Court File No. 32037

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

B E T W E E N

CURTIS SHEPHERD

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

APPELLANT'S FACTUM

[*Rules of the Supreme Court of Canada, Rule 42*]

MICHAEL W. OWENS

704-224 4th Avenue South
Saskatoon, SK S7K 5M5
Whose address for service is the same as above.
Lawyer in charge of file: Michael W. Owens
Telephone: (306) 665-8828
Fax: (306) 665-5519

Solicitor for the Appellant

Gowling, Lafleur & Henderson, LLP.
Barristers & Solicitors
Suite 2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
(Ottawa Agents for the Appellant)
Telephone: (613) 233-1781
Fax: (613) 563-9869

Saskatchewan Justice
Agent for the Attorney General for Saskatchewan
3rd Floor, 1874 Scarth Street
Saskatoon, Saskatchewan
S4P 4B3
Solicitor for the Respondent
W. Dean Sinclair
Telephone: (306) 787-5490
Fax: (306) 787-8878

Gowling, Lafleur & Henderson, LLP.
Barristers & Solicitors
Suite 2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
(Ottawa Agents for the Appellant)
Telephone: (613) 233-1781
Fax: (613) 563-9869

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Saskatchewan Court of Appeal did not have the benefit of the reasons as set out by this Court in *R. v. Rhyason* [2007] S.C.J. No. 39 where in a 5 - 4 decision this Court on July 27, 2007 reviewed the law respecting "reasonable and probable grounds" as the law relates to section 254 (3) of the *Criminal Code.* This Court in *Rhyason* stated clearly that whether "reasonable and probable grounds" exist in each case is an issue of fact to be determined by the Trial Judge. S.254(3) states the following (as contained at paragraph 11 in *Rhyason*):

> "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 [impaired driving], 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,...
>
> 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."

2. The Saskatchewan Court of Appeal, by holding that the determination of whether reasonable and probable grounds exist is a matter of law, as opposed to being a matter of determining facts made by the Trial Judge, essentially removed the fact finding responsibility of a Trial Judge and took it upon itself to substitute its view of the facts that were before a Trial Judge. This is contrary to what this Court said in *R. v. Bernshaw* [1995] 1 S.C.R. 254 where the test for reasonable and probable grounds was enunciated to be a fact-finding exercise which has subjective and objective components: (as stated at paragraph 12 in *Rhyason*)

> "[Section] 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. [para 48]
>
> . . .
>
> "The decision as to whether a police 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 on the case. It is, therefore, essentially a question of fact and not one of pure law. [para. 46].**" [Emphasis our own]

3. As stated, the Saskatchewan Court of Appeal did not have the advantage of having the *Rhyason* decision in hand when it made it's decision in the case at bar on March 14th, 2007. The dissenting opinion of Smith, J. A., followed the principles contained in *Bernshaw* and *Rhyason* even though the *Rhyason* decision was not yet been released. Further, noteworthy is the fact that both the Trial Judge and the Summary Conviction Appeal Judge cited *Bernshaw* as their authorities to come to their respective conclusions. Unfortunately, neither of the two Judges in the majority at the Saskatchewan Court of Appeal cited *Bernshaw* as authority for the principle that findings of fact made by a Trial Judge are entitled to any appellate Court's deference.

4. The *Rhyason* standard has now been applied in cases following both *Bernshaw* and *Rhyason*. For example, in *R. v. Mitsuing* [2007] S.J. No. 514 (SKQB) the Summary Conviction Appeal Court Judge dismissed the Crown's appeal which had been made on the basis that the investigating officer did not have reasonable and probable grounds to make a demand for a breath sample. As the Trial Judge commencing at paragraph 8 on page 3 of that case stated:

> 8 The jurisdiction of this Court on a summary conviction appeal is conferred by s. 830(1) of the *Criminal Code*:
>
> > 830. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or

> other final order or determination of a summary conviction court on the ground that:
>
> (a) it is erroneous in point of law;
>
> (b) it is in excess of jurisdiction; or
>
> (c) it constitutes a refusal or failure to exercise jurisdiction.

The Crown is not entitled to simply contend that the verdict is unreasonable. The issue of an unreasonable acquittal is a question of fact. I refer to the comments of Jackson J.A. in the case of *R. v. Houben*, 2006 SKCA 129, 289 Sask. R. 118, at paragraph 27. Although Jackson J.A.'s comments pertain to s. 839 of the *Criminal Code* as to an appeal to the Court of Appeal, for the purposes of this appeal the provisions of s. 830 are equivalent.

9 As to the criteria for review of factual decisions, I look to the the cases of *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. B.(G.)*, [1990] 2 S.C.R. 57; *R. v. Yebes*, [1987] 2 S.C.R. 168; and *R. v. Andres*, [1982] 2 W.W.R. 249 (Sask. C.A.) In general, the findings of fact made by a trial judge can only be overturned on appeal in casesof palpable and overriding or manifest error.

10 The decision turned on the application of the test for when a police officer may demand a breath sample which is set out in s. 254(3) of the *Criminal Code* which provides:

> 254....
> (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, ...
>
> ...
>
> 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.

11 As determined by the Supreme Court of Canada in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, the existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254 (3) of the *Criminal 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 (per Sopinka a., para. 48).

12 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* and must be based on the circumstances of the case. It is, therefore, essentially a question of fact and not one of pure law (per Sopinka J., para. 46).

13 **This latter point is confirmed in a decision of the Supreme Court of Canada in the case of *R. v. Rhyason*, [2007] S.C.J. No. 39(QL) SCC 39, wherein Abella J. stated in the majority judgment (para. 19), "...determining whether there are reasonable and probable grounds is a fact-based exercise dependant upon the circumstances of the case."** (emphasis our own)

5. It is respectfully submitted that the learned Queen's Bench Judge in the *Mitsuing* decision above applied the law correctly. It is further respectfully submitted that this Court should therefore allow the Appeal on this basis alone, reiterate the standard as set out in *Bernshaw* and *Rhyason* and allow Trial Judges to continue to do their work by assessing witnesses, making findings of fact based on their experience and advantage of actually hearing and seeing the witnesses themselves. It is respectfully submitted that the Trial Judge in this case obviously applied the correct law as he not only heard counsel in their arguments (as exhibited in the transcript) but was also provided a brief of law by counsel. As a result, the analysis of Smith J.A. should have prevailed on Appeal given this Court's dicta on the issue.

6. The secondary issue in this Appeal is whether the Trial Judge properly excluded from evidence the conscriptive breath samples from Mr. Shepherd when those samples were found by the Trial Judge to be conscriptive evidence. That is to say, the Trial Judge and Summary Conviction Appeal Judge and Smith, J.A. were correct that the failure of the officer to have reasonable and probable grounds to demand Mr. Shepherd provide samples of his breath violated Mr. Shepherd's right to be secure against unreasonable search or seizure as protected by section 8

of the *Charter* and his right not to be arbitrarily detained as protected by section 9 of the *Charter.* This becomes especially important in a situation where Parliament has decided that if an individual fails or refuses to provide incriminating evidence against himself, he will be charged for that refusal. It is in these circumstances that Parliament must realize (and the Courts must therefore protect these rights) that by expressly enacting legislation that violates a citizen's right to silence, Courts are going to be very protective of basic human rights in a society that defines itself in Section 1 of the *Charter* as a "free and democratic society". It is elementary law that Courts across Canada have recognized that the state's authorities can require an individual to provide incriminating evidence against himself as justified under Section 1 of the *Charter*. However, no one should be shocked that Courts, because of the Section 1 justification, are going to exclude evidence when an individual, under penalty of law, will be charged criminally, potentially convicted and provided a criminal record for maintaining their right to silence as protected by Section 7 of the *Charter*. It is this particular circumstance that makes Mr. Shepherd's case unique when scrutinized by the jurisprudence that has evolved in the *Charter* era. However, it must also be noted that the *Rhyason* decision of this Court did not refer at all to having to determine the issue of reasonable and probable grounds under Section 24 of the *Charter*. Therefore, it is quite possible that this Court could determine that the issue of "reasonable and probable grounds" has no relationship with the *Charter*.

7. Finally, the Appellant takes issue with the process by which the Saskatchewan Court of Appeal dealt with the Appeal itself. Clearly, the Crown as the Appellant at the Court of Appeal was required to obtain "leave" from the Court. The Court never dealt with that issue. It is respectfully submitted by failing to deal with the Leave Application (and the Saskatchewan Court of Appeal keeps no tape recordings of the submissions made by counsel, the Court's comments

during counsel's arguments, nor requires a separate application for "leave" before hearing the Appeal) that the process of Summery Conviction Appeals being heard by that court (all of which require "leave" to be determined before the issues can be put before the Court by the Appellant) was not followed. Furthermore, the standard of when "leave" should be granted was never met in this case: the majority of the Saskatchewan Court of Appeal, until it released it's decision, never discussed the issue of whether the threshold for "leave" had been met.

B. Statement of Facts

8. The Judgment of Smith J.A., the dissenting Judge at the Saskatchewan Court of Appeal, set out the facts most accurately as follows:

> "[24] The evidence at trial was that shortly before 4:00 a.m. on January 11, 2003 Sergeant Alan Sellers, of the Saskatoon City Police Service, saw the respondent approach and turn west onto 8th Street, in Saskatoon, failing to stop fully at the stop sign governing the intersection. By the time Sergeant Sellers reached 8th Street the respondent was accelerating quite fast and proceeding west on 8th Street at a speed of between 80 and 85 kilometres per hour. The speed limit on this easterly stretch of 8th Street is 60 kilometres per hour. The sergeant was driving a white Ford Expedition, a large sport utility vehicle. Although it had the usual police car markings with the overhead emergency lights and a siren, there were no markings on the front of the vehicle, which was entirely white. After following the vehicle for approximately one kilometre, Sergeant Sellers decided that because of the excess speed of the vehicle he would make a check stop. He activated the emergency equipment so that the siren came on, the headlights started to flash and the overhead lights were activated.
>
> [25] Eighth Street is a wide thoroughfare with three traffic lanes in each direction. When the emergency equipment was activated on the police vehicle behind him, the respondent pulled his vehicle into the right lane and slowed, but did not stop. Sergeant Sellers also pulled his vehicle into the right lane following about 75 feet behind the respondent's vehicle, emergency equipment still operating. As the vehicles neared Circle Drive, the respondent pulled from the rightmost driving lane, across the centre lane and into the left driving lane, again followed by the police vehicle. The respondent stopped for a red light at 8th Street and Circle Drive. Sergeant Sellers was still behind him, with the emergency equipment sounding and flashing. When the light turned green, the respondent again

accelerated and began speeding at approximately 90 kilometres per hour in an area that was now posted at 50 kilometres per hour. He proceeded through the intersection of Arlington Avenue and 8th Street at this speed. Sergeant Sellers testified that there was very little or no other traffic on the road at that hour. At Goodwin Avenue the respondent signaled a lane change and pulled again into the rightmost lane. He slowed his vehicle but did not stop. Sergeant Sellers following him into the right lane. At about Emerson Avenue the respondent drove again across the centre lane into the left lane, this time without signaling. The police vehicle stayed behind him. At Preston Avenue the respondent turned left onto Preston then pulled over and stopped. Sergeant Sellers testified that is was his belief that the respondent had been attempting to evade the pursuing police vehicle.

[26] Sergeant Sellers stopped behind the respondent's vehicle, approached the vehicle and ordered the respondent out of the vehicle. Sergeant Sellers had meanwhile called for backup assistance and Constable Horsley arrived within a minute or two. The respondent exited the vehicle. Sergeant Sellers immediately advised the respondent that he was being arrested for failing to stop for the police as required and handcuffed his hands behind his back. The respondent told him at that time that the reason he did not stop was that he thought the vehicle Sergeant Sellers was driving was an ambulance. Sergeant Sellers observed that the respondent looked lethargic and fatigued and had red eyes. He could smell alcohol on his breath. The respondent was escorted back to Constable Horsley's care and placed in the back seat. Sergeant Sellers testified that the respondent's movements were slow and deliberate. His speech was also slow and deliberate. He was fully cooperative at all times. As the respondent sat in the police car Sergeant Sellers observed that he had a slack jaw and seemed very fatigued.

[27] Sergeant Sellers testified that from the totality of the situation, the respondent's failing to stop for the police vehicle with emergency equipment engaged, the repeated lane changes, the smell of alcohol on his breath and his observations in regard to the respondent's physical ability (i.e. slow and deliberate movements and speech) he formed the opinion that his ability to drive was impaired by alcohol. Sergeant Sellers read the respondent his *Charter* rights including his right to counsel and made a breath test demand. Constable Horsley then transported the respondent to the Saskatoon Police Detention Centre where breath samples were taken.

[28] On cross-examination, Sergeant Sellers agreed that in the course of his driving on 8th Street the respondent's overall control of the vehicle appeared to be quite good.

[29] On this evidence, the respondent moved to exclude the evidence of the certificate of analysis of the breath sample on the grounds that Sergeant Sellers lacked reasonable and probable grounds to demand the sample and the respondent's right pursuant to ss. 8 and 9 of the *Charter* were therefore breached.

[30] The trial Judge ruled in favour of the respondent. He acknowledged that the

test for reasonable and probable grounds entailed both a subjective and objective component. He noted that it was necessary to look at the totality of the circumstances known to the officer in deciding whether those tests had been met. He then summarized those circumstances, noting in particular that the respondent had failed to stop at a stop sign and was speeding, that he had stopped at a red light, had signaled a lane change, that he did not swerve from one lane to another and appeared to the officer to be in complete control of his vehicle, although he had pulled over to the right lane and then the left lane when the police car emergency light and siren were activated behind him. He commented that the respondent had ultimately made a proper left turn off 8th Street and had stopped. He acknowledged that the police sergeant observed the smell of alcohol on the respondent's breath, that he was talking and walking in a slow and deliberate manner, and appeared lethargic. He found that these observations were substantially corroborated by Constable Horsley.

[31] The trial Judge found that Sergeant Seller did subjectively believe that the respondent's ability to operate a motor vehicle was impaired by alcohol. However, he concluded that, while there were grounds for suspicion that would have justified a roadside ALERT test, (which had not been done), there were not objectively reasonable grounds for concluding that the accused's ability to operate a motor vehicle was impaired by alcohol, notwithstanding the honest belief on the part of the police officer. He commented,

> 'My conclusion is based not only on what the police officer observed but upon the explanation that is reasonable to me as to why some of these activities-some of the conduct of the accused took place.'
>
> (Trial transcript at p. 168.)

[32] The trial Judge did not further elaborate in relation to his evaluation of the evidence of "what the police officer observed" (Trial transcript at p. 1680, but focused on the respondent's explanation for his driving conduct, namely, that he believed the emergency vehicle behind him was an ambulance. The trial Judge was of the view that, while a possible explanation of the respondent's failure to stop over several kilometres and the repeated lane changes in the course of that driving was that his Judgment was impaired by alcohol, the respondent's explanation was "as equally valid explanation in my mind as to why he traveled in the manner-why he drove his automobile in the manner that he did." (Trial transcript at p. 169) Clearly he felt that the police officer was obliged to take this explanation into account and he therefore concluded that the officer lacked objectively reasonable and probable grounds to believe that the respondent's ability to drive was impaired by alcohol.

[33] In relation of the s. 24(2) remedy, the trial Judge, having found that there were no reasonable grounds for concluding that the accused's ability to operate a motor vehicle was impaired by alcohol, said only the following:

> 'In the absence of such grounds the Certificate of Analysis is excluded from the evidence, pursuant to section 24(2) of the *Charter of Rights and Freedoms* as directed by the decision in *The Queen v. Stellato'* [[1994] 2 S.C.R. 478]. [Trial transcript at p. 6]

[34] The respondent was subsequently acquitted on all counts charged, after testifying to his belief that the pursuing police vehicle was an ambulance. It is of interest to note that in relation to the charge of failing to stop in order to evade a peace officer that trial Judge said the following:

> 'The explanation as given by the accused, although suspicious under all of the circumstances, does leave a doubt-a reasonable doubt and there is, in my mind, a reasonable doubt and there is, in my mind, a reasonable doubt on a whole of the evidence, the third portion of the test in *the Queen v. McKenzie* [(1996), 141 Sask.. R. 221], and accordingly I am compelled to, notwithstanding my suspicions, resolve that doubt in favour of the accused. I find him not guilty of Count 3 of the Information.'(Trial transcript at p. 208)

[35] The Crown appealed to the Court of Queen's Bench on the very general grounds that the trial judge erred in law in finding that the officer did not have reasonable and probable grounds to make a demand for a sample of breath suitable for analysis, in excluding the certificate of analysis pursuant to s. 24(2), and in finding that the Crown did not prove the offence of impaired driving beyond a reasonable doubt."

C) <u>The Judgments Below</u>

i) Trial Judge (Provincial Court)

9. The jurisprudence respecting the issue of "reasonable and probable grounds" seems to focus on whether the Trial Judge utilized the legal test in order to make his findings of fact. In this case, the transcript of the evidence clearly sets out that both counsel addressed the Court on the proper considerations to be made by a Trial Court including the issue of the Trial Judge's duty to objectively review the officer's subjective conclusion. As the Trial Judge stated commencing at line 26 on page 165 of the transcript:

> "I do not propose to deal at length with the law which counsel have referred to me, save and accept that the principle accepted and agreed to by counsel as set out in the *Queen v. Bernshaw,* a decision of the Supreme Court of Canada in 1994, which says simply this:

> **that the existence of reasonable and probable grounds entailed both an objective and subjective component. That is, Section 254 (3) of - - 254 (3) of the Code requires that the police officer subjectively have an honest believe that the suspect has committed the offense and has objectively there must exist reasonable and probable grounds for disbelief. And the offence, of course being that of operating a motor vehicle while one's ability to do so was impaired by alcohol**.
>
> I propose to deal with the **totality of the circumstances** known to the officer and decide upon that whether the two tests, the subjective and the objective tests have been met."

10. After making no error in defining his legal duty, the Trial Judge then addressed the driving and observations made by the officers and stated the following at page 168, commencing at line 1:

> "Dealing with what the officer - - I am of the opinion that he reasonable believed, that he subjectively believed that the accused's ability to operate a motor vehicle was impaired by alcohol**. But in the totality of the circumstances known to the officer I am not convinced that there was reasonable grounds - - reasonable and probable grounds to make the Breathalyzer demand."**
> (emphasis our own**)**

11. And finally at page 170, line 9, the Court concluded the following:

> "Accordingly I am - - I've concluded that while there was grounds for a roadside Alert testing, and regrettably it was not done, there was not reasonable grounds for concluding that the accused's ability to operate a motor vehicle was being impaired by alcohol, notwithstanding the honest belief on the part of the police officer."

ii) Summary Conviction Appeal Court (Court of Queen's Bench)

12. Justice Foley on appeal to him found that on the basis of the information the police sargent had when he made his demand for breath sample on Mr. Shepherd that the trial Judge had correctly weighed that evidence in light of the objective analysis that a trial Judge must carry out according to *Bernshaw*. Therefore, in upholding the Trial Judge's decision, he held that the Trial Judge's reasons and analysis for excluding the certificate of analysis were supportable by the

evidence and therefore beyond his role as the reviewing Judge.

iii) The Court of Appeal for Saskatchewan

13. Two of the three justices hearing this appeal overturned the Summary Conviction Appeal Court and the Trial Judge on the basis that determining whether reasonable and probable grounds exist is an issue of law alone. They therefore substituted their view of the facts for those of the Trial Judge. They also failed to acknowledge the Court's position in *Bernshaw* , *R. v. Bartle* [1994**]** 3 S.C.R. 173, and *R. v. Stillman* [1997] 1 S.C.R. 607 (as cited in *R. v. Schaeffer* [2005] S.J. No. 144 (SK C.A.) at paras 50-54)**.**

PART II: QUESTIONS IN ISSUE

14. The Appellant sought leave on five issues after being upheld by both the Trial Judge and the Summery Conviction Appeal Court Judge (Queen's Bench) but overturned at the Saskatchewan Court of Appeal in a 2 - 1 decision. Those five issues are as follows:

A. Did the Court of Appeal err by failing to deal with the issue of whether "leave" should be granted in the case before dealing with the substantive of arguments in the case?

B. Did the Court of Appeal err in holding that both the Trial Judge and Summary Conviction Appeal Judge erred in concluding that the police officer lacked reasonable and probable grounds to believe that the appellant's ability to properly operate a motor vehicle was, in fact, impaired by alcohol?

C. Did the Court of Appeal err by substituting its findings of fact for those findings of fact found by the Trial Judge where there was evidence to substantiate the findings of the Trial Judge?

D. Did the Court of Appeal err in finding that the Trial Judge had not offered a "full analysis" prior to excluding the evidence pursuant to section 24 (2) of the *Canadian Charter of Rights and Freedoms*?

E. Did the Court of Appeal err when finding that both the Summary Conviction Appeal Judge and the Trial Judge failed to find that the decision of the Trial Judge to acquit the accused of impaired driving was unreasonable and that the reasons offered by the Trial Judge failed to meet the minimum standard of providing reasons sufficient to permit appellate review?

PART III: ARGUMENT

A) Deference to the Trial Judge

i) Standard of Review

15. It is respectfully submitted that a Trial Judge's findings, again based on his ability to "read" witnesses who are present before him or her (especially on the issue of credibility) are deserving of respect. That is why this Court in *R. v. Chaisson* [2006] S.C.J. No. 11 held that a Trial Judge was entitled on the facts as he found them to conclude that an accused's *Charter* rights had been violated. As a result, the Supreme Court held that the Trial Judge committed no reviewable error and concluded that the Trial Judge had the right to consider the cumulative effect of the violation warranting exclusion of the impugned evidence under Section 24 (2) of the *Charter*. In that case, the Trial Judge's findings that a *Charter* breach had occurred had been overturned by the Court of Appeal; however, the Supreme Court indicated that the Court of Appeal impermissibly recast the issues by substituting it's own findings of fact for those of the Trial Judge. It therefore seems that where a Trial Judge in *Charter* matters decide certain facts to have existed, Appeal Courts are prohibited from interfering. In the case at bar, the Saskatchewan Court of Appeal failed to respect the principles established by *Chaisson* and impermissibly interfered.

16. In *Chaisson*, the accused was arrested because the police were suspicious about his behavior and saw him throw something to the other side of his car. As a result, the police officer concluded there was something illegal going on in the car and he felt like it was likely drug related. Ont that basis, without reading the accused his rights or providing any caution, the officer asked the accused to exit the vehicle. The officer then noticed a bag of marijuana on the floor of the car. The officer placed the accused under arrest again without reading him his rights or providing a caution. At the police station, the officer finally cautioned the accused and read

him his *Charter* rights. At trial, the Judge concluded that the accused's rights under Section 8, 9, and 10(b) of the *Charter* had been violated and that the violation did not warrant exclusion of the evidence. The Supreme Court restored the Trial Judge's decision.

17. Likewise in the case at bar, the Crown is asking the Court to recast the findings of fact made and substitute findings more to he Crown's liking. Clearly, that would be impermissible given the dicta of the Supreme Court. Therefore, this Court's review of the Trial Judge's and Summary Conviction Appeal Court (Queen's Bench) decision is limited as it should have been before the Court of Appeal. Both decisions can be supported by the evidence. The Crown simply disagreed with the Trial Judge's findings of fat that the investigation Constable simply did not balance all the factors available to him when deciding to make a s. 254(3) breath demand on Mr. Shepherd. As the Trial Judge properly stated, the officer was duty-bound to consider all of the information available to him when determining whether he had reasonable and probable grounds to make a breath demand. There is nothing wrong at all in either of the Trial Judge's or the Queen's Bench Judge's analysis of the law. There was no error of law. The Trial Judge objectively reviewed the officer's subjective observations and made a "call" based on the evidence. By doing so, the Trial Judge discharge his obligation correctly. The Crown on appeal wanted certain factors to receive more emphasis than they did in both Judges' analysis. With all due respect to the Crown, that kind of analysis took this case beyond the jurisdiction of Court of Appeal in determining questions of law alone. Such an exercise invited the Court of Appeal to engage in a re-weighing of the evidence and the subsequent substitution of findings of fact. Clearly, the Court of Appeal exceeded its jurisdiction 839 of the *Criminal Code*.

18. An entirely different panel of Saskatchewan Court of Appeal Judges recognized these limits in *R. v. Ahenakew* [2001] S.J. No. 346, where the Crown sought to overturn the Summary

Conviction Appeal Judges' decision with respect to the sentence imposed by the Provincial Court Judge. While leave was granted, the Crown's appeal was dismissed; however, in noting the extent of the workload imposed on Provincial Court Judges, the Saskatchewan Court of Appeal quoted Madam Justice McLachlin of the Supreme Court as she wrote the following in *R. v. Burns* [1994] 1 S.C.R. 656 about the extent to which Judges need not slavishly state the law which any Judge in the Provincial Court of Saskatchewan must be taken to know. In that decision, McLachlin, S.C.J. state the following as quoted in *R. v. Ahenakew* on page 4:

> "Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see *R. v. Smith* [1990] 1 S.C.R. 991, affirming (1989), A.R. 304, and *Mcdonald v. The Queen*, [1977) 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, then these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case."

19. This line of reasoning is also supported by jurisprudence preceding it. In *Lensen v. Lensen* [1987] 2 S.C.R. 672, the headnote reads as follows:

> "There was evidence on which a Trial Judge might properly find that there was no agreement as alleged between the father and son. It is a well established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the Trial Judge made some 'palpable and overriding error which effected his assessment of the facts'."

20. The *Lensen* case also stands for the proposition that an Appeal Court has neither a right nor duty to re-assess or re-try the evidence.

21. The Supreme Court in *R.v. Yebes* [1987] 2 S.C.R. 168 also set out the parameters of an Appellate Court's jurisdiction. At page 185, McIntyre J. stated:

> "I hasten to elaborate. I am in agreement with Hutcheon J.A. that the word 'possibly' is inappropriate. In my view, to adopt literally the proposition that the Appellate Court could only consider whether the impugned verdict could possibly have been reached would render review on appeal under the sub-section almost impossible. 'Reasonably could have reached' must be the test and from a reading of the whole of Pigeon J.'s judgment I am of the view that it was what was intended. The concept of reasonableness is clearly expressed in the section which speaks of an unreasonable verdict. Therefore curial review is invited whenever a jury goes beyond a reasonable standard. In my view, then, Corbette (R. v. Corbette) [1975 2 S.C.R. 275] is the governing case and the test is 'whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered."' (For the sake of brevity, this quotation from Yebes above is quoted from the decision of *R.v.Mickel* [2004] S.J. No. 420, Sask. Q.B.)

ii) What Did the Trial Judge Have to Assist him in His Efforts to Properly Determine the Issue?

22. The Trial Judge was provided with briefs of law and oral argument as noted in the transcript starting at page 119 and ending at page 168. Specifically, counsel apprised him of the following:

a) Section 254(3) of the *Criminal Code* states:

> "Where a Peace Officer believes on reasonable and probable grounds that a person is committing, or at any time within the proceeding two 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 soon thereafter as is practicable (a) such samples of the person's breath as in the opinion of a qualified technician . . . 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 purposes of enabling such samples to be taken."

b) Section 8 of the *Canadian Charter of Rights and Freedoms* states:

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

c) Section 9 of the *Canadian Charter of Rights and Freedoms* states:

"Everyone has the right not to be arbitrarily detained or imprisoned."

d) Section 24(2) of the *Canadian Charter of Rights and Freedoms* states:

"Where, in proceedings under subsection (1) a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

23. The Trial Judge was also provided with the following jurisprudence before rendering his decision:

a) In *R. vs. Nelson* [1972] 1 W.W.R. 393 (Alta. D.C.) Tavender D.C.J. stated at p. 397:

> "The evidence of the patrol constable comes down to this:
> 'I saw a motor vehicle which I thought might be driving too fast. I followed it for 6 ½ to 7 miles. While two-tenths of a mile behind it I clocked it. The car weaved from the yellow line to the broken line. I decided to stop the driver for speeding. I smelled an alcoholic beverage. I had him perform a heel-to-toe test. He was staggering a little but not excessively. I had no difficulty understanding him.'
>
> On these facts would an ordinary, prudent and cautious man be reasonably led to the conclusion that the accused person was probably guilty of impaired driving? There is no evidence as to the speed of the vehicle, whether the vehicle moved more than once from one road lane to another, whether the vehicle crossed the road line, where the odour of alcohol came from, how the appellant conducted himself on the heel-to-toe test, and in what manner he staggered a little.
>
> In my view there is no evidence upon which I can conclude that the patrol constable had reasonable and probable grounds to conclude that an offence had been committed under s. 222 [R.S.C. 1985, s. 253(a)]."

b) ____In *R. v. Thombs* (1986) 50 M.V.R. 31 (Ont. P.C.) the accused was stopped by the police during an impaired driving blitz. The officer in question was pulling over every vehicle travelling in the Guelph area. **There was no evidence that there was any problem with respect to the accused's driving that gave the officer any impression to stop the accused for drinking and driving.** When the police officer approached the accused's vehicle he noted that the accused's eyes were blood shot and glassy, his speech was slurred and there was a smell of liquor on his

breath. On this basis the officer felt that he had reasonable and probable grounds to make a breathalyzer demand. In its analysis the Court referred to *R. vs. Duguae* (1985) 50 O.R. (2d) 375 where the Ontario Court of Appeal held that in normal circumstances a police officer does not have the right to detain a person for questioning for further investigation except as authorized by law. That Court of Appeal also stated:

> "It is repugnant to our concept of the administration of criminal justice and to the rights of citizens in a free and democratic society, to make them subject to arbitrary arrest for investigative purposes."

c) In *R. v. Wilson* (1985) 42 Sask. R. 181 (Sask. Q.B.), the accused's truck collided with a parked vehicle. The accused was given a breathalyzer demand more than two hours after the accident. A demand on the accused to provide breath samples was also made more than two hours after the accident and it was held by Madam Justice Batten that such a demand did not comply with the requirements of the Criminal Code and that to admit such evidence would be contrary to the Charter's protection against arbitrary detention and therefore contrary to both sections 9 and 24(2) of the Charter. In her decision, Madam Justice Batten referred to the post-Charter *Therens* case and concluded the following at paragraph 9 on page 3:

> "The Trial Judge held that he was bound by the decision of the Saskatchewan Court of Appeal in the *Therens* case; that *R. v. Rilling* . . . by reason of the Charter of Rights was no longer the binding authority it once was; that the administration of justice would be brought into disrepute by the acceptance of the evidence based on the breathalyzer and that therefore the evidence should be excluded on the basis of section 24(2) of the Charter. I agree."

d) i) In *R. v. Enns* (1987) 85 A.R. 7 (Alta. P.C.), the accused was charged with driving over .08 and subsequently provided samples of his breath which indicated that his blood alcohol content was over .08. In his defence, the accused argued that the demand was made without reasonable grounds which would make the results of the breathalyzer tests inadmissible as a result of an unreasonable search and seizure contrary to sections 8 and 24(2) of The Charter. The

Alberta Provincial Court agreed with the accused and held that the tests constituted an unreasonable search and seizure and that the breathalyzer certificate should be excluded from the evidence. In its analysis, the Court held that when public authorities demand an accused to provide his breath for analysis, an accused is really being searched, and that such a search is subject to the requirements of section 8 of the Charter. In its presentation, the defence stated that it was the manner in which the search was conducted which was the subject of the Charter challenge. The Court was convinced that because the Criminal Code requires a police officer to have a belief based on reasonable and probable grounds before any demand becomes lawful that any finding that there were no reasonable and probable grounds on the part of peace officer must result in the exclusion of the test results as they were obtained as a result of the demand being both unlawful and unreasonable.

ii) With respect to the facts of this case, the Court held that for an officer to believe he has reasonable and probable grounds, he must hold that belief both honestly and bona fide. Furthermore, judicial scrutiny must objectively review the circumstances presented to the officer and after considering the evidence come to a decision on whether a reasonable person, having the same knowledge as the officer at the time would come to the same conclusion. In this case, the accused smelled of liquor, was driving his vehicle without his lights on and staggered when he got out of the vehicle. However, on cross-examination it was revealed that the Constable was observing the accused "stagger" on pavement that was wet. Even though the accused in this case failed a sobriety test of closing his eyes and putting his head back, the police indicated the accused swayed only "a bit". Furthermore, the policeman admitted that only one minute passed from the time he came into contact with the accused to the time that he made the breathalyzer demand. In its conclusion as to whether the Constable has reasonable and probable grounds the Court stated at page 5:

"All in all the Constable's evidence concerning this portion of his investigation is

> very unsatisfactory and on the basis of it I am driven to the conclusion that it cannot withstand the application of the objective portion of the test above referred to.
>
> I find that no reasonable grounds to make the demand have been shown and that accordingly the demand was not authorized by law and in the circumstances the provision of samples which followed it constituted an unreasonable search and seizure."

iii) The Court in determining whether the evidence should be excluded from the trial proceeded to analyse section 24(2) of the Charter and held that the admission of the evidence based on a Charter breach went to the very fairness of the Trial and therefore the evidence had to be excluded.

e) i) In *R. v. Redding* (1987) 3 M.V.R. (2d) 182 N.S.C.C., the Court discussed whether evidence obtained as a result of a *Charter* breach should be admissible in spite of the *Charter* breach. The Court held that even though the police officer unintentionally violated the accused's rights, it was a serious violation which could materially alter the outcome of the trial. The Court therefore determined that the Certificate of Analysis should be excluded pursuant to section 24(2) of the *Charter*. To come to the above conclusion, the Court referred to the *Therens* decision of the Supreme Court of Canada and at page 6, quoted the *Therens* case which states:

> "The central concern of section 24(2) would appear to be the maintenance of respect for the confidence in the administration of justice, as that may be effected by the violation of constitutional rights and freedoms."

ii) The Court also referred to *R. vs. Bent* (1987), 79 N.S.R. (2d) 169, where that Court considered the Supreme Court's decision in *R. vs. Collins* (1987), 1 S.C.R. 265, which held that the appropriate standard for "disrepute" is that of a "reasonable man having cognizance of all the surrounding circumstances" (page 7). Crown counsel in this case had argued that if a *Charter* right were abrogated then only the result of the abrogation of the right should be excluded from

evidence (that is to say that if the nexus between the *Charter* breach and the evidence is not direct, then evidence obtained later on should still be admissible.). In *Collins*, the Court relied on the reasoning of Mr. Justice Le Dain in *R. vs. Therens* which should that, the appropriate remedy was not only the exclusion of the evidence that gave rise to the accused providing evidence against himself by blowing into a breathalyzer machine, but also the Certificate of Analysis which resulted from the initial *Charter* breach. The Court held that "to rule otherwise would be to mock the rights of the accused".

f) In *R. vs. Lloyd* (1988) 12 M.V.R. (2d) 41 (N.S.C.C.), the Court held that the Trial Judge erred in its decision to convict an accused of driving over .08 when he had also held that the arresting officer did not have reasonable and probable grounds to make a breathalyzer demand. On appeal, the accused contended that his rights under sections 8 and 9 of the *Charter* had been infringed. The Constable's evidence in this case was that there was "nothing unusual about the manner in which the vehicle was being driven" except that the operator of the motor vehicle did not stop when the Constable engaged the emergency equipment. In its decision, based on the evidence and the law, the Court held that there was a breach of sections 8 and 9 of the *Charter* and the Certificate of Analysis ought to be excluded pursuant to section 24(2) of the *Charter.*

g) ____In *R. vs. McIntosh* [1972] 4 W.W.R. 458 (Sask. D.C.), the late Mr. Justice Maher was presented with a situation wherein the accused had blood shot eyes and smelled of alcohol. In its decision, the Court held that the failure of the Crown to establish that a peace officer has reasonable and probable grounds to believe that the offence of impaired driving was being committed or had been committed within the previous two hours was a defence to a charge of refusing to comply with the breathalyzer test. With respect to the reasonable and probable grounds issue, the Court stated the following at page 463:

> "... our law has not gone as far as the equivalent legislation in the United Kingdom where a Constable in uniform may require a specimen of breath from a person whom he **suspects** has alcohol in his body... the operating of a motor vehicle following consumption of alcohol is not an offense in Canada unless and until legislation equivalent to that in the United Kingdom becomes part of our law. An observation by a Peace Officer of eyes that appear to be blood shot accompanied by a smell of liquor, does not constitute reasonable and probable grounds for making a demand for a sample of breath. **This is so even when coupled with the opinion of an experienced officer that the driving ability of a person is impaired by alcohol when the evidence does not substantiate reasonable grounds for such opinion."** (Emphasis our own).

h) In *R. v. Cheecham* (1989) 80 Sask. R. 74 (Sask. C.A.), the Court dealt with an unreasonable search and seizure in a warrantless search situation and discussed the definition of "reasonable and probable grounds". It is the Appellant's contention in the case at bar that the definition of reasonable and probable grounds within the law does not vary from one type of search to the other. As a result, the Appellant submits that the Saskatchewan Court of Appeal's decision in *Cheecham* applies to this case. Specifically, the Court in *Cheecham* endorsed the Trial Judge's decision wherein he held that the Crown had failed to demonstrate the necessary grounds for a search and therefore a *Charter* violation had occurred. As a result of the *Charter* violation, the evidence had to be excluded pursuant to section 24(2) of the *Charter*. In the *Cheecham* case, the Trial Judge held that there was certainly suspicion that the accused had on his person an unlawful substance. This was based on the police officer having known the accused for several years over which time the police officer strongly suspected that the accused was trafficking marijuana. The court was satisfied that **only suspicion** was operative in the mind of the police officer at the time he conducted the search. The Court took a very dim view of officers acting on suspicion alone. In fact, the Court stated at pages 4-5 the following:

> "To condone that conduct and give effect to a search grounded in what prevailed in this instance would bring the administration of justice into disrepute for, amongst other things, it has the potential to subject many people to a search on something less than a belief based on reasonable and probable grounds."

i) In *R. v. Wicklun* [1987] S.J. No. 554 (Sask. Q.B.), Mr. Justice Hrabinsky was faced with

the issue of whether the investigating officer had reasonable and probable grounds to make a demand for a breath sample. In this decision, Mr. Justice Hrabinsky held that where an accused is required by law to adduce evidence which could incriminate him he is entitled to have the Court analyse the admissibility of the evidence given the laws pursuant to the Charter. In the end, the Court agreed at page 5:

> "The evidence should not be admitted. To admit evidence obtained pursuant to a section of the code, found to be in contravention of the Charter, that required the accused to adduce evidence that tended to incriminate him would bring the administration of justice into disrepute."

j) In *R. v. Haugen* [1989] S.J. No. 406 (Sask. Q.B.), Mr. Justice Wright was determining the issue as to whether a detention was arbitrary when reasonable and probable grounds did not exist to form the basis of a breathalyzer demand. In the end, Mr. Justice Wright held that where evidence was not lawfully obtained, it was proper that the evidence should be excluded (in this case the evidence was a certificate of analysis) under Section 24(2) of the Charter.

k) In *R. v. Hopkie* (1994) 126 SK. R. 44 (Sask. Q.B.), Chief Justice MacPherson had to decide whether the admissibility of the Certificate of Analysis depended on whether the arresting officer, at the time he demanded the accused to provide breath samples, had reasonable and probable grounds to believe that the accused "within the preceding two hours had committed, as a result of the consumption of alcohol an offence under Section 253". The facts in this case were that the accused had a smell of alcohol on his breath and his eyes were red. The police office acknowledged that he had no expertise or ability to determine one's blood alcohol level from one's breath. The Learned Chief Justice held that the accused was arbitrarily detained. As a result of the accused being illegally detained, the subsequent demand was unlawful and the test results and the Certificate of Analysis were excluded pursuant to Section 24(2) of the Charter. In his decision, the Chief Justice at page 3 reiterated the following as found in *Mellenthin* [1992] 3

S.C.R. 615 at 629:

> "It would surely affect the fairness of the trial should [unlawful detentions] be accepted as a basis for [an unlawful demand for a breathalyzer test] and the evidence derived from them was to be automatically admitted. To admit evidence obtained [from an unreasonable and unjustified breathalyzer test and Certificate of Analysis obtained] while a motorist [was unlawfully detained in a police vehicle] would adversely and unfairly effect the trial process and most surely bring the administration of justice into disrepute."

l) i) In *R. v. Ferguson* [1996] O.J. No. 4625 (O.C.J.), the evidence of the investigating constable was that Mr. Ferguson had slurred speech, glassy eyes and a strong odour of alcohol beverage coming from the vehicle which he was driving. However, in cross-examination, the constable stated that the odour was coming from the area of the driver but could not pin-point its source. When directed to pull over to the side of the road, Mr. Ferguson fled the scene in his vehicle. The Court held that the constable's evidence was a subjective analysis of whether there were reasonable and probable grounds for him to make a breathalyzer demand. Of significant importance in this case was the fact that the Court had "balancing evidence" that showed that the accused may not have been committing any offence under Section 253 of the Criminal Code. For instance, there was no evidence as to how the accused drove up to the R.I.D.E. check-stop program. No co-ordination tests were conducted. There was no evidence as to the accused's balance. The Court was then faced with the problem of having to **objectively** analyse the evidence. In coming to a decision, the Court referred to *R. v. Cooper* 46 M.V.R. (2d) 231 where the evidence given by the police officer indicated that the accused had glassy eyes, and slurred speech. However, there was no unsteadiness noted in the accused's gait. The Court also referred to *R. v. Chartier*, a decision of the Supreme Court of Canada where Mr. Justice Pigeon at page 55, v. 48, Canadian Criminal Cases (2d) stated the following:

> "For a peace officer to have reasonable and probable grounds for believing in someone's guilt, **his belief must take into account all information available to him.** He is entitled to disregard only what he has good reason for believing not reliable." (emphasis our own)

ii) In applying Mr. Justice Pigeon's reasoning in the *Ferguson* case, the Court held that a

common sense approach to the evidence should be utilized in order to make it clear that the formulation of a police officer's belief must be based on reasonable and probable grounds which involves more than a search of some circumstances which might be said to offer support for the belief. As Mr. Justice Pigeon stated **'It is the totality of the circumstances known to the officer'** which is important and must be considered by the Court in reviewing whether the officer had objective, reasonable and probable grounds to make a breathalyzer demand.

iii) Of further importance is the Court's comments with respect to the alleged reasonable and probable grounds found in this case: A strong odour of alcoholic beverage confirms the consumption of intoxicants but says nothing about the effect of the consumption. The remaining circumstances of glassy eyes and slurred speech required a subjective assumption as to the normal state of the subject's eyes and speech. The Court went on to state at page 5 that with respect to these assumptions:

> "Such assumptions are inevitable in assessing suspected drinking drivers, and there is nothing wrong with making them. **However, in a situation such as that presented in the case at bar, where the subject is a complete stranger, these particular circumstances are weak indicators of impairment of the ability to drive."** (emphasis our own)

iv) In summary, the Court concluded that a peace officer must be careful to include in his analysis as to whether he has reasonable and probable grounds the "non-indicators" of impairment: the fact that an accused may not exhibit any signs of impairment in the usual way (by speech, usual manner of walking and observable driving). Furthermore, the Court held that while the officer may have had a reasonable suspicion and "had ample grounds to be quite suspicious", suspicion was inadequate in order to make a direct demand for breathalyzer samples. Such suspicions, of course, are grounds to make a road-side screening test demand but are insufficient in order to require an accused to attend before a breathalyzer instrument. As a result of these findings, the Court held that the accused's Section 9 *Charter* rights were violated and

pursuant to Section 24(2) the certificate and all other evidence obtained as a result of the violation was excluded.

m) It is respectfully submitted by the Respondent that the required standard was not met by the officer before making the demand if he did not at least make such efforts as are practicable to investigate whether the symptomatology on which he relies might just as well have resulted from factors other than alcohol consumption especially when he is aware or made aware certain equivocal factors exist. If this is potentially the case, then his subjective views must be reviewed in light of all the evidence by the Court: *R. v. Gavin* [1993] P.E.I.J. No. 136 (P.E.I.C.A.).

n) i) In *R. v. Arnott* (unreported), November 19, 1998, (SK. P.C.) the Court carefully analysed the law and reviewed the Supreme Court and the Saskatchewan decisions respecting the issue of "reasonable and probable grounds". Of significance is the Court's quotation of *R. v. Bernshaw* (1995) 1 S.C.R. 254, where Mr. Justice Sopinka held:

> "The decision as to whether a peace officer believes on reasonable and probable grounds that an offence is being committed and, therefore, the demand is authorized under s. 254(3) of the Criminal Code, must be based on the circumstances of the case. It is therefore essentially a question of fact and not one of pure law... that is, s. 254(3) of the Code requires that a police officer subjectively have an honest belief that a suspect has committed the offence and objectively there must exist reasonable grounds for this belief".

ii) Mr. Justice Sopinka in *Bernshaw* further stated that reasonable and probable grounds must not only exist to satisfy the statutory requirement but must also exist to satisfy the constitutional requirement in order for a search and seizure under s. 8 of the Charter of Rights and Freedoms to be valid. As the Trial Judge states at page 5 of his decision:

> "Section 8 requires that reasonable and probable grounds exist in fact and not that their presence can be deemed to exist notwithstanding the evidence".

iii) In the *Arnott* case, the police officer knew that there had been a traffic accident and that the accused smelled of liquor. The driver also had some difficulty producing his registration

and the evidence showed that the accused had asked the other driver not to call the police. The police officer's evidence with respect to signs of impairment included a smell of alcohol, reddish eyes, speaking in a softer, lower volume, a slow, 'gingerly' walk, a sleepy look and a slight slur. However, the officer also acknowledged that the accused responded properly to questions asked and walked straight. The officer acknowledged although there was a "slight slur", he had never talked to the accused before. No sobriety tests were ever taken. Of significance is what is stated in the facts by the Trial Judge at page 7:

> "There is some indication that he was also told that the accused had been snowmobiling and that could account for his reddish eyes".

iv) In the end, the Learned Provincial Court Judge, based on all of the evidence that was available to the constable and on an objective review of all of the factors available to the constable held that while there were reasonable and probable grounds to believe that the accused had been drinking, there were insufficient reasonable and probable grounds to believe that he had committed the offence of impaired driving. As a result, the Certificate of Analysis was excluded from the evidence.

o) i) In *R. v. Sperle* [2004] S.J. No. 611 (Sk. Q.B.) Mr. Justice Laing was dealing with a Crown appeal that resulted from an acquittal after the trial judge found that the Respondent had been arbitrarily detained contrary to section 9 of the Charter. In quoting Dawson, J. from *R. v. Singer* (1999) 25 C.R. (5th) 374, the Court reiterated the necessity of an objective analysis of a police officer's subjective view of the circumstances in their entirety which are known to the officer. In his analysis, Laing, J. noted that the line between "reasonable suspicion" and "reasonable and probable grounds" is sometimes a fine one and that the *Hopkie* decision (supra) provides sufficient guidance on the issue. In his conclusion, Laing, J. held the following at page 5, paragraph 12:

> "The result is I agree with the learned trial judge's conclusion that while the Constable had reason to be suspicious that the accused's ability to operate a motor vehicle might be impaired by alcohol, he lacked an objective basis to elevate that suspicion to the level of "reasonable and probable grounds."

ii) The Court then went on to say the following about the exclusion of the certificate of analysis:

> "The Crown's position that the certificate of analysis should never-the-less been admitted into evidence, is contrary to the case law which has followed: *R. v. Bernshaw* (1995) 95 C.C.C. (3d) 193 (S.C.C.) and *R. v. Stillman*, (1997) 1 S.C.R. 607. In *R. v. Sesula* (1991), 93 Sk. R. 271 (C.A.), Sherstobitoff J.A. on behalf of the court specifically did not endorse the trial judge's finding that *R.v. Rilling* (1975), 24 C.C.C. (2d) 81 (S.C.C.) still had application post-Charter. **The learned trial judge was correct in excluding the certificate of analysis from evidence in the trial on the basis that the results were conscripted evidence not lawfully obtained, and the admission of the certificate would bring the administration of justice into disrepute."**(Emphasis our own)

iii) Why the Decision Made by the Trial Judge is Reasonable

24. There is no argument that the police had a right to stop Mr. Shepherd because of the fact he rolled through a stop sign. The Crown simply missed the point when they argued on Appeal that the Trial Judge's decision would limit the ability of police officers to investigate and detain people who constitute a risk to public safety. Nothing could be further from the truth in the case at bar. For example, officers have the right to conduct sobriety tests, have individuals (without having to be advised of their right to talk to a lawyer) blow into a Roadside Screening Device, ask questions and answers and conduct a physical analysis such as a standardized Field Sobriety Test. Sometimes, however, it is important for officers, no matter how experienced they are, to take their time in their investigation before jumping to conclusions.

25. Furthermore, as mentioned, the Crown argued on numerous occasions at the Trial, Summery Conviction Appeal and Court of Appeal the fact that Sargent Sellers was an

experienced police officer. No one disputes that: the Trial Judge knew it because he heard it in the evidence. What was unique about the situation involving Mr. Shepherd was that he was not being followed by a police car, but by a police truck which had a striking resemblance in his rear view mirror to that of an ambulance. Furthermore, it was not only an issue of Mr. Shepherd's speed (the speed limit between Boychuck Drive and McKercher Drive on 8th Street is 60 kilometers per hour) but as was also pointed out in the evidence, that road is a three lane major roadway in Saskatoon with a golf course on one side. In the two previous Appeals by the Crown in this case, the Crown argued that " there was no evidence Mr. Shepherd signaled his intention to pull over and that there was no evidence that he used his signal light. It was of great concern that the Crown inferred that simply because there was no evidence that Mr. Shepherd used his signal light that it should have been found as a fact that he did not use his signal light. In any event the law is clear: the Crown must prove its case and to allege that simply because there wasn't any evidence that a signal light was used cannot be used as a "negative" against the accused. Regardless, the Trial Judge found as a fact that Mr. Shepherd's driving behavior was consistent with trying to get out of the way of an ambulance. After all, an ambulance would be about the same size and shape of the police truck driven by the officer.

26. In previous Appeals, the Crown has argued that the officer described Mr. Shepherd as a person who had a smell of alcohol on his breath. Clearly, it is not an offence in law to be found in that condition. Nonetheless, the law authorizes the police to both make a Roadside Screening Device demand and conduct sobriety tests in such a circumstances. What is most strange is the innocuous descriptions used by Sergeant Sellers when he described Mr. Shepherd's condition: slow, deliberate, fatigued, slack-jawed, and intoxicated. The problem with these terms used to describe Mr. Shepherd (who was a total stranger to Sergeant Sellers) is that they are subjective

conclusions, not descriptions of how various activities were actually carried out. That is to say, what does it mean to move "slow" when a stranger is the only one providing an opinion as to how you are apparently supposed to move? What does it mean to be moving in a "deliberate" fashion when the person making the observation has never seen you move before? What does it mean to be "slack-jawed" at all? Does it mean to breath through one's mouth? What does is mean to be "intoxicated" as opposed to "impaired"? Several police officers use the term "intoxicated" to mean that a person might have consumed one beer because they are of the personal belief that one beer affects one's ability to drive when, scientifically, that is untrue. In any event, the *Criminal Code* sets out the specific requirement that before a Breathalyzer or Intoxilyzer Demand can be made under section 254(3) that there has to be a commission of an offence under section 253 (either being over 0.08 or actually impaired). Of course, the Appellant is not saying that there must be proof beyond a reasonable doubt of such an offence; only that there be reasonable and probable grounds of at least impairment to operate a motor vehicle as opposed to other subjective terms provided by the police.

27. It is also somewhat concerning that the Crown in its previous submissions would include in its argument what the blood alcohol concentrations were in determining whether the Sergeant had reasonable and probable grounds to make the demand. Clearly, the certificate's results cannot be admitted into evidence on the trial proper until the *Charter* issues are determined. Furthermore, without some expert analysis of what it means for a person to have a blood alcohol concentration "over .08" is of no value to the Court in this case as the officer had no expertise in interpreting a certain result and neither did the Court. Such an approach, if acted on, would only promote "armchair science." In any event, the officer has no idea of what results would be obtained from the conscripted evidence taken from Mr. Shepherd.

28. With respect to Constable Horsley's evidence (the officer who transported Mr. Shepherd to the police station after the breath demand had already been made), it was the Crown's further argument in the past that his observations were significant. With respect, it should not matter what constable Horsley thought because he never at any point communicated his observations to Sergeant Sellers prior to the demand being made to Mr. Shepherd. It is also noteworthy that by the time Constable Horsley arrived at the scene, Mr. Sheperd was already in Sergeant Sellers' custody and in handcuffs. Furthermore, none of Constable Horsley's observations he commented on at trial occurred until he was at the police station with Mr. Shepherd. Therefore, it is respectfully submitted that no matter what Constable Horsley thought it was of no concern to the Trial Judge because it was Sergeant Sellers' subjective view that required the Judge's focus. However, should this court consider Constable Horsley's observations to have some significance, his observations at the police station are of little value because he describes Mr. Shepherd as walking with one foot in front of the other, however both feet were parallel to each other and at a distance laterally from each other (transcript, page 115). With that kind of description of Mr. Shepherd's walking, it does not appear that it was abnormal at all for him or anyone else. (all page numbers from the transcript cited in this factum are the page numbers contained at Part IV of the Appellant's Record).

29. Most importantly, the observations of Sargent Sellers were cross-examined in order for a totality of the circumstances known to the officer to be put before the Court for proper adjudication. The following factors known to the officer before the breath demand was made elicited on that cross-examination were obviously significant to the Trial Judge: firstly, observations made by Constable Summacol (who spent 30 to 40 minutes with the accused) indicated that Mr. Shepherd's attitude was good and he had little difficulty with his dexterity. This evidence contradicted Sargent Sellers momentary observations thereby casting the Sargent's

credibility into doubt. Sargeant Sellers disagreed with Constable Summacol's observations for some unknown reason. In fairness, the sargeant did agree that Mr. Shepherd did not use the counter, walls or anything else for support for his balance. Neither did the sargeant have anything in his notes or have any recollection about any balance problems at the roadside. It is noteworthy that at page 41 of the transcript that the sargeant admits he would have made notes if Mr. Shepherd had any difficulty getting out of his vehicle but actually made no notes at all in that respect. In fact, at pages 41-42, the sargeant indicates that he would only describe Mr. Shepherd as "intoxicated" which meant, in his view, "appeared to have been consuming alcohol recently". Most noteworthy is his admission at page 42-43 in his cross-examination that he followed the Shepherd vehicle for over 3 kilometres and it never went out of its lane or crossed over its lane markings in any erratic manner. As well at page 47, the officer agreed that the overall course of driving with respect to control of the Shepherd vehicle appeared to be "quite good" and that Mr. Shepherd, according to him was "ya, he was in control, sure." Furthermore, at page 50, even though Mr. Shepherd had his hands cuffed behind his back he had no difficulty walking to and getting into the police car. When the sargeant was asked "But my question was, he executes it fine, correct?" The sargeant's answer was "yes".

30. With respect to the particulars of Mr. Shepherd's actions and odour, the officer, commencing at page 52, agreed that the odour of beverage alcohol only meant a person had consumed alcohol but not how much. He further indicated that all he could describe Mr. Shepherd's speech as was as if he were speaking slowly. Furthermore, the officer admitted that Mr. Shepherd did not stagger for the entire time he was in custody from the time of the vehicle stop.

31. If this Court might deem it appropriate to consider what Constable Horsely saw before the breath demand was made (as it may have assisted the Trial Judge in objectively reviewing the Sargeant's "reasonable and probable grounds" to make the demand), Constable Horsely's testimony commencing at page 67 of the transcript indicates that he first became involved in the matter when he heard the sargeant over the radio asking for some assistance. Constable Horsley's first saw Sargeant Sellers dealing with Mr. Shepherd when both vehicles were stopped at the intersection of Preston Avenue and 8th Street in Saskatoon. At page 71 of the transcript, Constable Horsley indicated that he took the accused into custody at the place where the vehicles came to a stop. Clearly he was able to observe Mr. Shepherd before any demand for breath sample was made by Sargeant Sellers. In that vein, Constable Horsley on cross-examination admitted that his observations of Mr. Shepherd were as follows:

a) He was walking at the same rate of speed as Constable Horsley, not any slower or faster (page 87, lines 15-20);

b) Mr. Shepherd had no difficulties getting into the back of the police car on his own (page 88, lines 2-10);

c) Constable Horsley would have written down things he considered to be important to an impaired driving investigation in terms of evidence; but if he did not make such a notation he did not consider any of the observations to be significant. His notes were extremely sparse in terms of any symptoms of impairment (page 88, lines 11-18);

d) His observations were over a period of approximately 55 minutes both before and after the demand was made (page 89, lines 3-8);

e) Mr. Shepherd understood the questions being asked of him and responded appropriately and did not cause the officer to be concerned at all for his safety (page 89, lines 9-24);

f) Mr. Shepherd has no difficulty removing things from his person which required dexterity

when at the police station (page 93, lines 15-20 and continuing on page 94, lines 1-26); and

g) Upon watching Mr. Shepherd over the period of time while in his custody, Constable Horsley did not note anything about Mr. Shepherd that made him look fatigued or tired looking (page 112, lines 10-17).

B) The *Charter* as it pertains to the Exclusion of Conscriptive Evidence That A Citizen Must Provided Under Penalty of Law.

32. No one can argue with the fact that the evidence against Mr. Shepherd is clearly conscriptive but more so conscriptive than in most other cases where the search of an individual is involved because his refusal to allow a search of his body for breath can result in further criminal charges for refusing to do so. It is within this light that any *Charter* review of the "reasonable and probable grounds" provisions contained in Section 254(3) of the *Code* has to take place. Within that backdrop any analysis (whether it be the analysis as contained in *R. v. Collins* [1987] 1 S.C.R. 265 or *R. v. Stillman* [1997] 1 S.C.R. 607) has to take place.

33. Furthermore, one must not forget that the principles contained in both *Stillman* and *Collins* are not mutually exclusive; that is to say, in such a case as the one at bar, one need only for a moment consider what happens in a "free and democratic society" where the police would be able to, without any consequences for their actions, ask anyone at anytime for a breath sample and if a person should fail that test or refuse to provide such evidence against himself, that evidence can be admitted against him without any repercussions for the state's authorities if they randomly select individuals to provide tests. Therefore, there must be consequences for the state if it allows its police forces to act outside the legislative provisions of Section 253 of the

Criminal Code. If there were no consequences for the state's authorities to not follow Parliament's directions in order to protect the freedoms Canadians enjoyed long before the *Charter* enshrined those freedoms, then the *Charter* becomes a meaningless document. The *Charter* would therefore only stand for the fact that a citizen has a right but no way to have any remedy to protect those rights even in cases such as those where a citizen may elect to maintain their right to silence yet still be convicted of an offence for failing to provide that incriminating evidence. As a result, the manner in which "trial fairness" has been defined in *Stillman* in the evolving jurisprudence should be maintained as there is no other way to properly balance the *Charter's* enshrined freedoms with the state's authority and power other than by providing the remedy of the exclusion of evidence in appropriate cases. The issue therefore is "what is an appropriate case to exclude evidence"? The answer is that the rules set out in *Stillman* provide the best national framework in which those decisions can be made**.** That is to say, those who practice law on the "front line" and those who adjudicate in the Provincial Courts and other Courts of first instance across the Dominion require a standard so that different individuals who face charges in different provinces presided over by different Judges have equal consideration before those Courts as opposed to having loose philosophical guidelines that are subject to an infinite number of interpretations. This is why the *Stillman* decision has been of such great assistance to lawyers and Judges alike at the trial levels across Canada: an easily understood criteria was created that provided meaningful and realistic assistance and ensured Canadians of equal standing from one part of the country to the other would receive the same considerations when a Trial Judge was determining whether evidence should be excluded if there was a *Charter* breach. If this Court were to find that the kind of analysis that went on prior to this Court's

decision in *Stillman* should prevail, the very problem that *Stillman* was written to provide clarity to the law in determining in what kinds of evidence should be excluded, will, unfortunately, return. The result will be inconsistency in the *Charter's* application, unequal treatment of Canadians who find themselves in similar situations and confusion among lawyers and judges. It will amount to being a "checkerboard" application of the *Charter* at best.

34. The confusion on the Bench in Saskatchewan is illustrated by the very case at bar. In this case, one can see that the Saskatchewan Court of Appeal has taken two different views of the application of section 24(2) of the *Charter*. As is pointed out by Madam Justice Smith in her reasons as contained at page 33 at paragraph 118 of her decision:

> "It is my conclusion, with respect, that the view expressed by Richards J.A. in *Shaeffer* reflects the correct position on this issue at this present time. In effect we are bound by *Stillman* and *Barlow*, which have not been overturned. Evidence of a breath sample obtained in violation of an accused's *Charter* rights is conscriptive evidence and as a general rule, its admission would render the trial unfair and bring the administration of justice into disrepute. While this view does not rule out exceptions (and I would see the circumstances which were obtained in *Tremblay* and *Mohl* as circumstances that could found such an exception) it does confirm that, in the absence of the Crown advancing reasons for departing from the general rule, a full analysis of the *Collins* factors is not required of the trial judge in the application of s. 24(2) prior to excluding evidence of an unconstitutionally obtained breath sample."

35. On the other side of the spectrum a different panel on the Court of Appeal on *R. v. Janzen* [2006] S.J. No. 629 thought out loud about the approach taken by the panel that heard the *Schaeffer* case and referred to it at paragraph 14 in the reasons provided by Sherstobitoff, J.A. in the case at bar:

> "However, I wish to put on record my reservations with respect to the conclusion reached by Smith J.A. in regard to the question of whether a judge is required to make a *Collins* [[1987] 1 S.C.R. 265] analysis prior to excluding evidence of an unconstitutionally obtained breath sample. In light of the opinion of Lebel J. (concurred in by Fish J.) in *R. V. Orbanski* [2005] 2 S.C.R. 3, as well as the Judgments of the Ontario and Manitoba

> Courts of Appeal referred to in the Judgment of Smith J.A., I prefer the comments made by this Court in *R. v. Janzen* (2006), 285 Sask. R 296 in regard to the issue to the conclusion reached by Smith J.A..”

36. Lane J.A at the case at bar agreed with Sherstobitoff J.A. to the extend that he stated the following at paragraph 22 of the Judgment:

> “It is not necessary for me to consider the s. 24 issue save to say I do share Sherstobitoff J.A.’s concern that an almost automatic exclusion of the results of breath tests would bring the administration of justice into disrepute.”

37. Neither of the majority Court of Appeal Justices made any attempt to discuss what is meant by the phrase “bring the administration of justice into disrepute”. It is that failure to have some concrete guidelines in place (as they currently exist in *Stillman)* that concerns trial lawyers and trial judges across Canada. Therefore, it is respectfully submitted that the *Stillman* decision should not be overturned in recognition of the fact that a “general rule” exists and if the general rule should at any point not be acceptable to the Crown, then the Crown should have the opportunity (and has under the current state of law) to put before the Trial Courts its rationale for not following the general rules as set out in *Stillman*.

IV) SUBMISSIONS, RE: COSTS

38. The Appellant does not seek costs.

V) ORDER SOUGHT

39. It is respectfully submitted that this Appeal be allowed, the Summary Conviction Appeal Court Judge’s decision be upheld and an acquittal be entered.

All of which is respectfully submitted this _____ day of December, 2007.

_____
Michael W. Owens
Counsel for the Appellant

VI) AUTHORITIES TO BE CITED

VII) STATUTORY PROVISIONS (contained at Tabs 24 and 25 of the Appellant's Book of Authorities)