

**CASE NO.**

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*[Cite: R. v. Bishop, 2002 NSPC 2]*

Her Majesty the Queen

Donald Ernest Bishop

2001 1011107

Sydney, Nova Scotia

Judge A. Peter Ross

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**DATE HEARD:** May 4, 2001; October 5, 2001

**DECISION:** May 7, 2002

**SUBJECT:** Refusal of approved roadside screening device demand - use of certain evidence elicited from detained driver in formulating grounds - s. 7, s. 8 Charter of Rights

**SUMMARY:** The Defendant's vehicle was stopped for a roadside check by a police officer. While there was little, if any indication of alcohol consumption, the police officer asked the Defendant whether he had been drinking. The Defendant replied "one beer". The defendant was then asked to blow in the direction of the officer's face. A mild odor of alcoholic beverage was detected. The officer took the Defendant to the police car where an approved screening device demand was given. After a number of unsuccessful attempts, he was charged with refusal under s. 254(5) of the Criminal Code. In accordance with usual practice and prevailing law, no s. 10(b) right to counsel had been afforded the Defendant prior to the ASD demand.

**ISSUE:** (1) May police conducting a roadside check query a driver about previous drinking and then use the information obtained to formulate grounds for a valid ASD demand? Does this constitute a breach of the detained driver's s. 7 Charter right to be free from self-crimination? (2) May police in this context request that a driver blow towards the officer's face and then use any smell of alcoholic beverage to formulate grounds for a valid ASD demand? Does this involve a breach of the detained driver's s. 8 Charter right to be free from unreasonable search and seizure?

**RESULT:**

(1) The verbal response was obtained in violation of the s. 7 right and tainted the ASD demand. Evidence of such, and the

consequent refusal ought to be excluded at trial. (2) The smell of liquor was not obtained through an unreasonable search. There was here no breach of the s. 8 right. However, as the Defendant's verbal response was the basis for the subsequent steps, the evidence of the ASD demand and refusal were excluded from the evidence at trial resulting in an acquittal.

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