numerous other applications of the implied licence to knock principle from all levels of court. Often, the line between when the police intend to investigate a crime and when they intend to secure evidence in relation to it is not easy to perceive; but, in my view, none of the appellate authorities stand for the proposition urged upon us by the Crown in this appeal that the Court can ignore the express purpose of the police in

approaching a dwelling house. The most noteworthy of the appellate decisions that I have considered are ***R v LeClaire***, 2005 NSCA 165 at para 15, 208 CCC (3d) 559, leave to appeal to SCC refused [2006] SCCA No 63…

…..

[47] ***LeClaire*** comes closest to extending the law to permit the police investigating a drinking and driving offence to use the implied licence to knock to gather evidence of drinking but, in the end, the Court draws back to saying "the conduct of the police did not amount to a search within the meaning of s. 8 of the *Charter*, because their purpose when they went onto the property of the appellant was to investigate the commission of an offence"

…..

[50] In ***Parr***, the most recent of the appellate authorities, the British Columbia Court of Appeal dismissed an appeal on the basis that the trial judge had made clear factual findings following the *voir dire* that "the officer who initially entered upon [Mr. Parr's] property did so for the limited purpose of facilitating communication with the occupants of the residence, and not to further an investigative aim"…..**The appeal Court held that "Provided the police act for a purpose falling within the scope of the implied invitation to knock principle, *and for no other reason*, the fact they are aware evidence might be acquired in the course of the entry does not make them "intruders" acting outside the scope of the doctrine"**

[51] **None of these authorities, or those mentioned by the Crown, stand for the proposition that when the police are investigating a drinking and driving offence, they may knock on the door of a residence to gather grounds to make a breath demand or otherwise determine whether the driver has been drinking.**

The Home Free Defence

[35] Counsel for Mr. Colley gave notice of a s.8 ***Charter*** challenge based on the assertion that the police did not have the right to knock on Mr. Colley's door to speak with him. I have previously reviewed the issue of what is known as the "Home Free Defence" in ***R. v. Mingo***, 2018 NSPC 8.

[36] The Saskatchewan Provincial Court case of ***R. v. Klevin*** 2017 SKPC 004 summarizes various cases that have held that **the police exceed their implied invitation to knock if they are actively engaged in a search**. At paragraph 26 of that case the Court stated that, "there was no evidence that the accused had committed any criminal offense."

[37] I have difficulties with the legal premise of the ***Lotozky*** case referred to in ***Klevin***. What is the distinction between the officers personally seeing Mr. Colley driving the vehicle and acting upon it, and a witness providing the police with a detailed description of the vehicle and the physical location of the vehicle to the police and them immediately acting on it? The police are no better eyewitnesses than lay persons.

[38] As noted in *Mingo*, there cannot be a "home free" policy in Nova Scotia that would permit impaired drivers to avoid conviction by the mere fact that they can get home before the police apprehend them.

[39] In ***R. v. Golubentsev***, 2007 ONCJ 568, the defendant was charged under 253(1)(a) and (b) of the Code. He asserted that his right to be secure against unreasonable search and seizure was violated by a non-consensual entry by police into his apartment where observations were made of his condition and his arrest ensued. In ***Golubentsev***, the police went to the address given for the registered owner of the pursued vehicle. They proceeded into the apartment building and to the defendant's apartment. The defendant answered the knock and opened the door. The officers entered the foyer and his arrest ensued shortly thereafter. The Crown's position in ***Golubentsev*** was that the entry into the apartment was consensual and the Court agreed. At paras 18-26 the Court stated:

> **18 While the finding that the entry was consensual determines the Charter issue, I would add that, even if the entry was not consensual, it does not necessarily follow that there was a Charter breach. The police may well have had legal authority under the circumstances present here to enter without warrant or consent.**
>
> 19 The unappealing alternative to recognizing such authority is that an impaired driver who makes it into his home has effectively reached "home free" and is immune from investigation, arrest and prosecution.

20 The fact situation that presents itself is similar to one that has been frequently arising in the case law, no doubt at least in part as a result of citizen awareness and concern regarding drinking drivers, the ubiquity of cell phones, and on board police computers that can access registered owners addresses in an instant….

21 Both the law of search and the law of arrest may be involved, depending on the precise reason for entry. The search warrant requirement from ***Hunter*** grafts the important exception "where feasible". The arrest warrant provision is also subject to statutory and common law exceptions related to exigent circumstances including the need to preserve evidence: section 529.3 Criminal Code. It is completely impractical to get either warrant under these circumstances. Timing, the dissipation of alcohol from the body and the opportunity to consume additional alcohol (or claim to do so) render immediate action imperative.

22 Beyond that, it may be impossible to get a warrant. It is doubtful that a search warrant could issue under section 487 to search for a viewing of the accused to ascertain indicia of impairment, since that section applies only to "things". Similarly it is doubtful that an arrest warrant could be issued if, as in the usual situation, the identity of the suspect is unknown.

23 The policy against sanctuary from arrest, even within a dwelling, has been repeatedly recognized by the Supreme Court of Canada: (***Eccles*** and ***Bourque*** [1975] 2 S.C.R. 739; ***R. v. Landry*** [1986] 1 S.C.R. 145; ***R. v. McCooh*** [1993] 2 S.C.R. 802). The need to discourage races to "home free" recognized in ***R. v. Lotozky*** and the exigent need to preserve evidence in impaired driving investigations, recognized in ***R. v. Soals***, are as much present with respect to suspects who make it in the door as those stopped in the driveway. Exigent circumstances have been held to justify entry into a dwelling: ***R. v. Golub*** (1997), 117 C.C.C. 3d 193; ***R. v. Godoy*** (1999), 131 C.C.C. 3d 129 (S.C.C.).

24 The contemporary American position is that where impaired driving is recognized as a crime and the police have probable cause, non-violent warrantless entry is supported.

> 25 This is not to suggest that any kind of entry by police would be justified. As stated, the American rule refers to non-violent entry. In Canadian terms, a search must be lawful and carried out in a reasonable manner. In this case, the entry was as benign and reasonable as could be imagined.
>
> 26 If it was necessary to decide, I would also hold that in the circumstances of this case, even if the police were not invited in, the search was not unreasonable and the arrest was lawful. There was no Charter violation.

[40] ***Golubentsev*** addresses the principle of "home free" that was critical to the ***Lotozky*** case. I accept the ***Golubentsev*** legal principle over the ***Lotozky*** legal principle as the state of the law in Nova Scotia.

[41] I also accept the case of ***R. v. Erskine*** 2015 ONSC 5887 as the applicable law in Nova Scotia. The Court in ***Erskine***, at para. 41, noted that the trial judge found that the officer did not violate Ms. Erskine's *Charter* rights given that there exists an implied licence to the public, including the police, to approach and knock on the door of a dwelling house. The Court then reviewed the law regarding "implied licence to knock." Relying on ***R. v. Desrochers*** (2008), 47 M.V.R. (5th) 315 (affirmed 2008 ONCA 255), the Court held that Ms. Erskine's s. 8 right had not been violated.

[42] In ***Desrochers,*** the lower Court found that **the officer was conducting a preliminary investigation to determine whether there was any evidence of a criminal offence having taken place. The officer was fulfilling his legal duty in conducting the investigation in going to the doorway of the residence.** The location where the conversation took place was at a place where guests are usually greeted and a lower expectation of privacy exists at the entrance to the household. The lower Court also found that there might have existed exigent circumstances entitling the officer to be present at the residence, notably the investigation of a suspected driver. The appellate Court agreed.

[43] The Supreme Court of Canada decision in ***Evans v. The Queen*** (1996), 104 C.C.C. (3d) 23 was distinguished as in that case there was no necessity of engaging the homeowner in conversation or questioning. The only purpose in having Evans open the door was to determine whether there was an odour of marijuana within. The Court stated at para. 17 that "[t]he police intent of facilitating communication,

even investigative questioning, does not exceed the bounds of the implied right to approach and knock…." The Court went on to note at para. 18:

> While citizens are entitled to a high expectation of privacy with respect to their homes, a criminal is not immune from arrest in his own home and there are strong policy considerations militating against making a home a sanctuary against arrest and encouraging individuals to see the police: see ***Eccles v. Bourque***, [1975] 2 S.C.R. 739 at 743; ***R. v. Macooh***, [1993] 2 S.C.R. 802 at para. 32.

[44] In ***Desrochers*** the Court relied on the decision in ***R. v. Van Wyk***, [1999] O.J. No. 3515. ***Van Wyk***, was approved by the decision of the Nova Scotia Court of Appeal in ***R. v. LeClaire***, [2005] N.S.J. No. 547. 22. In ***LeClaire***, the police were investigating an impaired driving incident. The plate of the vehicle was traced to LeClaire's address. When the police went to that address they found the vehicle present with the garage open. They could see a door from the garage to the house. There was a light on and a man inside. They knocked on the door and Mr. LeClaire answered the door and invited the officers in. When they observed his condition, they arrested him and gave him a breathalyzer demand. He refused. The appellant sought to exclude the observations made by the officers as being a search within s. 8 of the Charter. Roscoe J.A., for the Court, concluded that the conduct of the police did not exceed the implied license to knock on the door and converse with the occupant. Hence, there was no infringement of his reasonable expectation of privacy.

[45] Clearly, the case of ***LeClaire***, a Nova Scotia Court of Appeal case, applies to the Colley case before me, and is in fact binding on me.

Decision Regarding s. 8 *Charter* Breach

[46] I accept the evidence of the RCMP witnesses that they attended at Mr. Colley's residence in follow-up to a complaint of a possible impaired driver. Their conduct did not amount to a search within the meaning of s. 8 of the *Charter*, because their purpose when they went to Mr. Colley's property was to investigate the commission of an offence, and not to gather evidence against Mr. Colley (***LeClaire***). They initially knocked on the door to the Colley residence to communicate with the occupant(s) to further their investigation, and not to secure evidence.

[47] As the RCMP acted for a purpose falling within the scope of the implied invitation to knock principle, and for no other reason, the fact they were aware evidence might be acquired in the course of the entry does not make them "intruders" acting outside the scope of the doctrine (***Parr***).

[48] The RCMP wanted to speak to Mr. Colley 'to determine the identity of the person driving the vehicle at the time of the alleged impaired driving.' There is nothing objectionable in what the police did at the door of the residence where the sole purpose of the police officer is to ask questions of the homeowner, nothing can be gathered by the government, in the sense of unwitting disclosure by the occupant, until he or she chooses to speak. The police intent of facilitating communication, even investigative questioning, does not exceed the bounds of the implied right to approach and knock and is, accordingly, not trespassory or in breach of s. 8 of the Charter. (**Van Wyk**)

[49] There was no s. 8 *Charter* breach.

Grant **Analysis**

[50] If Mr. Colley's rights are found to have been violated due to an illegal search, a proper ***Grant*** analysis militates against the exclusion of the evidence of his impairment by alcohol confirmed through the two breathalyser readings.

[51] Under the Supreme Court's decision in ***R. v. Grant,*** 2009 SCC 32 (CanLII), [2009] 2 SCR 353, this court should look at three factors:

(a) Seriousness of the Charter-Infringing State Conduct

> [72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.
> [73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to

punish the police or to deter Charter breaches, although deterrence of Charter breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the Charter.

[74] State conduct resulting in Charter violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

(b) Impact on the Charter-Protected Interests of the Accused

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

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the Charter include the s. 7 right to silence, or to choose whether or not to speak to authorities (***Hebert***) — all stemming from the principle against self-incrimination: ***R. v. White***, 1999 CanLII 689 (SCC), [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the

> greater the risk that admission of the evidence would bring the administration of justice into disrepute.

[52] Any breach of Mr. Colley's s. 8 rights had minimal impact on his *Charter*-protected rights.

(c) Society's Interest in an Adjudication on the Merits

> [79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": ***R. v. Askov,*** 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in ***Collins*** that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.
>
> [80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see ***R. v. Wray,*** 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.
>
> [81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[53] The evidence which defence seeks to exclude did not involve the taking of bodily substances or any intrusion into his bodily dignity. To exclude the evidence would be to reward Mr. Colley for getting home before the police.

[54] If Mr. Colley's rights under s. 8 were violated, then the violation was minor, and does not warrant the exclusion of the evidence of the breathalyzer results.

[55] All the ***Grant*** factors militate in favour of admitting the evidence.

Summary/Decision

[56] There was no direct evidence regarding the driving of Mr. Colley. He is not guilty of the impaired driving charge.

[57] Mr. Colley is guilty of the 'over 80' s. 320.14(1)(b) charge.

Alain Bégin, JPC