

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** R. v. Gibson, 2004 NSSC 228

**Date:** 20041108  
**Docket:** S.K. 222870  
**Registry:** Kentville

**Between:**

Her Majesty The Queen

Appellant

v.

Robert Albert Gibson

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Gregory M. Warner

**Heard:** September 7, 2004, in Kentville, Nova Scotia

**Subject:** Criminal Law - Breathalyzer - What constitutes “evidence to the contrary” in Straddle cases under s. 258(1)(d.1)

**Summary:** Police stopped accused driving an ATV and later obtained BAC readings of 120 and 100 and charged him with failing the breathalyzer. At trial, a toxicologist testified that, based on accused's drinking scenario, age, weight and height and on the average absorption/elimination rate of all persons, the accused's BAC was between 40 and 105. This was consistent with the breathalyer readings (i.e., no challenge to presumption of accuracy). The accused challenged the presumption of identity based on the “last drink” defence. The trial judge acquitted the accused.

**Result:** The court confirmed the acquittal. It rejected the approach of the Ontario Court of Appeal in 2002 in **R. v. Heideman**. In **Heideman**, the Court held that evidence of the range of elimination rates of average persons (between 10 and 20 per hour) did not constitute material evidence because elimination rates vary from person to person and from time to time with each person and that moving from an average person to the accused is speculation only. This Court accepted the approach of the Quebec Court of Appeal in **R. v. Dery** (2001) and statements of the Supreme Court of Canada in **R. v. St. Pierre** (1996) in admitting such evidence as part of the

trial judge's analysis. Since it is impossible to measure an accused's actual elimination rate at the time of the offence and individual elimination rates change from time to time, an accused with a BAC below 80 at the time of the offence could be unjustly convicted if evidence of the elimination rate of average persons was not admissible.

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