IN THE PROVINCIAL COURT OF SASKATCHEWAN

Citation: 2013 SKPC 143

Date: August 29, 2013
Information: 37252811
Location: Moose Jaw

Between:

Her Majesty the Queen

- and -

Kayci Rose Rachner

Appearing:

Brian Hendrickson, Q.C. — For the Crown
Nicholas Robinson — For the Accused

JUDGMENT **M. GORDON, J**

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[1] Kayci Rose Rachner is charged on or about the 11th day of March A.D. 2012, at or near Moose Jaw, Saskatchewan, did having consumed alcohol in such quantity that the concentration thereof in her blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, operate a motor vehicle contrary to s. 255(1) and s. 253(1)(b) of the *Criminal Code* and count 2, on or about the 11th day of March A.D. 2012, at or near Moose Jaw, Saskatchewan, did while her ability to operate a motor vehicle was impaired by alcohol or a drug, operate a motor vehicle contrary to s. 255(1) and s. 253(1)(a) of the *Criminal Code*.

[2] The trial was held May 14, 2013 in Moose Jaw, which proceeded by way of a *voir dire* in connection with the *Charter* issue raised by the defence. The Crown called two police officers and the defence called one witness on the *voir dire*. It was agreed all admissible evidence on the *voir*

dire would be applied to the trial proper. The Crown then closed its case. This is my decision on the *voir dire*.

[3] At the conclusion of the evidence on the *voir dire*, the Crown entered a stay of proceedings on count #2. Therefore this decision just deals with the *Charter* application on count #1.

FACTS

[4] Cst. Torgunrud testified that he was on duty with his partner Cst. Biniaris on March 11, 2012. They were in a marked police vehicle and Cst. Torgunrud was the passenger. At approximately 2:15 a.m., while on routine patrol, the officer noted a vehicle parked with its lights on and running in a baseball park at the corner of 9th Avenue East and Caribou Street in Moose Jaw. The officers observed this vehicle for a few minutes and then noticed this vehicle proceeding towards the road. They watched it creep onto the road and park further down. The police vehicle drove past this suspicious vehicle and several people were noted in the vehicle. As a result, the officers turned around and stopped the vehicle. As the officers came up from behind, this suspicious vehicle backed up and then moved forward. The vehicle then stopped again and Cst. Biniaris, the driver of the police vehicle, put on the emergency lights. The suspicious car was parked at an angle facing west with two tires on the sidewalk and two tires on the roadway.

[5] The officer testified five to 10 minutes passed before both police officers got out of the vehicle. Cst. Torgunrud went to the passenger's side and Cst. Biniaris to the driver's side. This is standard procedure given the number of occupants in the vehicle. Cst. Torgunrud talked to the passenger and noted a strong smell of beverage alcohol from the vehicle. He heard Cst. Biniaris ask the driver to get out of the vehicle and go to the police vehicle. Cst. Torgunrud did not notice anything unusual in the accused's walk but said he really didn't have a good view. Cst. Biniaris placed Ms. Rachner (identity was admitted as the driver of the vehicle) in the police vehicle. Cst. Torgunrud finished dealing with the passengers and returned to the police vehicle. He had some

conversation with the accused and Cst. Biniaris. Cst. Biniaris advised Cst. Torgunrud there was a basis for an ASD and suggested he proceed. Then Cst. Torgunrud asked Ms. Rachner if she had anything to drink and she said "one and maybe some shots, very minimal". Then she admitted to one and a half drinks. The officer said there was a very faint smell of beverage alcohol, but not a "whole lot".

[6] At 2:40 a.m., Cst. Torgunrud read the ASD warning from his card and she indicated she understood. This demand was about 10 minutes after the time of the initial stop. There is no question Cst. Torgunrud was a qualified ASD operator and he had an approved Draeger Alcotest 7410 machine that was in proper working order. The officer explained the procedure and the reason for the ASD demand. Cst. Torgunrud said that he made the ASD demand because he had reasonable suspicion she had alcohol in her body. The officer noted a more definite smell of beverage alcohol when she spoke.

[7] At 2:43 a.m., Ms. Rachner registered a fail, meaning she was over the legal limit. Her rights to counsel were read. The breath test demand was at 2:51 a.m. and at 2:52 a.m., she was read the police warning. Cst. Biniaris drove directly to the police station and called ahead requesting that a breath technician be called in.

[8] In cross-examination, Cst. Torgunrud admitted that it was mostly his partner Cst. Biniaris that was talking with the accused initially. He noted further the accused took seven attempts to provide a satisfactory sample.

[9] The in-car video was marked as Exhibit D-1 by consent and a portion of the video was watched at the trial. I have watched the complete video. Ms. Rachner and Cst. Biniaris were sitting in the police vehicle for some time prior to Cst. Torgunrud returning to the vehicle and subsequently making the ASD demand.

[10] Cst. Biniaris was the driver of the police vehicle on the evening of March 11. He approached the driver's side of the vehicle and requested licence and registration for the purpose of *Traffic Safety Act* enforcement and sobriety check. He asked the driver if she had anything to drink and she admitted that she had one and a half shots. The officer was of the opinion while he was still at Ms. Rachner's vehicle that he had grounds to make the ASD demand. He also observed a faint odour of beverage alcohol on her breath, her flushed face, glossy eyes and slurring some words. She admitted to driving. He asked Ms. Rachner to exit the vehicle and placed her in the back of the police vehicle. Her walk and balance was fair or normal going back to the police vehicle. He got in the front. He said this took less than two minutes.

[11] At some point a little later, Cst. Torgunrud got in the passenger's side of the police vehicle and the video shows a very brief discussion between the officers. Cst. Biniaris indicated to Cst. Torgunrud that he could make the demand. The video shows Cst. Torgunrud asking Ms. Rachner as well about alcohol consumption. Cst. Biniaris estimates they were about five minutes in the police vehicle before the demand was made. The video does show Ms. Rachner asking the police about what was going to happen to her. She indicated she was from the States and visiting here on school break and was quite concerned about the whole affair and about her friend that they were trying to meet at the park area.

[12] On cross-examination Cst. Biniaris admitted that they were probably in the police vehicle about two minutes before the camera was turned on to record the back seat area. Cst. Biniaris admitted it was not less than 10 minutes and not more than 15 minutes from the time of the stop to the time the ASD demand was made by Cst. Torgunrud.

[13] Alyssa Larose testified for the defence. She was a passenger in the suspect vehicle. She noted the police pulled up from behind without any lights, honked, the officer got out of the passenger's seat and then he got back in. After about five minutes or more, the police did approach their vehicle. There was a police officer at the driver's side and the passenger's side questioning the

occupants of why they were in Canada and asked the driver to step out and go to the police vehicle. Ms. Rachner did go back to the police vehicle. The police asked for identification from all passengers and it was a long time before the police returned this identification.

[14] On cross-examination she admitted that they had been drinking Mike's Hard Lemonade and that Ms. Rachner had also been drinking. They were at Bell Park looking for a friend who happened to show up while Ms. Rachner was in the police vehicle. Ms. Larose was the owner of the Hyundai car that was being driven by Ms. Rachner. She said she realized the time was very important after she started thinking about the events of the evening, although she did not write anything down. It was her evidence that Ms. Rachner and the police officer were talking outside the vehicle for about two minutes with Cst. Biniaris questioning Ms. Rachner. Cst. Torgunrud was asking the passengers questions and kind of joking and laughing with them and asking why they would come to Canada for spring break. It was her evidence that they had been stopped about nine minutes when the police asked the passengers to step out of the vehicle.

SUBMISSIONS ON THE *VOIR DIRE*

[15] The accused argues that the ASD demand was not made forthwith contrary to s. 254(2)(b) of the *Criminal Code* and therefore the results of the ASD were unlawfully obtained and should not form part of the reasonable and probable grounds for making the Intoxilyzer demand. The police officer admitted the ASD was the basis for the Intoxilyzer demand. The defence submits that the ASD demand should have been made when the officer namely Cst. Biniaris was talking to Ms. Rachner at the window of her car. Cst. Biniaris testified he had a reasonable suspicion that she had alcohol in her body and she admitted drinking. Therefore the defence says the officer had a reasonable suspicion to make the ASD demand early on. There was no valid reason or explanation given by either officer for not doing so. Further the defence notes that Cst. Torgunrud was unsure of most of the times and it is unclear just how long the accused was in the police vehicle prior to the demand being made. The defence says the clock starts ticking as soon as Cst. Biniaris confronted

the accused at her vehicle.

[16] The defence submits that I should find a breach and exclude the results of the Certificate of Analyses based on what is commonly known as a *Grant* analysis. The defence argues the breach is serious as the accused was held without giving her any reason in the back of the police vehicle and without any rights to counsel. Therefore the accused was detained for an unacceptable time and not given her *Charter* rights to retain and instruct counsel under s. 10(b). Secondly, the length of the detention was unacceptable and thirdly, society's interest that a case proceed on its merits. Society does understand that the police officers should abide by the law and the law is clear as to the meaning of forthwith. It is important for society as a whole that peace officers be held accountable. The defence says the officers seemed relatively vague and unconcerned about the time requirements.

[17] The Crown argues that in the circumstances of the case the ASD demand was made forthwith by Cst. Torgunrud. The Crown denies that any of the accused's rights under the *Charter* were breached. The Crown relies partially on the evidence of Ms. Larose, the defence witness. Based on her evidence there was at the most nine minutes that had elapsed. The Crown points to the cases of *R. v. Gunningham*, 2011 SKPC 110; *R. v. Kukrudz*, 2011 SKPC 141; and *R. v. Ostropolskyi*, 2013 SKPC 17, as just a sample of many cases in this area that discuss the meaning of forthwith.

[18] The Crown admits the evidence is not perfect but argues that when one considers all of the evidence, the delay was not excessive and it was not in the 20 minute range as suggested by the accused. Finally, the Crown says even if a breach is found, that the breach is a minor one and the fail result of the ASD demand should not be excluded.

ANALYSIS

[19] First of all it is fair to say that absent the fail reading on the ASD, Cst. Torgunrud would not have had the reasonable and probable grounds necessary to make a demand for breath samples

pursuant to s. 254(3). As I understand the accused's argument, she asserts that her rights under s. 10(b) of the *Charter* were violated due to the fact that several minutes elapsed between the stop and the time that the ASD demand was made. Therefore, Ms. Rachner asserts she was detained and should have been advised of her rights to counsel before being required to provide any breath samples. Therefore Ms. Rachner asks that there be the exclusion of the fail results of the ASD and the subsequent breath test and Certificate of Analyses.

[20] Section 254(2) of the *Criminal Code* authorizes a peace officer to demand samples of breath for screening and analysis in certain circumstances. The section reads in part as follows:

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph *(a)*, in the case of a drug, or with either or both of paragraphs (*a*) and (*b*), in the case of alcohol:
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> > (*a*) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
> >
> > (*b*) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[21] While the demand and provision of an ASD sample involves detention of a suspected driver, the Supreme Court of Canada in *R. v. Grant* (1991), 67 CCC (3d) 268 (SCC), has stated that s. 254(2) is a reasonable limit on the rights to counsel and is saved by s. 1 of the *Charter*. However this is only the case if the demand meets the requirements set out in s. 254(2). Therefore, time is

important in this procedure and it is not unreasonable to expect the officers to understand this and act accordingly and record the times and steps in this procedure.

[22] The approved screening device demand must be made "forthwith" or without unreasonable or unnecessary delay after the peace officer forms the reasonable suspicion as required by this section of the *Code*. In *R. v. Bernshaw*, [1995] 1 S.C.R. 254, speaking for the majority Sopinka J. refers to *R. v. Grant*, [1991] 3 S.C.R. 139, and notes that the Court stated a broad interpretation should be given to the meaning of "forthwith" and also adopts a flexible approach should be given as was in *R. v. Dewald*, [1996] 1 S.C.R. 68 (S.C.C.). This approach is consistent with the reasonable limits on the accused's right to counsel under s. 10 of the *Charter*.

[23] There are many cases dealing with the "forthwith" requirement. I have considered many of them including the cases referred to by both counsel. The cases are helpful and offer guidance as to how the Courts are applying the law to the facts. However, context is of the utmost importance. Judge Koskie in a recent decision of *R. v. Ostropolskyi*, 2013 SKPC 17, refers to the Ontario Court of Appeal case of *R. v. Quansah*, 2012 ONCA 123, [2012] O.J. No. 779. I also find that case to be a very good summary of the law in the area and quote Mr. Justice LaForme at paras. 45 to 49 as follows:

> In sum, I conclude that the immediacy requirement in s. 254(2) necessitates the courts to consider five things. First, the analysis of the forthwith or immediacy requirement must always be done contextually. Courts must bear in mind Parliament's intention to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.
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> Second, the demand must be made by the police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body. The immediacy requirement, therefore, commences at the stage of reasonable suspicion.
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> Third, "forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation

> of reasonable suspicion to the making of the demand to the detainee's response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).
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> Fourth, the immediacy requirement must take into account all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD is not immediately available, or where a short delay is needed to ensure an accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delay that is no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.
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> Fifth, one of the circumstances for consideration is whether the police could realistically have fulfilled their obligation to implement the detainee's s. 10(b) rights before requiring the sample. If so, the "forthwith" criterion is not met.

[24] Therefore bearing in mind the legal requirements, what is the evidence that I accept that occurred in relation to this accused in the early morning hours of March 11, 2012? I accept that the peace officers were on a routine patrol, stopped and observed the subject vehicle which was parked at the ball diamond at Bell Park around 2:15 to 2:20 in the morning of March 11. The lights on the vehicle were on and the vehicle was running. The vehicle then travelled south through the field to Caribou Street and slowed down. The vehicle came to a stop on Caribou Street with two wheels on the street and the rear wheels still on the grass. The peace officers passed the vehicle, turned around and came up behind the subject vehicle. The accused's vehicle backs up towards the police vehicle and then forward and stops at an angle. After five or 10 minutes, the police officers go to this vehicle, one on each side, which is standard procedure. Cst. Torgunrud goes to the passenger's side and notes a strong smell of beverage alcohol coming from the vehicle. There were four occupants in the vehicle who admitted to drinking. The accused was identified as the driver and asked by Cst. Biniaris to exit the vehicle and was placed in the back of the police vehicle. She was detained. Cst. Biniaris said he was checking the accused for licence, registration and sobriety. He asked if she had anything to drink while she was still in the vehicle and she admitted one and a half plus some shots.

Cst. Biniaris testified that he had grounds to make the ASD demand quite quickly or early on when he was speaking with the accused at the car at the time of the stop. She had admitted to drinking and he had observed there was a faint odour of beverage alcohol on her breath, flushed face, slurred some words and glossy eyes. The accused accompanied Cst. Biniaris to the police vehicle and is placed in the rear seat. The video, Exhibit D-1, shows that approximately one and a half to two minutes elapsed prior to the rear camera being activated. There is conversation with the accused. She is obviously concerned about the well-being of her friend that they were to meet at the park as well as being concerned about what is going to happen to her. She says she is from Duluth, Minnesota and visiting on school break. This is a new experience for her. Cst. Biniaris does not make the ASD demand at that time. He is observed to be making notes. Cst. Torgunrud returns to the vehicle about two minutes later. Another couple of minutes elapse and Cst. Torgunrud talks with the accused. The two police officers then have some conversation in low tones which is difficult to hear on the video but I believe the gist of the conversation is that Cst. Biniaris says there are grounds to make the ASD demand and that Cst. Torgunrud should take over. Cst. Torgunrud confirms this and Cst. Biniaris says "yah". Cst. Torgunrud gets out of the vehicle and then returns shortly. When the officers were questioned on the time lines at this stage, they could not say. When the Court questioned Cst. Biniaris in particular as to what the length of time before Cst. Torgunrud returned to the vehicle, Cst. Biniaris agreed that it was less than 15 minutes but could not say if it was less than 10 minutes. This is consistent with his testimony in-chief that he did not recall when Cst. Torgunrud got back into the police vehicle. It is clear Cst. Torgunrud was dealing with the other passengers confirming their identity, answering their questions and arranging a cab. Cst. Biniaris said he was observing and making notes. He wrote her name and information. When Cst. Torgunrud returned to the passenger's seat and after the conversation with Cst. Biniaris, he asked the accused if she had been drinking and she replied that she had one to one and a half and some shots. There is more conversation and at 2:40 a.m., Cst. Torgunrud makes the ASD demand. At 2:43, there is a fail, rights to counsel given and Intoxilyzer demand and police warning are subsequently given. The accused is taken directly to the detachment and booked in and subsequently blows in the Intoxilyzer.

[25] I find the evidence of the police officers lacking on essential points which are extremely important. Every police officer on routine patrol should be aware in an impaired driving investigation there are time requirements. The ASD is an important investigative tool and in my view the police are quite proper in using this tool in most investigations. This test is minimally intrusive, can be done at the roadside and does not result in any charge if one complies. However, it is an important and effective screening mechanism which if done properly provides the grounds for further detention and an Intoxilyzer demand will be determinative of what happens next. During the period of time at the roadside, the subject is detained in the rear of the police vehicle. She is unable to leave and is facing investigation, in this case really by two police officers. The accused's rights to counsel are suspended. Therefore there are ample reasons that the demand must be made forthwith or as soon as possible. The bar for making an ASD demand is low. Most often the accused admits, as here, to this consumption when asked by the police. The observations the police must make are not difficult. For example, the smell of beverage alcohol and physical observations of the accused. The ASD demand is finally made by Cst. Torgunrud at 2:40 a.m. However, it is clear from the video that the accused had been in the police vehicle for 10 minutes and possibly longer before Cst. Torgunrud made the ASD demand. Exhibit D-1 shows the accused asking questions and speaking with Cst. Biniaris prior to this. She is concerned, she doesn't know what is going to happen to her and whether she is going to go to jail. Cst. Biniaris said he was observing and making notes. My concern is that Cst. Biniaris appears to be completely oblivious to the requirement that the ASD demand must be made forthwith and that the clock is running. I do not accept the fact that it was essential to observe and make notes for that period of time. There was another police officer involved dealing with the passengers. There were no safety concerns or problems with the accused or the passengers. There was no accident. There was no indication of recent consumption by the accused.

[26] Accordingly I conclude that the ASD demand was not a lawful one as it was not made forthwith and was only given after Ms. Rachner was placed in the back of the police vehicle and a further period of time elapsed until the second officer Cst. Torgunrud returned to the vehicle.

[27] Since I have found that the accused has established a *Charter* breach, the next step is whether the Certificate of Analyses ought to be excluded under s. 24(2) of the *Charter*. The Supreme Court of Canada in *R. v. Grant*, [2009] 2 S.C.R. 353, defined the test which a Court is to apply in determining whether evidence should be excluded as follows:

> The test requires an analysis of three factors:
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> (1) the seriousness of the *Charter*-infringing state conduct,
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> (2) the impact of the breach on the *Charter*-protected interests of the accused, and
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> (3) society's interest in the adjudication of the case on its merits.

[28] The Court is to consider these factors to determine if admission of the evidence would bring the administration of justice into disrepute. In *R. v. Gunningham*, 2011 SKPC 110, Judge Scott states at para. 30:

> According to *Grant*, there is a range of seriousness from "inadvertent or minor violations" to "wilful or reckless disregard" of *Charter* rights. Good faith on the part of the police can be a mitigating factor, but "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith" (*R. v. J.K.*, [2010] O.J. No. 2675 (Ont. C.J.)).

[29] I find holding the accused in the back of the police vehicle for at the very least 10 minutes and likely longer without giving her anymore information is unacceptable. The length of time that an accused is detained is not determinative and there have certainly been cases where the accused has been detained for longer and shorter periods of time with the Courts coming to various conclusions. One must look at the context. This was a routine stop of a "suspicious" looking vehicle which the police had under observation for several minutes at Bell Park. There was no driving or other infraction. As I have said there was no accident. Ms. Rachner as could be seen from her

driver's licence and she advised, lives in the United States. She was visiting friends and concerned about the well-being of another friend that they were to meet at Bell Park. She was coherent, polite and cooperative. She was becoming somewhat agitated when she did not receive any further information from Cst. Biniaris and she was concerned with what would happen to her. She is young and this was a new experience. The peace officer recognized it was all a new experience as well. There appeared to be a total disregard for the necessity of timeliness on the part of the police officer in making the ASD demand. The only explanation offered by Cst. Biniaris was that he was busy note taking. But the notes did not record the critical times or why he waited for Cst. Torgunrud to make the demand. He was a qualified operator of the ASD at the time. As a result I view this breach as serious and not just as technical in nature. I do not say there was bad faith on the part of Cst. Biniaris, but his apparent lack of awareness, concern and explanation for the necessity to make the ASD demand forthwith is of concern. The admissibility of the resulting Certificate of Analyses may send the message that these requirements in the *Criminal Code* are meaningless.

[30] In looking at the evidence in the context of the second point in *Grant*, the impact on the accused is not trivial. The ASD test is minimally intrusive. However, and I repeat myself, she is a young student from the United States and this was a new experience. She was cooperative but she was becoming agitated and concerned about what was happening. On the video she told the officers that she and the passengers were afraid as they noticed the police vehicle in the area. Once Cst. Torgunrud returned to the vehicle, it is at least three to four minutes before he makes the ASD demand. The police officers are talking in low tones. We have no explanation of why Cst. Torgunrud gets out of the vehicle and then returns and makes the demand. These actions without an explanation by the police could certainly have a negative impact on the accused. At one point there is some conversation of whether she is going to jail. Cst. Torgunrud says it will depend on the results of the machine.

[31] Under the third criteria the seriousness of the *Charter* breach must be considered. The evidence is reliable and essential to the Crown's case. Society is certainly interested in cases being

adjudicated on their merits. I have reviewed many cases including those from our Court. There are several cases in which the Court finds a breach but on a *Grant* analysis admitted the evidence of the Certificate of Analyses. These cases are decided on a case by case basis. When I watch Ms. Rachner on the video in the back of the police vehicle, she is visibly upset as time goes by. While it may not seem long, to a young woman in the early morning hours as a visitor to this country, I think it is reasonable to infer that it had a considerable impact on her.

[32] In my view, society would not find what occurred that night and the lack of compliance acceptable. There was no question in the mind of Cst. Biniaris that he had sufficient reasonable suspicion to make the ASD demand at the accused's vehicle.

[33] The totality of the above noted factors need to be weighed. The test is stated in *R. v. Harrison*, 2009 S.C.C. 34 at para. 36:

> [36] The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[34] There has been no satisfactory explanation offered for the vagueness or lack of concern about administering the test forthwith as soon as Cst. Biniaris had formed the reasonable suspicion. There is no explanation being offered for why she was detained in the rear of the police vehicle for that length of time. Considering the entire situation, I am not prepared to sanction this *Charter* breach in these particular circumstances. The defendant has met the test. Pursuant to s. 24(2) of the *Charter* I exclude the evidence of the ASD test result which followed Ms. Rachner's unlawful detention and

the evidence of the Intoxilyzer tests as the breath demand for those tests was based on the results of the ASD test.

M. Gordon, J