Case Name:

R. v. Sandhu

Between
Her Majesty The Queen, and
Tejpreet Singh Sandhu

[2013] A.J. No. 850

2013 ABPC 208

567 A.R. 325

108 W.C.B. (2d) 607

2013 CarswellAlta 1457

Docket: 120607981P1

Registry: Edmonton

Alberta Provincial Court

S.R. Creagh Prov. Ct. J.

August 6, 2013.

(105 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impairing driving or driving over the legal limit -- Roadside screening test -- Approved screening device -- As soon as practicable or forthwith -- Reasonable suspicion -- Breathalyzer or blood sample demand -- Reasonable and probable grounds -- Trial of accused charged with impaired driving and driving with a blood alcohol level over .08 -- Accused convicted of both charges -- Accused's admission that he had consumed two drinks gave reasonable grounds for roadside test -- Officer's failure to note device temperature did not give objective basis to conclude result was not be reliable -- Test was taken forthwith -- There was no section 8 Charter breach -- Operation of s. 10(b) of Charter is suspended at roadside -- Accused's driving pattern fell within a marked departure from norm and alcohol consumption was reason for marked departure.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Right to retain and instruct counsel without delay -- Trial of accused charged with impaired driving and driving with a blood alcohol level over .08 -- Accused convicted of both charges -- Accused's admission that he had consumed two drinks gave reasonable grounds for roadside test -- Officer's failure to note device temperature did not give objective basis to conclude result was not be reliable -- Test was taken forthwith -- There was no section 8 Charter breach -- Operation of s. 10(b) of Charter is suspended at roadside -- Accused's driving pattern fell within a marked departure from norm and alcohol consumption was reason for marked departure.

Trial of accused charged with impaired driving and driving with a blood alcohol level over .08. Witnesses observed a car being driven erratically. The police attended at the accused's residence and observed the accused exiting a car the matched the description. The officer noted the accused wavered as he stood and that he had bloodshot eyes. The accused had difficulty producing his vehicle documents. The officer did not detect an odour of alcohol on the accused. In response to the officer's question as to whether he had had any drinks that night, the accused admitted that he had had two drinks. The officer ordered a roadside screening device and administered the test to the accused. The accused blew a fail. The officer arrested the accused for impaired driving and read the accused his Charter rights and breath demand. At the station, the accused was offered access to the phone room to contact a lawyer and refused. The accused provided breath samples. The accused argued that the results of the breath tests should be excluded from evidence based on breaches of his section 8 and section 10(b) Charter rights. He argued that the officer did not have reasonable grounds for either the arrest or the demand for breath samples. He argued that his admission that he had had two drinks could not support a reasonable suspicion because it was vague as to time. The accused argued that the result of the roadside test was unreliable because the officer failed to note the operating temperature of the device. The accused argued that the demand should have been made immediately upon the formation of grounds, or alternatively that the officer should have given the accused notice that he had called for the device. The accused also argued that he should have been permitted to call a lawyer from the roadside, while they were waiting for the arrival of the screening device.

HELD: Accused convicted of both charges. The accused's admission of consumption of two drinks gave the officer grounds to made the demand for the roadside test. There was nothing vague or ambiguous about either the question or the answer. The officer had been trained in the use of the roadside screening device and was a qualified operator. There was nothing in the operation of the device that gave the officer any reason to question whether it was working properly. His failure to either check the temperature or to make any note of it did not give any objective basis to conclude that the result might not be reliable. The total time elapsed from the formation of the grounds to the result of the roadside test was 17 minutes. It makes no difference if the officer made the demand and then ordered the test or if he made the demand after he had the test in hand. The test was taken forthwith. There was no authority to support an argument that the officer should have given the

accused notice that he had sent for the device. There was no breach of section 8 of the Charter. It is well established that the operation of s. 10(b) is suspended at the roadside. Had the court found a breach of either section 8 or 10(b), the evidence would have been admitted in any case. The accused's driving pattern fell within a marked departure from the norm. Given the corroboration of the observations of the officer and the readings on the certificate of analysis, alcohol consumption was the reason for the marked departure. As the readings on the certificate of analysis were over .08 the accused was convicted of operating a motor vehicle with a blood alcohol level over .08 and with impaired operation of a motor vehicle.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 9, s. 10(b)

Criminal Code, R.S.C. 1985, c. C-46, s. 254(2), s. 254(2)(b), s. 254(3)

Counsel:

Breena Smith, for the Crown.

Brij Mohan, for the Accused.

Reasons for Decision on Voir Dire

1 S.R. CREAGH PROV. CT. J.:-- Mr. Sandhu, the accused in this matter, is charged with impaired driving and driving with more than the legal limit of alcohol in his blood. The trial on this matter took place on May 13, 2013. After hearing the evidence and argument of the parties, I reserved my decision until July 8, 2013, when I gave these reasons in court.

2 At the time I delivered these reasons, I indicated that the written reasons would follow. These are those reasons. Wherever these reasons vary from what was said in court, the written reasons will govern.

3 The issues under consideration are:

1. Did the arresting officer, Cst. Hilbert, breach the rights of the accused as guaranteed by section 8 of the *Canadian Charter of Rights and Freedoms* by arresting the accused and demanding a sample of his breath when there was no basis to do so?

2. Did Cst. Hilbert breach section 10(b) of the *Canadian Charter of Rights and Freedoms* by failing to provide the accused with a reasonable opportunity to consult with counsel at the roadside while they were waiting for the approved screening device (ASD) to arrive?
3. If either of these breaches occurred, should the results of the breath tests be excluded? And finally,
4. Has the Crown proven the count of impaired operation beyond a reasonable doubt?

4 I have divided my reasons into three parts. Part one is a brief overview of the evidence. Part 2 is a consideration of each issue, and Part 3 is my overall conclusion. I will comment on the credibility of the witness as I work my way through the issues.

5 I now turn to Part 1, a summary of the evidence. As the purpose of this summary is to give a context to the discussion of the legal issues, it is brief. I will make further, more detailed references to the evidence in when I address the specific issues.

6 On May 4, 2012 Mr. de la Salle and Ms. Thompson were returning home from an Oil Kings game. As they drove south on 50th Street, they noticed a vehicle driven by the accused. The driving pattern concerned them, so they called 911 to report it.

7 As directed by the 911 operator, they followed the vehicle, giving updates as to its route, while Cst. Hilbert and his partner, Cst. Berezanski, were dispatched to investigate the complaint.

8 The operator continually updated the officers as to where the accused's vehicle was and its direction of travel. In this fashion Cst. Hilbert learned that the vehicle had parked on the driveway at 4420-29 Avenue, Edmonton, Alberta and that Mr. de la Salle and Ms. Thompson were stopped nearby.

9 As a result of the updates, Cst. Hilbert understood that the vehicle was veering into oncoming lanes and almost hitting curbs. In his mind it was a concerning driving pattern and he wanted to get to the vehicle as quickly as possible.

10 When he arrived at 4420-29 Avenue, he noted a Nissan Maxima stopped on the driveway of the residence. The vehicle was turned off and the accused was just getting out of the vehicle via the driver's door. He had the keys to the vehicle in his hand.

11 Cst. Hilbert told the accused that he was investigating him as an impaired driver so he needed to ask some questions. He could see that the accused was "wavering" or rocking back and forth as he stood next to the car and that the accused's eyes were bloodshot. When the officer asked the accused for the vehicle documents, the accused first presented the wrong documents.

12 Although Cst. Hilbert was specifically looking for an odour of alcohol on the accused he could

not detect one.

13 Accordingly Cst. Hilbert asked the accused if he had any alcohol to drink that night. The accused said he had two drinks of gin and tonic in celebration of getting his business licence at the shop where he worked. The accused added that, in his estimation, this should not have put him over the limit.

14 With this admission and given all the other information he had about the accused and his driving pattern, Cst. Hilbert concluded that he had a reasonable suspicion that the accused had alcohol in his body and that he had been operating a motor vehicle. Therefore, at 22:27, Cst. Hilbert called for a roadside screening device. The device was delivered to him at 22:35.

15 At 22:36 Cst. Hilbert read the accused the demand for a road side screening device test. The accused complied and, at 22:44, blew a fail. According to Cst. Hilbert's training, this meant that the blood alcohol level of the accused was over 100 mg per cent. This result, in combination with his observations of the accused, led him to form the opinion that he had reasonable grounds to believe that the accused had been driving the vehicle "at above the legal limit" and he arrested the accused for impaired driving.

16 Cst. Hilbert put the accused in the rear seat of his police car where he read the accused his Charter rights. The accused said he understood the right and he would "go for a free lawyer". Cst. Hilbert then read the accused the standard caution and the first demand for a breath sample. The accused said he would comply and he was immediately taken to the nearest police station.

17 Once at the police station the accused was offered access to the phone room. He replied "I don't know if I should or not". Cst. Hilbert explained to the accused that this was his opportunity to talk to a lawyer. Since the accused did not appear to be sure that he wanted to talk to a lawyer, Cst. Hilbert read the waiver to him. The accused said he understood the waiver and he did not want access to a lawyer.

18 Cst. Hilbert understood this to mean that the accused did not want to call a lawyer so he proceeded with the investigation.

19 The accused was taken before a qualified breath technician and provided samples of his breath at 23:13 and at 23:33. The resulting Certificate of Analyst is Exhibit A on the trial. Although I did not know the precise readings, as I heard Cst. Hilbert's evidence they were obviously over .08.

20 The accused was released from custody at 00:25 hours. Cst. Hilbert drove him home. Cst. Hilbert later realized that he had not served the accused with his copy of the Certificate of Analyst so, on May 22, 2012, he served the accused with the Notice of Intention and a true copy of the Certificate of Analyst.

21 This concludes my initial summary of the evidence. I now turn to the issues, beginning with

Section 8 of the Charter.

1. Did the arresting officer, Cst. Hilbert, breach the rights of the accused as guaranteed by section 8 of the Charter of Rights and Freedoms by arresting the accused and demanding a sample of his breath when there was no basis to do so?

22 Section 8 of the *Canadian Charter of Rights and Freedoms* provides that:

> "Everyone has the right to be secure against unreasonable search or seizure".

To be reasonable, and therefore in compliance with the *Charter*, a search must be authorized by law. See *R. v. Collins,* 33 C.C.C. (3d) 1 (S.C.C.).

23 Where, as here, the search is authorized by a statute, rather than a judicial order (a situation described as a warrantless search), the search will be reasonable if the Crown can show, on a balance of probabilities, that it complies with the statute.

24 In this case the search, the taking of the breath samples, is authorized by Section 254(3) of the *Criminal Code*. That section, edited to the essential points for this case provides that:

> (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
>
> (a) to provide, as soon as practicable,
>
> (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, ... and
>
> (b) if necessary, to accompany the peace officer for that purpose.

25 As noted, the argument in this case is that Cst. Hilbert did not have reasonable grounds for either the arrest or the demand for breath samples. Reasonable grounds "entails both an objective and a subjective component". In other words, the officer must subjectively have an honest belief in his grounds, and that belief must be objectively reasonable. See *R. v. Bernshaw* [1995] 1 S.C.R. 254 and *R. v. Rhyason*, [2007] S.C.J. No. 39 at para 12.

26 The objective assessment of the grounds is that of a reasonable third party standing in the shoes of the officer. See *R. v. Cuthbertson* [2004] 8 W.W.R. 162 at para 45-6.

27 The grounds must be based on "facts known by or available to the officer at the time he formed his grounds". *R. v. Shepherd* [2009] S.C.J. No. 35 at para 23. The grounds can be based on hearsay, assumptions or even misunderstandings as long as the belief is subjectively honest and objectively reasonable. *R. v. McClelland* (1995), 98 C.C.C. (3d) 509 (Alta. C.A.), *R. v. Musurichan* (1990), 56 C.C.C. (3d) 570, 107 A.R. 102 (C.A.).

28 When assessing the reasonableness of grounds, it is an error for a judge to review the grounds piecemeal: the judge must consider the totality of the factors used by the officer. *R. v. Rhyason, supra*, and *R. v. Huddle* (1989), 102 A.R. 144 (Alta. C.A.).

29 In this case Cst. Hilbert's grounds consisted of what he had learned via the broadcast about the driving, his observations of the accused and the results of the roadside screening test[1].

30 The Crown concedes that without the ASD result the remaining grounds are insufficient and the search would be unreasonable and in breach of the *Charter*.

31 The accused raises three issues in connection with the ASD:

(i) Did Cst. Hilbert have the grounds to make the demand for the ASD test?
(ii) Could Cst. Hilbert rely on the results of the ASD test?
(iii) Was the ASD test conducted forthwith?

I will deal with each point in turn.

i. Did Cst. Hilbert have the grounds to make the demand for the ASD test?

32 Section 254(2) provides (edited to focus on the point in issue):

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle ... or had the care or control of a motor vehicle ... whether it was in motion or not, the peace officer may, by demand, require the person...
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

33 In Alberta, the seminal case on this section is *R. v. Gilroy* (1987), 79 A.R. 318, 3 M.V.R. (2d) 123 (C.A.). In that case the Court of Appeal held that the test for the suspicion is one of consumption alone:

> The essence of the offence is ascertainable, although the citizen affected might have hoped that Parliament could define, in less than 120 words, a positive obligation carrying criminal consequences, for a mere failure to act. The offence does not call for proof beyond a reasonable suspicion that the suspect driver has alcohol in his body, a valid demand and an invalid refusal. Legislative priority has removed the process from the judge's consideration of the degree of impairment that is displayed before the demand is made. The test is consumption alone and not its amount or behaviourial consequence. Authority for this beyond the wording of the section, includes Hebb (1985), 17 C.C.C. (3d) 545; Talbourdet (1984), 12 C.C.C. (3d) 173 and Altseimer (1983), 1 C.C.C. (3d) 7. As irritating and seemingly intrusive as the process may be to the consuming but still sober driver, the requisites of the crime of refusing the demand fell to Parliament alone.

34 The statement by the accused that he had consumed two gin and tonics is an admission of consumption and is therefore capable of providing a basis for the reasonable suspicion.

35 The accused argues that this admission cannot support a reasonable suspicion because it is vague as to time. He argues that Cst. Hilbert should have asked further questions to establish when the alcohol was consumed before he could conclude that he had a reasonable suspicion. He bases this argument on *R. v. Hnetka* [2007] A.J. No. 806.

36 In *R. v. Hnetka, supra,* the accused admitted consuming alcohol "a while ago". My colleague concluded that this response was ambiguous with respect to the time of consumption and since the officer chose not to ask any more questions, he had no real knowledge when alcohol was consumed. See para 16.

37 This case is very different on its facts. Here, the admission of consumption is in response to the question, "have you had anything to drink this evening". There is nothing vague or ambiguous about either the question or the answer.

38 In any event, whether there is any need for an officer to address questions of timing of consumption has recently been the subject of comment in the Court of Appeal.

39 In the reasons dismissing a leave application in *R. v. Ishmael*, 2012 ABCA 282, at para 11 it was noted that:

> "Although the first question raises a question of law, it is not of sufficient public importance so as to justify an appeal to this court. The law on this issue is well settled. Starting with this court's decision in R. v. Gilroy (1987), 79 A.R. 318

> (Alta CA), [1987] A.J. No. 822, an admission of consumption of alcohol is sufficient to meet the objective part of the test under s 254(2). It is unnecessary to analyze the behaviourial consequences. Numerous Court of Queen's Bench decisions have followed Gilroy and have found that other evidence about timing or amount of consumption need not be pursued to support this proposition: See R. v. Thomas, 2008 ABQB 610, 461 A.R. 216; R. v. Orcheski, 2011 ABQB 280, 517 A.R. 150; and R. v. Chipchar, 2009 ABQB 562, [2009] A.J. No. 1058.

40 Accordingly this argument fails. The admission of consumption by the accused gave Cst. Hilbert the grounds to make the demand for the ASD.

ii. Could Cst. Hilbert rely on the results of the ASD test?

41 In *R. v. Black*, 2011 ABCA 349, the Court of Appeal observed that the law does not require the Crown to prove that an ASD that is approved under the statutory scheme was working properly. Rather, the issue is whether "the officer can reasonably and honestly rely on its accuracy unless there is evidence that the officer knew or believed that it was not working properly". See *R. v. Black, supra* at para 44, *R. v. Bernshaw*, (1995), 95 C.C.C. (3d) 193 (S.C.C.) at para. 80, and *R. v. Biccum* [2012] A.J. No. 234 (Alta. C.A.).

42 The defence argument is that the failure of Cst. Hilbert to note the operating temperature of the device constitutes evidence that the officer did not know or could not believe that the device was working properly and this makes the result unreliable. Thus the subjective belief of the officer that the device is working properly is not objectively reasonable.

43 In support of his argument counsel for the accused cites two decisions from the Provincial Court of British Columbia, *R. v. Gill* [2011] B.C.J. No. 2383 and *R. v. Baldeon* [2012] B.C.J. No. 70. In his written argument, defence counsel also relies on *R. v. McKeith*, an unreported decision of my colleague Judge Demetrick from October 28, 2010. It is summarized in the argument of the defence as follows: "No evidence was led as to whether the officer took steps to satisfy himself that the roadside device was working properly. Demetrick J. held that there was no basis for the Court to find the officer was justified in relying on the "fail" result."

44 In *R. v. Gill*, the learned trial judge concluded that "it does not appear on the evidence before me that she [the officer] ever turned her mind to this issue before performing the test. Again, she agreed that she was unable to give us any evidence to support the proposition that the temperature was in the range required to produce a reliable test result". See para 20.

45 In *R. v. Baldeon*, the learned trial judge noted that the officer conceded that she had not conducted the test properly because she had not checked the temperature and she later found out that the machine will not give a reliable result if it is not within the proper temperature. She also

testified that the device "... will produce a test result without any warning to the operator that the temperature is outside the proper range..." at para 42.

46 In her written argument Crown Counsel notes that she was unable to find any other cases which deal with this issue or cite these cases, "particularly none in Alberta".

47 I begin by noting that while the British Columbia cases can be persuasive, they are not binding on me.

48 Bearing in mind that the issue is whether Cst. Hilbert's belief was objectively reasonable, I return to the evidence. I add that I accept his evidence on this point. Cst. Hilbert was able to rely on contemporaneous notes which aided his memory in describing the events. I find that his testimony is credible.

49 Cst. Hilbert testified that he used an Alco-Sensor FST. Cst. Hilbert has been trained in its use and so is a qualified operator of the device, which he testified was an approved screening device. Indeed, this device is listed in the *Approved Screening Devices Order* SI/85-200.

50 It took him one to two minutes to get the ASD ready to take the sample. When he turned it on there were no error signs or warnings. The label indicated that it was within the calibration dates (calibration expired May 10). When he put the straw (he later says mouthpiece; it's a hollow plastic tube so he calls it a straw) into the ASD, it indicated that it was ready to take the sample.

51 He explained to the accused how to provide the sample and the accused appeared to follow his instruction because the tone sounded when the sample was taken. Cst. Hilbert understood this meant that the accused produced a suitable sample. In his opinion the ASD was functioning properly and was able to give an accurate result.

52 In cross-examination, he agreed that the instructions say "check the temperature", because the result will not be accurate if the temperature is wrong. However, he did not know what the temperature should be or what the temperature of the ASD was and he has no notes on this point. Since the ASD worked, he assumed that the temperature was within the acceptable range. He could not say if the ASD will appear to work properly but because it is outside the temperature range the results could be faulty.

53 However, since the device gave him the appropriate notifications before he used it, he believed that the temperature "would have to be" within the range.

54 He was specifically asked about his belief in the accuracy of the reading:

> A. It - yeah, it indicates the temperature and then it indicates when it's ready to - for the person to begin using it, and it just says B-L-O, blow, and those indications would have to - I would have to see those in order to use the

machine. If there were any other error messages or anything like that, I wouldn't use the machine.

Q MS. SMITH: And I know you are not able to tell us the temperature, you didn't note it, but did you form an opinion as to whether or not that ASD was working when you conducted the test?

A Yes. I formed the opinion that it would be able to take an adequate sample of breath.

Q And in regards to its ability to give you an adequate - an accurate result, did you form an opinion as to its ability to give an accurate result?

A Yes, I did. I believed everything was functioning correctly on the machine, it was within the calibration dates, and had not expired yet, so I believed it to be able to provide an accurate reading of the blood alcohol concentration of the subject.

55 In my view this evidence shows that, according to his training on the ASD, nothing in the operation of the ASD that night gave Cst. Hilbert any reason to question whether it was working properly. In light of the fact that the ASD was within its calibration date and that it gave no error messages, his failure to either check the temperature or to make any note of it does not give any objective basis to conclude that the result might not be reliable. Indeed, it would be speculative to conclude the opposite and such speculation cannot form the basis for concluding that Cst. Hilbert did not have objective grounds.

56 I find that this evidence is significantly different than the evidence in either *R. v. Gill* or *R. v. Baldeon* and so the rulings can have no application here.

57 In any event, I would not follow these cases. In light of the jurisprudence such as *R. v. Black, supra* and *R. v. Bernshaw, supra* and the limited role of the device in the investigation, acting only as a screening device, in the absence of any warning or error message indicating that there is an issue with the device, there is no need for the officer to concern himself with the temperature.

58 On the evidence before me I conclude that Cst. Hilbert had an honest subjective belief that the machine was operating properly and objectively that belief was reasonable.

59 This argument fails.

iii. Was the ASD test conducted forthwith?

60 The governing section requires the accused to "provide forthwith a sample of breath" (see section 254(3) of the *Criminal Code* as cited in paragraph 31, *supra*).

61 I return to the evidence. Cst. Hilbert arrived on scene at 22:22. Within five minutes, Cst.

Hilbert had come to the conclusion that he had the grounds to demand a breath sample into an approved screening device and he called for one at 22:27. The device was on scene within 8 minutes (22:35) and Cst. Hilbert made the demand one minute later (22:36). The test was conducted and the result obtained within 8 minutes, at 22:44. The total time elapsed from the formation of the grounds to the result of the test was 17 minutes.

62 The case law defines "forthwith", as that word is used in the section, to mean "immediately or without delay". See *R. v. Woods* [2005] 2 S.C.R. 205.

63 The defence argues that the demand should have been made immediately upon the formation of the grounds, not when the officer had possession of the device and was in a position to take the test forthwith. Alternatively, he argues that the accused should at least have had notice that the officer had called for the device and was waiting for it.

64 In my view neither argument can succeed. The requirement is that the test be administered forthwith after the peace officer concludes that he has the grounds for the demand. Alberta jurisprudence is clear: it makes no difference if he gives the demand and then waits or if he waits and then, when he has the device in hand and can proceed with the test, makes the demand. See *R. v. Martens*, 2008 ABQB 223 at para 62, leave to appeal dismissed 2008 ABCA 283. Accordingly the fact that the officer waited for the device before making the demand is in conformity with the law.

65 The accused drew my attention to cases, primarily from other jurisdictions, on this point. *R. v. Allen* [2004] O.J. No. 5793, *R. v. Nicolle* [2002] O.J. No. 5229, *R. v. Muirhead* [2006] A.J. No. 854 2006 ABPC 183, *R. v. Singh* [2000] O.J. No. 4992 para. 37, and *R. v. Janeiro* [2003] O.J. No. 5135. However, I prefer to follow the Alberta jurisprudence and believe that paragraph 62 in *R. v. Martens, supra* is an accurate summary of that jurisprudence.

66 Nor does the total time elapsed raise any questions. The device arrived within 5 minutes of the request, the demand was made and the test taken. The time lapse between demand and result (8 minutes) raises no concern: it was occupied with explaining the process to the accused and administering the test. Therefore I find that the test was taken forthwith within the meaning of the section.

67 The accused also argued that at the least Cst. Hilbert should have given him notice that he had sent for the device. I can find no Alberta authority to support this argument. As I understand the cases in the Supreme Court of Canada, there is no expectation that an officer will do this. I would not add this to his duties.

68 In conclusion, the Crown has established that Cst. Hilbert was entitled to rely on the ASD result for his grounds. There being no successful attack on the ASD results, I find that he had reasonable grounds to make the breath demand and there is no breach of section 8 of the *Charter*.

2. Did Cst. Hilbert breach section 10(b) of the Charter by his failure to provide the accused with a reasonable opportunity to consult with counsel at the roadside while they were waiting for the approved screening device to arrive?

69 In summary the argument here is that the accused should have been permitted to call a lawyer from the roadside, while they were waiting for the arrival of the ASD.

70 This argument fails.

71 It is well established that the operation of s. 10(b) is suspended at the roadside. See *R. v. Orbanski*, *supra; R. v. Elias*, [2005] S.C.J. No. 37. At law, Cst. Hilbert was not required to provide the accused a reasonable opportunity to consult counsel then and there.

72 Furthermore it is difficult to see how Cst. Hilbert could provide a reasonable opportunity at the roadside. The elements of reasonable opportunity are: ensuring that a detainee has the information available to permit him to contact counsel of choice, privacy to speak with that counsel and the time and the means to do it.

73 There is no evidence that the accused had a telephone (the means) with him. There is also no evidence that Cst. Hilbert could give the accused any information about available lawyers at the roadside - no evidence that he had the telephone number for free legal advice or that he had telephone books or a list of lawyers that accept this type of call with him.

74 Lastly, it is difficult to see how Cst. Hilbert could ensure that the accused had privacy to make the call from the back seat of the police car. I note that some of the cases refer to the right as one to consult and note that there is a difference between a consultation and a conversation (see *R. v. Torsney*, [2007] O.J. No. 355 (C.A.) at para 13, leave refused [2007] S.C.C.A. No. 126; *R. v. Cloutier*, [2008] O.J. No. 670 (S.C.J.) at para 27-28). I find it difficult to see how a consultation could take place in the back of the police car.

75 Accordingly there is no breach of section 10(b).

76 Although sections 7 and 9 were also raised, they add nothing to the arguments made and were not pursued. Therefore I will not address them.

3. Should the results of the breath test be excluded?

77 Given that I have found no breaches, I will not comment in detail on section 24(2). I will only say that these breaches are of such a nature that the *Grant* criteria would not justify exclusion: [2009] 2 S.C.R. 353, 66 C.R. (6th) 1, 245 C.C.C. (3d) 1. Had I found a breach of either section 8 or 10(b), while there are elements of some minor degree of seriousness to them, the degree of seriousness is not overwhelming and the impact on the rights protected would be minimal. Indeed, it

would be somewhat ironic to find a breach of section 10(b) at this point when, later in the investigation, the accused refused the reasonable opportunity to consult counsel. In the end the evidence produced, the breath results, were highly reliable and necessary for the Crown's case. Therefore, I would have admitted it in any case.

4. Has the Crown proven the count of impaired operation beyond a reasonable doubt?

78 I now turn to the question of whether the Crown has proven the case of impaired operation beyond a reasonable doubt. I do so because this is the manner in which the evidence and the arguments were presented and counsel were in agreement that I deal with this issue at this point.

79 The law on this offence is clearly set out in *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 at 384 (Ont. C.A.): has the Crown proven impairment of the ability to drive to any degree from slight to great beyond a reasonable doubt?

> [14] In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the evidence has been made out.

80 Our Court of Appeal in *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 at 405, sets out some observations on the method of analysis required of a trial judge where as here the proof of impairment of the ability to drive is based on empirical observation.

> [29] ...
>
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

81 I return to the evidence of the only witnesses to see the accused operating his motor vehicle: Mr. de la Salle and Ms. Thompson. I begin by noting that I accept their testimony. I find them to be honest witnesses who were doing their best to accurately recall what they saw and did that night. They gave written statements directly after the incident and used them to refresh their memory.

82 As noted, they were returning home after an Oil Kings game. Ms. Thompson was driving, Mr. de la Salle was the passenger.

83 They first noticed the accused's vehicle on 50th Street, just north of the Whitemud Freeway. It was in the lane to the left of them. The vehicle was "leaning" or swerving toward the median. At the last second, just before hitting the median, the vehicle would swerve back into its proper lane. Mr. de la Salle saw this happen two or three times.

84 On one of those "swerving back into the lane" moves, Ms. Thompson noted that the vehicle jolted to the right and came into her lane. She believed that the vehicle almost collided with her vehicle on the front driver's side.

85 At this point, Ms. Thompson backed off and got behind the vehicle and Mr. de la Salle called the police. The operator told them to follow the vehicle if they felt comfortable doing so but to keep a safe distance and drive safely. They followed the vehicle for what Mr. de la Salle thought was 15 or 20 minutes; Ms. Thompson thought it was closer to half an hour.

86 Ms. Thompson is very familiar with the Millwoods area and was able to specify the route: south on 50 Street to 34 Avenue, then east on 34 Avenue to Millwoods Road where he turned right onto Millwoods Road. As he drove on Millwoods Road she noticed him swerve again. He sped up towards the four-way stop. He did stop there and then continued along Millwoods Road to 23 Avenue, where he turned right to go west. At this point she thought he was going probably 75 or 80 kilometres per hour. He next turned right onto 50th Street to go north. He sped up to 80 kms per hour. He turned right onto 28 Avenue and about a hundred feet before the three way stop sign, he stopped and turned on his four way flashers. He then drove towards the stop sign and in fact turned right without stopping. He accelerated, reaching estimated speeds of 90 kms per hour on the residential street. When he reached the original four-way stop back on Millwoods Road, he went through it without stopping[2] and then, after a route that took him three left turns, he drove into the driveway and stopped.

87 Mr. de la Salle, on the other hand, had little familiarity with the area and was unable to give his evidence with the same degree of precision as Ms. Thompson. However, his evidence agreed with hers in its broad outlines. He remembers the vehicle they were following straddling the lanes and not signalling turns. At one point, they were on a two-lane road in a residential area and the accused was in the oncoming lane. However, Mr. de la Salle also agreed that it was late and there was no one coming from the opposite direction.

88 Mr. de la Salle also recalls the accused stopping for a brief second and turning on his four-way

flashers. Then he "blasted through a four-way stop" with the flashers still on. Mr. de la Salle thought that the vehicle was driving at a "reasonably high" rate of speed and that the driver changed lanes without signalling.

89 Throughout this incident, Ms. Thompson and Mr. de la Salle were able to keep the vehicle in sight, although they lost sight of it now and again when it turned a corner. However, they regained sight of it almost immediately.

90 When the accused parked in the driveway, Ms. Thompson stopped, turned around, parked and kept watch on the vehicle. She saw a man get out of the vehicle from the driver's side.

91 The police arrived almost as soon as she did; within 30 seconds to a minute after her. The police confronted the driver as he was getting out of the vehicle. Then a police officer told her to go around the corner and stop. She did.

92 Throughout the incident Ms. Thompson could see only one person in the vehicle, the driver. Mr. de la Salle was unable to see how many people were in the car, but when it stopped only one person, the man the police confronted got out. On cross examination he did agree that by the time the police arrived it was dark out.

93 Ms. Thompson believed that the accused realized they were following him when he turned onto Millwoods Road because it was at this point that he started to speed up. She referred to the incident at the three-way stop. She interpreted this manoeuvre as the accused trying to either evade her or scare her off. She agreed that he did not run any red lights and that he did not hit any cars. The two infractions she noted were speeding and failing to stop at the three-way and the four-way stops.

94 Mr. de la Salle had no specific memory of the vehicle running any red lights on 50 Street, nor can he recall if it stopped for a red light. However, since they were able to stay with the vehicle he thought the traffic lights must have been green or amber.

95 On cross examination Ms. Thompson admitted that in the course of this incident she had committed traffic infractions such as speeding. She did, however, stop at the stop signs.

96 As noted, I find these witnesses are honest and I accept their description of the driving pattern. I find that this pattern demonstrates a sufficient deviation from the norm to lead me to conclude that the ability of the accused to operate his motor vehicle was impaired. The pattern shows a clear failure to control the vehicle.

97 The question then becomes the role of alcohol - was it the cause of the impaired ability to operate the motor vehicle?

98 Cst. Hilbert's observations of the accused included bloodshot eyes, difficulty producing

documents, wavering while he stood in place and the odour of alcohol on his breath (noted after his arrest). These observations are signs of consumption of alcohol and offer evidence that the cause of the impairment of the ability to drive was the consumption of alcohol. The Crown, however, does concede that the evidence of consumption is weak.

99 However, the Crown argues that I may use the results of the Certificate of Analyst to corroborate Cst. Hilbert's observations of the signs of consumption of alcohol and the conclusion that the cause of the impairment to operate the motor vehicle was alcohol. See *R. v. Rogers* (1976), 55 C.C.C. (2d) 181 (B.C.C.A.). Crown counsel also directed by my attention to *R. v. Goheen*, 2010 ABPC 146, and the line of cases referred to in that decision.

100 In particular she relies on the following passage from *R. v. Letendre* (1989), 97 A.R. 339 (Alta. Prov. Ct.) at para 26 where my colleague Judge Ayotte said:

> The s. 253(a) (impaired driving) charge is more problematic. On the evidence presented apart from the breathalyzer certificate, there would of necessity have been some doubt concerning impairment, but when that latter piece of evidence is added, the doubt disappears. In saying that I acknowledge that no expert evidence was called by the Crown to relate the readings obtained to the question of impairment. Nonetheless, the readings reflect a blood-alcohol level three times the legal limit and that fact added to the observations of the other Crown witnesses is sufficient in my view to ground a finding of impairment.

101 Counsel for the accused does not agree with the effect of the cases and points out that in the absence of expert evidence explaining the relationship between the reading and the impairment of the ability to drive, the readings themselves mean nothing. However, he does appear to concede that the only thing the readings on the certificate would show is that the accused had been consuming alcohol.

102 I agree that without expert evidence to tie the readings into the ability to operate the motor vehicle, I cannot use the certificate as evidence of impairment of the *ability* to operate the motor vehicle. However, in my view, the certificate can be used to corroborate the investigators observations of insobriety and thus strengthen the conclusion that the impairment of the ability to drive was by reason consumption of alcohol. See *R. v. Goheen, supra*, at para 49 where Judge Rosborough notes:

> The question of whether evidence that the accused's blood/alcohol level at the time of driving could corroborate an investigator's observations was addressed as a question of law in the case of R. v. Rogers (1976), 55 C.C.C. (2d) 181 (B.C.C.A.) ('Rogers'). The qualified technician in that case testified that the accused's blood/alcohol level at the time of driving was, presumptively, 190 mg.% and the trial judge found this to be corroborative of the investigator's observations of insobriety. On appeal, the court was called upon to determine

whether, as a matter of law, the trial judge erred in using this evidence as corroboration.

103 In this case the readings are 140 and 130 milligrams per cent. While they are not in the same range as the readings referred to by my colleague in *R. v. Letendre, supra* I find that they still offer corroboration of Cst. Hilbert's evidence relating to insobriety and support the conclusion that the reason for the impairment was the consumption of alcohol.

104 Accordingly, I am satisfied that the Crown has proven that the driving pattern does fall within the marked departure from the norm and given the corroboration of the observations of the constable provided by the readings on the certificate, that alcohol consumption is the reason for this marked departure.

105 There being no other objections to the Certificate of Analyst, it was entered as Exhibit 1 on the trial. The readings being over .08 I convict the accused on count 2; operating a motor vehicle with more than the legal limit of alcohol in his blood. For the reasons given, I also convict him of impaired operation of a motor vehicle.

S.R. CREAGH PROV. CT. J.

1 In the evidence Cst. Hilbert used the term "roadside screening device" and "ASD" (approved screening device) interchangeably. In my judgment I will use the abbreviation "ASD" to refer to the approved screening device.

2 Upon proofreading these reasons to the transcript I determined that I stated in error that he did not stop on his first approach to the four-way sign. In fact, according to the evidence, he did stop on the first time but not the second.