Date: 2002-02-15

IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Cite as: R. v. Bishop, 2002 NSPC 002)

HER MAJESTY THE QUEEN

versus

DONALD ERNEST BISHOP

s. 254(5) Criminal Code

D E C I S I O N

BEFORE: **The Honourable A. Peter Ross, JPC**

COUNSEL: **Mr. Darcy MacPherson, for the Prosecution**
Mr. David Iannetti, for the Defence

DATE OF RELEASE: **May 7, 2002**

INDEX

INTRODUCTION

[1] May a police officer conducting a roadside check of a vehicle query the driver about the drinking of alcoholic beverages and then use the information obtained to formulate grounds to make a roadside screening device demand? May a police officer conducting a roadside check of a vehicle request the driver to blow towards the officer's face and then use the smell of alcoholic beverage to formulate grounds for such demand? Is the testing procedure vitiated when the basis for initiating it is a response to one of the foregoing questions? Put another way, has there been an infringement of the driver's constitutional rights such that the results of the test, or any evidence regarding failure or refusal of the test, ought to be excluded from the evidence at the driver's trial? These questions arise for determination in this case.

FACTS

[2] A Prosecutor's Information Sheet prepared by the officer who stopped and charged the defendant, one Donald Ernest Bishop, was submitted as an agreed statement of facts. From that document the following can be distilled.

[3] On September 17th, 2000 at approximately 4:50 p.m. Constable Flannigan of the RCMP was on routine patrol in the Dingwall area of Victoria County, Nova Scotia. A large red truck pulling a boat trailer passed by. Constable Flannigan observed an Alexander Keith's beer carton on the trailer. He turned and followed the vehicle for approximately two kilometres to a place where it would be safe to pull it over. There was nothing unusual in the manner of driving, given the size of the load.

[4] Upon stopping, the defendant exited the driver's door of the truck and approached the police car. Constable Flannigan met the defendant outside and asked to see his driver's license, which was produced. The Constable then asked the defendant if he had had anything to drink that day. Mr. Bishop replied that he had drunk "one beer". The Constable then asked the defendant to blow in his (the Constable's) face. The defendant did so. The Constable detected a very mild odour of liquor. The Constable inquired about the beer box. The defendant said that it contained machine parts.

[5] From the submitted facts it is not entirely clear where the events in the preceding paragraph occurred. However, I have not asked for clarification because it does not matter, in the result, whether the conversations occurred outside the vehicles, or while Mr. Bishop was in his own vehicle with the police officer at his driver's window, as would most commonly occur. In addition I

have made the following inference from the submitted facts, namely, that the police officer detected no smell of alcoholic beverage from Mr. Bishop during routine conversation.

[6] Constable Flannigan next asked the defendant to come to the police car. The defendant did so. Constable Flannigan asked the defendant to blow in his face once again. This time a mild to moderate odour was detected. The defendant was observed to have bloodshot eyes. There were no other signs of possible impairment by alcohol.

[7] At 4:57 Constable Flannigan read an Approved Screening Device (ASD) Demand. The defendant indicated that he understood. Nevertheless, over a period of nearly 30 minutes, the defendant repeatedly failed to provide a proper sample. The defendant was advised throughout that failure to provide a proper sample would constitute a refusal. The defendant indicated that he understood and also that a charge of refusal carried the same penalty as that of impaired driving. Eleven opportunities were provided to the defendant, but not once did he blow properly.

[8] At 5:19 Constable Flannigan advised the defendant he would be charged with refusal, and at 5:24 he was put under arrest for refusal and read the standard right to counsel. When asked if he understood this measure, the defendant answered "I don't know why I am, I didn't refuse nothing".

[9] In subsequent conversation, Mr. Bishop stated that he had drunk a bottle of beer at the slipway in Dingwall about 15 or 20 minutes before encountering the police car. It was later determined that the beer box contained machine parts and also one open bottle of Labatt's Blue beer with a small amount of liquid in the bottom. The defendant was released on an appearance notice and later charged with refusing an ASD demand.

CASE LAW REGARDING ROADSIDE DETENTION OF DRIVERS

[10] In the past 15 years or so a number of cases have wound their way to various Provincial Courts of Appeal, and in some cases to the Supreme Court of Canada, on the rights of drivers and the powers of police officers involved in motor vehicle stops. The *ratio* of those cases and their possible application in Nova Scotia was taken up by our Court of Appeal in R . v. MacLennan [1995] 97 C.C.C. (3d) 69. This decision sets out general precepts which I ought to take as a starting point in determining the issues which arise. Like all cases, it grew out of its facts, but in a sense, it has outgrown its facts. I am not aware

of any subsequent decision which qualifies it or would call into question its application here.

[11] MacLennan falls in a category of cases sometimes referred to as "random spot checks". Likely very few such stops are truly "random". They may be unanticipated, either by the driver or police officer, but generally something is observed which piques the police officer's interest. In MacLennan it was an unbelted passenger. Here it was a beer carton. In some cases it is the location, time of day, or identity of the particular driver. Be that as it may, MacLennan stands for the proposition that peace officers in Nova Scotia may, randomly or otherwise, require drivers of vehicles on a highway to come to a stop and produce his or her license, vehicle permit and insurance card. At page 78 Justice Freeman states:

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

[12] He continued at page 84

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

[13] In the judgement it is noted that there is an initial "incubation period" beginning with first contact by the police officer, including any inspection of the driver's papers, during which the driver is susceptible to observation. The judgement states that if the inspection and observation are related solely to the officer's duties to control traffic, which includes the detection of drinking drivers, no breach of the Charter occurs. If a "reasonable suspicion" is incubated in the mind of the police officer, then the ASD demand must be made "forthwith" within flexible limits. In the usual case failure of the ASD test will result in a breathalyzer demand, though in certain situations the indicia of impairment may strike the officer so forcefully that the ASD demand may be bypassed. MacLennan makes clear that from the moment the vehicle is stopped, the driver

is detained, but not entitled to the right to counsel pursuant to s. 10(b) of the Charter. This state of affairs continues until the driver is either permitted to leave or subjected to a breathalyzer demand.

[14] While the Court in MacLennan stated that a randomly stopped driver cannot be "conscripted" against himself, a request to accompany the police officer to the police cruiser was found to be reasonably incidental to the performance of her duties. Such a request was considered proper, and while the defendant was not obliged to comply, the fact that he did was not considered a breach of his rights (see page 86).

[15] The Court of Appeal in MacLennan gave R. v. Mellenthin (1992) 76 C.C.C.(3d) 481 S.C.C. as an example of how police powers at roadside may be exceeded. In that well-known case, a vehicle was stopped and police shone a flashlight into the interior, noting an open gym bag. While the driver said it contained food when queried, the police conducted a search of the bag and located vials of cannabis resin. The Supreme Court of Canada found no problem with the visual inspection of the car by the police, including an inspection with the aid of a flashlight where the stop was at night. Such inspection was deemed essential for the protection of the police. However, the questions pertaining to the gym bag and the later search were improper. The Court stated, at p. 487

> "random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search".

[16] In the present case I must ask whether the questioning of Mr. Bishop as to prior drinking was unfounded and whether Mr. Bishop was conscripted into giving self criminating evidence in a manner which infringed his Charter rights. I need to consider as well whether the request to blow in the officer's face constituted an unreasonable search.

[17] Further in MacLennan it is said:

> Observations of drivers made in the course of inspecting documents and reasonably incidental, or safety related, activities such as examining the interior of vehicles by flashlight or requesting drivers to attend at the police cruiser are relevant to the formation of a reasonable suspicion of the presence of alcohol in the driver's body...they may also result in the formation of a reasonable belief sufficient to justify a breathalyzer demand...the suspension of the right to counsel and the guarantee against arbitrary detention under s. 9 of the Charter do not justify the taking of statements or searches unrelated to the control of traffic, i.e., the inspection of documents or mechanical condition and detection of drinking drivers.

Justice Freeman here gives two examples of "reasonably incidental, or safety related, activities" - examining the interior of vehicles and requesting drivers to attend at the police cruiser. Might two more be added - asking the driver whether he has consumed any alcoholic beverages, and requesting that the driver blow towards the officer's face? May the fruits of such investigations be used against the Defendant by the police officer at roadside, and by the Crown at trial?

[18] Early in the judgement it is stated at p. 78 that

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

However, this follows upon the observation that the driver in that case had been asked where he had been and where he was going, questions which seem unrelated to inspections of documents, mechanical condition of the vehicle or detection of drinking drivers. It thus appears that the decision in MacLennan leaves open the answers to the questions posed above, and at the outset of these reasons.

[19] In R. v Baroni (1989) 49 C.C.C.(3d) 553 the Nova Scotia Court of Appeal dealt with the constitutional propriety of sobriety tests administered to a motorist detained at roadside with a view to determining whether there were grounds to make a breathalyzer demand. In that case the police had observed the defendant's vehicle cross the centre line of the highway on one occasion. Upon stopping the vehicle the sole occupant exhibited some signs of impairment. After asking for the usual papers, the driver was asked if he had been drinking and replied that he had had one drink. While that fact is *a propos* the issue in the present case, it was the next step which became the principal subject of the Court's judgement. The driver was asked to step out of his car and to perform two physical co-ordination tests. Based on his poor performance, a breathalyzer demand was made.

[20] At the time of the Baroni decision it had been established that no violation of Charter s. 10(b) occurs where a motorist is detained and required to take an ASD test. The issue in Baroni became whether the police officer's request to perform physical sobriety tests was a reasonable limit on the defendant's s. 10(b) rights.

[21] The Court referenced the decision of the Ontario Court of Appeal in R v. Saunders [1988] 41 C.C.C.(3d) 532. Saunders was invoked to support the proposition that the defendant Baroni was detained. Mention was also made of s. 30 (now s. 48) of the Ontario Highway Traffic Act which specifically authorized police officers to stop a motorist to determine "where or not there is evidence to justify making a demand under s. 238 (now s. 254) of the

Criminal Code." Our Court of Appeal noted that no similar provision existed in the Nova Scotia Motor Vehicle Act. The Ontario Court of Appeal in Saunders determined that s. 30 *did* empower the police to require a driver to perform physical co-ordination tests, and that while such did contravene s. 10(b), the contravention was saved by s. 1 of the Charter. In considering whether physical sobriety tests were saved pursuant to s. 1 by the laws extant in Nova Scotia, the Court cited from the decision of Judge Freeman, then of the County Court, hearing the first level of appeal where he stated

> Physical co-ordination tests...are not required under the Criminal Code, under the Statutes of Nova Scotia, by implication flowing from other statutory requirements, nor under the common law. They may be requested by police but there is no duty upon the citizen to perform them. While they may be refused with impunity, a citizen detained at roadside does not necessarily know that without the advice of counsel. The reasonable person is likely to err on the side of caution, assume lawful authority and to comply with the demand...in the absence of statutory authority, apparent or implied, or a foundation in the common law, it cannot be said that sobriety tests are a reasonable limit on the rights of Canadians "prescribed by law."

[22] In R. v Smith [1996] 105 C.C.C.(3d) 58 the Ontario Court of Appeal took up more directly the issue of whether police may question a detained motorist about the consumption of alcoholic beverages. A police officer had observed a vehicle cross the centre line of a road and, suspecting the driver had been drinking, pulled the vehicle over. During discussion about the driver's license, insurance and registration, an odour of alcohol was detected from his breath. The police officer asked the defendant how many drinks he had consumed. The driver answered "a beer and a pitcher." The police officer then told the defendant he would be subjected to some sobriety tests. The driver did fairly well on the sobriety test and explained that his driving was caused by the use of a cellular phone. However, the police officer testified that the driver's admissions that he had been drinking together with the smell of alcohol on his breath gave him grounds upon which to demand an ASD sample. Based on a failure of that test, the officer concluded there were grounds to make a breathalyzer demand and Mr. Smith was taken in for the usual tests.

[23] In discussing the various issues on appeal, it is clear that s. 48 of the Ontario H.T.A., supra, and the Court's previous decision in Saunders, were important touchstones. Doherty, J.A. notes that in Saunders, Cory, J. held that by inference s. 48 of the H.T.A. authorized the taking of "reasonable steps" to determine whether there was evidence to justify making the demands referred to in s. 254 of the Criminal Code. In Smith, further consideration was given to the scope of that inferred power. The Smith decision also deals directly with

the contention that the police officer's questions concerning alcohol consumption constituted an infringement of the driver's s. 7 Charter Rights. Doherty, J.A. states that s. 48 authorized procedures that were reasonable and done for the purpose of determining grounds for a 254 demand. A procedure should be such that it could be performed at the site of detention, with dispatch, with no danger to the safety of the driver, and with minimal inconvenience. In concluding that the questions asked at the scene met these criteria of reasonableness, he states at page 74:

> I see little distinction in terms of self-incrimination between evidence that flows from a standing sobriety test performed by a driver and evidence in the form of a driver's answers to questions put to him by the police officer... I see even less distinction between a direct question concerning alcohol consumption and questions relating to other matters asked in part at least for the purpose of determining whether the driver's speech will provide evidence of impairment or alcohol consumption. All of these procedures are aimed at getting information from the driver concerning alcohol consumption. The direct questions have the benefit of making the officer's purpose clear to the driver and avoid the subjectivity and ambiguity associated with attempts to assess intoxication from the sound of a stranger's voice.

He notes that verbal admissions made by a driver will have limited value since they go only to a determination of whether there are grounds to make a s. 254 demand, which in itself does not impose criminal liability. He concludes that the statutory provision in the Ontario H.T.A. authorizing "reasonable steps" included direct questions of the driver concerning alcohol consumption. While not citing R. v Bernshaw [1995] 95 C.C.C.(3d) 193(S.C.C.) as direct authority, Doherty reads into that judgement the Supreme Court's apparent acceptance of questioning concerning alcohol consumption as a legitimate roadside investigative technique. Doherty, J. concludes this portion of the judgement by saying at page 76:

> The questions were a proper exercise of the authority granted under s. 48 of the H.T.A.. Nor was the officer's authority under that Section exhausted by the questions concerning alcohol consumption.

[24] The judgement then proceeds to consider whether s. 48 of the H.T.A., in giving lawful authority to such questions, imposes a reasonable limitation on the detained driver's right to counsel. After consideration of the objectives of the legislation, the rational connection between the authority and the objectives, and the proportionality component of the s. 1 test, the court concludes that s. 48 is indeed saved by s. 1.

[25] Doherty, J.A. refers to comments in the Bernshaw decision [1995] 95 C.C.C.(3d) 193 as being supportive of his position that questioning concerning

alcohol consumption is a legitimate roadside investigative technique. In Bernshaw, at page 211-212, Cory, J. says "in addition, the respondent had admitted that he had been drinking." At page 225 Sopinka, J. states "the respondent admitted that he had been drinking." I have looked at the reasons given by the British Columbia Court of Appeal reported at 85 C.C.C. (3d) 404 at page 407 where it states:

> Constable Nashford noticed a grey BMW exceeding the speed limit, drift on two occasions "from the far side of the shoulder of the road to the centre, back to the shoulder, back to the centre line" with its brake lights flickering on and off. He stopped the vehicle and questioned the driver who identified himself... Constable Nashford noting a smell of liquor on Bernshaw asked him if he had anything to drink. Bernshaw replied that he had. The constable noted too that Bernshaw's eyes were extremely red and glassy.

Doherty, J.A. himself acknowledges that Bernshaw is not direct authority that the Ontario Traffic Act authorized direct questions of the driver concerning alcohol consumption. It appears to me that any support it might give for such a proposition is diluted considerably by its facts, for there was, prior to and aside from the answer to the inquiry about alcohol consumption, many indicia of impaired driving. It seems certain that the constable would have proceeded with an ASD Demand completely aside from the question and answer about prior consumption.

[26] The court then gives separate consideration to whether the police officer's questioning concerning prior alcohol consumption resulted in a denial of his right to silence and whether such infringement is justified under s. 1. The court considered R. v. Hebert [1990] 57 C.C.C.(3d) 1 in which the Supreme Court of Canada considered the connection between the s. 10(b) right to counsel and the s. 7 right to silence. Doherty, J.A. states:

> Where, as here, a statutory provision limits a detainee's right to counsel in a manner that accords with s. 1, then as long as the police remain within the ambit of that provision, the detainee has no right to counsel. The police cannot be obliged under s. 7 of the Charter to inform a detainee of "right" that the detainee does not have. If there is no right to counsel...there can be no right to be informed of the right to counsel... Where s. 10(b) rights do not exist, then the s. 7 right to make an informed choice as to whether to speak to the police requires only that the police not engage in conduct that effectively and unfairly deprives that detainee of the right to chose whether to speak to the police.

In defining the issue, he further states:

> In deciding whether Constable Stuckey's questions denied the appellant his right to chose whether to speak to the police...I must determine whether the police conduct effectively and unfairly denied the appellant that choice.

While this portion of the judgement does not deal with the constitutionality of s. 48 of the H.T.A. *per se*, it seems that the existence of this section is a significant if not indispensable factor in the reasoning. Doherty, J.A. first notes that other provisions in highway traffic legislation, as interpreted by previous cases, require drivers when detained at the roadside to provide police with certain information such as license and insurance. He then states at page 81:

> Questions of a detained driver concerning alcohol consumption are also authorized by statute and are concerned with the driver's entitlement to operate a motor vehicle on a public thorough fare. They are less invasive than the questions described above... In my opinion, questions concerning alcohol consumption, just like a request that a driver produce his license or insurance, involved no breach of s. 7 of the Charter.

[27] In Brown v. Durham Police Service Board [1998] 131 C.C.C.(3d) 1, Doherty, J.A. again engages in a comprehensive discussion of police powers, under statute and common law, with a roadside stop of motorists again as a starting point. In that case various members of a motorcycle club were stopped at various police check points on a public highway. The police were sued for alleged violation of s. 9 Charter Rights. The judgement notes that claims under s. 7 and 8 of the Charter were abandoned or not permitted at trial, and consequently the sole issue was whether the defendants were unconstitutionally detained when stopped at the road checks. Police openly acknowledged that the reason for the check point was their concern about criminal organizations and gang related "activity." The check points were manned by numerous officers and all the checks were video taped. Police used the procedure as an opportunity to make identifications and glean other intelligence information. Persons stopped were required to produce the usual papers and detained while such were checked. Police checked vehicles and equipment for fitness and compliance with safety standards. There was some conversation and questioning while awaiting the results of CPIC checks. The detentions lasted from thirty seconds to twenty minutes. While the facts here are quite different than those in the case before me, the judgment synthesizes and sets out certain principles governing roadside detentions (in that Province at least).

[28] Reference is made to s. 216(1) of the Ontario H.T.A. as the lawful authority for check points. In describing the scope of this section's predecessor (s.189(a)(i))

the following extract from the judgement of Cory, J. in R. v. Ladouceur [1990] 1 S.C.R. 1257 is reproduced:

> Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's license and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may be justifiably asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based on reasonable and probable grounds.

The foregoing section is roughly equivalent to s. 83(1) of the Nova Scotia M.V.A.. MacLennan, supra, draws a connection between the two.

[29] In attempting to describe the parameters for a proper search, Doherty, J. states that police are entitled under s. 216(1) to stop drivers and check licenses. In doing so this identification of drivers may be useful in gathering police intelligence about ongoing criminal activity. He saw no reason to declare that a legitimate police interest beyond highway safety concerns should taint the lawfulness of a stop and detention. On the other hand, he states that a purpose which is in itself improper, for instance to conduct an unconstitutional search, will take the stop outside the limits of the authorizing legislation. He stated that courts are alive to the potential abuse of the power and should limit its use to "situations in which the police have both legitimate highway safety concerns and do not have a co-existing improper purpose." He states "highway safety concerns are important, but they should not provide the police with means to pursue objects which are themselves an abuse of the police power or otherwise improper." He also discusses the importance of pro-active policing in the prevention of crime and maintenance of public peace.

[30] In R. v. Medwyk [1998] N.S.J. No. 364, Williams, P.C.J., dealt with a case where a police officer observed a vehicle operated by the defendant pause at flashing red lights for about ten seconds. The police officer concluded that this was an excessively long period and considered it an indication of possible alcohol impairment. He stopped the defendant about a block down the road and noticed a faint smell on his breath. He then asked the defendant whether he had been drinking, and when a positive response was received, the police officer obtained the driver's papers and called for another police car to bring an approved screening device to the scene. When the device arrived the defendant was asked to provide a sample. On route to the police car a stronger smell of

alcohol was noted and apparent sleepiness. After twenty unsuccessful attempts the defendant was charged.

[31] Portions of Judge Williams' decision seem to imply that police need an objective and articulable reason for a roadside stop. MacLennan, supra, states otherwise at p. 88:

> Police in Nova Scotia are justified in stopping vehicles at random, independently of any articulable cause, for the purpose of controlling traffic on the highway by inspecting...documents, the mechanical condition of vehicles, and to detect impaired drivers.

Judge Williams also states at paragraph 26:

> I conclude that the police obtained the self-incriminating statement in the context of the infringements of the accused's right to counsel under s. 10(b) of the Charter.

The case law from the Supreme Court of Canada speaks of the suspension of 10(b) rights at this early stage of roadside detention. In Medwyk the police officer said he called for the ASD instrument because of the odour of alcohol and because of the statement about drinking a couple of beers. MacLennan suggest that the detection of the smell of alcohol, obtained in the course of routine questioning, would be sufficient to formulate a proper ASD demand. If so, the affirmative response Medwyk gave to the question about drinking, and any infringement of rights which are entailed with that, may be somewhat superfluous. Be that as it may, I find myself in agreement with certain of the concerns identified by Judge Williams in the Medwyk decision. Courts should be cautious in determining the scope of police power and careful to ensure that any curtailment of constitutional rights is well founded in the common law or a particular statutory provision.

[32] In the course of my deliberations I became aware of an unreported decision of Judge Robert Prince, J.P.C. delivered in the case R. v. Fitzgerald at Yarmouth, N.S., on May 18th, 1999. In that case a vehicle was noted in a "random vehicle spot check" which was carried out "ostensibly by virtue of provisions of the Motor Vehicle Act and perhaps the Criminal Code." The officer approached the driver and noted bloodshot eyes and a smell of liquor coming from the vehicle itself. The police officer had the driver accompany him to the police car where the demand for breath samples was given. Upon failure of the roadside screening device a breathalyzer demand was made and tests conducted. While MacLennan, supra, was not mentioned, Judge Prince may have concluded on the basis of evidence not specifically set out in the reasons

that the police officer there went further than did the police officer in MacLennan in "taking control" over the defendant. Judge Prince concluded that there had been a breach of Charter Rights and that as the evidence was conscriptive, and rendered the trial unfair, it ought to be excluded, resulting in an acquittal.

[33] In R. v. Power [2001] N.J. No. 267 Q.L. the Newfoundland Court of Appeal dealt with a case where a driver was stopped for crossing the centre line of a highway. The driver was able to produce a vehicle permit and proof of insurance but did not have his driver's license. The police requested the driver to accompany them back to the police vehicle, ostensibly to check identity and any outstanding warrant. The driver was told that he was not under arrest, but complied with the request nevertheless. Prior to having the driver enter the back seat of the police car, he was told he would be searched for weapons. The driver said he had none. The police officer then conducted a frisk search and noticing an object in his jacket asked the defendant to remove it. It was a set of scales and a packet of marihuana.

[34] The trial Judge had concluded that the defendant was asked to come to the police car so that he could be searched on the way, rather than his being searched because his presence in the police car was necessary. Gushue, J.A. stated

> There was no legitimate suspicion of any criminal activity on the part of the respondent and thus the police officer had no statutory authority to arrest him, nor any grounds to obtain a warrant. Nor was there any suspicion that he carried a weapon...while the respondent did not object to the search, obviously because he thought he had no choice, he certainly gave no informed consent to it... If such a course of action by police officers were allowed, there would never be any reason for a warrant to be obtained. A driver being stopped for the most minor of highway traffic act infractions could be removed from his or her vehicle and searched. Obviously the courts cannot sanction or condone such conduct.

The trial judge's determination that there was a s. 8 Charter breach was upheld.

[35] The foregoing are but a few of the many cases dealing with the exercise and extent of police powers incident to a roadside detention. In this situation the Charter rights of the detained motorist and the statutory and common law powers of police meet. Often there is a context, such as a campaign against drunk driving, or an investigation of criminal gangs, which bears on the extent to which police may employ statutory and common law powers. Presumably common law powers of police are the same from province to province. There is rough correspondence between various statutory provisions dealing with

licensing, documentation and mechanical fitness, as discussed in MacLennan, supra. Notable, however is the absence from the Motor Vehicle Act of this province of any counterpart to s. 48 of the Ontario Highway Traffic Act, the section which specifically addresses the power of a police officer to stop a driver for the purpose of determining whether there is evidence to justify making an ASD or breathalyzer demand. MacLennan, supra, holds that police in Nova Scotia may utilize the powers they are given to inspect documents and mechanical fitness of vehicles, in conjunction with their common law powers, to conduct incidental safety related activities and glean information which might provide grounds for an ASD or breathalyzer demand. This seems roughly analogous to the reasoning of Doherty, J.A. in Brown, supra, where the gathering of police intelligence was found to be an appropriate adjunct to the underlying police interest in highway safety concerns. In Ontario, questioning of a detained motorist regarding prior alcohol consumption and the performance of physical co-ordination tests are interpreted by the Ontario Court of Appeal to be direct adjuncts of specific statutory provisions. As noted, there is no statutory provision in Nova Scotia permitting police to detain for the purpose of seeking s. 254 grounds. This case therefore concerns the extent, in the absence of any express statutory provision, of the adjunctive power to investigate possible impaired drivers set out in MacLennan.

[36] It is possible decisions and outcomes such as one finds in Fitzgerald, Medwyk, and Power, supra, reflect a concern for the undue expansion of police power or, at least a concern for the *bona fides* of the police action in stopping and detaining the motorist. Is the police officer truly concerned with checking documents, mechanical fitness and possible impairment, or merely saying so to justify, after the fact, some other suspicion or oblique motive? While MacLennan affords police an opportunity to detect impaired drivers while exercising certain statutory and common law powers, it is not an invitation to engage in pure pretense.

COMMENT REGARDING VOLUNTARINESS OF THE RESPONSES OF A DETAINED DRIVER

[37] Constable Flannigan asked two questions of Mr. Bishop and received two responses, one verbal, one non-verbal. Two pieces of information were obtained. Constable Flannigan put these together with other things he was able to observe. He then performed a certain mental calculation to determine whether there was a reasonable suspicion to make an ASD Demand. Obviously this was but the first step in a more general investigation into the possibility that Mr. Bishop was driving while impaired or with more than 80 mg of alcohol per

100 ml of blood. It is reasonable to infer, that had Mr. Bishop passed the ASD Test he would have been sent on his way; had he failed he would have been on his way to the Detachment for a breathalyzer test. Had there been a "warn" he might have been subject to an administrative suspension of his license under s. 279 C of the Motor Vehicle Act.

[38] Courts have sometimes taken comfort in the idea that because a person is not obliged to answer or act in an encounter with the authorities, the fact that he does voluntarily supply the response entitles the state to the use of that evidence in conducting a criminal investigation. For instance, in MacLennan, supra, the police officer separated the driver from a passenger by asking him to come back to the police car. The court stated:

> This request was a perfectly proper one and while Mr. MacLennan was not obliged to comply with it, the fact that he did so can hardly be considered a breach of his rights.

[39] However, it is difficult to know in a given case whether a response is truly voluntary. The simple fact that a request takes the grammatical form of a question does not mean that the response is offered freely. The circumstances in which a question is posed, and the subject-matter of the question itself, may lead a reasonable person to think that he has little choice but to respond. Even the tone of the question, or other non-verbal signals, or the overall bearing and deportment of the police office, given his position of authority, might convert what is literally a question into what is in effect a demand. For instance, in his judgement in Baroni which was eventually upheld on appeal, Freeman, Co. Ct. J., stated, at 87 N.S.R. (2d) 155, in reference physical co-ordination tests:

> They may be requested by police, but there is no duty upon the citizen to perform them. While they maybe refused with impunity, a citizen detained at roadside does not necessarily know that without the advice of counsel. In the words of LeDain, J. in Therens, 'the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand.'

[40] It is not clear from the agreed statement of facts precisely what words were used by Constable Flannigan to illicit the response "one beer". One might imagine a number of possibilities and I will sketch out four possible scenarios which might occur at roadside, with increasing degrees of "compulsion". One might think of these as taking place in a circumstance where, as in the instant case, there are no previous indicia of consumption of alcohol.

> (i) A police officer pulls over a vehicle on a routine spot check. As he approaches, the driver rolls down his window. The police officer says "How do you do, sir?"

The driver says "Officer I'll tell you right away I had a beer a little while ago but I'm okay to drive."

(ii) The police officer pulls over a vehicle to do a routine spot check. He approaches the driver, says "Hello", and asks to see the driver's license, insurance and vehicle permit. While examining the motor vehicle inspection sticker on the windshield he says to the driver "I stopped you just for a routine check, and you don't have to answer this, but would you mind telling me whether you have been consuming any alcoholic beverages this evening?"

(iii) As above, except that the officer says "While I have you here, I'd like to know whether you are a drinking driver. Have you consumed any alcoholic beverages this evening?"

(iv) As above, with the officer saying, as the driver searches for his papers, "You are under detention here, you have no right to call a lawyer right now and I want you to tell me whether you have been consuming any alcoholic beverages this evening."

[41] The content of the question may also be an important consideration. A police officer might simply ask about something he had observed, for instance, "Is there some reason why you have a beer carton on your trailer?" Or "Is there some reason why you have such glassy eyes?" Or "Can you tell me why you're driving so erratically?" He may, simply by stating such facts, create the expectation of a reply.

[42] A stop may be "random" and routine to the police officer; the motorist will not likely view it as though it were a chance encounter in the checkout at the local grocery. The detention, slight though it may be, is more than a mere inconvenience. The driver immediately begins to wonder whether he has possession of the necessary papers, whether there is something wrong with his vehicle that he is not aware of, whether he has unwittingly committed some driving infraction, whether he's being mistaken for some other person that the police are specifically searching for, etc.. The encounter may at first be very cordial, but it is potentially antagonistic, and depending upon what the police officer finds, may become an increasingly "adversarial" encounter between the individual and State authority. The degree of "voluntariness" of the verbal response is not relevant here with respect to the classic confession rule so much as it is to the question of whether the detainee's right to silence and right to be free from self-crimination, encompassed in s. 7 of the Charter, have been infringed. A motorist knowledgeable of the law might realize that refusing to answer such a question would not constitute obstruction of the police, but the motorist in the midst of a roadside detention may nevertheless feel compulsion to comply with the police officer's request.

[43] In many ways the act of blowing in the officer's face and the comment "one beer" are similar. Both are responses to a question, supplying evidence which emanates from the person which is then available for use by the authorities to do further investigation. However, there are some differences worthy of note. The smell of liquor from the breath is potentially discoverable by the police officer putting his nose close to the driver's face. The driver cannot stop breathing. On the other hand, words are not the same sort of "passive emanation" as the breath. People can keep their thoughts inside them.

THE REQUEST TO BLOW TOWARDS THE OFFICER'S FACE - s. 8 CHARTER

[44] The terms "sobriety test", "physical sobriety test", and "physical coordination test" are sometimes used interchangeably in the case law. While Baroni, supra, uses the first two terms, it dealt with a situation where the police officer had the driver perform certain physical acts by which the officer could make a rough estimate of the extent of impairment. Thus, while a request to blow a stream of air in the direction of a police officer's nose might be a "sobriety test" in the general sense, it is not the same sort of test or actions contemplated by Baroni or other cases dealing with physical coordination tests such as walking a straight line, touching one's nose, etc..

[45] If blowing toward in a police officer's face on request is a physical sobriety test, then it falls under the *ratio* of Baroni requiring the observance of the detainee's s. 10(b) Charter rights failing which the results would be excluded under s. 24(2). Absent such evidence, the Crown would have no grounds for the demand and an acquittal would follow. This reasoning was followed in R. v. Oldham [1996] N.B.J. No. 399 (NBCA). The accused there was asked to perform an eye coordination test and a walking test. The Court stated at para. 15

> The evidence of the sobriety tests...could not have been obtained but for the unwitting participation of Oldham. It was incriminating evidence emanating from him and conscripted the defendant to act against himself thus tending to render the trial process unfair.

[46] The exhalation of air from the lungs does not require full command of one's motor skills. No degree of dexterity is required. As Crown counsel said in his brief,

> People do not generally try to walk a straight line on the side of the highway. They do not close their eyes and touch their nose as a matter of course. People do not try to balance on one foot every day. But everybody breathes. All the time.

[47] To the suggestion that breathing is merely a passive emanation, Defence counsel argued that one's appearance is also a passive thing, yet in R. v. Ross [1989] 1 S.C.R. 3 participation in a police line up without observance of counsel rights was determined to be a Charter breach. While there is some basis for this analogy, I think there is a considerable gulf between a request to a driver to direct a stream of air towards a police officer's nose and the taking into custody of a detainee for the purpose of a police line up. The latter requires vastly more time and is a much greater intrusion on the individual's liberty and freedom of movement.

[48] I thus conclude that blowing in the police officer's face was not a physical sobriety test which is caught by the decision in Baroni. It nevertheless remains to be determined whether this evidence was obtained in violation of Mr. Bishop's Charter rights.

[49] Safety has often been considered a justification for certain steps taken by police in dealing with suspects and detainees. For instance, at a roadside stop at night, police are permitted to shine flashlights in the vehicle to check for weapons or other possible dangers. In some situations police may do a frisk search to check for weapons. In MacLennan, supra, the action of the officer in separating the driver from his passenger by taking him back to the car was deemed to be a reasonable and appropriate step undertaken in the interests of safety. The Court also appeared to approve of this as a means for determining the source of a smell of liquor where the police officer thought that some beer had been spilled on the floor of the subject vehicle. It is not much of a stretch to conclude that a police officer might request a driver to blow a stream of air in his or her face for the same reasons, namely, to determine the source of a smell of alcohol, and to ensure officer safety. Again I quote from the Crown's brief

> Smelling a person's breath is something that can be accomplished in several ways. Sometimes it is done passively, even involuntarily. Sometimes the smeller may have to sniff. An officer in the observation stage could even put his/her nose in front of the subject's face, but a request to blow on the officer's face would be substantially less intrusive and, in some circumstances, safer.

[50] A police officer on highway patrol for drunken drivers has three instruments in his arsenal - the breathalyzer machine, the roadside screening device, and his/her nose. While the olfactory senses are not calibrated quite so finely as the first two, the use of the nose did not become illegitimate with the birth of the

machines. If, as it would seem from MacLennan, a police officer can lean through the driver's window so as to put his face within inches of the driver's in order to sniff for the smell of alcoholic beverage, there seems nothing wrong with permitting the officer to request the driver to blow in his/her face. While one can think of reasons why one may not wish to make such a request, compliance with such would seem to be a very minor imposition on the detained driver. The *ratio* of MacLennan is, in my view, sufficiently elastic to encompass this step within the "reasonably incidental" and "safety related" activities permitted of the police in the context of a roadside check. I therefore conclude that there is no breach of Mr. Bishop's s. 8 or s. 10(b) rights arising from his blowing an alcoholic smell towards Constable Flannigan's face.

[51] Even if such a measure is deemed to be a Charter infringement, it is surely a very minor one. Again, adopting the Crown's argument, under the principles in Stillman (1997) 113 C.C.C. (3d) (SCC) the smell of the accused's breath is discoverable by the investigating officer putting his nose directly in front of the accused's face. Admission of such would not bring the administration of justice into disrepute.

[52] In the discussion which follows concerning the incriminating statement "one beer" I will mention the problem of the "slippery slope". I do not sense such a danger with the request to blow in the face. The result is what it is. It may be put together with other indicators but cannot lead to other measures of the same sort. The police officer can go no further with this mode of investigation because Baroni is in the way. At that point, MacLennan loses its elasticity.

THE QUESTION ABOUT PREVIOUS ALCOHOL CONSUMPTION - s. 7 CHARTER - s. 24(1) CHARTER

[53] One of the leading decisions on the right to be free from self-crimination, contained in s. 7 of the Charter is R. v. White (1999) 24 C.R. (5d) 201. The case concerned the admissibility at a criminal trial of an accident report compelled by statute and given to a police officer who was investigating a possible Criminal Code driving offence. The Supreme Court stated that the principle against self-crimination serves two key purposes: to protect against unreliable confessions, and to protect against abuses of power by the state. In White the Crown sought to introduce the accused's statement at her trial on the charge of dangerous driving. In the present case, the Crown does not seek to adduce Mr. Bishop's response of "one beer" as proof of any element of the offence. At the same time, the response led to a further request for Mr. Bishop to blow in Constable Flannigan's face, and thus led to, and itself contributed to grounds for making the ASD demand which Mr. Bishop is charged with

refusing. I must therefore be concerned whether the statement elicited from Mr. Bishop, at a time when his s. 10(b) rights were "suspended", is being used to incriminate him in a way that violates his s. 7 Charter right. If the Crown's case relies on this statement, in whole or in part, to support the "reasonable suspicion" which must exist in order to support a ASD demand and a conviction for refusal of the same, then (it would seem) the statement is amenable to a s. 7 analysis and a potential s. 24(1) Charter remedy.

[54] White speaks to various factors bearing on the important "search for truth" which occurs in a criminal trial and those which support the right to be free from undue compulsion by the state. The principle against self-crimination is said to be "contextually sensitive", demanding different things at different times. In that case, as here, the accused gave the statement in the presence of a police officer. This was said to be a context of psychological pressure. The courts noted that persons suspected of offences are generally in an adversarial relationship with the state. The prospect of drivers giving unreliable accident reports was mentioned. Also noted was the possibility that permitting the use of accident reports in criminal trials would increase the likelihood of abuses by the state in that the police might extend the parameters of the report in order to get other useful information. The Supreme Court pointed out that the accused in a given case must prove that the statement was compelled unduly and that the use would constitute an infringement of s. 7. The Court reminded us that the subject matter of the right to silence is the individual's private thoughts and actions.

[55] MacLennan, supra, dealt primarily with s. 10(b) and 9 of the Charter and briefly with s. 8. It did not directly address s. 7 Charter concerns although, as noted above, some comments in the judgement caution against the police improperly eliciting incriminating statements from detained drivers. Freeman, J.A. gives as a basis for stopping of vehicles "to detect impaired drivers". Since this basis is itself an amalgam of common law, police powers and specific authority given to police to check for license, registration and insurance, what MacLennan leaves open is whether "to detect" includes "to question" about possible impairment with a view to using the answer to formulate grounds for a demand.

[56] As noted above, being stopped at the roadside by a police officer is not such an unusual occurrence but neither is it as routine a matter as providing a fish hail, as in R. v. Fitzpatrick (1995) 43 C.R. (4d) 343. Although a stop may be random from a police officer's point of view, the driver cannot know this, and will in most cases, and quite reasonably, believe that he or she is under suspicion of having committed some offence. In many cases, and this is one, the police officer will also harbor some suspicion at the time of the initial stop.

Here, Constable Flannigan was clearly concerned by the sight of the beer carton on the boat trailer being towed by Mr. Bishop.

[57] Drunk driving is a pressing public concern fully worthy of condemnation, prosecution, and punishment. However, it is well to remember that there is no criminality in driving a motor vehicle with some small amount of alcohol in one's system. In terms of quantifiable amounts, anything less than 80 milligrams in 100 millilitres of blood is below the threshold of criminal liability. In terms of "driving while impaired" by alcohol thus committing a s. 253(a) offence, I feel comfortable in saying, having read many decisions and presided over many trials, many involving expert evidence, that "one beer" would, in itself, rarely result in impairment. I say this recognizing that even slight impairment runs afoul of s. 253(a), following R. v. Stellato [1993] 78 C.C.C. 3(d) 380 (Ont. C.A.). Presumably it is open to Parliament to criminalize driving with any amount of alcohol in one's system but it has not gone this far. The legislature of this province has set a 0% limit for newly licensed drivers. Under recent amendments to the Motor Vehicle Act where a person registers a "warn" to an ASD demand the police officer may request surrender of the person's license and driving privileges are thereby suspended for 24 hours. S. 279C (8) specifically directs that ASD devices shall not be calibrated to register "warn" when blood alcohol concentrations are less than 50 milligrams in 100 millilitres of blood. The legislation also permits temporary suspension of driver's licenses where they have refused a s. 254 demand. Where a breathalyzer test shows more than 50 milligrams, again, the police officer may require a person to surrender his or her license temporarily. Thus it appears that in Nova Scotia, with the exception of newly licensed drivers and learners, one may drive a motor vehicle with less than the 50/100 ratio of alcohol without committing a criminal offence and without being amenable to an administrative suspension of license, so long as any alcohol in the system below that level is not contributing to impairment of one's ability to drive.

[58] As suggested above, a person may well make statements to a police officer in the context of a chance encounter or otherwise innocent conversation which are incriminating in nature. No Charter rights would be violated in such a case. It is a different matter however when police ask questions, even in a context which starts off innocuously, which are intended to prompt incriminating information. In the instant case it was the sight of a beer carton on the boat trailer which motivated the police officer to stop the defendant's vehicle. There was nothing whatsoever in the driving or appearance of the vehicle which would have drawn the attention of the police to it. After Mr. Bishop was detained, there was nothing in his speech or conduct which aroused suspicion.

Evidently his papers were in order. Nevertheless, after all that, the police officer pursued the matter of the beer carton, though not by inquiring directly about it. Had he followed that path of inquiry, it may have led him at once to a beer carton containing machine parts and one empty beer bottle with remnant of beverage in it. Instead, he chose to question Mr. Bishop about alcohol consumption. Mr. Bishop had obliged the Constable's every direction to this point but still was being subject to further questions. It is reasonable to conclude that he would feel some compulsion to provide an answer.

[59] The prospect of an unreliable statement in these circumstances seems as real as in the circumstances pertaining in White , supra. It is quite possible that a police officer who receives the answer “one beer” will take it to be yet another case of someone admitting only part of the truth. In many instances the person may in fact be minimizing the extent of his drinking. If the person is a convincing liar and the question is posed early in the detention period, the police officer may be distracted from other modes of detection or investigation which would disclose the existence of actual impairment.

[60] Moreover, a truthful response may bring an unfortunate and unfair result. If a person truthfully responds that he or she has had "one beer" and yet receives a demand to provide an RSD sample, the person may, thinking that the police officer has believed him, conclude incorrectly that he will fail the RSD. Such a person may then pretend not to be able to provide a proper sample. Most lawyers know that blowing a fail on the RSD is not a criminal offence. Many people will not. The police officer may explain this, but is not required to by law. There is no evidence he did so in this case. The adverse consequences a driver fears may include not only a criminal charge but a 24 hour administrative suspension of license.

[61] In addition to the foregoing concerns about reliability, one must always be mindful of the proverbial "slippery slope". Just how far should a police officer be permitted to go in his questioning? May he ask about consumption within a specified period, the nature of the beverage, where it was consumed, whether the person is coming from a liquor establishment, etc.? Bearing in mind that impaired driving can be committed through consumption of drugs, might a police officer be permitted to query a driver about the use of drugs? Might he ask whether the person is on any medications, and if so, whether he is taking them according to a prescription? What are the medications, what is the nature of the illness, etc.? While at first blush there seems nothing offensive about a police officer approaching the driver of a motor vehicle with the simple question, "have you had anything to drink today sir?", what does the answer

actually mean in the absence of any other indicia of impairment, unless the question is followed up by more questions?

[62] Should a person consume one beer and a short time later drive a motor vehicle, he or she knows that there may be a tell tale smell on the breath. This however, is a passive emanation worn like one's coat. It would not be surprising or disturbing to a reasonable person in such circumstances to learn that this smell has resulted in them being detained for an ASD test, even where they grudgingly comply with a request to blow toward the officer's face.. However it is rather more unsettling to think that a person may feel obliged to tell a police officer about his alcohol consumption where there are no other indicia, and the question amounts to a pure fishing expedition. While it is impossible to hold one's breath inside, it is possible to keep one's thoughts to oneself and authorities should not coax these thoughts from the individual inappropriately. Courts should be careful not to allow the right to silence to be eroded in the absence of clear and valid common law or statutory authority.

[63] In Saunders, supra, a particular provision of the Ontario H.T.A. was interpreted as being sufficiently broad to permit police to require physical co-ordination tests of drivers, and such legislation was further determined to be a reasonable limit to the s. 10(b) Charter Right in accordance with s. 1. However, in Nova Scotia, our Court of Appeal in Baroni, supra, decided that a requirement to participate in physical sobriety tests was an infringement of the s. 10(b) right which, in the absence of any statutory authority, was not saved by s. 1. In Smith, supra, the same legislative provision led the Ontario Court of Appeal to conclude that there was 'little distinction in terms of self-incrimination between evidence that flows from a standing sobriety test performed by a driver and evidence in the form of a driver's answers to questions put to him by the police officer.' While it does not follow as a matter of strict logic that the absence of such legislation in Nova Scotia vitiates the use of answers to questions, as it did physical sobriety tests, there is a certain consistency to having the outcome here parallel that in Baroni.

[64] In Brown, supra, Doherty, J.A., states at paragraph 60:

> It is well established that in acting in furtherance of their duties, the police need not point to express statutory authority for every action they take which imposes some limitation on individual liberties.

[65] On the other hand, the Alberta Court of Appeal in R. v. Guthrie, [1982] A.J. 29 (QL), stated at paragraph 8:

> We view the right of silence in response to police interrogation, custodial or otherwise, as too firmly established within the common law to be unseated by mere judicial erosion. It must await statutory impetus...

[66] The request to blow towards the officer's face fits within the *ratio* of MacLennan in a way that the verbal responses to questions do not. The enactment, in Nova Scotia, of a section comparable to s. 48 of the Ontario H.T.A. would involve a public debate by elected officials, the input of legislative counsel, a study by committee, and other law-making processes. There is at least a reasonable possibility that should such a provision be legislated, it would be found a reasonable limitation, prescribed by law, on the s. 7 right, as was found in the Ontario Courts in Smith, supra. In the absence of such provision in our Motor Vehicle Act, there is nothing "prescribed by law", in either statutory or common law, which would create a saving limit under s. 1 of the Charter.

[67] In the present case, one may ask whether the request for information about prior drinking was a reasonable limit on the driver's s. 10(b) rights. This approach was taken in Baroni or, one might ask whether the s. 7 right to silence is "suspended" in the same sense as the s. 10(b) right in the preliminary stages of a roadside vehicle check. While it is impracticable to afford a right to counsel in this context, there seems no reason why it is impracticable to afford the right to silence. In R. v. Hebert [1990] 2 S.C.R. 151 page 271, the Supreme Court comments on the relationship between s. 7 and s. 10(b) as follows:

> The first Charter Right of importance in defining the scope of the right to silence under s. 7 of the Charter at the pre-trial stage is the right to counsel under s. 10(b) of the Charter. Section 7 confers on the detained person the right to chose whether to speak to the authorities or to remain silent. Section 10(b) requires that he be advised of his right to consult counsel and to do so without delay. The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is the right to silence. The detained suspect, potentially at a disadvantage...is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advise with respect to the choice he faces. Read together, s. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.

[68] I conclude that questioning of the detained driver, at a time when his s. 10(b) rights are in limbo, resulting in self-criminating statements given by the detainee, then used to make a demand for tests under s. 254 of the Criminal Code results in a breach of the s. 7 rights of the detained driver. Such evidence is obtained as a result of a Charter violation in circumstances where the detainee is conscripted against himself by evidence emanating from him. It

thus tends to render the trial process unfair. The question, the self-criminating statement, the RSD demand, and the refusals thereof form an inextricable chain of events, each leading directly to the other. The evidence of the refusal thus derives from the breach of the s. 7 right and ought not to be available to the Crown at trial to convict Mr. Bishop of this criminal offence. Admission of such evidence would be unfair to Mr. Bishop as it was obtained as a direct consequence of a breach of his s. 7 rights. I order such evidence excluded under s. 24(1) of the Charter, as was done in R. v. White (1998) 24 C.R. (5d) 201 (SCC).

CONCLUSION

[69] I have concluded that the self-criminating admission of having "one beer" cannot serve as a proper foundation for a valid ASD demand, given the infringement of s. 7 rights entailed. On the other hand, I have concluded that the detection of the smell of alcohol from a driver's breath achieved in response to a request to blow towards the officer's face can legitimately be used for such purpose following the reasoning in MacLennan, without breach of s. 8. It seems clear that had Constable Flannigan not found out, through his questioning, that Mr. Bishop had consumed "one beer", he would not have requested that Mr. Bishop blow in his face. He would thus not have obtained either of the two principle pieces of evidence which gave him reasonable suspicion to make an ASD demand. All the subsequent steps by Constable Flannigan, and thus the gist of the crown's case, followed upon the initial breach. As the s. 7 breach taints all the subsequent steps, and the evidence obtained at each stage, it ought all to be excluded under s. 24(1).

[70] As a closing comment, I wish to indicate that in any case where there is a valid, non-conscripted basis for thinking that a driver might be drinking, including the need to define whether an alcoholic smell is coming from the driver, it is my view that it is permissible for the police officer to request of the driver that he blow towards the officer's face, and the officer may then use any resulting smell in formulating reasonable suspicion for an ASD demand. However, if police at a roadside check wish to query a driver about prior consumption of alcohol, they should first give the driver his/her s. 10(b) right to counsel; otherwise, the information they elicit will be tainted and may vitiate a subsequent ASD demand.

[71] By way of *dicta*, I would, if called upon to decide, apply the reasoning in this decision to the formulation of grounds for a breathalyzer demand.

Dated at Sydney, this 7th day of May, A.D., 2002.

_____

A. Peter Ross, JPC