SCC File No. 36771

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

BETWEEN:

DION HENRY ALEX

APPELLANT
(Appellant)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF THE RESPONDENT'S POSITION, STATEMENT OF FACTS AND JUDGMENTS

A. Overview

1. In the hyper-litigated world of drinking and driving offences in the *Charter of Rights* era, few decisions of this Court have attracted as much jurisprudential attention by trial courts as its pre-*Charter* decision in *R. v. Rilling*, [1976] 2 S.C.R. 183.

2. However, over the last number of years provincial courts of appeal across most of Canada explained how this attention was unwarranted and that any so-called controversy about the post-*Charter* meaning and impact of *Rilling* in Canadian trial courts was without foundation. The trial court debates generated much heat but very little light.

3. This case provides the Court with the opportunity to end any lingering doubts that remain about *Rilling* and the *Charter*. It allows this Court to endorse a few simple but important propositions concerning critical differences between the *Criminal Code* provisions that authorize police to demand screening and evidential breath samples (in s. 254) and the *Code* provisions that provide the Crown with evidentiary shortcuts concerning evidentiary breath samples (in s. 258), and the relationship of these provisions to the *Canadian Charter of Rights and Freedoms*.

4. The essence of the *Rilling* principle is that an insufficiently grounded (and therefore unlawful) breath demand is irrelevant to the operation of the evidentiary shortcuts known as the presumption of accuracy in s. 258(1)(g) of the *Criminal Code* and the presumption of identity in s. 258(1)(c) of the *Code*. Breath samples obtained following compliance with an unlawful breath demand may be excluded from evidence by means of a *Charter* application application by the accused. With one exception, provincial courts of appeal have effectively endorsed this approach as correct because:

a. Sections 254(2) and (3) of the *Code* speak to the authority to make the demand and *not* admissibility or other use of the results of compliance with the demand;

b. Sections 258(1)(c) and (g) do *not* incorporate the lawfulness of the breath demand as a condition for the operation of the presumptions in relation to the breath sample results;

c. The *Charter*, being the supreme law of Canada, specifically provides in s. 8 for the right to be secure from any unreasonable search and seizure by the state where a citizen has a reasonable expectation of privacy;

d. The balancing mechanism in s. 24(2) to determine the admissibility of evidence flowing from any breach provides for careful assessment of factors that take into account the seriousness of the breach, the degree of invasion and the extent of the expectation of privacy, as well as the importance of the evidence to the case and the gravity of the alleged offence; and

e. Depending on the outcome of the s. 24(2) analysis, breath samples provided in response to unlawful breath demands can be excluded from evidence, thus affording accused persons full *Charter* protection against any established s. 8 *Charter* infringement.

5. These conclusions can be reduced to a few general propositions that flow from what the majority of this Court said in *Rilling*, what the overwhelming majority of provincial appellate courts have said about *Rilling* after the *Charter* came into force, or what are logical corollaries of these rulings. Most importantly, these propositions respect Parliament's carefully calibrated legislative scheme to address a persistent and pernicious criminal problem while at the same time ensuring *Charter* rights are respected and drinking and driving trials remain procedurally manageable in a reasonable time. The propositions represent the Crown's position in this case.

Proposition 1 – Rilling Respects the Statutory Scheme

6. While both the demand provisions in ss. 254(2) and (3) and the presumption/shortcut provisions in ss. 258(1)(c) and (g) of the *Criminal Code* are obviously designed to work together further the broad objective of identifying and criminalizing alcohol impaired drivers, each provision operates independently as part of a comprehensive statutory scheme.

7. Sections 254(2) and (3) of the *Code* authorize police to demand screening and evidential breath samples from detainees when they have a justifiable basis (i.e. reasonable suspicion or belief) to do so. The provisions authorize state action only in specified circumstances.

8. Sections 258(1)(c) and (g) of the *Code*, on the other hand, are different as they only provide for evidentiary shortcuts in the form of presumptions that allow the Crown to abbreviate certain technical aspects of a drinking and driving prosecution. However, these presumptions only apply when the statutory conditions set out in those subsections are met, thus ensuring their

scientific reliability, but the presumption in s. 258(1)(c) is also subject to rebuttal by an accused based on "evidence to the contrary" that undermines their reliability. None of these statutory conditions mandate a lawful demand, which has nothing to do with scientific reliability.

9. The majority of this Court in *Rilling* confirmed the fundamental distinction between the demand provisions[1] and the presumption provisions, which have not been materially altered since that ruling. There is no reason for this Court to decide otherwise.

Proposition 2 – Rilling Respects s. 8 of the Charter

10. The s. 8 *Charter* guarantee against unreasonable search and seizure is arguably the most invoked *Charter* provision in Canadian criminal trials. This holds true in drinking and driving trials involving the offence contrary to s. 253(1)(b) known as "over 80".

11. Where police seize breath samples for screening or evidential purposes without meeting the requisite statutory threshold of reasonable suspicion or grounds in ss. 254(2) or (3) of the *Code*, s. 8 of the *Charter* will be infringed and an accused may choose to apply to the trial court to establish the *Charter* infringement and seek exclusion of the breath samples as evidence pursuant to s. 24(2). As with any evidence seized in contravention of s. 8, depending on how the trial court assesses the relevant factors, the breath samples may or may not be excluded from evidence.

12. Prior to the *Charter* there were few, if any, mechanisms for criminal trial courts to refuse to admit unlawfully obtained evidence, as evidenced by this Court's ruling in *Rilling*. Since the *Charter*, every accused facing an "over 80" charge can challenge the lawfulness of the demand and seek exclusion of the resulting breath sample evidence.

13. In stark contrast, the evidentiary shortcuts in ss. 258(1)(c) and (g) do not authorize any search or seizure. Instead, evidence that would be otherwise admissible if presented in a different form (*viva voce* testimony) is permitted to be produced in documentary form if certain prerequisites are fulfilled to ensure the scientific reliability and integrity of the breath testing process and its results. Whether considered textually, contextually or logically, none of these

[1] While *Rilling* was decided before the enactment of s. 245(2) of the *Code* that authorizes an Approved Screening Demand (ASD), there is no material distinction between the that provision and s. 254(3) that casts its reasoning in doubt.

prerequisites includes a requirement that the breath demand that preceded the breath sample be lawful.

Proposition 3 – Rilling Respects Logic, Common Sense and Efficiency

14. Confining challenges to the sufficiency of the foundation for breath demands that result in seizures of breath samples to s. 8 *Charter* applications for the exclusion of evidence does more than respect the statutory scheme and allow for the vindication of *Charter* rights. It also precludes procedural complexity that would defeat doctrinal coherence and dangerously encumber the trial efficiency that the evidentiary shortcuts and presumptions were designed to promote. One example serves to highlight the potential problems of departing from the *Rilling* approach.

15. If exclusion of breath samples can be sought both by means of a s. 8 *Charter* application *and* as a means to deprive the prosecution of the presumptions of accuracy and identity, "over 80" trials will become needlessly complex, uncertain and lengthy. For example, an unlawful breath demand may not be excluded under s. 24(2), but would nonetheless deprive the Crown of the presumptions for reasons unrelated to their existence. As a practical matter, to avoid this risk would effectively require the Crown to abandon the presumptions and adduce lengthy, expensive and needless expert testimony as a substitute. As a matter of law, policy and doctrinal coherence, this simply makes no sense; rather, it defeats Parliament's carefully crafted legislative mechanisms that are designed to ensure fair and efficient trials for "over 80" offences.

B. Statement of Facts

16. The Crown takes no issue with the facts as set out in paras. 1-11 of the appellant's factum, but adds the following additional facts:

a. Cst. Caruso had over 7 years of experience as a police officer and had personally undertaken in excess of 100 impaired driving investigations. (Summary Conviction Appeal Judgment, Appellant's Record ("AR") p. 14, para. 9; Transcript, AR p. 74, lines 24-37); and

b. The odour of liquor that the officer detected coming from the vehicle was "strong". (Transcript, AR p. 93, lines 28-43)

C. Judgments

a) Trial Judgment (AR 1-10)

17. The appellant advanced no *Charter* application at his trial in support of his argument that the officer lacked the requisite reasonable suspicion and that this warranted exclusion of the breath sample evidence (Transcript, AR p. 72, line 40 to p. 73, line 31). He instead argued that the ASD demand was unlawful because it was made without reasonable suspicion, which in turn impugned the lawfulness of the evidential breath demand that followed, and that this rendered inapplicable the presumptions of identity and accuracy in ss. 258(1)(c) and (g).

18. While the trial judge was not satisfied that the ASD demand was based on reasonable suspicion, he accepted that the *Rilling* decision "remains good law", and that without an application to exclude the evidence based on a breach of the appellant's *Charter* rights, the absence of reasonable grounds to make a breath demand has no bearing on the admissibility of the certificate nor the application of the presumptions under the *Code*. (Trial Judgment, AR p. 9, paras. 27-28) The appellant was convicted of the "over 80" offence.

b) Summary Conviction Appeal Judgment (AR 12-28; *R. v. Alex*, 2014 BCSC 2328)

19. The appellant's summary conviction appeal was dismissed.

20. The appeal judge agreed with the Crown that the trial judge committed legal error in his assessment of whether the investigating officer met the reasonable suspicion standard required for his ASD demand to be lawful. The appeal judge nonetheless concluded that these errors were not conclusive of the appeal because a proper assessment of the officer's evidence would not inevitably have led to a finding that the objective element of his suspicion was met. On this basis, he felt it necessary to consider the main ground of appeal, namely the *Rilling* issue. (Appeal Judgment, AR pp. 18-19, paras. 24-26)

21. On the question of whether *Rilling* continues to bind courts, the appeal judge concluded that "*Rilling* has not been impliedly overruled by subsequent decisions and that the mere existence of the *Charter* does not mandate its extinction." Consequently, he ruled that "*Rilling* continues to apply until and unless it is explicitly rejected by the Supreme Court of Canada." (Appeal Judgment, AR p. 28, paras. 56-57)

22. In so concluding, the appeal judge declined to follow the ruling of *R. v. Girard*, (1999) 47 M.V.R. (3d) 108 (B.C.S.C.) and instead followed *R. v. Charette*, 2009 ONCA 310 in which the Ontario Court of Appeal stated that "*Rilling* remains good law and it will continue to bind this court unless and until it is overturned by the Supreme Court of Canada or Parliament intervenes and changes the law." (Appeal Judgment, AR pp. 23-25 and 28, paras. 46 and 56)

c) British Columbia Court of Appeal Judgment (AR 39-66; *R. v. Alex*, 2015 BCCA 435)

23. Leave to appeal was granted by a judge of the British Columbia Court of Appeal (BCCA) on three grounds. (Court of Appeal Judgment, AR pp. 32-33, paras. 9-15) The first concerned the reasonable suspicion issue while the latter two involved the continued binding effect of *Rilling* and its applicability in the case.

24. In dismissing the appellant's appeal, the BCCA first concluded that while the officer's suspicion was objectively reasonable, the trial judge was not satisfied that the officer had the requisite subjective belief. This necessitated consideration of the *Rilling* issue.

25. Newbury J.A. (Harris and Goepel J.A. concurring) stated that *Rilling* continued to apply for a number of reasons (Court of Appeal Judgment, AR p. 65, para. 52):

> [52] Like the Court in *Forsythe*, I fully agree with the reasoning of the Ontario Court of Appeal to the effect that *Rilling* must be taken to apply both to paras. 258(1)(g) and s. 258(1)(c). On a more general level, while I might not have decided *Rilling* in 1975 in the same way that the majority of the Supreme Court did, the evolution of jurisprudence under ss. 8 and 24(2) of the *Charter* has obviously provided a remedy – now more nuanced than previously – for the conscription of physical evidence by the police where reasonable grounds are not proven. In my view, it would be counter-productive now to rule that evidence may be excluded (presumably almost automatically as a matter of non-compliance with a statutory condition) on the basis of lack of reasonable and probable grounds, when exclusion is available under s. 8 if the admissibility of the evidence would bring the administration of justice into disrepute. The idea of having two separate tracks with slightly different reasoning applicable to each, possibly different rules applicable thereto, and potentially different outcomes, seems to be a recipe for confusion and judicial inefficiency. On the other side of the coin, the obligation on defence counsel to raise any *Charter* application when the evidence is being proffered, and the requirement to comply with applicable rules requiring prior notification to Crown counsel respecting *Charter* challenges, are not onerous. I agree with the Court in *Charette* that this approach strikes an appropriate balance.

PART II: RESPONDENT'S POSTION ON QUESTIONS IN ISSUE

26. The Crown submits that this appeal raises a single issue: for purposes of an "over 80" prosecution in s. 253(1)(b) of the *Criminal Code*, is compliance with the statutory conditions for demanding breath samples under s. 254(2) or (3) a pre-condition to admissibility of the test results or the operation of the presumptions in ss. 258(1)(c) and (g)? The Crown's position is that, in the absence of an application to exclude evidence under the *Canadian Charter of Rights and Freedoms*, the answer is no.

27. The two questions in issue posed in Part II of the appellant's factum represent sub-issues of the broad issue identified in the preceding paragraph. The Crown's position in relation to these sub-issues is:

1. Is the majority or minority interpretation in *R. v. Rilling* of sections 254 and 258 the proper one to apply in light of the constitutional requirement to interpret legislation in a manner that is compliant with *Charter* values?

   Crown position: The majority ruling in *Rilling* interpreting ss. 258(1)(c) and (g) remains correct. It is consistent with Parliamentary intent and the overall operation of the legislative scheme addressing drinking and driving. It deprives no accused of the ability to defend an "over 80" charge on the basis that breath samples were seized in violation of s. 8 of the *Charter* and should be excluded pursuant to s. 24(2).

2. Is *Rilling* irreconcilable with the other decisions of this Court on the necessity for strict compliance with statutory preconditions to the use of evidentiary presumptions or "shortcuts"?

   Crown position: Reconciling *Rilling* with these decisions is unnecessary. The majority ruling in *Rilling* correctly concluded that the lawfulness of a breath demand is not a pre-condition to admissibility of the breath samples or the application of the evidentiary presumptions. Since *Rilling*, admissibility will depend on the outcome of a *Charter* application seeking exclusion of the breath sample evidence.

PART III: ARGUMENT

A. Introduction

28. The Crown submits that the majority ruling of this Court in *Rilling* was correct that where a demand for a breath sample is complied with, the results of the breath test are admissible in evidence despite any absence of grounds[2] for the demand. Nothing warrants any change in this conclusion. Exclusion of breath sample evidence in such cases must be sought by way of a constitutional challenge based on s. 8 and s. 24(2) of the *Canadian Charter of Rights and Freedoms*, and not by suggesting that the absence of grounds has any impact on the operation of the presumptions of accuracy and identity in ss. 258(1)(c) and (g) of the *Code*. To do otherwise would be to defeat the very different purposes of the demand provisions and the presumption provisions. Moreover, it would not serve to enhance trial fairness, but instead create unworkable complexity and needlessly prolong trials.

29. Before addressing the context, legislation and relevant jurisprudence by way of response to the specific arguments advanced by the appellant, the Crown will address the central theme that permeates his entire submission. His assertion is both simple and sweeping: it is unfair and contrary to *Charter* principles that *Rilling* permits breath sample evidence to be admitted where the demand for the breath sample was complied with but was unlawful because it did not meet the statutory requirements in the *Criminal Code* (i.e. reasonable suspicion or grounds): see, for example, appellant's factum at paras. 33-4, where he states that the statutory term "reasonable grounds" as a pre-condition to making a breath demand becomes meaningless.

30. This assertion, which ignores or heavily discounts the possibility of *Charter* relief that can terminate an "over 80" prosecution, is entirely without merit for several reasons:

a. Sections 254(2) and (3) of the *Code* speak to authority to make the demand and not admissibility or other use of the results of compliance with the demand;

b. The *Charter*, being the supreme law of Canada, specifically provides in s. 8 for the right to be secure from any unreasonable search and seizure by the state where a citizen has a reasonable expectation of privacy and;

[2] For the sake of brevity, "grounds" is used to encompass both the "reasonable grounds" standard for an evidential breath demands pursuant to s. 254(3) of the *Criminal Code* and the "reasonable suspicion" standard for an Approved Screening Device (ASD) demand pursuant to s. 254(2) of the *Code*. For the purposes of this case, there is no difference between them.

c. The balancing mechanism in s. 24(2) to determine the admissibility of evidence flowing from any breach provides for careful assessment of factors that take into account the seriousness of the breach, the degree of invasion and the extent of the expectation of privacy, as well as the importance of the evidence to the case and the gravity of the alleged offence.

31. It is therefore open to any person who has provided a breath sample in compliance with a demand made pursuant to s. 254 of the *Criminal Code* to challenge its lawfulness and seek exclusion of the breath sample from evidence in a criminal proceeding. This is fair. It is more than consistent with *Charter* principles; it represents their actual application. Most importantly, *Rilling* does not preclude access to this *Charter* relief.

B. Broad Context – Drinking and Driving

32. The strong public interest in effective law enforcement with respect to the problem of drinking and driving is seen in the complex and comprehensive criminal and provincial legislative responses to curb the problem. It is also reflected in the long-standing jurisprudence of Canadian courts that have scrutinized these measures through the lens of the *Charter of Rights and Freedoms*.

33. There is a broad societal concern in dealing with the carnage caused by those who commit offences involving drinking and driving and it is beyond debate that offences involving the operation or care or control of a motor vehicle while under the influence of alcohol (generally referred to as "drinking and driving" offences) are crimes with a high degree of gravity and significant moral culpability. In the constitutional context, no other offences have necessitated such significant yet justifiable limitations on the constitutional rights of citizens. Similarly, in the sentencing context, mandatory minimum penalties imposed by Parliament have been accompanied by a judicial emphasis on deterrence, denunciation and protection of the public to address the gravity of the crimes and the risk they pose to such a large part of the populace. Charron J. (LeBel, Abella, Rothstein JJ. concurring; Fish J. and McLachlin C.J.C., Bastarache, Deschamps JJ. dissenting on another point) reiterated this proposition in *R. v. Beaudry*, [2007] 1 S.C.R. 190, 2007 CarswellQue 235 at paras. 41-42:

> 41 …To re-emphasize the seriousness of offences associated with drunk driving, and as a caveat against trivializing them, I reproduce without reservation

> the comment made by Cory J. in *R. v. Bernshaw* (1994), [1995] 1 S.C.R. 254 (S.C.C.):
>
> > Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country. [para. 16]
>
> 42 The situation in Canada has improved since Cory J. made this damning observation, but only because both the authorities and society itself have made extensive efforts to raise public awareness and crack down on impaired driving.

34. The problem remains persistent and intractable. As recently as 2015, Wagner J. (Abella, Moldaver, Karakatsanis, and Côté JJ. concurring; McLachlin C.J. and Gascon J. dissenting on other grounds) observed in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 that "[d]espite countless awareness campaigns conducted over the years, impaired driving offences *still* cause more deaths than any other offences in Canada: House of Commons Standing Committee on Justice and Human Rights, *Ending Alcohol-Impaired Driving: A Common Approach* (2009), at p. 5." (at para. 7, emphasis added)

35. In another 2015 case, Karakatsanis J. (Cromwell, Moldaver, Wagner, Gascon and Côté JJ. concurring; McLachlin C.J. dissenting on other grounds) started her judgment in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250 with brief yet compelling synopsis that encompasses the gravity and magnitude of the problem (at para. 1):

> The devastating consequences of impaired driving reverberate throughout Canadian society. Impaired driving renders roads unsafe, destroys lives, and imposes costs throughout the health care system. The federal and provincial governments have all acted in response to this pressing danger.

C. Legislative Provisions and History

36. Sections 254(2) and (3) of the *Criminal Code* authorize ASD and evidential breath sample demands:

> (2) 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:

> (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.

…

(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

> (a) to provide, as soon as practicable,
>
> > (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or
> >
> > (ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and
>
> (b) if necessary, to accompany the peace officer for that purpose.

37. The presumptions of identity and accuracy are located in a different section of the *Criminal Code*, ss. 258(1)(c) and (g):

> c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
>
> > (i) [Repealed before coming into force, 2008, c. 20, s. 3]
> >
> > (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
> >
> > (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

> (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
>
> evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;
>
> …
>
> (g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating
>
> (i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,
>
> (ii) the results of the analyses so made, and
>
> (iii) if the samples were taken by the technician,
>
> (A) [Repealed before coming into force, 2008, c. 20, s. 3]
>
> (B) the time when and place where each sample and any specimen described in clause (A) was taken, and
>
> (C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,
>
> is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

38. The presumptions are simply evidentiary shortcuts to avoid the necessity of calling lengthy scientific evidence in each case to establish the accuracy of breath test results and the BAC of the accused at the time of driving. The conditions for their operation are designed to ensure scientific reliability and integrity and may be rebutted by evidence to the contrary.

39. A concise historical overview of the "over 80" offence and the presumptions of identity and accuracy was set out by Deschamps J. (McLachlin C.J., LeBel, Fish, Abella, JJ. concurring;

Cromwell and Rothstein JJ. dissenting but not on this point) in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187 (at paras. 5-6):

> [5] In 1969, Parliament made it a criminal offence for a person to operate or have the care of a vehicle while his or her blood alcohol level exceeded .08, and made it mandatory under the *Criminal Code* to provide breath samples for analysis for the purpose of determining whether that offence had been committed. Among other things, the relevant provisions required a person stopped by the police to provide breath samples and created a mechanism by which those samples would be analyzed by designated technicians using approved devices. Parliament also introduced presumptions (of accuracy and identity) that would apply if certain conditions were met and would make it easier for the prosecution to prove that a person had operated or had the care of a vehicle while his or her blood alcohol level exceeded the legal limit.
>
> [6] According to the presumption of accuracy, the certificate of the technician responsible for the analyses is presumed to provide an accurate determination of the person's blood alcohol level at the time the breath samples were taken. According to the first presumption of identity, a person's blood alcohol level as shown by the test is presumed to be the same as his or her blood alcohol level at the time of the alleged offence. Pursuant to a second presumption of identity added by Parliament in 1997 (*Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 10(2)), a blood alcohol level that exceeds .08 at the time of the analyses is presumed to have also exceeded .08 at the time when the offence was alleged to have been committed (*R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at para. 14).

D. The *Rilling* Principle

40. In *R. v. Rilling*, [1976] 2 S.C.R. 183 this Court considered whether the absence of reasonable and probable grounds for a breath sample demand rendered the resulting certificate of analysis inadmissible as evidence of the test results. The Court held that while absence of reasonable and probable grounds for belief of impairment may afford a defence to a refusal charge under the current s. 254(5) of the *Criminal Code*, it does not render the certificate inadmissible for purposes of proving the "over 80" offence under the current s. 253(1)(b). The motive that actuates a peace officer to make a s. 254(3) demand is not a relevant consideration when the accused has complied with the demand.

41. *Rilling* conclusively resolved a previous conflict in the lower courts on the relationship between a s. 254(3) demand and a certificate of analysis. The majority decision of Judson J. in *Rilling* is quite brief and does not offer any substantial analysis. However, it is instructive to review the decision of the Alberta Court of Appeal (*R. v. Rilling* (1973), 11 C.C.C. (2d) 285 (Alta. S.C., App. Div.)), the conclusion of which was adopted by Justice Judson. The Court of

Appeal's analysis of earlier case law and its own comments on this issue identify the following factors in support of the decision:

- The demand is not a constituent element of the "over 80" offence and therefore the character of the demand cannot affect the admissibility of the certificate.

- At common law, the admissibility of evidence is not affected by the illegality of the means through which it has been obtained. The breath sample provisions of the *Criminal Code* do not alter the common law rule.

- If reasonable and probable grounds for a demand were to be part of an "over 80" prosecution, there would be a reversion to the very situation that the legislation, at least in part, was designed to remedy: conviction for impaired driving on police opinion.

- Given the difficulties in proving impairment under the previous law, the "over 80" provision should be liberally interpreted in support of suppressing the dangerous practice of impaired driving rather than giving preference to technical objections that do not go to the root of the matter.

42. Although the Court of Appeal in *Rilling* referred to the common law rule regarding the admissibility of evidence, other cases have explained the *Rilling* principle by reference to the *prima facie* admissibility of certificate evidence under the current s. 258(1)(g) of the *Code*: *R. v. Hruby* (1980), 4 M.V.R. 192 (Alta. C.A.); *R. v. Linttell* (1991), 64 C.C.C. (3d) 507 (Alta. C.A.) at paras. 15–20; *R. v. Gundy*, 2008 ONCA 284 at paras. 27–40

43. The post-*Rilling* decision of this Court in *R. v. Crosthwait*, [1980] 1 S.C.R. 1089 takes a similar perspective. The issue in *Crosthwait* was whether the admissibility of a certificate of analysis was affected by the failure of the technician to follow the manufacturer's instructions for testing the accuracy of the breathalyzer instrument. The Court held that while evidence tending to invalidate the test results may constitute "evidence to the contrary", the only conditions relevant to the admissibility of the certificate itself were those specifically prescribed by Parliament. Pigeon J. (for the Court) stated as follows (at p. 1099):

> In the instant case, the certificate filed at the trial fully complies with the conditions stated in para. (*f*). It was, therefore, by itself, evidence of the results of

> the analyses. With respect, I cannot agree that there is another implicit condition namely, that the instrument used must be shown to have been functioning properly, and the technician had followed the manufacturer's instructions in testing its accuracy. It is clear from the wording of the *Code* that the rebuttable presumption arises from the mere statements in the certificate itself. The presumption may no doubt be rebutted by evidence that the instrument used was not functioning properly but the certificate cannot be rejected on that amount [sic].
>
> [Emphasis added]

44. Regardless of whether the emphasis is on admissibility at common law or by statutory prescription, the point is the same: relevant evidence of an "over 80" offence is *prima facie* admissible unless a legal rule provides for its exclusion. Section 254(3) of the *Criminal Code* contains no such rule.

45. However, since the advent of the *Canadian Charter of Rights and Freedoms* in 1982, ss. 8 and 24(2) provide a rule that may result in exclusion of breath samples provided in compliance with a demand that is unlawful because it was made without reasonable grounds.

46. The appellant's attempt (at paras. 1, 31-4, 37 and 46 of his factum) to conflate the *Wray* principle with the principle in *Rilling* is a red herring and is flawed in two critical respects.

47. First, this Court's ruling in *Rilling* rested on the conclusion that a lawful demand was not a pre-condition or prerequisite to the admissibility of a certificate of analysis of a breath sample, not on a broad principle that unlawfully obtained evidence was admissible if it was relevant. (*Wray* was not mentioned in either *Rilling* judgment.)

48. Second, the applicant's invocation of the *Charter* as a basis to overrule *Rilling* (said to be identical in principle to *Wray*) collapses on itself: it is the very availability of *Charter* relief that allows for exclusion of breath results where a demand is unlawful that provides an accused with protection that *Rilling* could not in 1976. Because *Rilling* says that a lawful demand is not a prerequisite to admissibility of a breath analysis certificate and, in turn, an unlawful demand cannot affect its statutory admissibility, *the Charter affords an accused precisely what the applicant says Rilling denies: meaningful access to recourse from a breath demand (screening or evidential) alleged to be unlawful.*

E. *Rilling* Respects Statutory Scheme and Recognizes Distinction Between Demand and Presumption Provisions

49. Despite the relative brevity of its analysis, the conclusion of the majority in *Rilling* remains correct because it is consistent with the simple, but fundamental, difference between the demand provisions in ss. 254(2) and (3) and the presumption provisions in ss. 258(1)(c) and (g).

50. The breath demand provisions are expressly designed to authorize police to demand and seize breath samples only where there is a reasonable basis to do so, which will involve either suspicion (for screening purposes) or belief (for evidential purposes).

51. Where the accused complies with the demand, the resulting breath sample evidence may be adduced in evidence and is not otherwise inadmissible. As with any other state agent seizure of evidence in which an accused has a reasonable expectation of privacy, its admissibility may be challenged on the ground that the seizure was unreasonable and therefore exclusion is warranted under s. 24(2) of the *Charter*.

52. The presumption provisions do not authorize the search or seizure. Instead, they provide evidentiary shortcuts that enable the prosecution to establish facts based on the analysis of the seized breath samples. They operate only if specific statutory conditions designed to ensure the scientific reliability and integrity of the presumptions have been complied with. In addition, the presumptions can be rebutted by evidence to the contrary that raises a doubt about the reliability or integrity of the presumptions.

53. The demand and presumption provisions are part of a single scheme designed to identify drivers who have operated motor vehicles with excessive BACs, but they are directed two very different issues. One is to ensure that state-authorized invasion of a reasonable expectation of privacy (in breath) is reasonable, while the other addresses the reliability of presumptions based on scientific processes applied to the seized breath samples. Each has its own internal requirements which simply do not overlap.

54. LaForest J. (for the Court) in *R. v. Deruelle*, [1992] 2 S.C.R. 663 specifically emphasized the importance of not conflating the requirements of different statutory mechanisms that operate

independently but in furtherance of a single objective. In the specific context of the s. 254(3) evidential breath demand and the presumption of identity in s. 258(1)(c), he stated (at p. 672):

> Looking beyond the text of the provision, the breathalyzer scheme of the *Code* is designed to ensure that breath or blood samples are obtained as quickly as possible after the alleged impaired driving offence. This overriding objective is achieved through various mechanisms found in specific *Code* provisions. While the general objective is the same throughout the scheme, the specific purposes of each mechanism are different. As such, the fact that the provisions constitute a "scheme" does not mandate a unitary interpretation contrary to the language of each individual provision. The two-hour limit in s. 254(3) contributes to the objective of the scheme by forcing prompt police investigation, and by requiring the police to take the sample as soon as practicable. This specific purpose, which goes to the admissibility of the sample into evidence, can be distinguished from the purpose of the time limit in the presumption section, s. 258(1)(*c*). The latter provides a procedural shortcut for the police, but only if the breath or blood sample is obtained within two hours of the alleged offence. As such, it is concerned with the quality of the evidence obtained by the police, rather than its admissibility.
>
> [Emphasis added]

55. This passage highlights the essential differences between the s. 254(3) demand provision and the s. 258(1)(c) presumption provision. Simply put, the former provides requirements for the *making* of a breath demand while the latter set out conditions for the *taking* of a breath sample.

56. A peace officer's evidential breath demand will be lawful if the following conditions are met:

a. the officer has reasonable grounds to believe:
    i. a person is committing or has committed within the previous three hours;
    ii. an offence contrary to s. 253 of the *Code* as a result of the consumption of alcohol; and
b. the demand is made as soon as practicable.

57. In contrast, s. 258(1)(c) provides that the presumption of identity (i.e. that evidence of the BAC as revealed by analysis of the breath sample is proof of the concentration of alcohol in the accused's blood at the time of the analysis and the time of the offence) will apply if the following conditions are met:

a. each breath sample is taken:

   i. as soon as practicable after the offence; and

   ii. in the case of the first sample, no later than two hours after that time; and

   iii. with at least 15 minutes between the samples; and

b. each sample

   i. is received from the accused;

   ii. into an approved container or instrument; which is

   iii. operated by a qualified technician; and

   iv. the analysis of each sample is made by means of

   v. an approved instrument that is

   vi. operated by a qualified technician.

58. The presumption of identity in s. 258(1)(c), including the conditions for its applicability and the limitations on what constitutes evidence to the contrary, unequivocally demonstrate that Parliament's intention in creating the presumption was to ensure scientific reliability and fairness in its operation, including its rebuttal. The legislative evolution of the presumption provisions, and this Court's interpretation and constitutional scrutiny of this evolution demonstrate that the presumption provisions have always been crafted with a view to ensuring the scientific reliability and integrity of the presumptions and while ensuring the existence of appropriate mechanisms for rebuttal.

59. The analysis of the majority of this Court in *St-Onge Lamoureux* exemplifies the singular focus of the presumption provisions on criteria that are relevant to their reliability. In upholding the constitutional validity of Parliament's exclusion of self-reported drinking (*Carter* evidence) as capable of constituting evidence to the contrary, the majority noted how Parliament's objective in the amendments to s. 258(1) was to give priority to the *reliability* of the test results (para. 59) and to give the test results a weight consistent with their scientific value (para. 62).

60. In light of this clear legislative objective of ensuring fair and scientifically reliable presumptions accompanied by meaningful means for rebuttal, it is obvious that the existence of

reasonable grounds as a basis for the evidential breath demand has no scientific relevance or logical bearing on the reliability or integrity of the scientific basis for the presumptions or their rebuttal.

61. In this context, the most that can be said of the reference to breath samples being taken pursuant to a demand in the opening words of ss. 258(1)(c) and (g) is that they are words that identify the sample to which the presumptions will apply. As thoroughly explained by Scherman J. in *R v. Dolezsar*, 2012 SKQB 6 (at paras. 14-19):

> [14] The purpose and objective of the demand being "as soon as practicable" in s. 254(3) is to ensure that the accused understands from an early moment what she or he is potentially going to be charged with. This is so that she or he can promptly focus on whether or not the peace officer had reasonable grounds to make the demand, to understand the seriousness of what they are facing and to provide a basis for the potential accused to make his or her decision to seek legal counsel.
>
> [15] Whether or not the s. 254(3) demand was made "as soon as practicable" after the peace officer concluded there were reasonable grounds to believe an offence under s. 253 was being or had been committed is entirely irrelevant to the scientific reliability objective and purpose of the conditions enumerated in s. 258(1)(c). Thus there would be no logical reason to conclude that Parliament intended to import this as a precondition to the operation of s. 258(1)(c).
>
> [16] The time that passes between the alleged offence (when last driving) and the time the samples were taken, is logically related to the reliability of drawing the inference and the statutorily permitted conclusion that the blood alcohol contents were the same at both times. Parliament has set conditions for drawing the conclusion that the blood alcohol content at the time of the offence and the time of the tests are the same, being:
>
> (i) each sample is taken as soon as practicable after the alleged offence;
> (ii) the time difference cannot be more than two hours;
> (iii) the samples are received into an approved instrument operated by a qualified operator; and
> (iv) the concentration level to be attributed to the time of driving is to be the lowest of the levels in the two samples which must be taken at least 15 minutes apart.
>
> [17] Blood alcohol levels are a function of the rates at which alcohol is being absorbed into and eliminated from the blood. Both of these biological processes

> operate from the time of the offence to the time of samples. Testing criteria relevant to these biological processes were stipulated by Parliament for the purpose of ensuring that the conclusive effect of the certificate was within acceptable scientific parameters for drawing the conclusion.
>
> [18] The criteria following the word "if" are clearly focused on the scientific reliability of the test results and the validity of the extrapolation of the blood alcohol findings back to the time of the alleged offence. The section is not dealing with the protocols for a compliant demand.
>
> [19] When ss. 254(3) and 258(1)(c) are interpreted with regard to their respective purposes and objectives, as opposed to parsing potential literal implications of the words, it is clear that while the same words "as soon as practicable" are used in each section, they are used with different purposes. With this understanding, the initial words of s. 258(1)(c), "where samples of the breath of the accused have been taken pursuant to a demand made under s. 254(3)", are best understood as being introductory words to identify the samples in question. These words should not be interpreted as creating a precondition to the operation of the subsection.
>
> [Emphasis added]

F. *Rilling* Overwhelmingly Accepted as Binding Authority and Compatible with the *Charter*

62. Since the advent of the *Canadian Charter of Rights and Freedoms* in 1982, many judges – principally in trial courts – wrestled with the question of whether the *Rilling* principle survives. But the struggle effectively ended with most provincial courts of appeal concluding that it does, for two very simple reasons. First, as this Court concluded in *Rilling*, the *Criminal Code* has never made a lawful breath demand a statutory prerequisite to the admissibility of breath sample results. Second, the *Charter* affords every accused the opportunity to challenge the admissibility of breath samples based on an allegation that they were seized as a result of an unlawful breath demand.

63. Of the provincial courts of appeal that have considered the question, all but one (the New Brunswick Court of Appeal in *R. v. Searle*, 2006 NBCA 118) have concluded that the principle in *Rilling* continues to apply and that exclusion of breath sample evidence based on an alleged

unauthorized demand is to be determined by application for relief pursuant to the *Charter of Rights and Freedoms*:

- Alberta: *R. v. J.P.L.*, 1993 ABCA 282 and *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385 (Alta. C.A.) (leave to appeal to SCC refused April 15, 1993, Doc. 23399, Lamer C.J.C. McLachlin and Major JJ.)
- Manitoba: *R. v. Forsythe*, 2009 MBCA 123, (leave to appeal to SCC refused June 24, 2010, Doc. 33577, McLachlin C.J. and Abella and Cromwell JJ.) and *R. v. Banman*, 2008 MBCA 103
- Newfoundland and Labrador: *R. v. Langdon* (1992), 74 C.C.C. (3d) 570 (Nfld. C.A.)[3]
- Nova Scotia: *R. v. Marshall* (1989), 91 N.S.R. (2d) 211 (C.A.)
- Ontario: *R. v. Charette*, 2009 ONCA 310 and *R. v. Gundy*, 2008 ONCA 284
- Quebec: *R. v. Anderson*, 2013 QCCA 2160 and *R. v. C.L.*, 2000 CanLII 7942 (Que. C.A.)
- Saskatchewan: *R. v. Johnson*, 1997 CanLII 9712 (SKCA), 1997 CarswellSask 108

G. ***Bernshaw, Dedman* and *Forsythe*: No Rejection of *Rilling***

64. The minority opinion of Cory J. in *R. v. Bernshaw*, [1995] 1 S.C.R. 254 included *obiter dicta* expressly stating that the *Rilling* principle survived the arrival of the *Charter* and indeed was consistent with having admissibility questions flowing from alleged unreasonable searches and seizures dealt with by way of an application for exclusion of evidence pursuant to s. 24(2) of the *Charter*: paras. 39-42.

65. The appellant argues (at para. 40 of his factum) that statements in the majority opinion of Sopinka J. and the opinion of L'Heureux-Dubé, neither of which mention *Rilling* or comment on Cory J.'s opinion on the case, "suggest that, on both a statutory and constitutional basis, the results of an unlawful demand cannot be admitted whether, the *Charter* is specifically engaged

[3] The appellant says (at para. 6 of his factum) that in this case the Newfoundland Court of Appeal "decided not to decide the issue." Cory J. (in *obiter*, Lamer C.J. and Iacobucci JJ. concurring) in *R. v. Bernshaw*, [1995] 1 S.C.R. 254 included this case in a list of cases that he said supported the continued application of *Rilling* with relief to be obtained *via Charter* application: see para. 14. No Newfoundland appellate case subsequent to *Langdon* casts any doubt on the continued applicability of *Rilling*; to the contrary, two trial decisions and one summary conviction appeal decision subsequent to *Langdon* endorse the proposition that *Rilling* continues to apply, subject to a *Charter* application being advanced: *R. v. White*, 1993 CarswellNfld 283 (S.C.T.D.); *R. v. Parsons*, 2001 CarswellNfld 81 (Prov. Ct.); *R. v. Bugden*, 2015 CarswellNfld 166 (Prov. Ct.).

through a court application or not". This amounts to the appellant saying that *Rilling* and Cory J.'s *obiter dicta* were rejected in those opinions. Smith J. (as she then was) in *R. v. Girard* (1999), 47 M.V.R. (3d) 108 shared this view (at para. 33):

> 33 The difficulty with relying on the minority decision in *Bernshaw*, as it relates to that court's confirmation of *Rilling*, is that Sopinka J. expressly disagreed with Cory J.'s reasons by which he arrived at the same result as the majority. That disagreement, necessarily, must encompass Cory J.'s comments with respect to the continuing authoritative value of *Rilling*.

66. With respect, as correctly found by the summary conviction appeal judge (Appeal Judgment, AR pp. 25 and 27, at paras. 47 and 53) there is no merit to this assertion. First, Cory J.'s discussion of *Rilling* was unquestionably *obiter dicta*. Second, neither *Rilling* nor Cory J.'s discussion of the case was addressed by the majority judgment. With respect, it is virtually unimaginable that if a majority of this Court was to depart from or qualify one of its previous decisions, that it would do so without addressing the case expressly and extensively. Third, the majority expressly disagreed with Cory J.'s reasons as they related to the *issue in the case* identified in the opening paragraph of each opinion (paras. 1 and 45). Indeed, the opening paragraph of L'Heureux-Dubé J.'s opinion (concurring in the result) similarly identified the issue for decision in the case, namely, whether a "hold off" period for alcohol screening measures is warranted where there is evidence of recent alcohol consumption (para. 88).

67. Further, the paragraphs from the majority judgment in *Bernshaw* reproduced by the appellant (at para. 39 of his factum) do not support any rejection of the approach in *Rilling*. To the contrary, Sopinka J.'s reference to the statutory prerequisites of s. 254(3) being a pre-condition to a lawful search and seizure under s. 8 of the *Charter* highlights only that the absence of the statutory requirements can ground a s. 8 *Charter* claim and an application for exclusion of evidence under s. 24(2). Neither the statements of Sopinka J. or L'Heureux-Dubé J. say anything concerning the admissibility of breath sample evidence where no *Charter* application is advanced.

68. The appellant (at paras. 64-5 of his factum) also relies on statements in *Girard* to the effect that this Court's decision in *R. v. Dedman*, [1985] 2 S.C.R. 2 undermined the applicability of the *Rilling* decision by placing those who comply with the demand of police officer in a worse situation than those who refuse to comply. The Crown says that this is unsupported by a careful

reading of *Dedman*, as concluded by the summary conviction appeal judge (Appeal Judgment, AR p. 27, para. 54).

69. The sole question at issue in *Dedman* was whether there existed a common law police power to randomly stop drivers for the purpose of alcohol screening at the roadside. The lawfulness of any breath demand was not before the Court. Indeed, the majority (speaking through LeDain J.) concluded that the common law power did exist, and then expressly declined to address a further question that was closely related to the issue that was decided in *Rilling* (at para. 74):

> 74 In view of this conclusion, it is unnecessary for me to express an opinion as to whether, if the random vehicle stop were unlawful for lack of statutory or common law authority, its unlawful character would constitute a reasonable excuse, on the authority of the decision of the majority of this court in *Brownridge v. R.*, [1972] S.C.R. 926, 18 C.R.N.S. 308, 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1 , for the failure to comply with the s. 234.1(1) demand for a sample of breath, or would render such demand invalid, on the reasoning of the House of Lords in *Morris v. Beardmore*, [1981] A.C. 446, [1980] 3 W.L.R. 283, 71 Cr. App. R. 256, [1980] 2 All E.R. 753.
>
> [Emphasis added]

70. And in any event, as already explained, ss. 8 and 24(2) of the *Charter* provide a potential remedy by means of exclusion of evidence that may flow from compliance with an unlawful demand. This fully addresses the concern expressed by LeDain J. in *Dedman* that "[a] person should not be penalized for compliance with a signal to stop by having it treated as a waiver or renunciation of rights, or as supplying a want of authority for the stop." (at para. 59)

71. The Crown rejects the appellant's submission (at paras. 51, 56-62 of his factum) that *Forsythe* effectively collapses *all* requirements for the operation of the presumptions into s. 254(3) of the *Code* such that *Rilling* would mandate that non-compliance with *any* of the requirements in ss. 258(1)(c) and (g) would mean that exclusion of breath sample evidence could only result from a *Charter* application. This is wrong because it fails to recognize the very distinction that formed the foundation of *Rilling*, namely the distinction between the statutory requirements for a lawful demand in s. 254 of the *Code* on the one hand, and the statutory requirements for the operation of evidentiary presumptions connected with the breath sample evidence in s. 258 of the *Code* on the other. As noted by this Court in *Rilling*, and as explained

by the Ontario Court of Appeal in *Charette* and *Gundy* the statutory requirements in the demand section and the presumption provisions are *separate*.

72. In *Charette*, Moldaver J.A. (as he then was) thoroughly canvassed the foundation for this Court's ruling in *Rilling* and concluded that the opening words to both ss. 258(1)(c) and (g) ("where samples of breath of the accused have been taken pursuant to a demand made under subsection 254(3)") do not mean that the lawfulness of such a demand is a prerequisite to the operation of those provisions, which only provide for the operation of the presumptions of accuracy and identity (at paras. 38-44 of *Charette*).

73. *Forsythe*, properly understood, stands for a much narrower proposition than the one asserted by the appellant. The accused in *Forsythe* was arguing that the samples were inadmissible if they were not taken as soon as practicable (para. 6). The argument was that s. 254(3) imposed such a requirement *quite independently of what s. 258(1)(c) accomplished*. The accused's argument therefore remained grounded in an alleged failure to comply with the requirements for a valid demand in s. 254(3), not s. 258 of the *Code*. Rather than reasonable grounds, the deficiency was said to relate to another requirement for a valid demand in s. 254(3), i.e. that the samples were not taken as soon as practicable.

74. Consistent with this Court's ruling in *Rilling* (which was explained comprehensively in *Charette*), the court in *Forsythe* said that impugning the lawfulness of a s. 254(3) demand in order to exclude results of compliance with the demand must be advanced by way of *Charter* application. Beard J.A. (for the court) stated (at paras. 26-7):

> *Conclusion*
>
> 26 There is no reason to have different procedures and principles apply to the determination of the admissibility of breathalyzer evidence taken under s. 254(3) depending on which of the requirements in that section have not been met. The decision in *Rilling*, and the reasoning in *Banman* and *Charette*, for requiring a *Charter* analysis to determine the admissibility of the breath samples should apply to all of the requirements in that section.

VI. Decision

> For the reasons noted above, I find that, given the decision of the Supreme Court of Canada in *Rilling*, the appeal judge erred in law by concluding that the requirement of s. 254(3) of the *Code*, that the police take an accused's breath samples "as soon as practicable," is a pre-condition to the admissibility of the test results.
>
> [Emphasis added]

75. *Forsythe* may be incorrect in one respect. Section 254(3) of the *Code* clearly mandates reasonable grounds for a breath demand and that the *demand be made as soon as practicable* as requirements for it to be lawful. There is no requirement for a valid breath demand pursuant to s. 254(3) that the evidential breath *samples be taken as soon as practicable*; this is a prerequisite to the operation of the presumptions of identity and accuracy in ss. 258(1)(c) and (g).

76. Section 254(3) requires that the *demand be made* as soon as practicable, but whether the *samples are in fact taken* as soon as practicable (or at all) is not logically connected to the requirements of a valid demand. Taking breath samples from the detainee will take place in the future if the demand is complied with. Evaluating the validity of a breath demand based on a future contingency involves *ex post facto* analysis that is incompatible with the structure and intent of the breath testing scheme. Obtaining breath samples as soon as practicable is logically and textually an essential component of the operation of the presumptions of identity and accuracy in ss. 258(1)(c) and (g). Reference in s. 254(3) to *providing* samples "as soon as practicable" simply imposes an obligation *on the detainee* to comply with the demand "as soon as practicable," without which the detainee would have an infinite amount of time in which to decide to finally comply. Where proof of the offence is literally being eliminated by the minute, this obligation is critical.

77. This is clear from the unambiguous text of s. 254(3) and interpretation of the legislative scheme. As lucidly explained by Scherman J. in *R. v. Dolezsar*, 2012 SKQB 6 at paras. 10-21, "when ss. 254(3) and 258(1)(c) are interpreted with regard to their respective purposes and objectives, as opposed to parsing potential literal implications of the words, it is clear that while the same words 'as soon as practicable' are used in each section, they are used with different purposes" (at para. 19).

78. The requirement for the *samples of breath to be taken* as soon as practicable after the time of driving is to ensure the scientific validity of extrapolating the blood alcohol readings back to the time of driving, which is the object of the presumption of identity in s. 258(1)(c) of the *Code*. This is entirely distinct from the purpose and objective of the requirement that the *demand for breath samples be made as soon as practicable*, which is to ensure that the accused understands from an early moment what she or he is potentially going to be charged with. This is so that she or he can promptly focus on what he or she is required to do, and make his or her decision to seek legal counsel: see *Dolezar* at paras. 10-20.

79. Even if *Forsythe* correctly incorporates a requirement that samples be taken as soon as practicable into the requirement for a valid demand pursuant to s. 254(3), the correctness of such a ruling is not raised in the case at bar. This case is only about whether the lawfulness of a s. 254(3) breath demand must be advanced by way of *Charter* application, failing which breath samples obtained in compliance with the demand will be admissible (a proposition endorsed in *Forsythe*).

H. ***Statutory* Interpretation**

80. The appellant argues (principally at paras. 41-45 of his factum) that *Charter* values should in some fashion inform the question as to whether *Rilling* was correctly decided. This argument was fully and correctly answered by the appeal judge at para. 55 of the Appeal Judgment (Appeal Judgment, AR p. 27, at para. 55)

81. It warrants repetition and emphasis that the interpretation of the demand and presumption provisions in *Rilling* neither deprives access of any accused person to the full panoply of *Charter* remedies, nor does it dilute or render such access more onerous. It merely deprives accused persons of the possibility of defeating s. 258 presumptions for reasons entirely unconnected to their rationale and text of the provisions.

82. Allowing for an absence of grounds for a breath demand to defeat the presumptions would have the following incongruous and incorrect results (see also the Policy Rationales section of this factum.):

a. As a practical matter, it would result in a risk of automatic exclusion of the breath sample evidence by reason of it being unlawfully obtained, unless the Crown

abandoned the presumptions and called *viva voce* evidence as a substitute. Yet, automatic exclusion of unlawful obtained evidence, and particularly reliable breath sample evidence, has never been a part of Canada's *Charter* jurisprudence, as clarified by the Supreme Court of Canada's judgment in *R. v. Grant*, 2009 SCC 32.

b. To avoid this risk of loss of the presumptions *for reasons unrelated to the requirements that ensure their reliability*, the Crown is effectively forced to abandon them and do precisely what the presumptions were designed to avoid: call scientific or technical evidence relating to the conditions of the taking of the samples.

c. Because of the highly variable and fundamentally fact-driven nature of reasonable grounds for breath demands, in the same set of factual circumstances reasonable people will frequently disagree as to whether such a threshold is met. This is precisely why it would be extremely difficult for prosecutors to rely on the presumptions; there is simply too much unpredictability and the outcome is too stark i.e. effective exclusion of the breath sample evidence. Moreover, the highly nuanced question of reasonable grounds is clearly better situated within the framework of ss. 8 and 24(2) of the *Charter*, where the facts and circumstances will serve to inform both questions of infringement and, if necessary, remedy.

83. As correctly concluded by the summary appeal judge, the interpretive assistance of *Charter* values is resorted to only if there is genuine ambiguity as to the meaning of a provision: *R. v. Clarke*, 2014 SCC 28 at paras. 12-16. Accepting for the sake of argument that *Rilling* involves a question of statutory interpretation, the majority of the Supreme Court of Canada in that case found no ambiguity in the *Criminal Code* provision authorizing breath demands. Indeed, the provision (both then and now) clearly does not to speak to admissibility of breath sample evidence or the operation of the presumptions.

84. Further, the Ontario Court of Appeal in *Gundy* and *Charette* clearly explained that whether a breath demand is authorized by s. 254 of the *Code* is not incorporated into admissibility or presumption requirements in the various provisions of s. 258. Moldaver J.A. (as

he then was), speaking on behalf of the Ontario Court of Appeal, carefully reviewed both *Rilling* and its earlier ruling in *Gundy* and concluded (at para. 44):

> [44] As *Gundy* makes clear, *Rilling* remains good law and it will continue to bind this court unless and until it is overturned by the Supreme Court of Canada or Parliament intervenes and changes the law. Until then, I see no reason why the opening words of s. 258(1)(c) – "where samples of breath of the accused have been taken pursuant to a demand made under subsection 254(3)" -- should be interpreted any differently than the identical words in the opening of s. 258(1)(g).

I. Policy Rationales

85. The Manitoba and Ontario Courts of Appeal have addressed the compelling policy rationales that support a single analytical framework under the *Charter* as the appropriate mechanism to assess constitutional violations and determine admissibility in the context of breath samples. They were comprehensively articulated by Moldaver J.A. (as he then was) in *Charette* at paras. 45-51:

> [45] I am further satisfied that as a matter of policy and sound criminal procedure, the *Rilling* principle should apply equally to s. 258(1)(c) as it does to s. 258(1)(g). When one considers the carnage and destruction caused by impaired drivers, I do not think we should be promoting "trial by ambush" in "over 80" trials. In *Gundy*, this court made it clear that the notice requirements for *Charter* applications should, as a rule, be adhered to and that non-*Charter* motions to exclude evidence should be raised before or when the evidence is proffered (see *Gundy*, at paras. 19-24 and 50).
>
> [46] At present, for purposes of s. 258(1)(g), where an accused is charged with driving "over 80", the Crown need not concern itself with proving the existence of reasonable and probable grounds under s. 254(3) unless the accused brings a *Charter* application challenging the admissibility of the test results. While that will not change if the decision of the summary conviction appeal court judge stands, as a practical matter, it will be of no benefit to the Crown because in order to take advantage of the presumption of identity in s. 258(1) (c), the Crown will be obliged to establish reasonable and probable grounds in every "over 80" case, or risk having the charge dismissed. And because an attack on the presumption of identity does not technically involve an application to exclude evidence, it is at least arguable that an accused could wait until the end of the trial, after all of the evidence has been heard, before springing the trap and arguing that the presumption should not be available to the [page734] Crown because the arresting officer did not have reasonable and probable grounds for making a demand under s. 254(3).

[47] Faced with that prospect, as a precautionary measure, in every case of driving "over 80", the Crown would feel obliged to call all of the evidence available to it touching on the officer's grounds for making the breath demand. And in those cases where the Crown could not be certain of obtaining a favourable finding, it would need to have a toxicologist on hand who could relate the readings back to the time of driving. In the Crown's submission, these consequences would have a negative impact on a justice system that is already over- burdened, especially at the Ontario Court of Justice, where drinking and driving offences consume enormous amounts of time and resources.

[48] Under the regime proposed by the Crown, absent a *Charter* challenge to exclude the test results or prevent the Crown from relying on the presumption of identity, the Crown would not have to concern itself with the "reasonable and probable grounds" requirement in s. 254(3) to take advantage of the evidentiary shortcuts provided for in s. 258(1)(c) and (g) of the *Code*. Once an accused has acceded to a demand, the existence of reasonable and probable grounds under s. 254(3) should be immaterial.

[49] In my view, the *Charter*/non-*Charter* dichotomy represents a fair and equitable approach. It achieves a proper balance between the rights of the accused and the interests of society.

[50] Under such a regime, accused persons are better off than they were in the immediate aftermath of *Rilling*, i.e., before the advent of the *Charter*. In the period from 1975 to 1982, accused persons who acceded to a demand in circumstances where the arresting officer did not have reasonable and probable grounds were left without a remedy. But that changed with the arrival of the *Charter*. Now accused persons can challenge the admissibility of the test results under s. 8 and seek to exclude those results under s. 24(2).

[51] As for the interests of society, under the proposed regime, the Crown will be alerted to the s. 8 breach and can prepare for it. With the guesswork removed, the trial can then proceed in a more efficient, orderly and less costly fashion. As well, contrary to the view expressed by the trial judge in *Tran*, the *Charter*/non-*Charter* dichotomy involves more than "huge volumes of *Charter* materials that really are not necessary" since the finding of a s. 8 breach will not automatically result in the exclusion of evidence under s. 24(2) (see, for example, the comments of [page735] Weiler J.A. in *R. v. Richfield*, [2003] O.J. No. 3230, 178 C.C.C. (3d) 23 (C.A.), at paras. 14-18 and *R. v. Wilding* (2007), 88 O.R. (3d) 680, [2007] O.J. No. 4776).

See also *Forsythe* at paras. 21 – 24

86. If the "*Charter*/non-*Charter* dichotomy" in relation to the demand and presumption provisions is not maintained, there are additional complexities, incongruities and inefficiencies that would ensue beyond of those identified in *Charette* and *Forsythe*.

87. For example, if the appellant's position is accepted, it would be open to an accused to attack both the admissibility of the breath samples based on insufficiency of grounds and attack the presumption of identity on the same basis. If the accused is successful in securing exclusion of the samples under s. 24(2), the attack on the presumption is academic.

88. However, in some cases a demand will be found to be unlawful, but the samples will not be excluded from evidence. The question then becomes whether such a ruling should be effectively negated by leveraging the s. 8 violation as a means to defeat the presumptions. The Québec Court of Appeal concluded that it would be illogical to permit such an outcome. Bélanger J.A. (Rochette J.A. and Rochon J.A. concurring) stated in *Anderson* (at paras. 48-52):

> [48] A final question remains: Does the presumption of identity continue to apply when the motion to exclude the evidence has been dismissed?
>
> [49] In my opinion, the trial judge was correct in saying that when a motion to exclude evidence is dismissed, [translation] "the accused is in the same situation as an accused who has not invoked the *Charter*, and *Rilling* applies. The certificate of analysis is admissible in evidence, and the presumptions apply".
>
> [50] The logical outcome of admitting the breathalyzer evidence is the application of the presumption of identity.
>
> [51] To find otherwise would indirectly undermine the still-applicable principles in *Rilling* and considerably reduce the effect of the judgment rendered under subsection 24(2) of the *Charter*.
>
> [52] In this case, the appellant filed his motion to exclude the evidence, which was dismissed for the reasons outlined above. Having complied with the breathalyzer demand, and the evidence having been ruled admissible, he may not ask the Court during closing arguments of the trial on the merits to revisit the issue as to whether there were reasonable grounds to order the tests as a way of challenging the presumption of identity.
>
> [Footnotes omitted]

89. If *Anderson* is not correct in this respect, the Crown will necessarily be required to be ready to call *viva voce* technical evidence as a prophylactic measure where an unlawful demand

would not result in breath sample exclusion, but would result in loss of the s. 258 presumptions. As noted earlier, this loss of the presumptions would be for a reason unconnected to the criteria in ss. 258 (1)(c) and (g).

90. Beyond this illogical and incongruous result, trial efficiency would be needlessly compromised. In addition to a *voir dire* involving *Charter* arguments concerning the admissibility of the evidence and the application of the presumptions, trials would be further lengthened by the technical evidence that would be called to address a defect not in the scientific integrity or reliability of the testing procedure, but rather the lawfulness of the procedure which resulted in the seizure of the sample.

91. The foregoing observations of a systemic or policy nature are important, as coherence and integrity are recognized objectives in criminal law: *R. v. Babos*, 2014 SCC 16 at para. 33 and *R. v. Mahalingan*, [2008] 3 S.C.R. 316 at para. 38.

92. In addition, as this Court recently emphasized in *R. v. Jordan*, 2016 SCC 27, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice, for a panoply of reasons. Timeliness, fairness and efficiency in criminal trials are interdependent rather than mutually exclusive values (at paras. 27-8). Beyond the doctrinal incoherence inherent in the appellant's position, it would engender significant additional trial time and inefficiencies for offences prosecuted overwhelmingly by summary conviction, without in any way enhancing fairness.

J. Conclusion

93. There is no basis in law, logic or policy for this Court to overturn its majority ruling in *Rilling*. The *Charter of Rights* added a protection for detainees from whom breath samples are demanded that was unavailable prior to 1982.

94. The *Charter* allows detainees to challenge the admissibility of breath samples where they feel that the breath demand is unlawful. Where a breath demand is found to be unlawful, s. 24(2) of the *Charter* allows trial judges to weigh a variety of relevant considerations in determining whether the breath samples should be admitted in evidence.

95. If breath samples are admitted, the Crown must establish the criteria in the s. 258(1) presumption provisions in order to use the evidentiary shortcuts to establish elements of the

"over 80" offence, failing which it may choose to prove the case through other means. The criteria are concerned with scientific reliability and integrity and do not include the lawfulness of the breath demand.

96. This scheme is fair and efficient and should be maintained.

PART IV: NATURE OF ORDER SOUGHT

97. The Crown submits that this Court should dismiss the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Rodney G. Garson
Crown Counsel

Dated this 2nd day of September, 2016
at Victoria, British Columbia

PART V: LIST OF AUTHORITIES

Paragraph Nos.

STATUTORY PROVISIONS

Paragraph Nos.

Offence involving bodily harm or death

(1.3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life if

(a) the person knows that another person involved in the accident is dead; or

(b) the person knows that bodily harm has been caused to another person involved in the accident and is reckless as to whether the death of the other person results from that bodily harm, and the death of that other person so results.

Evidence

(2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

R.S., 1985, c. C-46, s. 252; R.S., 1985, c. 27 (1st Supp.), s. 36; 1994, c. 44, s. 12; 1999, c. 32, s. 1(Preamble).

Operation while impaired

253 (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

For greater certainty

(2) For greater certainty, the reference to impairment by alcohol or a drug in paragraph (1)(a) includes impairment by a combination of alcohol and a drug.

R.S., 1985, c. C-46, s. 253; R.S., 1985, c. 27 (1st Supp.), s. 36, c. 32 (4th Supp.), s. 59; 2008, c. 6, s. 18.

Definitions

254 (1) In this section and sections 254.1 to 258.1,

Infraction entraînant des lésions corporelles ou la mort

(1.3) Est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité la personne qui commet l'infraction prévue au paragraphe (1) si, selon le cas :

a) elle sait qu'une autre personne impliquée dans l'accident est morte;

b) elle sait que des lésions corporelles ont été causées à cette personne et ne se soucie pas que la mort résulte de celles-ci et cette dernière en meurt.

Preuve

(2) Dans les poursuites prévues au paragraphe (1), la preuve qu'un accusé a omis d'arrêter son véhicule, bateau ou aéronef, d'offrir de l'aide, lorsqu'une personne est blessée ou semble avoir besoin d'aide et de donner ses nom et adresse constitue, en l'absence de toute preuve contraire, une preuve de l'intention d'échapper à toute responsabilité civile ou criminelle.

L.R. (1985), ch. C-46, art. 252; L.R. (1985), ch. 27 (1er suppl.), art. 36; 1994, ch. 44, art. 12; 1999, ch. 32, art. 1(préambule).

Capacité de conduite affaiblie

253 (1) Commet une infraction quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, dans les cas suivants :

a) lorsque sa capacité de conduire ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire est affaiblie par l'effet de l'alcool ou d'une drogue;

b) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang.

Précision

(2) Il est entendu que l'alinéa (1)a) vise notamment le cas où la capacité de conduire est affaiblie par l'effet combiné de l'alcool et d'une drogue.

L.R. (1985), ch. C-46, art. 253; L.R. (1985), ch. 27 (1er suppl.), art. 36, ch. 32 (4e suppl.), art. 59; 2008, ch. 6, art. 18.

Définitions

254 (1) Les définitions qui suivent s'appliquent au présent article et aux articles 254.1 à 258.1.

analyst means a person designated by the Attorney General as an analyst for the purposes of section 258; (*analyste*)

approved container means

(a) in respect of breath samples, a container of a kind that is designed to receive a sample of the breath of a person for analysis and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada, and

(b) in respect of blood samples, a container of a kind that is designed to receive a sample of the blood of a person for analysis and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada; (*contenant approuvé*)

approved instrument means an instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada; (*alcootest approuvé*)

approved screening device means a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada; (*appareil de détection approuvé*)

evaluating officer means a peace officer who is qualified under the regulations to conduct evaluations under subsection (3.1); (*agent évaluateur*)

qualified medical practitioner means a person duly qualified by provincial law to practise medicine; (*médecin qualifié*)

qualified technician means,

(a) in respect of breath samples, a person designated by the Attorney General as being qualified to operate an approved instrument, and

(b) in respect of blood samples, any person or person of a class of persons designated by the Attorney General as being qualified to take samples of blood for the purposes of this section and sections 256 and 258. (*technicien qualifié*)

Testing for presence of alcohol or a drug

(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that

agent évaluateur Agent de la paix qui possède les qualités prévues par règlement pour effectuer des évaluations en vertu du paragraphe (3.1). (*evaluating officer*)

alcootest approuvé Instrument d'un type destiné à recueillir un échantillon de l'haleine d'une personne et à en faire l'analyse en vue de déterminer l'alcoolémie de cette personne et qui est approuvé pour l'application de l'article 258 par un arrêté du procureur général du Canada. (*approved instrument*)

analyste Personne désignée comme analyste par le procureur général pour l'application de l'article 258. (*analyst*)

appareil de détection approuvé Instrument d'un genre conçu pour déceler la présence d'alcool dans le sang d'une personne et approuvé pour l'application du présent article par un arrêté du procureur général du Canada. (*approved screening device*)

contenant approuvé Selon le cas :

a) contenant d'un type destiné à recueillir un échantillon de l'haleine d'une personne pour analyse et qui est approuvé comme contenant approprié pour l'application de l'article 258 par un arrêté du procureur général du Canada;

b) contenant d'un type destiné à recueillir un échantillon de sang d'une personne pour analyse et qui est approuvé pour l'application de l'article 258 par un arrêté du procureur général du Canada. (*approved container*)

médecin qualifié Personne qui a le droit d'exercer la médecine en vertu des lois de la province. (*qualified medical practitioner*)

technicien qualifié

a) Dans le cas d'un échantillon d'haleine, toute personne désignée par le procureur général comme étant qualifiée pour manipuler un alcootest approuvé;

b) dans le cas d'un échantillon de sang, toute personne désignée par le procureur général, ou qui fait partie d'une catégorie désignée par celui-ci, comme étant qualifiée pour prélever un échantillon de sang pour l'application du présent article et des articles 256 et 258. (*qualified technician*)

Contrôle pour vérifier la présence d'alcool ou de drogue

(2) L'agent de la paix qui a des motifs raisonnables de soupçonner qu'une personne a dans son organisme de

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:

(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.

Video recording

(2.1) For greater certainty, a peace officer may make a video recording of a performance of the physical coordination tests referred to in paragraph (2)(a).

Samples of breath or blood

(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable,

(i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and

(b) if necessary, to accompany the peace officer for that purpose.

l'alcool ou de la drogue et que, dans les trois heures précédentes, elle a conduit un véhicule — véhicule à moteur, bateau, aéronef ou matériel ferroviaire — ou en a eu la garde ou le contrôle ou que, s'agissant d'un aéronef ou de matériel ferroviaire, elle a aidé à le conduire, le véhicule ayant été en mouvement ou non, peut lui ordonner de se soumettre aux mesures prévues à l'alinéa a), dans le cas où il soupçonne la présence de drogue, ou aux mesures prévues à l'un ou l'autre des alinéas a) et b), ou aux deux, dans le cas où il soupçonne la présence d'alcool, et, au besoin, de le suivre à cette fin :

a) subir immédiatement les épreuves de coordination des mouvements prévues par règlement afin que l'agent puisse décider s'il y a lieu de donner l'ordre prévu aux paragraphes (3) ou (3.1);

b) fournir immédiatement l'échantillon d'haleine que celui-ci estime nécessaire à la réalisation d'une analyse convenable à l'aide d'un appareil de détection approuvé.

Enregistrement vidéo

(2.1) Il est entendu que l'agent de la paix peut procéder à l'enregistrement vidéo des épreuves de coordination des mouvements ordonnées en vertu de l'alinéa (2)a).

Prélèvement d'échantillon d'haleine ou de sang

(3) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne est en train de commettre, ou a commis au cours des trois heures précédentes, une infraction prévue à l'article 253 par suite d'absorption d'alcool peut, à condition de le faire dans les meilleurs délais, lui ordonner :

a) de lui fournir dans les meilleurs délais les échantillons suivants :

(i) soit les échantillons d'haleine qui de l'avis d'un technicien qualifié sont nécessaires à une analyse convenable permettant de déterminer son alcoolémie,

(ii) soit les échantillons de sang qui, de l'avis du technicien ou du médecin qualifiés qui effectuent le prélèvement, sont nécessaires à une analyse convenable permettant de déterminer son alcoolémie, dans le cas où l'agent de la paix a des motifs raisonnables de croire qu'à cause de l'état physique de cette personne elle peut être incapable de fournir un échantillon d'haleine ou le prélèvement d'un tel échantillon serait difficilement réalisable;

b) de le suivre, au besoin, pour que puissent être prélevés les échantillons de sang ou d'haleine.

Evaluation

(3.1) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under paragraph 253(1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, require the person to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose.

Video recording

(3.2) For greater certainty, a peace officer may make a video recording of an evaluation referred to in subsection (3.1).

Testing for presence of alcohol

(3.3) If the evaluating officer has reasonable grounds to suspect that the person has alcohol in their body and if a demand was not made under paragraph (2)(b) or subsection (3), the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable, a sample of breath that, in the evaluating officer's opinion, will enable a proper analysis to be made by means of an approved instrument.

Samples of bodily substances

(3.4) If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe, based on the evaluation, that the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable,

(a) a sample of either oral fluid or urine that, in the evaluating officer's opinion, will enable a proper analysis to be made to determine whether the person has a drug in their body; or

(b) samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine whether the person has a drug in their body.

Évaluation

(3.1) L'agent de la paix qui a des motifs raisonnables de croire qu'une personne est en train de commettre, ou a commis au cours des trois heures précédentes, une infraction prévue à l'alinéa 253(1)a) par suite de l'absorption d'une drogue ou d'une combinaison d'alcool et de drogue peut, à condition de le faire dans les meilleurs délais, lui ordonner de se soumettre dans les meilleurs délais à une évaluation afin que l'agent évaluateur vérifie si sa capacité de conduire un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire est affaiblie par suite d'une telle absorption, et de le suivre afin qu'il soit procédé à cette évaluation.

Enregistrement vidéo

(3.2) Il est entendu que l'agent de la paix peut procéder à l'enregistrement vidéo de l'évaluation visée au paragraphe (3.1).

Contrôle pour vérifier la présence d'alcool

(3.3) Dans le cas où aucun ordre n'a été donné en vertu de l'alinéa (2)b) ou du paragraphe (3), l'agent évaluateur, s'il a des motifs raisonnables de soupçonner la présence d'alcool dans l'organisme de la personne, peut, à condition de le faire dans les meilleurs délais, ordonner à celle-ci de lui fournir dans les meilleurs délais l'échantillon d'haleine qu'il estime nécessaire à la réalisation d'une analyse convenable à l'aide d'un alcootest approuvé.

Prélèvement de substances corporelles

(3.4) Une fois l'évaluation de la personne complétée, l'agent évaluateur qui a, sur le fondement de cette évaluation, des motifs raisonnables de croire que la capacité de celle-ci de conduire un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire est affaiblie par l'effet d'une drogue ou par l'effet combiné de l'alcool et d'une drogue peut, à condition de le faire dans les meilleurs délais, lui ordonner de se soumettre dans les meilleurs délais aux mesures suivantes :

a) soit le prélèvement de l'échantillon de liquide buccal ou d'urine qui, de l'avis de l'agent évaluateur, est nécessaire à une analyse convenable permettant de déterminer la présence d'une drogue dans son organisme;

b) soit le prélèvement des échantillons de sang qui, de l'avis du technicien ou du médecin qualifiés qui effectuent le prélèvement, sont nécessaires à une analyse convenable permettant de déterminer la présence d'une drogue dans son organisme.

Condition

(4) Samples of blood may be taken from a person under subsection (3) or (3.4) only by or under the direction of a qualified medical practitioner who is satisfied that taking the samples would not endanger the person's life or health.

Failure or refusal to comply with demand

(5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

Only one determination of guilt

(6) A person who is convicted of an offence under subsection (5) for a failure or refusal to comply with a demand may not be convicted of another offence under that subsection in respect of the same transaction.

R.S., 1985, c. C-46, s. 254; R.S., 1985, c. 27 (1st Supp.), s. 36, c. 1 (4th Supp.), ss. 14, 18(F), c. 32 (4th Supp.), s. 60; 1999, c. 32, s. 2(Preamble); 2008, c. 6, s. 19.

Regulations

254.1 (1) The Governor in Council may make regulations

(a) respecting the qualifications and training of evaluating officers;

(b) prescribing the physical coordination tests to be conducted under paragraph 254(2)(a); and

(c) prescribing the tests to be conducted and procedures to be followed during an evaluation under subsection 254(3.1).

Incorporated material

(2) A regulation may incorporate any material by reference either as it exists on a specified date or as amended from time to time.

Incorporated material is not a regulation

(3) For greater certainty, material does not become a regulation for the purposes of the *Statutory Instruments Act* because it is incorporated by reference.

2008, c. 6, s. 20.

Punishment

255 (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

Limite

(4) Les échantillons de sang ne peuvent être prélevés d'une personne en vertu des paragraphes (3) ou (3.4) que par un médecin qualifié ou sous sa direction et à la condition qu'il soit convaincu que ces prélèvements ne risquent pas de mettre en danger la vie ou la santé de cette personne.

Omission ou refus d'obtempérer

(5) Commet une infraction quiconque, sans excuse raisonnable, omet ou refuse d'obtempérer à un ordre donné en vertu du présent article.

Une seule déclaration de culpabilité

(6) La personne déclarée coupable d'une infraction prévue au paragraphe (5) à la suite du refus ou de l'omission d'obtempérer à un ordre ne peut être déclarée coupable d'une autre infraction prévue à ce paragraphe concernant la même affaire.

L.R. (1985), ch. C-46, art. 254; L.R. (1985), ch. 27 (1er suppl.), art. 36, ch. 1 (4e suppl.), art. 14 et 18(F), ch. 32 (4e suppl.), art. 60; 1999, ch. 32, art. 2(préambule); 2008, ch. 6, art. 19.

Règlements

254.1 (1) Le gouverneur en conseil peut, par règlement :

a) régir les qualités et la formation requises des agents évaluateurs;

b) établir les épreuves de coordination des mouvements à effectuer en vertu de l'alinéa 254(2)a);

c) établir les examens à effectuer et la procédure à suivre lors de l'évaluation prévue au paragraphe 254(3.1).

Incorporation de documents

(2) Peut être incorporé par renvoi dans un règlement tout document, soit dans sa version à une date donnée, soit avec ses modifications successives.

Nature du document

(3) Il est entendu que l'incorporation ne confère pas au document, pour l'application de la *Loi sur les textes réglementaires*, valeur de règlement.

2008, ch. 6, art. 20.

Peine

255 (1) Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible :

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than $1,000,

(ii) for a second offence, to imprisonment for not less than 30 days, and

(iii) for each subsequent offence, to imprisonment for not less than 120 days;

(b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and

(c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

a) que l'infraction soit poursuivie par mise en accusation ou par procédure sommaire, des peines minimales suivantes :

(i) pour la première infraction, une amende minimale de mille dollars,

(ii) pour la seconde infraction, un emprisonnement minimal de trente jours,

(iii) pour chaque infraction subséquente, un emprisonnement minimal de cent vingt jours;

b) si l'infraction est poursuivie par mise en accusation, d'un emprisonnement maximal de cinq ans;

c) si l'infraction est poursuivie par procédure sommaire, d'un emprisonnement maximal de dix-huit mois.

Impaired driving causing bodily harm

(2) Everyone who commits an offence under paragraph 253(1)(a) and causes bodily harm to another person as a result is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Conduite avec capacités affaiblies causant des lésions corporelles

(2) Quiconque commet une infraction prévue à l'alinéa 253(1)a) et cause ainsi des lésions corporelles à une autre personne est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans.

Blood alcohol level over legal limit — bodily harm

(2.1) Everyone who, while committing an offence under paragraph 253(1)(b), causes an accident resulting in bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Alcoolémie supérieure à la limite permise : lésions corporelles

(2.1) Quiconque, tandis qu'il commet une infraction prévue à l'alinéa 253(1)b), cause un accident occasionnant des lésions corporelles à une autre personne, est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans.

Failure or refusal to provide sample — bodily harm

(2.2) Everyone who commits an offence under subsection 254(5) and, at the time of committing the offence, knows or ought to know that their operation of the motor vehicle, vessel, aircraft or railway equipment, their assistance in the operation of the aircraft or railway equipment or their care or control of the motor vehicle, vessel, aircraft or railway equipment caused an accident resulting in bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Omission ou refus de fournir un échantillon : lésions corporelles

(2.2) Quiconque commet l'infraction prévue au paragraphe 254(5), alors qu'il sait ou devrait savoir que le véhicule — véhicule à moteur, bateau, aéronef ou matériel ferroviaire — qu'il conduisait ou dont il avait la garde ou le contrôle ou, s'agissant d'un aéronef ou de matériel ferroviaire, qu'il aidait à conduire, a causé un accident ayant occasionné des lésions corporelles à une autre personne, est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans.

Impaired driving causing death

(3) Everyone who commits an offence under paragraph 253(1)(a) and causes the death of another person as a result is guilty of an indictable offence and liable to imprisonment for life.

Conduite avec capacités affaiblies causant la mort

(3) Quiconque commet une infraction prévue à l'alinéa 253(1)a) et cause ainsi la mort d'une autre personne est coupable d'un acte criminel passible de l'emprisonnement à perpétuité.

Blood alcohol level over legal limit — death

(3.1) Everyone who, while committing an offence under paragraph 253(1)(b), causes an accident resulting in the death of another person is guilty of an indictable offence and liable to imprisonment for life.

Failure or refusal to provide sample — death

(3.2) Everyone who commits an offence under subsection 254(5) and, at the time of committing the offence, knows or ought to know that their operation of the motor vehicle, vessel, aircraft or railway equipment, their assistance in the operation of the aircraft or railway equipment or their care or control of the motor vehicle, vessel, aircraft or railway equipment caused an accident resulting in the death of another person, or in bodily harm to another person whose death ensues, is guilty of an indictable offence and liable to imprisonment for life.

Interpretation

(3.3) For greater certainty, everyone who is liable to the punishment described in any of subsections (2) to (3.2) is also liable to the minimum punishment described in paragraph (1)(a).

Previous convictions

(4) A person who is convicted of an offence committed under section 253 or subsection 254(5) is, for the purposes of this Act, deemed to be convicted for a second or subsequent offence, as the case may be, if they have previously been convicted of

(a) an offence committed under either of those provisions;

(b) an offence under subsection (2) or (3); or

(c) an offence under section 250, 251, 252, 253, 259 or 260 or subsection 258(4) of this Act as this Act read immediately before the coming into force of this subsection.

Conditional discharge

***(5)** Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest,

Alcoolémie supérieure à la limite permise : mort

(3.1) Quiconque, tandis qu'il commet une infraction prévue à l'alinéa 253(1)b), cause un accident occasionnant la mort d'une autre personne est coupable d'un acte criminel passible de l'emprisonnement à perpétuité.

Omission ou refus de fournir un échantillon : mort

(3.2) Quiconque commet l'infraction prévue au paragraphe 254(5), alors qu'il sait ou devrait savoir que le véhicule — véhicule à moteur, bateau, aéronef ou matériel ferroviaire — qu'il conduisait ou dont il avait la garde ou le contrôle ou, s'agissant d'un aéronef ou de matériel ferroviaire, qu'il aidait à conduire, a causé un accident qui soit a occasionné la mort d'une autre personne, soit lui a occasionné des lésions corporelles dont elle mourra par la suite est coupable d'un acte criminel passible de l'emprisonnement à perpétuité.

Règle d'interprétation

(3.3) Il est entendu que les peines minimales prévues à l'alinéa (1)a) s'appliquent dans les cas visés aux paragraphes (2) à (3.2).

Condamnations antérieures

(4) Une personne déclarée coupable d'une infraction prévue à l'article 253 ou au paragraphe 254(5) est, pour l'application de la présente loi, réputée être déclarée coupable d'une seconde infraction ou d'une infraction subséquente si elle a déjà été déclarée coupable auparavant d'une infraction prévue :

a) à l'une de ces dispositions;

b) aux paragraphes (2) ou (3);

c) aux articles 250, 251, 252, 253, 259 ou 260 ou au paragraphe 258(4) de la présente loi dans sa version antérieure à l'entrée en vigueur du présent paragraphe.

Absolution conditionnelle

***(5)** Nonobstant le paragraphe 730(1), un tribunal peut, au lieu de déclarer une personne coupable d'une infraction prévue à l'article 253, l'absoudre en vertu de l'article 730 s'il estime, sur preuve médicale ou autre, que la personne en question a besoin de suivre une cure de désintoxication et que cela ne serait pas contraire à l'ordre public; l'absolution est accompagnée d'une ordonnance de probation dont l'une des conditions est l'obligation de suivre une cure de désintoxication pour abus d'alcool ou de drogue.

* [Note : En vigueur dans les provinces de la Nouvelle-Écosse, du Nouveau-Brunswick, du Manitoba, de l'Île-du-Prince-Édouard,

by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.

[*] [Note: In force in the Provinces of Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan and Alberta and in the Yukon Territory and the Northwest Territories, *see* SI/85-211 and SI/88-24.]

R.S., 1985, c. C-46, s. 255; R.S., 1985, c. 27 (1st Supp.), s. 36; R.S., 1985, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 18; 1999, c. 32, s. 3(Preamble); 2000, c. 25, s. 2; 2008, c. 6, s. 21, c. 18, ss. 7, 45.2.

de la Saskatchewan et d'Alberta et dans le territoire du Yukon et les Territoires du Nord-Ouest, *voir* TR/85-211 et TR/88-24.]

L.R. (1985), ch. C-46, art. 255; L.R. (1985), ch. 27 (1er suppl.), art. 36; L.R. (1985), ch. 1 (4e suppl.), art. 18(F); 1995, ch. 22, art. 18; 1999, ch. 32, art. 3(préambule); 2000, ch. 25, art. 2; 2008, ch. 6, art. 21, ch. 18, art. 7 et 45.2.

Aggravating circumstances for sentencing purposes

255.1 Without limiting the generality of section 718.2, where a court imposes a sentence for an offence committed under this Act by means of a motor vehicle, vessel or aircraft or of railway equipment, evidence that the concentration of alcohol in the blood of the offender at the time when the offence was committed exceeded one hundred and sixty milligrams of alcohol in one hundred millilitres of blood shall be deemed to be aggravating circumstances relating to the offence that the court shall consider under paragraph 718.2(a).

1999, c. 32, s. 4(Preamble).

Détermination de la peine : circonstances aggravantes

255.1 Sans que soit limitée la portée générale de l'article 718.2, lorsqu'un tribunal détermine la peine à infliger à l'égard d'une infraction prévue par la présente loi commise au moyen d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, tout élément de preuve selon lequel la concentration d'alcool dans le sang du contrevenant au moment où l'infraction a été commise était supérieure à cent soixante milligrammes d'alcool par cent millilitres de sang est réputé être une circonstance aggravante liée à la perpétration de l'infraction dont le tribunal doit tenir compte en vertu de l'alinéa 718.2a).

1999, ch. 32, art. 4(préambule).

Warrants to obtain blood samples

256 (1) Subject to subsection (2), if a justice is satisfied, on an information on oath in Form 1 or on an information on oath submitted to the justice under section 487.1 by telephone or other means of telecommunication, that there are reasonable grounds to believe that

(a) a person has, within the preceding four hours, committed, as a result of the consumption of alcohol or a drug, an offence under section 253 and the person was involved in an accident resulting in the death of another person or in bodily harm to himself or herself or to any other person, and

(b) a qualified medical practitioner is of the opinion that

(i) by reason of any physical or mental condition of the person that resulted from the consumption of alcohol or a drug, the accident or any other occurrence related to or resulting from the accident, the person is unable to consent to the taking of samples of his or her blood, and

(ii) the taking of samples of blood from the person would not endanger the life or health of the person,

the justice may issue a warrant authorizing a peace officer to require a qualified medical practitioner to take, or

Télémandats pour obtention d'échantillons de sang

256 (1) Sous réserve du paragraphe (2), un juge de paix peut décerner un mandat autorisant un agent de la paix à exiger d'un médecin qualifié qu'il prélève, ou fasse prélever par un technicien qualifié sous sa direction, les échantillons de sang nécessaires, selon la personne qui les prélève, à une analyse convenable permettant de déterminer l'alcoolémie d'une personne ou la quantité de drogue dans son sang s'il est convaincu, à la suite d'une dénonciation faite sous serment suivant la formule 1 ou une dénonciation faite sous serment et présentée par téléphone ou par tout autre moyen de télécommunication qui satisfait aux exigences établies à l'article 487.1, qu'il existe des motifs raisonnables de croire :

a) d'une part, que la personne a commis au cours des quatre heures précédentes une infraction prévue à l'article 253 à la suite de l'absorption d'alcool ou de drogue et qu'elle est impliquée dans un accident ayant causé des lésions corporelles à elle-même ou à un tiers, ou la mort de celui-ci;

b) d'autre part, qu'un médecin qualifié est d'avis à la fois :

(i) que cette personne se trouve, à cause de l'absorption d'alcool ou de drogue, de l'accident ou de tout autre événement lié à l'accident, dans un état

to cause to be taken by a qualified technician under the direction of the qualified medical practitioner, the samples of the blood of the person that in the opinion of the person taking the samples are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol or drugs in the person's blood.

Form

(2) A warrant issued pursuant to subsection (1) may be in Form 5 or 5.1 varied to suit the case.

Information on oath

(3) Notwithstanding paragraphs 487.1(4)(b) and (c), an information on oath submitted by telephone or other means of telecommunication for the purposes of this section shall include, instead of the statements referred to in those paragraphs, a statement setting out the offence alleged to have been committed and identifying the person from whom blood samples are to be taken.

Duration of warrant

(4) Samples of blood may be taken from a person pursuant to a warrant issued pursuant to subsection (1) only during such time as a qualified medical practitioner is satisfied that the conditions referred to in subparagraphs (1)(b)(i) and (ii) continue to exist in respect of that person.

Copy or facsimile to person

(5) When a warrant issued under subsection (1) is executed, the peace officer shall, as soon as practicable, give a copy of it — or, in the case of a warrant issued by telephone or other means of telecommunication, a facsimile — to the person from whom the blood samples are taken.

R.S., 1985, c. C-46, s. 256; R.S., 1985, c. 27 (1st Supp.), s. 36; 1992, c. 1, s. 58; 1994, c. 44, s. 13; 2000, c. 25, s. 3; 2008, c. 6, s. 22.

No offence committed

257 (1) No qualified medical practitioner or qualified technician is guilty of an offence only by reason of his refusal to take a sample of blood from a person for the purposes of section 254 or 256 and no qualified medical practitioner is guilty of an offence only by reason of his refusal to cause to be taken by a qualified technician under his direction a sample of blood from a person for those purposes.

physique ou psychologique qui ne lui permet pas de consentir au prélèvement de son sang,

(ii) que le prélèvement d'un échantillon de sang ne risquera pas de mettre en danger la vie ou la santé de cette personne.

Formule

(2) Un mandat décerné en vertu du paragraphe (1) peut être rédigé suivant les formules 5 ou 5.1 en les adaptant aux circonstances.

Dénonciation sous serment

(3) Nonobstant les alinéas 487.1(4)b) et c), une dénonciation sous serment présentée par téléphone ou par tout autre moyen de télécommunication pour l'application du présent article comprend, au lieu des déclarations prévues à ces alinéas, une déclaration énonçant la présumée infraction et l'identité de la personne qui fera l'objet des prélèvements de sang.

Durée du mandat

(4) Une personne visée par un mandat décerné suivant le paragraphe (1) peut subir des prélèvements de sang seulement durant la période évaluée par un médecin qualifié comme étant celle où subsistent les conditions prévues aux sous-alinéas (1)b)(i) et (ii).

Fac-similé ou copie à la personne

(5) Après l'exécution d'un mandat décerné suivant le paragraphe (1), l'agent de la paix doit dans les meilleurs délais en donner une copie à la personne qui fait l'objet d'un prélèvement de sang ou, dans le cas d'un mandat décerné par téléphone ou par tout autre moyen de télécommunication, donner un fac-similé du mandat à cette personne.

L.R. (1985), ch. C-46, art. 256; L.R. (1985), ch. 27 (1er suppl.), art. 36; 1992, ch. 1, art. 58; 1994, ch. 44, art. 13; 2000, ch. 25, art. 3; 2008, ch. 6, art. 22.

Non-culpabilité

257 (1) Un médecin qualifié ou un technicien qualifié n'est pas coupable d'une infraction uniquement en raison de son refus de prélever un échantillon de sang d'une personne, pour l'application des articles 254 ou 256 ou, dans le cas d'un médecin qualifié, uniquement de son refus de faire prélever par un technicien qualifié un échantillon de sang d'une personne, pour l'application de ces articles.

No criminal or civil liability

(2) No qualified medical practitioner by whom or under whose direction a sample of blood is taken from a person under subsection 254(3) or (3.4) or section 256, and no qualified technician acting under the direction of a qualified medical practitioner, incurs any criminal or civil liability for anything necessarily done with reasonable care and skill when taking the sample.

R.S., 1985, c. C-46, s. 257; R.S., 1985, c. 27 (1st Supp.), s. 36; 2008, c. 6, s. 23.

Immunité

(2) Il ne peut être intenté aucune procédure civile ou criminelle contre un médecin qualifié qui prélève ou fait prélever un échantillon de sang en vertu des paragraphes 254(3) ou (3.4) ou de l'article 256, ni contre le technicien qualifié agissant sous sa direction pour tout geste nécessaire au prélèvement posé avec des soins et une habileté raisonnables.

L.R. (1985), ch. C-46, art. 257; L.R. (1985), ch. 27 (1er suppl.), art. 36; 2008, ch. 6, art. 23.

Proceedings under section 255

258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

(a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be;

(b) the result of an analysis of a sample of the accused's breath, blood, urine or other bodily substance — other than a sample taken under subsection 254(3), (3.3) or (3.4) — may be admitted in evidence even if the accused was not warned before they gave the sample that they need not give the sample or that the result of the analysis of the sample might be used in evidence;

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

(i) [Repealed before coming into force, 2008, c. 20, s. 3]

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

Poursuites en vertu de l'article 255

258 (1) Dans des poursuites engagées en vertu du paragraphe 255(1) à l'égard d'une infraction prévue à l'article 253 ou au paragraphe 254(5) ou dans des poursuites engagées en vertu de l'un des paragraphes 255(2) à (3.2) :

a) lorsqu'il est prouvé que l'accusé occupait la place ou la position ordinairement occupée par la personne qui conduit le véhicule à moteur, le bateau, l'aéronef ou le matériel ferroviaire, ou qui aide à conduire un aéronef ou du matériel ferroviaire, il est réputé en avoir eu la garde ou le contrôle à moins qu'il n'établisse qu'il n'occupait pas cette place ou position dans le but de mettre en marche ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire, ou dans le but d'aider à conduire l'aéronef ou le matériel ferroviaire, selon le cas;

b) le résultat d'une analyse d'un échantillon de l'haleine, du sang, de l'urine ou d'une autre substance corporelle de l'accusé — autre qu'un échantillon prélevé en vertu des paragraphes 254(3), (3.3) ou (3.4) — peut être admis en preuve même si, avant de donner l'échantillon, l'accusé n'a pas été averti qu'il n'était pas tenu de le donner ou que le résultat de l'analyse de l'échantillon pourrait servir en preuve;

c) lorsque des échantillons de l'haleine de l'accusé ont été prélevés conformément à un ordre donné en vertu du paragraphe 254(3), la preuve des résultats des analyses fait foi de façon concluante, en l'absence de toute preuve tendant à démontrer à la fois que les résultats des analyses montrant une alcoolémie supérieure à quatre-vingts milligrammes d'alcool par cent millilitres de sang découlent du mauvais fonctionnement ou de l'utilisation incorrecte de l'alcootest approuvé et que l'alcoolémie de l'accusé au moment où l'infraction aurait été commise ne dépassait pas quatre-vingts milligrammes d'alcool par cent millilitres de sang, de l'alcoolémie de l'accusé tant au moment des analyses qu'à celui où l'infraction aurait été commise, ce taux correspondant aux résultats de ces analyses, lorsqu'ils sont identiques, ou au plus faible d'entre eux s'ils sont différents, si les conditions suivantes sont réunies :

(iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

(d) if a sample of the accused's blood has been taken under subsection 254(3) or section 256 or with the accused's consent and if

(i) at the time the sample was taken, the person taking the sample took an additional sample of the blood of the accused and one of the samples was retained to permit an analysis of it to be made by or on behalf of the accused and, in the case where the accused makes a request within six months from the taking of the samples, one of the samples was ordered to be released under subsection (4),

(ii) both samples referred to in subparagraph (i) were taken as soon as practicable and in any event not later than two hours after the time when the offence was alleged to have been committed,

(iii) both samples referred to in subparagraph (i) were taken by a qualified medical practitioner or a qualified technician under the direction of a qualified medical practitioner,

(iv) both samples referred to in subparagraph (i) were received from the accused directly into, or placed directly into, approved containers that were subsequently sealed, and

(v) an analysis was made by an analyst of at least one of the samples,

evidence of the result of the analysis is conclusive proof that the concentration of alcohol in the

(i) [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

(ii) chaque échantillon a été prélevé dès qu'il a été matériellement possible de le faire après le moment où l'infraction aurait été commise et, dans le cas du premier échantillon, pas plus de deux heures après ce moment, les autres l'ayant été à des intervalles d'au moins quinze minutes,

(iii) chaque échantillon a été reçu de l'accusé directement dans un contenant approuvé ou dans un alcootest approuvé, manipulé par un technicien qualifié,

(iv) une analyse de chaque échantillon a été faite à l'aide d'un alcootest approuvé, manipulé par un technicien qualifié;

d) lorsqu'un échantillon de sang de l'accusé a été prélevé en vertu du paragraphe 254(3) ou de l'article 256 ou prélevé avec le consentement de l'accusé, la preuve du résultat de l'analyse ainsi faite fait foi de façon concluante, en l'absence de toute preuve tendant à démontrer à la fois que le résultat de l'analyse montrant une alcoolémie supérieure à quatre-vingts milligrammes d'alcool par cent millilitres de sang découle du fait que l'analyse n'a pas été faite correctement et que l'alcoolémie de l'accusé au moment où l'infraction aurait été commise ne dépassait pas quatre-vingts milligrammes d'alcool par cent millilitres de sang, de l'alcoolémie de l'accusé tant au moment du prélèvement de l'échantillon qu'à celui où l'infraction aurait été commise, ce taux correspondant au résultat de l'analyse, ou, si plus d'un échantillon a été analysé, aux résultats des analyses, lorsqu'ils sont identiques, ou au plus faible d'entre eux s'ils sont différents, si les conditions suivantes sont réunies :

(i) au moment où l'échantillon a été prélevé, la personne qui le prélevait a pris un échantillon supplémentaire du sang de l'accusé et un échantillon a été gardé pour en permettre l'analyse à la demande de l'accusé et, si celui-ci fait la demande visée au paragraphe (4) dans les six mois du prélèvement, une ordonnance de remise de l'échantillon a été rendue en conformité avec ce paragraphe,

(ii) les échantillons mentionnés au sous-alinéa (i) ont été prélevés dans les meilleurs délais après la commission de l'infraction alléguée et dans tous les cas au plus tard deux heures après,

accused's blood both at the time when the samples were taken and at the time when the offence was alleged to have been committed was the concentration determined by the analysis or, if more than one sample was analyzed and the results of the analyses are the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things — that the analysis was performed improperly, that the improper performance resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

(d.01) for greater certainty, evidence tending to show that an approved instrument was malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

(i) the amount of alcohol that the accused consumed,

(ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or

(iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed;

(d.1) if samples of the accused's breath or a sample of the accused's blood have been taken as described in paragraph (c) or (d) under the conditions described in that paragraph and the results of the analyses show a concentration of alcohol in blood exceeding 80 mg of alcohol in 100 mL of blood, evidence of the results of the analyses is proof that the concentration of alcohol in the accused's blood at the time when the offence was alleged to have been committed exceeded 80 mg of alcohol in 100 mL of blood, in the absence of evidence tending to show that the accused's consumption of alcohol was consistent with both

(i) a concentration of alcohol in the accused's blood that did not exceed 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed, and

(iii) les échantillons mentionnés au sous-alinéa (i) ont été prélevés par un médecin qualifié ou un technicien qualifié sous la direction d'un médecin qualifié,

(iv) les échantillons mentionnés au sous-alinéa (i) ont été reçus de l'accusé directement, ou ont été placés directement, dans des contenants approuvés et scellés,

(v) l'analyse d'au moins un des échantillons a été faite par un analyste;

d.01) il est entendu que ne constituent pas une preuve tendant à démontrer le mauvais fonctionnement ou l'utilisation incorrecte de l'alcootest approuvé ou le fait que les analyses ont été effectuées incorrectement les éléments de preuve portant :

(i) soit sur la quantité d'alcool consommé par l'accusé,

(ii) soit sur le taux d'absorption ou d'élimination de l'alcool par son organisme,

(iii) soit sur le calcul, fondé sur ces éléments de preuve, de ce qu'aurait été son alcoolémie au moment où l'infraction aurait été commise;

d.1) si les analyses visées aux alinéas c) ou d) montrent une alcoolémie supérieure à quatre-vingts milligrammes d'alcool par cent millilitres de sang, le résultat des analyses fait foi d'une telle alcoolémie au moment où l'infraction aurait été commise, en l'absence de preuve tendant à démontrer que la consommation d'alcool par l'accusé était compatible avec, à la fois :

(i) une alcoolémie ne dépassant pas quatre-vingts milligrammes d'alcool par cent millilitres de sang au moment où l'infraction aurait été commise,

(ii) l'alcoolémie établie par les analyses visées aux alinéas c) ou d), selon le cas, au moment du prélèvement des échantillons;

e) le certificat d'un analyste déclarant qu'il a effectué l'analyse d'un échantillon de sang, d'urine, d'haleine ou d'une autre substance corporelle de l'accusé et indiquant le résultat de son analyse fait preuve des faits allégués dans le certificat sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire;

f) le certificat d'un analyste déclarant qu'il a effectué une analyse d'un échantillon d'un alcool type identifié

(ii) the concentration of alcohol in the accused's blood as determined under paragraph (c) or (d), as the case may be, at the time when the sample or samples were taken;

(e) a certificate of an analyst stating that the analyst has made an analysis of a sample of the blood, urine, breath or other bodily substance of the accused and stating the result of that analysis is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

(f) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with an approved instrument and that the sample of the standard analyzed by the analyst was found to be suitable for use with an approved instrument, is evidence that the alcohol standard so identified is suitable for use with an approved instrument without proof of the signature or the official character of the person appearing to have signed the certificate;

(f.1) the document printed out from an approved instrument and signed by a qualified technician who certifies it to be the printout produced by the approved instrument when it made the analysis of a sample of the accused's breath is evidence of the facts alleged in the document without proof of the signature or official character of the person appearing to have signed it;

(g) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), a certificate of a qualified technician stating

(i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,

(ii) the results of the analyses so made, and

(iii) if the samples were taken by the technician,

(A) [Repealed before coming into force, 2008, c. 20, s. 3]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

dans le certificat et conçu pour être utilisé avec un alcootest approuvé, et qu'il s'est révélé que l'échantillon analysé par lui convenait bien pour l'utilisation avec un alcootest approuvé, fait foi de ce que l'alcool type ainsi identifié est convenable pour utilisation avec un alcootest approuvé, sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du signataire;

f.1) le document imprimé par l'alcootest approuvé où figurent les opérations effectuées par celui-ci et qui en démontre le bon fonctionnement lors de l'analyse des échantillons de l'haleine de l'accusé, signé et certifié comme tel par le technicien qualifié, fait preuve des faits qui y sont allégués sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire;

g) lorsque des échantillons de l'haleine de l'accusé ont été prélevés conformément à une demande faite en vertu du paragraphe 254(3), le certificat d'un technicien qualifié fait preuve des faits allégués dans le certificat sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du signataire, si le certificat du technicien qualifié contient :

(i) la mention que l'analyse de chacun des échantillons a été faite à l'aide d'un alcootest approuvé, manipulé par lui et dont il s'est assuré du bon fonctionnement au moyen d'un alcool type identifié dans le certificat, comme se prêtant bien à l'utilisation avec cet alcootest approuvé,

(ii) la mention des résultats des analyses ainsi faites,

(iii) la mention, dans le cas où il a lui-même prélevé les échantillons :

(A) [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

(B) du temps et du lieu où chaque échantillon et un spécimen quelconque mentionné dans la division (A) ont été prélevés,

(C) que chaque échantillon a été reçu directement de l'accusé dans un contenant approuvé ou dans un alcootest approuvé, manipulé par lui;

h) lorsque les échantillons du sang de l'accusé ont été prélevés en vertu des paragraphes 254(3) ou (3.4) ou de l'article 256 ou prélevés avec le consentement de l'accusé, un certificat d'un médecin ou d'un technicien qualifiés fait preuve des faits allégués dans le certificat sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire dans l'un ou l'autre des cas suivants :

(C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

(h) if a sample of the accused's blood has been taken under subsection 254(3) or (3.4) or section 256 or with the accused's consent,

(i) a certificate of a qualified medical practitioner stating that

(A) they took the sample and before the sample was taken they were of the opinion that taking it would not endanger the accused's life or health and, in the case of a demand made under section 256, that by reason of any physical or mental condition of the accused that resulted from the consumption of alcohol or a drug, the accident or any other occurrence related to or resulting from the accident, the accused was unable to consent to the taking of the sample,

(B) at the time the sample was taken, an additional sample of the blood of the accused was taken to permit analysis of one of the samples to be made by or on behalf of the accused,

(C) the time when and place where both samples referred to in clause (B) were taken, and

(D) both samples referred to in clause (B) were received from the accused directly into, or placed directly into, approved containers that were subsequently sealed and that are identified in the certificate,

(ii) a certificate of a qualified medical practitioner stating that the medical practitioner caused the sample to be taken by a qualified technician under his direction and that before the sample was taken the qualified medical practitioner was of the opinion referred to in clause (i)(A), or

(iii) a certificate of a qualified technician stating that the technician took the sample and the facts referred to in clauses (i)(B) to (D)

is evidence of the facts alleged in the certificate without proof of the signature or official character of the person appearing to have signed the certificate; and

(i) le certificat du médecin qualifié contient :

(A) la mention qu'il a lui-même prélevé les échantillons et que, avant de les prélever, il était d'avis que ces derniers ne mettraient pas en danger la vie ou la santé de l'accusé et, dans le cas d'un ordre donné en vertu de l'article 256, que l'accusé était incapable de donner un consentement au prélèvement de son sang à cause de l'état physique ou psychologique dans lequel il se trouvait en raison de l'absorption d'alcool ou de drogue, de l'accident ou de tout événement découlant de l'accident ou lié à celui-ci,

(B) la mention qu'au moment du prélèvement de l'échantillon, un autre échantillon du sang de l'accusé a été prélevé pour en permettre une analyse à la demande de celui-ci,

(C) la mention du temps et du lieu où les échantillons mentionnés à la division (B) ont été prélevés,

(D) la mention que les échantillons mentionnés à la division (B) ont été reçus directement de l'accusé ou ont été placés directement dans des contenants approuvés, scellés et identifiés dans le certificat,

(ii) le certificat du médecin qualifié énonce qu'il a fait prélever les échantillons par un technicien qualifié sous sa direction et qu'il était de l'avis mentionné à la division (i)(A),

(iii) le certificat du technicien qualifié énonce les faits mentionnés aux divisions (i)(B) à (D) et qu'il a prélevé les échantillons;

i) le certificat de l'analyste déclarant qu'il a effectué une analyse d'un échantillon du sang de l'accusé présent dans un contenant approuvé, scellé et identifié dans le certificat, indiquant le moment, le lieu de l'analyse et le résultat de celle-ci fait foi des faits énoncés dans le certificat sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire.

(i) a certificate of an analyst stating that the analyst has made an analysis of a sample of the blood of the accused that was contained in a sealed approved container identified in the certificate, the date on which and place where the sample was analyzed and the result of that analysis is evidence of the facts alleged in the certificate without proof of the signature or official character of the person appearing to have signed it.

Evidence of failure to give sample

(2) Unless a person is required to give a sample of a bodily substance under paragraph 254(2)(b) or subsection 254(3), (3.3) or (3.4), evidence that they failed or refused to give a sample for analysis for the purposes of this section or that a sample was not taken is not admissible and the failure, refusal or fact that a sample was not taken shall not be the subject of comment by any person in the proceedings.

Preuve de l'omission de fournir un échantillon

(2) Sauf si une personne est tenue de fournir un échantillon d'une substance corporelle aux termes de l'alinéa 254(2)b) ou des paragraphes 254(3), (3.3) ou (3.4), la preuve qu'elle a omis ou refusé de fournir pour analyse un échantillon pour l'application du présent article, ou que l'échantillon n'a pas été prélevé, n'est pas admissible; de plus, l'omission ou le refus ou le fait qu'un échantillon n'a pas été prélevé ne saurait faire l'objet de commentaires par qui que ce soit au cours des procédures.

Evidence of failure to comply with demand

(3) In any proceedings under subsection 255(1) in respect of an offence committed under paragraph 253(1)(a) or in any proceedings under subsection 255(2) or (3), evidence that the accused, without reasonable excuse, failed or refused to comply with a demand made under section 254 is admissible and the court may draw an inference adverse to the accused from that evidence.

Preuve de l'omission d'obtempérer à un ordre

(3) Dans toute poursuite engagée en vertu du paragraphe 255(1) à l'égard d'une infraction prévue à l'alinéa 253(1)a) ou en vertu des paragraphes 255(2) ou (3), la preuve que l'accusé a, sans excuse raisonnable, omis ou refusé d'obtempérer à un ordre qui lui a été donné en vertu de l'article 254 est admissible et le tribunal peut en tirer une conclusion défavorable à l'accusé.

Release of sample for analysis

(4) If, at the time a sample of an accused's blood is taken, an additional sample is taken and retained, a judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction shall, on the summary application of the accused made within six months after the day on which the samples were taken, order the release of one of the samples for the purpose of examination or analysis, subject to any terms that appear to be necessary or desirable to ensure that the sample is safeguarded and preserved for use in any proceedings in respect of which it was taken.

Accessibilité au spécimen pour analyse

(4) Si, au moment du prélèvement de l'échantillon du sang de l'accusé, un échantillon supplémentaire de celui-ci a été pris et gardé, un juge d'une cour supérieure de juridiction criminelle ou d'une cour de juridiction criminelle peut, sur demande sommaire de l'accusé présentée dans les six mois du prélèvement, ordonner qu'un spécimen de son sang lui soit remis pour examen ou analyse. L'ordonnance peut être assortie des conditions estimées nécessaires ou souhaitables pour assurer la conservation du spécimen et sa disponibilité lors des procédures en vue desquelles il a été prélevé.

Testing of blood for concentration of a drug

(5) A sample of an accused's blood taken under subsection 254(3) or section 256 or with the accused's consent for the purpose of analysis to determine the concentration, if any, of alcohol in the blood may be tested to determine the concentration, if any, of a drug in the blood.

Analyse du sang pour déceler des drogues

(5) Un échantillon de sang d'un accusé prélevé pour déterminer son alcoolémie en vertu du paragraphe 254(3) ou de l'article 256 ou avec le consentement de l'accusé peut être analysé afin de déterminer la quantité de drogue dans son sang.

Attendance and right to cross-examine

(6) A party against whom a certificate described in paragraph (1)(e), (f), (f.1), (g), (h) or (i) is produced may, with leave of the court, require the attendance of the qualified

Présence et droit de contre-interroger

(6) Une partie contre qui est produit un certificat mentionné aux alinéas (1)e), f), f.1), g), h) ou i) peut, avec

medical practitioner, analyst or qualified technician, as the case may be, for the purposes of cross-examination.

Notice of intention to produce certificate

(7) No certificate shall be received in evidence pursuant to paragraph (1)(e), (f), (g), (h) or (i) unless the party intending to produce it has, before the trial, given to the other party reasonable notice of his intention and a copy of the certificate.

R.S., 1985, c. C-46, s. 258; R.S., 1985, c. 27 (1st Supp.), s. 36, c. 32 (4th Supp.), s. 61; 1992, c. 1, s. 60(F); 1994, c. 44, s. 14(E); 1997, c. 18, s. 10; 2008, c. 6, s. 24.

Unauthorized use of bodily substance

258.1 (1) Subject to subsections 258(4) and (5) and subsection (3), no person shall use a bodily substance taken under paragraph 254(2)(b), subsection 254(3), (3.3) or (3.4) or section 256 or with the consent of the person from whom it was taken after a request by a peace officer or medical samples that are provided by consent and subsequently seized under a warrant, except for the purpose of an analysis that is referred to in that provision or for which the consent is given.

Unauthorized use or disclosure of results

(2) Subject to subsections (3) and (4), no person shall use, disclose or allow the disclosure of the results of physical coordination tests under paragraph 254(2)(a), the results of an evaluation under subsection 254(3.1), the results of the analysis of a bodily substance taken under paragraph 254(2)(b), subsection 254(3), (3.3) or (3.4) or section 256 or with the consent of the person from whom it was taken after a request by a peace officer, or the results of the analysis of medical samples that are provided by consent and subsequently seized under a warrant, except

(a) in the course of an investigation of, or in a proceeding for, an offence under any of sections 220, 221, 236 and 249 to 255, an offence under Part I of the *Aeronautics Act*, or an offence under the *Railway Safety Act* in respect of a contravention of a rule or regulation made under that Act respecting the use of alcohol or a drug; or

(b) for the purpose of the administration or enforcement of the law of a province.

Exception

(3) Subsections (1) and (2) do not apply to persons who for medical purposes use samples or use or disclose the

l'autorisation du tribunal, exiger la présence de l'analyste, du technicien qualifié ou du médecin qualifié, selon le cas, pour contre-interrogatoire.

Avis de l'intention de produire le certificat

(7) Aucun certificat ne peut être reçu en preuve en conformité avec l'alinéa (1)e), f), g), h) ou i), à moins que la partie qui a l'intention de le produire n'ait, avant le procès, donné à l'autre partie un avis raisonnable de son intention et une copie du certificat.

L.R. (1985), ch. C-46, art. 258; L.R. (1985), ch. 27 (1er suppl.), art. 36, ch. 32 (4e suppl.), art. 61; 1992, ch. 1, art. 60(F); 1994, ch. 44, art. 14(A); 1997, ch. 18, art. 10; 2008, ch. 6, art. 24.

Utilisation des substances

258.1 (1) Sous réserve des paragraphes 258(4) et (5) et du paragraphe (3), il est interdit d'utiliser les substances corporelles prélevées sur une personne en vertu de l'alinéa 254(2)b), des paragraphes 254(3), (3.3) ou (3.4) ou de l'article 256 ou prélevées avec son consentement à la demande d'un agent de la paix ou les échantillons médicaux prélevés avec son consentement et subséquemment saisis en vertu d'un mandat à d'autres fins que pour les analyses qui y sont prévues ou pour lesquelles elle a consenti.

Utilisation des résultats

(2) Sous réserve des paragraphes (3) et (4), il est interdit d'utiliser, ou de communiquer ou de laisser communiquer, les résultats des épreuves de coordination des mouvements effectuées en vertu de l'alinéa 254(2)a), les résultats de l'évaluation effectuée en vertu du paragraphe 254(3.1), les résultats de l'analyse de substances corporelles prélevées sur une personne en vertu de l'alinéa 254(2)b), des paragraphes 254(3), (3.3) ou (3.4) ou de l'article 256 ou prélevées avec son consentement à la demande d'un agent de la paix ou les résultats de l'analyse des échantillons médicaux prélevés avec son consentement et subséquemment saisis en vertu d'un mandat, sauf :

a) dans le cadre de l'enquête relative à une infraction prévue soit à l'un des articles 220, 221, 236 et 249 à 255, soit à la partie I de la *Loi sur l'aéronautique*, soit à la *Loi sur la sécurité ferroviaire* pour violation des règles ou règlements concernant la consommation d'alcool ou de drogue, ou lors de poursuites intentées à l'égard d'une telle infraction;

b) en vue de l'application ou du contrôle d'application d'une loi provinciale.

Exception

(3) Les paragraphes (1) et (2) ne s'appliquent pas aux personnes qui, à des fins médicales, utilisent des

results of tests, taken for medical purposes, that are subsequently seized under a warrant.

échantillons, ou utilisent ou communiquent des résultats d'analyses effectuées à des fins médicales, qui sont subséquemment saisis en vertu d'un mandat.

Exception

(4) The results of physical coordination tests, an evaluation or an analysis referred to in subsection (2) may be disclosed to the person to whom they relate, and may be disclosed to any other person if the results are made anonymous and the disclosure is made for statistical or other research purposes.

Exception

(4) Les résultats des épreuves, de l'évaluation ou de l'analyse mentionnées au paragraphe (2) peuvent être communiqués à la personne en cause et, s'ils sont dépersonnalisés, à toute autre personne à des fins de recherche ou statistique.

Offence

(5) Every person who contravenes subsection (1) or (2) is guilty of an offence punishable on summary conviction.

2008, c. 6, s. 25.

Infraction

(5) Quiconque contrevient aux paragraphes (1) ou (2) est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

2008, ch. 6, art. 25.

Mandatory order of prohibition

259 (1) When an offender is convicted of an offence committed under section 253 or 254 or this section or discharged under section 730 of an offence committed under section 253 and, at the time the offence was committed or, in the case of an offence committed under section 254, within the three hours preceding that time, was operating or had the care or control of a motor vehicle, vessel or aircraft or of railway equipment or was assisting in the operation of an aircraft or of railway equipment, the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be,

(a) for a first offence, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and not less than one year;

(b) for a second offence, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and not less than two years; and

(c) for each subsequent offence, during a period of not less than three years plus any period to which the offender is sentenced to imprisonment.

Ordonnance d'interdiction obligatoire

259 (1) Lorsqu'un contrevenant est déclaré coupable d'une infraction prévue aux articles 253 ou 254 ou au présent article ou absous sous le régime de l'article 730 d'une infraction prévue à l'article 253 et qu'au moment de l'infraction, ou dans les trois heures qui la précèdent dans le cas d'une infraction prévue à l'article 254, il conduisait ou avait la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, ou aidait à la conduite d'un aéronef ou de matériel ferroviaire, le tribunal qui lui inflige une peine doit, en plus de toute autre peine applicable à cette infraction, rendre une ordonnance lui interdisant de conduire un véhicule à moteur dans une rue, sur un chemin ou une grande route ou dans tout autre lieu public, un bateau, un aéronef ou du matériel ferroviaire :

a) pour une première infraction, durant une période minimale d'un an et maximale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné;

b) pour une deuxième infraction, durant une période minimale de deux ans et maximale de cinq ans, en plus de la période d'emprisonnement à laquelle il est condamné;

c) pour chaque infraction subséquente, durant une période minimale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné.

Alcohol ignition interlock device program

(1.1) If the offender is registered in an alcohol ignition interlock device program established under the law of the province in which the offender resides and complies with the conditions of the program, the offender may, subject

Programme d'utilisation d'antidémarreurs avec éthylomètre

(1.1) À moins d'ordonnance contraire du tribunal, le contrevenant peut, sous réserve du paragraphe (1.2), conduire, durant la période d'interdiction, un véhicule à moteur équipé d'un antidémarreur avec éthylomètre s'il