

Case Name:
R. v. Manku

Between
Her Majesty the Queen, and
Amarjit Manku, Accused

[2010] A.J. No. 819

2010 ABPC 225

34 Alta. L.R. (5th) 188

2010 CarswellAlta 1393

89 W.C.B. (2d) 119

Docket: 091036343P1

Registry: Edmonton

Alberta Provincial Court

J.T. Henderson Prov. Ct. J.

Heard: June 8, 2010.

Judgment: July 7, 2010.

(68 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Breathalyzer or blood sample demand -- Reasonable and probable grounds -- Application by accused charged with impaired driving and driving while over the legal limit to exclude the evidence on the grounds of an alleged breach of his s. 8 Charter rights dismissed -- The officer in question had reasonable grounds to make the breath sample demand -- The combination of the driving pattern and the indicia of impairment, which included bloodshot eyes, unsteadiness, profuse sweating, and the admitted consumption of five beers, satisfied the court the subjective belief of impairment was objectively reasonable in the circumstances -- Canadian Charter of Rights and Freedoms, s. 8.

Criminal law -- Constitutional issues -- Legal rights -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Application by accused charged with impaired driving and driving while over the legal limit to exclude the evidence on the grounds of an alleged breach of his s. 8 Charter rights dismissed -- The officer in question had reasonable grounds to make the breath sample demand -- The combination of the driving pattern and the indicia of impairment, which included bloodshot eyes, unsteadiness, profuse sweating, and the admitted consumption of five beers, satisfied the court the subjective belief of impairment was objectively reasonable in the circumstances -- Canadian Charter of Rights and Freedoms, s. 8.

Application by accused charged with impaired driving and driving while over the legal limit to exclude the evidence on the grounds of an alleged breach of his s. 8 Charter rights. On the day in question, the accused was stopped for speeding. The arresting officer, Harsch, noted the accused appeared to be dazed, he had glossy eyes and was in a deep stare, his hands were shaking and unsteady, and he had a strong odour of alcohol on his breath. While dealing with the accused, the police received a report of a possible impaired driver, and the vehicle reported matched that of the accused. After being asked to exit the vehicle, the accused was observed to be unsteady on his feet. He was arrested by officer Harsch for impaired driving at that point. A second officer, Keith, subsequently took custody of the accused, observing the accused's eyes were bloodshot and he was sweating profusely. Keith also overheard a conversation with Harsch where the accused stated he had had five beers that night. Although Harsch did not report to Keith the observations that caused him to arrest the accused for impaired driving, Keith formed the opinion the accused's ability was impaired by alcohol precisely at the time the accused was arrested by Harsch. The issues were: (1) whether Keith violated the accused's s. 8 rights by demanding a breath sample without reasonable grounds; and (2) if so, should the evidence be excluded from trial.

HELD: Application dismissed. The police officer, Keith, did have reasonable grounds to demand a breath sample. Based on the evidence of Keith, Keith heard the radio broadcast reporting on a suspected impaired driver in a motor vehicle matching the description of the accused's vehicle prior to making the first breath demand, and this was a factor that could be taken into consideration. The evidence available to Keith at the time he made the breath demand included the accused's driving pattern with an excessive rate of speed, bloodshot eyes, the accused was unsteady on his feet, he was sweating profusely, the radio broadcast of a suspected impaired driver, and the accused's admission of the consumption of five beers. Based on Keith's evidence, he had an honest subjective belief that reasonable grounds existed to demand a breath sample. This subjective belief was objectively reasonable. The accused's vehicle was travelling 100 km/hr in a 60 km/hr zone, amounting to grossly excessive speed. The combination of the driving pattern and the indicia of impairment satisfied the court the subjective belief of impairment was objectively reasonable in the circumstances. There was therefore no breach of s. 8 of the Charter. Alternatively, the court would not have excluded the evidence from trial. On the scale of seriousness, any breach by Keith was at the lowest end of the scale, and the balance fell in favour of inclusion of the evidence, as excluding

it would bring the administration of justice into disrepute.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 253(1)(a), s. 253(1) (b), s. 254(3)

Counsel:

B. Malo, for the Crown.

B. Mohan, for the Accused.

Ruling on Voir Dire

J.T. HENDERSON PROV. CT. J.:--

I. Introduction

1 The Accused is charged with the operation of a motor vehicle while his ability to do so was impaired by alcohol contrary to s. 253(1)(a) of the *Criminal Code*. The Accused is also charged with the related offence of operating a motor vehicle after having consumed alcohol in such a quantity that his blood alcohol level exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Criminal Code*.

2 A *Charter* notice was filed on behalf of the Accused which alleged that police did not have reasonable grounds to demand a breath sample from him and, as a result, the Accused submits that his s. 8 *Charter* rights have been violated. The *Charter* notice asserts that the appropriate remedy for the *Charter* breach is the exclusion of evidence pursuant to s. 24(2) of the *Charter*.

3 For the reasons which follow I conclude that police did have reasonable grounds to demand a breath sample and that the Accused's rights under s. 8 of the *Charter* have not been violated.

II. Relevant Facts

4 On August 2nd, 2009 shortly before 2:00 a.m. Cst. Brad Harsch ("Harsch") and Cst. Michael Keith ("Keith"), were members of the Edmonton Police Service ("EPS") and were on patrol in a marked EPS patrol wagon. Harsch was the operator of the patrol wagon and Keith was the passenger. They had just left the Old Strathcona Police Station and were facing in an easterly direction about to make a lefthand turn onto Gateway Boulevard. At that point Gateway Boulevard

is a major one-way northbound thoroughfare leading to Whyte Avenue. The traffic on Gateway Boulevard was light.

5 The police officers observed a white Mercedes Benz motor vehicle travelling at a high rate of speed approaching their position from the south. They estimated that the speed of the Mercedes was approximately 100 kilometres per hour. At that point Gateway Boulevard has a speed limit of 60 kilometres per hour.

6 Harsch was concerned about the speed of the Mercedes Benz, particularly because it was approaching Whyte Avenue which was, at that time, still very busy with pedestrian traffic. As a result, Harsch activated the emergency lights on the patrol wagon, hoping that by doing so the Mercedes Benz would slow down before reaching Whyte Avenue.

7 After the Mercedes Benz passed their location, police turned onto Gateway Boulevard northbound in pursuit. The Mercedes Benz turned left at 80th Avenue and began to travel in a westerly direction until it came to a stop just before reaching 104th Street.

8 At 1:58 a.m. Harsch brought the patrol wagon to a stop behind the Mercedes Benz and exited the patrol wagon. An individual, who was subsequently identified as the Accused, was in the driver's seat of the Mercedes Benz with the window rolled down. Harsch advised the Accused that his vehicle had been stopped by police because it had been travelling at an excessive rate of speed. Harsch then asked that the Accused produce his driver's licence, registration and insurance documents. The Accused complied with this request.

9 While he was speaking to the Accused, Harsch noted several signs of potential impairment, including the following:

- a) the Accused appeared to be dazed;
- b) the Accused had glossy eyes and was in a "deep stare"; and
- c) while the Accused was retrieving the documents his hands were shaking and unsteady. Harsch concluded that this was not attributable to nervousness because, in Harsch's view, the Accused was otherwise calm.
- d) the Accused had a strong odour of alcohol on his breath.

10 Based upon these observations Harsch asked the Accused to turn off the ignition and to exit the motor vehicle.

11 While Harsch was dealing with the Accused, Keith remained in the patrol wagon and was conducting a computer search with respect to the Mercedes Benz. While he was doing so Keith heard a broadcast over the police radio which alerted patrol members to information received from an anonymous caller that a suspected impaired driver had just left the Ramada Inn on 53rd Avenue. A description of the vehicle, including the licence plate number, was provided over the radio broadcast. Keith noted that the vehicle description and the licence plate which had been reported

matched that driven by the Accused.

12 When he heard the radio broadcast Keith exited the patrol wagon and approached Harsch. At that time the Accused was exiting the Mercedes Benz. Both police officers observed that while the Accused was moving to the rear of the Mercedes Benz he was unsteady on his feet. Harsch described this unsteadiness as a "swaying from side to side".

13 At 2:00 a.m. Harsch advised the Accused that he was under arrest for impaired driving. He did so because he had formed the opinion that the Accused's ability to operate a motor vehicle was impaired by alcohol.

14 Because Harsch was performing duties of an acting sergeant that evening, and because his duties required him to have the patrol wagon in the Whyte Avenue area, Harsch turned the Accused over to Keith for further handling. No discussions took place between Harsch and Keith regarding the observations made by Harsch which resulted in the arrest being effected.

15 After turning the Accused over to Keith, Harsch conducted a search of the Mercedes Benz and found 2 opened 73 millilitre bottles of Rock Star vodka on the floor in the rear passenger area. Both of these bottles were half full. He then seized the motor vehicle.

16 Immediately before he took custody of the Accused, Keith observed that the Accused's eyes were bloodshot and that he was sweating profusely. In addition he overheard a portion of the conversation between Harsch and the Accused. Keith remembers hearing the Accused say that he had 5 beers that night, although he did not hear the question which Harsch apparently asked and which the Accused was responding to at that point. It should be noted that Cst. Harsch has no memory of specifically asking the Accused how much he had to drink that evening.

17 Based on his own observations of the speed of the Accused's motor vehicle, the unsteadiness the Accused while moving to the back of the vehicle; the statement of Accused with respect to "5 beers" and also based on the radio broadcast regarding the potential impaired driver leaving the Ramada Inn, Keith formed the opinion that the Accused's ability to operate a motor vehicle was impaired by alcohol. He formed this opinion without speaking to Harsch. Specifically Harsch did not report to Keith the observations which he had made which caused him to arrest the Accused for impaired driving. Keith formed his opinion that the Accused's ability to operate a motor vehicle was impaired by alcohol at 2:00 a.m., precisely the time that the Accused was arrested by Harsch and approximately 2 minutes after the Accused's vehicle had been stopped.

18 It should be noted that Keith does not have a sense of smell and therefore he did not detect, and could not have detected, any odour of alcohol coming from the Accused.

19 After the Accused was arrested, he was placed in the back of the patrol wagon. Keith then spent approximately 9 minutes making a series of calls to arrange for a police vehicle to transport the Accused to the police station, to arrange for a breathalyzer technician to be available at the

police station and to advise a supervisor of the arrest. Also during this time Keith made a number of entries in his notebook.

20 At 2:09 a.m. Keith read the Accused his *Charter* rights. A brief discussion took place between Keith and the Accused regarding such things as the number of calls which could be made and the persons who could be called. Based on these discussions it was clear to Keith that the Accused wished to exercise his right to speak to counsel.

21 At 2:10 a.m. Keith read the Accused the standard Caution. Keith did not ask the Accused whether he wanted to say anything but it was clear to Keith that the Accused wanted to make no further statements. Also at 2:10 a.m. Keith read to the Accused the first demand for a breath sample and the Accused indicated that he would comply with the demand.

22 At 2:15 a.m. a patrol car arrived at the scene to transport the Accused and Keith to the Southwest Division Police Station. They departed the scene at 2:18 a.m. and arrived at the station at 2:24 a.m. The Accused was placed in the phone room at 2:27 a.m. Keith checked to ensure that the phone was working and instructed the Accused to dial "9" to initiate the calls. He then showed the Accused the phone books and the 1-800 Legal Aid number and then left the Accused so that any calls could be made in private.

23 At 2:45 a.m. the Accused exited the phone room and was taken before a qualified technician, Cst. Penne. At that time a second demand for a breath sample was made.

24 Breath samples were provided by the Accused into an Intoxilyzer C (an Approved Instrument in accordance with Can. Reg. SI/85-201) at 2:49 a.m. and 3:10 a.m. Between the first and the second samples the Accused said to Keith that "it looks like I'm not going to be a cop now - I did something stupid". Keith concluded that the Accused was being remorseful.

III. Issues

25 While the *Charter* notice filed on behalf of the Accused raises a number of issues, the only issues which the Accused pursued during the *Voir Dire* were the following:

1. Did Cst. Keith violate the Accused's rights under s. 8 of the *Charter* by demanding a breath sample without having reasonable grounds for doing so?
2. If the Accused *Charter* rights were violated, should evidence of the results of the breath samples be excluded from evidence in accordance with s. 24(2) of the *Charter*?

IV. Discussion

A - Reasonable Grounds to Demand a Breath Sample

(1) Positions of the Parties

26 The Accused argues that Keith did not have reasonable grounds to demand a breath sample. He argues that while some indicia of impairment were observed by Keith, these indicia were not sufficient to support a breath demand. The Accused therefore argues that his s. 8 *Charter* rights have been violated.

27 The Accused also argues that the Court should not take into consideration one of the factors which Keith said he relied upon in forming his grounds to make the breath sample. Specifically, he argues that the evidence of the radio broadcast reporting on the suspected impaired driver leaving the Ramada Inn was not evidence available to Keith at the time that he formed reasonable grounds. The position of the Accused is based upon the fact that the entry in Keith's notebook with respect to that radio broadcast was made subsequent to 2:10 a.m. when the breath demand was made. In his evidence Keith explained that the radio broadcast was heard by him while he was in the patrol wagon and before he had any contact with the Accused. He further said that he did not make a notebook entry with respect to the broadcast until time permitted the entry to be made. Keith explained that this was after the demand for the breath sample had been made.

28 I am satisfied on the evidence of Keith that he did hear the radio broadcast reporting on a suspected impaired driver in a motor vehicle matching the description of the Accused's vehicle, prior to making the first breath demand and therefore this is a factor which can properly be taken into consideration in assessing whether the grounds for the breath demand were reasonable under the circumstances.

29 The Crown argues that there was more than sufficient evidence available to Keith to permit him to form reasonable grounds to demand a breath sample. As a result the Crown argues that the Accused's rights under s. 8 *Charter* have not been violated.

(2) General Principles - Section 254(3) Demand for Breath Sample

30 Section 8 of the *Charter* provides that "Everyone has the right to be secure against unreasonable search or seizure". Taking a breath sample from an Accused person is a search and seizure within the meaning of s. 8 of the *Charter*.

31 Since s. 8 only protects against "unreasonable" search or seizure, then any search or seizure which is reasonable will not offend the section. A search will be reasonable if it is authorized by law, the law itself is reasonable and the search is carried out in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265). To be authorized by law the search must be permitted by a specific statutory or common law rule, must be carried out in accordance with the procedural and substantive requirements the law provides and must be limited in scope to the area and to those items for which the search has been authorized (*R. v. Caslake*, [1998] 1 S.C.R. 51).

32 The demand by police for the Accused to provide a breath sample was made in accordance with s. 254(3) of the *Criminal Code*. Because this type of search is made without a warrant it is presumptively unreasonable and the Crown has the onus to justify the search (*Hunter v. Southam*, [1984] 2 S.C.R. 145).

33 A demand for a breath sample under s. 254(3) is lawful only if the police officer making the demand has "reasonable grounds" to believe that the person to whom the demand is made has, within the preceding 3 hours, operated a motor vehicle while his ability to do so was impaired by alcohol. The degree of impairment of the ability to operate a motor vehicle is not a factor in assessing "reasonable grounds" since the offence of impaired driving can be established on proof of even slight impairment of the ability to operate a motor vehicle; *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.) aff'd [1994] 2 S.C.R. 478; *R. v. Andrews* (1996), 178 A.R. 182 (Alta. C.A.).

34 The requirement that a police officer have "reasonable grounds" to demand a breath sample is not only a statutory but also a constitutional requirement and is a precondition to a lawful search and seizure under s. 8 of the *Charter* (*R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 51).

35 The Supreme Court of Canada in *R. v. Shepherd*, 2009 SCC 35; [2009] 2 S.C.R. 527 discussed the grounds necessary for a breath demand and has reaffirmed its decision in *Bernshaw* which made it clear that "reasonable grounds" entails both a subjective and an objective component. In *Bernshaw* at para. 49 Mr. Justice Sopinka said the following:

"The *Criminal Code* provides that where a police officer believes on reasonable and probable grounds that a person has committed an offence pursuant to s. 253 of the *Code*, the police officer may demand a breathalyzer. The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, 254(3) of the *Code* requires that a police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief."

36 In *R. v. Cuthbertson*, 2003 ABPC 83 Judge Allen reviewed the jurisprudence relating to "reasonable and probable grounds" to demand a breath sample and provided the following useful summary at para. 46:

"The grounds must be examined from the viewpoint of the knowledge of the peace officer at the time when the demand was made. Subsequent actions are of no consequence, nor are the observations of others. The Court examining the reasonable and probable grounds must focus upon the knowledge and understanding of the peace officer who made the demand. That officer's understanding may be based upon hearsay and even a misperception of the actual evidence. The Court does not look over the shoulder of the officer to see whether or not the circumstances understood by the officer are true. The Court must weigh the circumstances as understood by the officer to determine their

reasonableness and probability. It is an error in law to test individual pieces of evidence; rather, the evidence as a whole must be considered in determining whether the facts support a standard of objective reasonableness. Clearly, the determination is dependent upon the understanding of the officer in the individual circumstances under litigation. Reference to other reported cases is helpful in understanding what may constitute a reasonable and probable grounds."

37 In *R. v. Bellamy*, 2009 ABQB 759 at para. 31 the Court of Queen's Bench of Alberta made the following comments regarding "reasonable grounds":

"It is important to recall that the police officer is not the trier of fact. He need not demonstrate a *prima facie* case for conviction before pursuing his investigation. In *R. v. Skuse*, [2004] O.J. No. 2726, 2004 ONCJ 91 at para 9, Jennis J. noted that, if proof beyond a reasonable doubt of slight impairment to operate a motor vehicle is sufficient for a conviction, then the test is lower for a *prima facie* case and still yet even lower for the requirement of reasonable and probable grounds. And as Hill J. stated in *R. v. Censoni*, [2001] O.J. No. 5189 (S.J.C.) at paras. 46 and 47, the existence of reasonable grounds does not devolve into a simple mathematical exercise of comparing a list of factors supporting impairment to drive with a list of factors pointing in the opposite direction ..."

38 In *Shepherd, supra*, the factors which resulted in police making the breath demand were described by Chief Justice McLaughlin and Justice Charron at para. 5 to 6 as follows:

"In the early morning of January 11th, 2003, Sergeant Sellers of the Saskatoon City Police Service saw Mr. Shepherd's vehicle fail to stop at a stop sign and then begin to travel at 20 to 25 kilometres per hour over the posted speed limit. Sgt. Sellers activated his police cruiser's siren and lights in an effort to get the vehicle to pull over. The vehicle slowed down but did not stop. It then accelerated and changed lanes multiple times over approximately a three kilometre distance before finally pulling over.

Sgt. Sellers approached the vehicle and informed Mr. Shepherd that he was under arrest for failing to stop for police. Mr. Shepherd explained that he had not stopped because he thought the police car was an ambulance. The officer noted that Mr. Shepherd looked lethargic and fatigued and had red eyes. He could smell alcohol on his breath. He also noted that his movements and speech were slow and deliberate. On the basis of these observations, Sgt. Sellers formed the opinion that Mr. Shepherd was "intoxicated". The officer read Mr. Shepherd his *Charter* rights and made a breathalyzer demand."

39 The Supreme Court emphasized that s. 254(3) does not require police to demonstrate a *prima facie* case before making a breath demand. The only requirement is for reasonable and probable grounds. The Supreme Court observed that the police officer's belief was based not only on Mr. Shepherd's erratic driving pattern but also on the various indicia of impairment. On the facts in *Shepherd*, the Supreme Court concluded that there was "ample evidence" to objectively support the police officer's subjective belief and therefore concluded that no *Charter* breach had been established.

40 In *R. v. Hnetka*, 2010 ABQB 56, Madam Justice Romaine heard a summary conviction appeal from a decision, [2008] A.J. No. 502, in which the trial judge concluded that police had "overwhelming" grounds to make a breath demand. In that case police observed Mr. Hnetka to be operating a motor vehicle in an erratic fashion. After stopping the vehicle, police observed several indicia of impairment including a strong smell of alcohol, red bloodshot eyes, and unsteadiness on his feet. On the basis of these observations the officers made a demand for a breath sample pursuant to s. 254(3). In dismissing Mr. Hnetka's appeal, Justice Romaine observed that the decision of the trial judge was supported by the analysis in *Shepherd* because the reasonable grounds were based not only on the erratic driving pattern but also by the indicia of impairment observed by police.

41 In *R. v. Lee*, 2009 ABPC 135, police were responding to a complaint of a suspected impaired driver when they saw Mr. Lee's vehicle travelling at an unusually slow rate of speed. Police activated their emergency lights to attempt to stop the vehicle but it proceeded for a substantial distance before stopping. When police approached Mr. Lee they noted that he had blood shot eyes, droopy eyelids, a flushed and relaxed face, a smell of alcohol on his breath, slurred speech and some manual dexterity problems. The Court concluded that the police had objectively reasonable grounds to make a demand for a breath sample.

42 In *R. v. Kimmel*, 2009 ABPC 289, police were responding to a complaint when they stopped at a four way stop. After beginning to enter the intersection police observed the accused's vehicle stop at the stop sign and then enter the intersection. Police slammed on the brakes to avoid a collision and then permitted the accused to proceed before initiating a traffic stop. Police observed that the accused was seated in an unusual way in the driver's position. He was asked for his documents but had some difficulty complying with the request. The accused admitted consuming "2". The police officer made a demand for a sample into an approved screening device. While walking back to the police vehicle the accused wobbled and then struck the rear of his vehicle. In the vehicle the police officer smelled alcohol on the accused's breath. The Court concluded that even though a demand for an ASD sample was made, the police officer had reasonable grounds to demand the breath sample. The Court noted that the ASD demand was initially made, rather than a s.254(3) demand for a breath sample, because there was no smell of alcohol on the accused's breath. This deficiency was met while the accused was in the police vehicle.

43 The cases in which Courts have found that the demand for a breath sample was objectively reasonable are merely illustrations of the application of the general principles. The decisions are fact

dependent. A number of cases also illustrate the circumstances in which grounds for a breath demand have been held to be not objectively reasonable.

44 In *R. v. Chorney*, 2008 ABPC 206, Judge Allen dealt with an accused whose vehicle was observed to have crossed the centre line and then over corrected and straddled the lines of traffic on his own side of the road. When the accused was stopped, the investigating constable detected a strong smell of alcohol coming from the vehicle and noted that the accused's eyes were glazed and that he spoke in a slurred manner. The accused admitted to the consumption of 3 glasses of wine. When the Court considered the evidence as a whole, it concluded that the evidence did support a consumption of alcohol by the accused, but that the evidence was not sufficient to establish that the officer had reasonable grounds to believe that the accused's ability to operate a motor vehicle was impaired by alcohol.

45 In *R. v. Kelly*, 2006 ABPC 226 an accused did not exhibit an unusual driving pattern and, after being stopped, his physical actions were appropriate and coordinated. However, the police constable noted indicia of impairment consisting of a strong smell of alcohol coming from the driver's breath, glassy eyes and slurred speech. The court concluded that this was not sufficient to provide reasonable grounds to demand a breath sample.

46 In *R. v. Cuthbertson, supra*, police received a report of a person sleeping in a parked motor vehicle which had been running for 5 hours. On investigation police approached the vehicle and tapped on the window. The accused slowly put himself in an upright position on the seat of the vehicle. He tried unsuccessfully to open the window 4 times before the police officer opened the car door. The accused answered questions slowly and in a laboured fashion. He had glassy eyes, a vacant look, sluggish movements and his breath smelled of alcohol. He admitted to consuming 2 beers. The court concluded that this did not constitute reasonable grounds to demand a breath sample.

47 In *R. v. McTague*, 2008 ABPC 360 police saw a motor vehicle at 2:15 a.m. which was being operated without any tail lights. The police officer thought this might be an indicator of impairment and as a result he stopped the motor vehicle. The police officer immediately noticed a strong smell of alcohol coming from the vehicle. In discussion with the accused the officer noted that the accused mumbled, had a dry mouth, that his motions were slow and that he had glassy eyes. The officer asked the accused to step out of the vehicle and when he did so the police noted that he was unsteady on his feet and had a strong smell of alcohol about him. The court concluded that the police officer's subjective belief of impairment by alcohol was not objectively reasonable and thus found a s. 8 breach.

48 In *R. v. Haut*, 2009 ABPC 337 police observed a black truck travelling in the opposite direction of the police car. The truck accelerated loudly as it passed the police vehicle. The police pursued the truck for approximately 2 minutes over a distance of 8 blocks. The truck made an abrupt turn into a church parking lot and parked the wrong way near the curb. The 2 occupants of

the truck, including the accused, exited the vehicle and walked toward a residence. Police asked them to return to their vehicle which they did. Police noted some unsteadiness while walking. Police also noted a moderate odour of alcohol coming from the accused's breath and that the accused spoke in a slow and deliberate manner. Red and bloodshot eyes were also observed. The Court concluded that police did not have reasonable grounds to demand a breath sample. The Court noted that the driving was aggressive but did not effect other traffic nor did the accused swerve in his lane. The physical symptoms observed were made within a very short time in a dynamic situation. The Court concluded that the demand for a breath sample was not objectively reasonable and accordingly a s. 8 breach was found.

49 These cases provide illustrations of situations in which Courts have found s. 8 breaches on the basis of a lack of objectively reasonable grounds to make a breath demand. As such they are useful in considering the reasonableness of a breath demand. However, because they are fact dependent it is much more important to consider the general principles than it is to consider the outcome of individual cases.

50 A driving pattern can be an important factor weighing on the issue of reasonable grounds to demand a breath sample, even though a driving pattern alone will usually be insufficient to justify a breath demand because both impaired and unimpaired drivers can drive erratically.

51 Indicia of impairment such as the smell of alcohol on a suspect's breath, poor motor coordination, red eyes and the admission of consumption of alcohol can also support reasonable grounds to demand a breath sample provided that the indicia of impairment are sufficiently strong to permit a reasonable inference that the suspect's ability to operate a motor vehicle was impaired, even to a slight degree.

52 More commonly, it is the combination of a driving pattern along with the indicia of impairment which will need to be considered when determining whether police had reasonable grounds to demand a breath sample. In *Shepherd* (and also in *Hnetka*, *Lee* and *Kimmel*) it was the accused's "erratic driving pattern" in combination with "various indicia impairment" which caused the Court to conclude that there was "ample evidence" to support a lawful breath demand.

(3) Application of General Principles to the Facts

53 The evidence available to Keith at the time that he made the breath demand can be summarized as follows:

- 1) driving pattern - excessive rate of speed,
- 2) bloodshot eyes,
- 3) unsteady on his feet,
- 4) sweating profusely,
- 5) radio broadcast of suspected impaired driver; and
- 6) admission of the consumption of 5 beers

54 Based on the evidence of Keith I am satisfied that he had an honest subjective belief that reasonable grounds existed to demand a breath sample. The only remaining question therefore is whether or not this subjective belief was objectively reasonable.

55 In the present case there is evidence of an irregular driving pattern. The speed of the Accused's vehicle was approximately 100 kph in a 60 kph zone. This was more than simply speeding on a major roadway with light traffic. The speed was grossly excessive and amounted to a safety issue to such an extent that police elected to engage the emergency lights to attempt to slow the vehicle even before it arrived at their location. On the other hand, apart from the grossly excessive speed, the driving of the Accused was otherwise unremarkable.

56 While the Accused's pattern of driving could certainly not be characterized as "erratic" as in *Shepherd*, it was nevertheless of sufficient concern that it was a legitimate factor which Keith could properly take into consideration in assessing whether there were grounds to demand a breath sample.

57 The indicia of impairment observed by Keith were also legitimate factors which needed to be considered when making a decision to make a demand for a breath sample. The combination of unsteadiness on his feet, the admission of the consumption of 5 beers along with the physical symptoms, sweating and bloodshot eyes are all important factors which Keith needed to consider.

58 The fact that Keith had heard a radio broadcast reporting on a suspected impaired driver is also a factor which could properly be taken into account but is of relatively little value because Keith did not have any particulars from the anonymous caller as to what factors the caller took into account in forming his or her conclusion as to impairment.

59 The whole of the evidence must be considered when assessing the objective reasonableness of the police officer's belief. It is an error to individually assess each piece of evidence. When the evidence is considered as a whole, it clearly supports the conclusion that the accused had consumed alcohol. In addition, a combination of the driving pattern (i.e. speed of travel) and the indicia of impairment satisfies me that Keith's subjective believe as to the Accused's impairment by alcohol to operate a motor vehicle was objectively reasonable in the circumstances. Accordingly I conclude that the demand for the breath sample was properly made and thus there was no infringement of s. 8 of the *Charter*.

B - Exclusion of Evidence - Section 24(2)

60 Because I have found that there was no breach of the Accused's *Charter* rights there is no need to consider the second issue raised by the Accused dealing with the exclusion of evidence.

61 However, if I am in error in my conclusion that Keith had reasonable grounds to demand a breath sample from the Accused then, despite the violation of the Accused's rights under s. 8 of the *Charter*, I would not exclude the results of the breath samples from evidence.

62 The breach of a *Charter* right does not automatically result in an exclusion of evidence. Instead it is necessary to consider the factors outlined in *R.v. Grant*, 2009 SCC 32; [2009] 2 S.C.R. 353 to determine what relief, if any, should be granted as a result of the breach.

63 The first factor which *Grant* requires that I consider is the "seriousness of the breach". I am satisfied that at all times Keith was acting in good faith. He understood the rights of the Accused and attempted to comply with the *Charter* requirements. If there was a breach of the Accused's *Charter* rights it was not "deliberate and egregious" or "wilful or flagrant". On a scale of seriousness any breach by Keith is at the lowest end of the scale. Keith's conduct is not sufficiently severe that the Court should disassociate itself from the fruits of the conduct. The first factor would therefore argue in favour of the inclusion of the breath sample results into evidence.

64 The second factor which *Grant* requires that I consider is the "impact of the breach on the Accused". This inquiry focuses on whether the admission of the breath sample results would bring the administration of justice into disrepute from the perspective of society's interest in respect for *Charter* rights. While the method of collection of breath sample evidence is relatively non-intrusive and therefore will often favour the admission of breath sample results (*Grant*, para 111), a breach of s. 8 can have a much greater impact on an accused than other types of breaches. In particular, if there was a breach of the Accused's s. 8 rights then he was seriously impacted because he was under arrest for a considerable period of time, taken to the police station and not released for almost 2 hours. This is a serious impact on the Accused's liberty interests and favours the exclusion of the breath sample results from evidence.

65 The third factor which *Grant* requires that I consider is "Society's interest in having the case adjudicated on its merits". This line of inquiry asks whether the truth seeking function of the criminal trial process would be better served by the admission of evidence or the exclusion of evidence. The reliability of the evidence is an important factor in this line of inquiry. In this case any breach of s. 8 would have no impact on the reliability of the breath sample results and those results are the only means by which the Crown can prove the charge under s. 253(1)(b). As a result this line of inquiry favours the inclusion of the breath sample results into evidence.

66 It is necessary to consider all of the circumstances within the framework of the three lines of inquiry for the purpose of determining whether the admission of the breath sample results would bring the administration of justice into disrepute. There are no over arching rules to determine how this balance should be struck. Mathematical precision is not possible.

67 On the facts of this case, I conclude that the balance falls in favour of the inclusion of the breath sample results into evidence because, on the totality of the three lines of inquiry, the exclusion of the evidence would bring the administration of justice into disrepute.

V. Conclusion

68 The application of the Accused to exclude the evidence on the basis of an alleged breach of s.

8 of the *Charter* is dismissed. The grounds which Keith had for making the breath demand were objectively reasonable and accordingly there was no s. 8 breach.

J.T. HENDERSON PROV. CT. J.