IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Cameron, 2003NSSC229

Date: 20031125
Docket: S.H. 204682
Registry: Halifax

Between:

Gerry Edward Cameron

Appellant

v.

Her Majesty the Queen

Respondent

Before: The Honourable Justice Glen G. McDougall

Heard: October 22, 2003

Counsel: Michael Stephen Taylor, Esq., on behalf of Mr. Cameron
Allen Gordon Murray, Esq., on behalf of the Crown

McDougall, J.:

[1] This is an appeal from a decision of the Honourable Judge John G. MacDougall, a Judge of the Provincial Court, given orally on the 24th day of June, 2003. Gerry Edward Cameron (the "Appellant") was convicted of operating a motor vehicle having consumed alcohol in such quantity that the concentration in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood contrary to section 253(b) of the *Criminal Code of Canada*.

[2] The Appellant had also been charged with impaired driving contrary to Section 253(a) of the *Criminal Code*. He was acquitted at trial on this charge.

[3] Initially three grounds of appeal were raised. The appellant's factum which was filed in advance of the hearing provided notice that one of the grounds of appeal was being abandoned. The factum provided further notice that the first ground of appeal should have been stated differently. The Crown was aware of these changes prior to the hearing of the appeal and offered no objection.

[4] The grounds of appeal therefore are as follows:

1. That the Learned Trial Judge erred in law by ruling that the Crown proved that the "roadside screening device" was in fact an "**approved screening device**" in order to accept the readings obtained by the administering of the device as providing reasonable and probable grounds for a breathalyzer demand;

2. That the Learned Trial Judge erred in law in finding that there were reasonable and probable grounds, on an objective basis, for the arresting officer to administer a breathalyzer demand to the Appellant.

SUMMARY OF FACTS:

[5] The appellant was operating a motor vehicle on Mooseland Road between the communities of Mooseland and Tangier in the early morning of June 22, 2002. At approximately 12:35 a.m., Constable Denzil Firth of the Sheet Harbour Detachment of the Royal Canadian Mounted Police decided to pull over the vehicle operated by the appellant for a random police check. While following the vehicle for only a short distance - less than a kilometre according to his evidence - Cst. Firth observed the vehicle coming "*awfully close to the shoulder - to the gravel shoulder of the highway*". Although the vehicle came close to the gravel shoulder of the road it did not leave the pavement. There did not appear to be any mechanical problems with the vehicle nor with its lights. Cst. Firth indicated that there had been recent problems in the area with cottage break-ins and he made random stops of unfamiliar vehicles travelling in the area especially late at night to check on drivers license, vehicle registration and insurance.

[6] When he stopped the appellant's vehicle there were two people inside. He immediately noticed the smell of alcohol emanating from the vehicle when the

driver rolled down the window. The driver showed some signs of alcohol use - - glossy eyes, flushed face and slightly slurred speech. At trial, Cst. Firth admitted that based on his observations of the appellant's driving and the evidence of impairment exhibited by the appellant he did not think there were reasonable and probable grounds to make a breathalyzer demand under section 254(3) of the *Criminal Code.* He did feel however that there was sufficient evidence to cause him to reasonably suspect that the appellant had alcohol in his body. As a consequence he issued a demand for a breath sample to properly analyse the Appellant's breath by means of an approved screening device under section 254(2) of the *Criminal Code*. After making these observations Cst. Firth was asked the following questions by Crown counsel at the trial:

> Q. "All right. What action did you take then?"
>
> A. "I had asked him to produce his motor vehicle documents. And I had a suspicion that he had been consuming alcohol and I demanded that he provide a sample of his breath. I had the roadside ALERT - - or roadside screening device in my vehicle. So - -"
>
> Q. "All right."
>
> A. "And asked him to accompany me to the police vehicle to conduct the test."

[7] The appellant registered a fail on the roadside screening device. Based on this and the other evidence of possible impairment the arresting officer felt he had reasonable and probable grounds to make a breathalyzer demand. He placed the appellant under arrest for impaired driving and after making the demand he then advised the appellant of his *Charter* rights. The appellant accompanied Cst. Firth to the nearest detachment of the RCMP and after speaking with duty counsel he took the breathalyzer test. He registered readings of 200, 170 and 180 milligrams of alcohol in 100 millilitres of blood.

[8] At trial the defence raised a *Charter* argument claiming that the appellant's right to consult legal counsel <u>of choice</u> [emphasis added] had been breached. Advance notice of this *Charter* argument was provided to the court and to the crown prior to the commencement of trial. A *voir dire* was conducted. At the conclusion of the *voir dire* defence counsel argued not only the section 10(b) violation but also a violation of Section 8 which had not been contemplated until after all the evidence on the *voir dire* had been heard. In effect he argued that the

police officer did not have sufficient evidence to form a reasonable suspicion to make the demand for a breath sample for analysis by means of an approved screening device. Without this he could not have made a lawful demand and without the "fail" results of the roadside screening device there was insufficient evidence to establish reasonable and probable grounds, which is a pre-requisite for making a breathalyzer demand. If this was the case then the results of the breathalyzer test would be inadmissible and an acquittal would have to be entered. Crown counsel did not object to this second *Charter* argument which was made without any advance notice by the defence. The trial judge denied both motions. This led to the admission in evidence of the certificates of analysis along with the notice of intention to produce. In summing up his client's case, defence counsel conceded that if the roadside screening test device results were allowed to be considered, the police officer would have had sufficient evidence to establish reasonable and probable grounds to make the breathalyzer demand. Furthermore, he took no issue with the certificates of analysis that were tendered in evidence. After the crown closed its case, defence counsel then realized there was another possible argument to make. The crown had not led evidence to establish the type of roadside screening device used by the arresting officer nor was the word "approved" used to describe it. Indeed, the police officer's initial reference to the instrument was as indicated previously "...roadside ALERT - - or roadside screening device..." The transcript indicates that the policeman quickly corrected himself and used the term "roadside screening device". Any further reference to the instrument or the procedure followed by the police officer used the term roadside screening device or roadside screening test and nothing further of a descriptive nature.

[9] During the *voir dire* the appellant himself in giving testimony, referred to the device as an ALERT on certain occasions and roadside screening device on others.

[10] Defence counsel did not cross-examine the police officer with regard to the make or model of the screening device used nor did he explore the possibility that it might not be an approved instrument. It was only after the close of the crown's case after the trial judge's ruling on the *voir dire* was this raised as a further argument. The trial judge reserved decision and allowed counsel to make further written submissions on this issue. After receiving the further submissions of counsel the trial judge concluded that the evidence of the failed roadside screening device test could be relied upon by the police officer in establishing the requisite reasonable and probable grounds to make the breathalyzer demand. There was no

evidence to suggest that the police officer either knew that the device was not an approved instrument or that it was not working properly. He further concluded that based on indirect or circumstantial evidence the only reasonable conclusion was that the device used was an "approved instrument" even though there was no direct evidence to establish this. Based on this he convicted the appellant of the offence described in section 253 (b) of the *Criminal Code*.

ANALYSIS

[11] The relevant sections of the *Criminal Code* are as follows:

> **253.** Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (*a*) ...
>
> (*b*) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.
>
> **254.** (1) In this section and sections 255 to 258,
>
> "approved instrument" means an instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada;
>
> "approved screening device" means a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada;
>
> (2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace

> officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.
>
> (3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
>
> (*a*) such samples of the person's breath as in the opinion of a qualified technician, or
>
> *(b*) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,
>
> > (i) the person may be incapable of providing a sample of his breath, or
> >
> > (ii) it would be impracticable to obtain a sample of the person's breath,
>
> such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

[12] Counsel for the appellant has argued that the police officer's reliance on the results of the roadside screening device test cannot be used to establish the reasonable and probable grounds that are required to make a demand for a breath sample under section 254(3) of the *Criminal Code*. In order for the police officer to have properly relied on the results of the roadside screening device test it would have had to have been proved that the testing device was an "approved instrument" as defined in section 254(1) and as provided for in the Regulations. The crown in

its oral submissions before me conceded that without the "fail" results of the roadside screening device there was insufficient evidence to establish reasonable and probable grounds to warrant the breathalyzer demand that followed.

[13] The Crown argued that the law as stated in the pre-Charter case of **R.** v. **Rilling** (1975), 24 C.C.C. (2d) 81 (S.C.C.) still remains applicable subject however to the *Charter*-era case of **R.** v. **Bernshaw**, [1995] 1 S.C.R. 254. If there was any doubt about the applicablility of the **Rilling** case (*supra)*, Cory, J., certainly made it clear that it is still good law subject, however, to the *Charter*. AT paragraphs 39 to 42, he wrote:

> 39 In this case, the police officer undoubtedly had reasonable and probable grounds for making the breathalyzer demand. It is therefore not strictly necessary to consider the applicability of Rilling v. The Queen, supra. Yet, both parties addressed this issue and there seems to be a difference of opinion on the question among the Courts of Appeal. In Rilling, it was held that the lack of reasonable and probable grounds for making the demand was irrelevant in those situations where the driver had, in any event, acceded to the request. This Court adopted the position of the Court of Appeal, which was put in this way, at p. 198:
>
> > It is my opinion that this Court should accept and adopt the views expressed in the Orchard, Showell and Flegel cases, supra, and hold that while absence of reasonable and probable grounds for belief of impairment may afford a defence to a charge of refusal to submit to a breathalyzer test laid under subs. (2) of s. 235 of the Code, it does not render inadmissible certificate evidence in the case of a charge under s. 236 of the Code. The motive which actuates a peace officer in making a demand under s. 235(1) is not a relevant consideration when the demand has been acceded to.
>
> 40 The British Columbia Court of Appeal in this case held that Rilling was no longer good law since it was decided prior to the Charter.
>
> 41 In my view, the Court of Appeal erred in taking this position. Certainly the Charter is relevant. An accused may be able to establish on the balance of probabilities that the taking of breath samples infringed his Charter rights. For example, it might be contended that the requisite reasonable and probable grounds for making the breathalyzer demand were absent, and that, in the circumstances, the admission of those breathalyzer results would bring the administration of justice into disrepute. In those circumstances, the breathalyzer evidence might well not be accepted. Yet, where an accused complies with the breathalyzer demand, the Crown need not prove as part of its case that it had reasonable and probable grounds to make that demand. Rather, I think, the onus rests upon the accused to establish on the balance of probabilities that there has been a Charter

> breach and that, under s. 24(2), the evidence should be excluded. There should not be an automatic exclusion of the breathalyzer test results.
>
> 42 Several provincial appellate courts have taken the position that the Rilling case is still applicable in appropriate circumstances. That is to say where breath samples are obtained without reasonable and probable grounds for the demand, the evidence should only be excluded upon an application by the accused to exclude it pursuant to s. 24(2) of the Charter. See R. v. McNulty (1991), 35 M.V.R. (2d) 27 (Ont. C.A.); R. v. Linttell (1991), 64 C.C.C. (3d) 507 (Alta. C.A.); R. v. Dwernychuk (1992), 77 C.C.C. (3d) 385 (Alta. C.A.), leave to appeal refused, [1993] 2 S.C.R. vii; R. v. Marshall (1989), 91 N.S.R. (2d) 211 (C.A.); R. v. Langdon (1992), 74 C.C.C. (3d) 570 (Nfld. C.A.); R. v. Leneal (1990), 68 Man. R. (2d) 127 (C.A.). This, I think, is the approach that should be adopted.

[14] Cory, J.'s, decision was concurred in by Lamer, C.J. (as he then was) and Iaccobucci, J. Justice Sopinka writing on behalf of Justices LaForest, McLachlin (as she then was) and Major although agreeing that the appeal should be allowed disagreed with the reasons by which Cory, J. arrived at the result. At parragraph 45 he wrote:

> ...In the circumstances of the present appeal, I agree that the police officer had reasonable and probable grounds to make a breathalyzer demand based on the results of the screening test along with the other indicia of impairment. However, I am not prepared to hold that, as a matter of law, a "fail" result is sufficient to constitute reasonable and probable grounds, per se, where a police officer is aware of circumstances that make the results of the test unreliable.

[15] Justice Sopinka goes on to state at paragraph 46:

> In the case at bar there is no evidence that such circumstances were present. There was no evidence concerning the time when the respondent consumed his last drink of alcohol nor was there any evidence of other circumstances which would render the results of the test unreliable. The officer was entitled to rely on the results of the test in support of his opinion that reasonable and probable grounds existed on which to base a demand for a breathalyzer test. The decision as to whether a peace officer believes on reasonable and probable grounds that an offence is being committed and, therefore, that a demand is authorized under s. 254(3) of the Criminal Code, R.S.C., 1985, c. C-46, must be based on the circumstances of the case. It is, therefore, essentially a question of fact and not one of pure law.

[16] According to Justice Sopinka: "[T]he existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254(3) of the *Code* requires that the police officer subjectively have an honest belief that the

suspect has committed the offence and objectively there must exist reasonable grounds for this belief: **R.** v. **Callaghan**, [1974] 3 W.W.R. 70 (Sask. Dist. Ct.); **R.** v. **Belnavis**, [1993] O.J. No. 637 (Gen. Div.) (QL); **R.** v. **Richard** (1993), 12 O.R. (3d) 260 (Prov. Div.); and see also **R.** v. **Storrey**, [1990] 1 S.C.R. 241, regarding the requirements for reasonable and probable grounds in the context of an arrest." [para. 48].

[17] Finally at paragraph 49, he wrote:

> It is clear that Parliament has set up a statutory scheme whereby a screening test can be administered by the police merely upon entertaining a reasonable suspicion that alcohol is in a person's body. The purpose behind this screening test is evidently to assist police in furnishing the reasonable grounds necessary to demand a breathalyzer. The roadside screening test is a convenient tool for confirming or rejecting a suspicion regarding the commission of an alcohol-related driving offence under s. 253 of the Code. A "fail" result may be considered, along with any other indicia of impairment, in order to provide the police officer with the necessary reasonable and probable grounds to demand a breathalyzer. Normally, where a properly conducted roadside screening test yields a "fail" result, this alone will be sufficient to furnish a police officer with such grounds.

[18] Although defence counsel did not, at trial, specifically state that he was framing his argument to exclude the results of the screening device test on a breach of a particular section of the Charter it is clear that this, indeed, was his intent. Once the matter was raised then the trial judge must allow the crown to properly respond to the *Charter* challenge provided the party alleging the breach has established on a balance of probabilities that one has occurred. The timing of the *Charter* challenge in the appeal that is before me occurred without prior notice and after the close of the crown's case. The trial judge, recognizing that the crown was entitled to proper notice and an adequate opportunity to respond, reserved decision and allowed counsel to make further written submissions. Indeed, when rendering his final decision the trial judge alerted the appellant (who was in court without his counsel on that day) to another potential *Charter* argument and offered him the opportunity to seek a further adjournment so both the defence and the prosecution could call additional evidence and make further argument to deal with this. The appellant declined the offer and the trial judge proceeded to render his decision. The case of **R.** v. **Kovac**, [1998] O.J. No. 2347 provides an excellent review regarding the timing exclusionary applications on constitutional grounds. Justice

Hill, who decided that case quoted from a decision of Finlayson, J.A. in **Regina** v. **Katynec** (1992), 70 C.C.C. (3d) 289 (Ont. C.A.) At 294, 295 and 296:

> Some element of discipline must be introduced into the bringing of Charter motions,...
>
> Prior to the proclamation of the Charter, no one conversant with the rules controlling the conduct of criminal trials would have suggested that an objection to the admissibility of evidence tendered by the Crown could routinely be initiated after the case for the Crown was closed. It is self-evident that objections to admissibility of evidence must be made before or when the evidence is proffered. This common sense proposition is equally applicable to Charter applications to exclude evidence ...
>
> Litigants, including the Crown, are entitled to know when they tender evidence whether the other side takes objection to the reception of that evidence. The orderly and fair operation of the criminal trial process requires that the Crown know before it completes its case whether the evidence it has tendered will be received and considered in determining the guilt of an accused. The ex post facto exclusion of evidence, during the trial, would render the trial process unwieldy at a minimum.
>
> ...
>
> As a basic proposition, an accused person asserting a Charter remedy bears both the initial burden of presenting evidence that his or her Charter rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a Charter violation. If the evidence does not establish whether or not the accused's rights were infringed, the court must conclude that they were not: see R. v. Collins (1987), 33 C.C.C. (3d) 1 at pp. 13-4, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265 (S.C.C.). It is obvious that counsel for the accused is not entitled to sit back, as he did in this instance, and hope that something will emerge from the Crown's case to create a Charter argument or assist him in one he is already prepared to make. The onus is on the accused to demonstrate on a balance of probabilities that he is entitled to a Charter remedy and he must assert that entitlement at the earliest possible point in the trial. Otherwise, the Crown and the court are entitled to proceed on the basis that no Charter issue is involved in the case.
>
> ...
>
> Where the evidence is directed to the proof of a criminal offence, the onus of showing it is admissible is upon the Crown. Counsel for the accused can wait until the evidence is proffered and make timely objection. Unfortunately, defence counsel have become too comfortable with this format; they have not adjusted to the new reality of the Charter. Under the Charter, the burden of having the court reject evidence that is otherwise admissible passes to the defence. The Crown does not have to anticipate that the defence will seek to exclude Crown evidence on the basis of an alleged Charter breach. The defence must make its application

> for relief under s. 24(2) before the evidence is admitted, not after it has been accepted: R. v. McNulty, a judgment of the Ontario Court of Appeal, released November 18, 1991.
>
> In R. v. McNulty, supra, this court held that where counsel desired to challenge the admissibility of the evidence of a breathalyzer technician, he had to do so before it was admitted in evidence ...
>
> Manifestly, the Charter application by the accused must precede the admission of the evidence.

[19] Justice Hill further stated at paragraphs 36, 37 and 45, the following:

> 36 In my view, there exists a duty to raise the Charter issue at the outset, not during the course, of trial so that the Crown has a clear and adequate opportunity to muster evidence, if it is able, to permit full joinder on the relevant subject matter.
>
> 37 In Regina v. Krallisch, supra at para. 1, Osborne J.A. quite properly observed "it was for the appellant to squarely raise the Charter" at trial to attack the officer's reasonable grounds for making a breath demand.
>
> 45 Where it can fairly be said that had the prosecution received appropriate and timely notice, the Crown would have engaged in additional questioning of witnesses or would have called additional evidence, then real, not speculative, prejudice is established. Such a disadvantage, especially one occasioned by a calculated defence tactic, weighs heavily against consideration of an accused's Charter application first raised at the conclusion of the trial.

[20] As state previously the trial judge clearly recognized the appropriateness of allowing the crown to re-open its case, if necessary, to address the *Charter* issue raised by the defence at the conclusion of the trial. After allowing counsel for both sides to make further written submissions the trial judge, based on the evidence, concluded that the screening device used by the police officer was an “approved screening device” and hence the results of the test along with the other indicia of impairment noted by him were sufficient to establish reasonable and probable grounds. The decision of the trial judge that the instrument used was an approved screening device is a decision of fact that should only be interfered with if it is demonstrably unreasonable . He determined that proof the screening device was approved should be on the balance of probabilities. In my opinion, this is not something that would normally have to be proved by the crown. Reference is

made to the decision of the Nova Scotia Court of Appeal in **R.** v. **Seymour**, [1986] N.S.J. No. 571, 75 N.S.R. (2d) 174 at paragraph 8:

> 8 The Crown is not required to produce evidence that the A.L.E.R.T. device is an approved instrument or that it was functioning properly at the time for the reason that failing the A.L.E.R.T. is not an offence. It will suffice on this point to refer to R. v. Fraser (1983), 57 N.S.R. (2d) 91, wherein Macdonald J.A., stated at p. 97:
>
> > "If a person is to be convicted upon the reading of a machine the court must, of course, be satisfied beyond a reasonable doubt that the machine was functioning properly. A 'fail' result registered by the A.L.E.R.T, not being the result of a chemical analysis of a breath sample, cannot found a conviction for any drinking and driving offence. That being so there is no obligation upon the Crown to lead evidence that the machine is working properly."

[See also **R.** v. **Denney**, [1985] N.S.J. No. 62 at paragraph 9]

[21] In a more recent case decided by His Honour, Provincial Court Judge A. Peter Ross, in **R.** v. **Dubois**, [2001] N.S.J. No. 23, concluded at paragraphs 11 and 12:

> 11 I thus conclude that I am not violating the principle of stare decisis in ruling as follows:
>
> > 1. The make of the RSD device, and whether it is on the list of approved instruments, is not an element of the offence of exceeding the breathalyzer contrary to s. 253(b) ;
> >
> > 2. There is a positive onus on a defendant to establish on a balance of probabilities a Charter breach; which it may do (as in LeBrun) by reference to evidence contained in the case for the Crown;
> >
> > 3. Given the evidence in this case, there is no basis upon which to conclude that the roadside screening device was not an approved device, and hence no basis upon which to find any unlawful detention;
> >
> > 4. I do not consider the ratio in LeBrun to be as broad as the defence has argued for here;
> >
> > 5. In short, I see no onus or obligation on the Crown, in proving a case under s. 253(b), to put into evidence the particular make and model of the roadside screening device which was

utilized to determine the presence of alcohol in the defendant's body and thus to supply grounds for a breathalyzer demand and the procuring of evidence of blood alcohol levels.

> 12 Left open here is the result where the police officer did not use the word "approved" in reference to the roadside screening device when making the demand, or elsewhere in his evidence. By way of dicta, I am inclined to the same result even in the absence of such testimony, but I leave this point for another day.

[22] The case which I must decide can be distinguished from the decision of my brother Justice C.E. Haliburton in **R.** v. **LeBrun**, [1999] N.S.J. No. 288; [1999] Carswell NS 261; 178 N.S.R. (2d) 388 (N.S.S.C.) in that there is no evidence of the make or model of the screening device and hence nothing to suggest that it is not on the list of instruments approved by Parliament. For the defence to successfully advance the *Charter* argument there must be some evidence to establish, on a balance of probabilities, that a breach has occurred. I agree with the decision of Judge Ross in **Dubois** (*supra*) and the dicta contained in paragraph 12. The crown need not prove the make or model of the roadside screening device used to determine the presence of alcohol in the appellant's body nor does it have to establish that it was an "approved screening device" unless there is some evidence that would suggest that it might not be.

[23] Although I do not think in this case it was necessary for the crown to prove that the screening device was an approved instrument, the learned trial judge concluded that there was sufficient circumstantial evidence to do so. This was clearly a determination of fact on his part and under the circumstances could not be considered unreasonable.

[24] If I had instead concluded that it was necessary for the crown to prove that the screening device was an approved instrument, and the trial judge had reached an unreasonable conclusion based on only circumstantial evidence, I would have over-turned the conviction and referred the matter back for a new trial before another judge. I would have further ordered the Defence to provide proper notice to the Prosecution of its intention to raise a *Charter* argument challenging the approval of the screening device.

[25] However, for the reasons stated, the results of the screening test were admissible and could be properly relied upon by the arresting police officer along with the other indicia of impairment in deciding that there were reasonable and probable grounds for making the breathalyzer demand.

[26] I would therefore dismiss the appeal and up-hold the conviction of the appellant.

J.