SCC No.

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

Between:

DION HENRY ALEX

Applicant
(Appellant)

And:

REGINA

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
FILED BY THE APPLICANT, DION HENRY ALEX
(Pursuant to Section 691(1)(b) of the *Criminal Code* and
Rule 25 of the *Rules of the Supreme Court of Canada*)

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART 1 - OVERVIEW:

A. Issues of Public Importance:

1. This appeal is all about ***R. v. Rilling*** [1976] 2 S.C.R. 183 – rightly seen by many judges and lawyers as a relic of a bygone era. We say the time has come to let it go. ***Rilling***, along with its parent case, ***The Queen v. Wray***, [1971] S.C.R. 272, have steered our courts in most parts of the country into a distortion of section 254 of the *Criminal Code* that frustrates the obvious intention of Parliament and can only lead to disrespect for our criminal law.
2. ***Rilling*** has and continues to provide much discomfort to our courts. This is reflected in the comments of the Court of Appeal in this case, which said, "In 1975, the Supreme Court of Canada held, in ***R v. Rilling***, that the belief (or 'motive') of a police officer as to the existence of reasonable grounds for demanding a breath sample from a motorist was irrelevant to the admissibility of a certificate confirming the results of a breathalyzer test. This ruling was made in the face of what would be seen today as a statutory condition requiring that the officer have 'reasonable grounds to suspect' the commission of an impaired driving offence before making a demand under s. 254(2) of the *Criminal Code*", and that " ..many Canadians would find the application of ***Rilling*** in 2015 to be surprising, if not shocking …"
3. The same "surprising, if not shocking" result flows for section 254(3) where the words "has reasonable grounds" and "as soon as practicable" have been held to mean nothing where citizen complies with a breath demand – while they are key to any defence if she refuses.
4. In many cases since the advent of the *Charter*, counsel have argued that this interpretation of section 254, which flies in the face of a plain reading of the section and of the *Charter*, cannot stand. Many of those arguments flow from decisions of this court subsequent to ***Rilling***.

5. Many provincial Courts of Appeal that have considered ***Rilling*** have also said this court should, or at least is the only court that can, deal with the role of ***Rilling*** in a post-*Charter* age.
6. And as one Alberta trial judge said in some frustration a few years back:

   [49] Having reviewed the relevant case law, and with great respect for all those who hold a contrary view, I am not at all satisfied that the Supreme Court of Canada has directly, or by necessary implication, overruled ***R. v. Rilling***, supra. The opponents of ***Rilling*** rely on the Supreme Court of Canada decisions in ***Bernshaw*** and ***Woods***, but, with respect, what those decisions offer on the issue of ***Rilling*** is, at best, akin to the vague outline of an island seen through fog at twilight. There are possible hints which come and go like the Cheshire cat in Lewis Carroll's *Alice's Adventures in Wonderland*, but there is no definitive statement in spite of opportunities to make one. [- ***R. v. Yaran***, 2009 ABPC 31].
7. Further, ***Rilling*** is not "good law" in some parts of our country. In New Brunswick, the courts do not follow it, as their Court of Appeal in ***Searle v. R.***, 2006 NBCA 118, 215 CCC (3d) 374, found the crown cannot rely on the presumption of identity when a demand is made without reasonable grounds.
8. Thus this section of the *Criminal Code*, a federal law, is being applied differently amongst provinces.
9. And in those jurisdictions where ***Rilling*** has been held as "good law", we will submit that ***Rilling*** is leading to mischief and a "wrong-headed" approach to what should be a clear matter of statutory interpretation, to confusion over the role of section 24(2) of the *Charter*, and to the failure to follow legal principles developed by this court respecting preconditions to the use of statutory shortcuts by the crown in proving its case.

B. <u>Statement of Facts:</u>

10. On April 21, 2012, at about 5:40 pm, Cst. Caruso of the Penticton detachment of the RCMP was conducting a seatbelt road check at the intersection of Lakeside Road and Front Street in Penticton at a point where the street has a bend which

provides the police with an element of surprise. [Trial Reasons for Judgment, ("Trial Reasons") para. 8].

11. As the appellant, who is a native male, approached the intersection, he went into the curb lane for right-turning traffic. He did not make any abrupt maneuver or operate the van in any unusual fashion. [Trial Reasons para. 9]
12. Cst. Caruso said the movement by the appellant into the right-hand turn lane reminded him of some of the elderly drivers he has observed proceeding as though they were oblivious to the fact that he was conducting checks. Although this move did not involve any poor driving, it seemed suspicious to him, so he ordered Mr. Alex to stop the van. [Supreme Court Reasons para. 4]
13. When he approached the driver's side of the van, he detected an odour of liquor coming from the vehicle. He saw an open can of beer on the floor near the passenger side of the van and noted a male passenger seated on that side. He did not deal much with the passenger, but formed the opinion the passenger was intoxicated from his own observations and what another officer at the scene told him. [Trial Reasons, para. 10]
14. Cst. Caruso asked the appellant if he had a driver's licence and the appellant said he did not as he was suspended. He instead produced his Indian Status card. The officer also asked if he had consumed alcohol and the appellant said he had not since the night before when he had partied it up "pretty hard." He said he had picked up his cousin from a party, as his cousin had been in a heated argument and he wanted to "nip it in bud" and not have it escalate. [Trial Reasons, para. 11]
15. Cst. Caruso said he formed the suspicion that the appellant had alcohol in his body based on the following criteria:
    (a) The odour of liquor in the vehicle was not stale, but of recently-consumed liquor;
    (b) The appellant (whom the officer described as a "native male"), had red cheeks and watery eyes;
    (c) There was an open beer can on the floor near the passenger side, although the officer admitted it could have been for either occupant.

    [Trial Reasons, para. 12]

16. The learned trial judge found that there were no other indicia of impairment noted by the officer and in particular no detection of an odour of liquor on the appellant's breath. [Trial Reasons, para. 12]
17. The officer directed the appellant to pull his vehicle into a vehicle parking stall, which he did without any difficulties. He directed him to get out of the van and did not detect the appellant having any difficulties doing so, or notice any balance problems while he stood outside vehicle. [Trial Reasons, para. 13]
18. The officer administered an ASD test following demand, which read a "fail". He testified he then formed the opinion the appellant's ability to operate a motor vehicle was impaired by alcohol and read the breath demand and COR information. The appellant was taken to the Penticton detachment where two breath samples were taken with readings of 140mgs and 130mgs respectively. [Trial Reasons, para. 18]
19. The learned trial judge found as a fact that the suspicion was not reasonable. He further found that the officer may not have turned his mind to the "threshold question" of whether he had sufficient grounds to make the ASD demand and that, in fact, there was doubt the officer had the necessary subjective suspicion either. [Trial Reasons, paras. 14, 20-26]
20. Nevertheless, the learned trial judge found that ***R. v. Rilling***, [supra] remains good law in Canada and that, as the appellant complied with the ASD demand, lack of proper grounds to make the demand is, absent a *Charter* challenge, not a defence.
21. The BC Supreme Court judge on appeal found that the question of whether the officer had sufficient grounds for the screening device demand was a question of law and that the learned trial judge was in error in concluding he did not. [Supreme Court Reasons paras. 23-25]
22. He also considered ***R. v. Rilling*** [supra] and concluded that "... *the decision in* ***Rilling*** *continues to apply until and unless it is explicitly rejected by the Supreme Court of Canada*." [para. 56, emphasis added] He dismissed the appeal. [para.61]
23. The British Columbia Court of Appeal ["BCCA"] granted leave to appeal, but dismissed the appeal, upholding the finding of the Supreme Court judge that there were sufficient objective grounds to establish "reasonable suspicion", but said:

[29] It is unclear as to whether the constable was found to have subjectively believed he had reasonable grounds to request the sample. The trial judge said he was left with a doubt on the point (at para. 25), adding that "even if" he were satisfied "beyond a reasonable doubt", he was not satisfied as to the objective grounds. ...

[30]... This makes it necessary, then, to consider whether the appeal judge erred in admitting the certificates on the basis of ***Rilling***. ...

[53] In all the circumstances, I conclude that where no *Charter* challenge is advanced, the admissibility of a certificate under s. 254 and the operation of the presumptions of identity and accuracy in s. 258 remain governed by ***Rilling*** *unless and until the Supreme Court of Canada sees fit to overrule it.*[emphasis added]

24. In the result, it upheld the conviction. Had it allowed the appeal, a new trial would have been necessary in light of the learned trial judge's doubt that the officer had subjective grounds.
25. No leave is being sought from the decision that that the learned trial judge erred in his finding there were no objective grounds for the reasonable suspicion. Leave is being sought on whether this court should reconsider ***Rilling***.

PART II - STATEMENT OF ISSUES:

1. Why differing decisions of appellate courts in this country on the applicability of ***R. v. Rilling*** [1976] 2 S.C.R. 183, and their calls to this court to reconsider ***Rilling*** in light of the subsequent enactment of the *Charter of Rights and Freedoms,* now make it timely for this court to do so.

2. Why the potential availability of a *Charter* section 8 declaration and relief by way of exclusion of evidence under section 24(2) does not provide an adequate reason to continue to apply the decision in ***Rilling*** where no reasonable grounds exist for an ASD or a breath demand.

3. Why ***Rilling*** is 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".

PART III - STATEMENT OF ARGUMENT:

Issue 1: Why differing decisions of appellate courts in this country on the applicability of *R. v. Rilling* [1976] 2 S.C.R. 183, and their calls to this court to reconsider *Rilling* in light of the subsequent enactment of the *Charter of Rights and Freedoms*, now make it timely for this court to do so.

26. Section 254(3) of the *Criminal Code* provides that a police officer may demand a breath sample from an individual if the officer "has reasonable grounds to believe that person" operated a motor vehicle while impaired by alcohol and under section 254(2) to make an ASD if the officer "has reasonable grounds to suspect" a vehicle operator has alcohol in her or his body. Today, Canada's Courts of Appeal disagree as to whether they should continue to apply this court's 1976 ruling in ***Rilling*** that, notwithstanding the plain language of section 254(2) and (3), a breathalyzer certificate obtained in circumstances where no reasonable grounds were present is nonetheless admissible, subject to a *Charter* challenge. We submit that this court's ruling in ***Rilling*** is inconsistent with the principles of statutory interpretation developed by this court since the *Charter* and can cast disrepute on the administration of justice. Thirty-three years on from the advent of the *Charter*, it is time for this court should revisit ***Rilling***.

27. There is a division of opinion in Canadian appellate courts respecting whether ***Rilling*** has survived the *Charter*. New Brunswick has held ***Rilling*** is no longer good law and that the crown loses the presumption of identity if the grounds are lacking, (***Searle v. R.***, 2006 NBCA 118; 215 CCC (3d) 374). Newfoundland has decided not to decide the issue (***R. v. Langdon***, (1992) 74 C.C.C. (3d) 570). Other provinces including Ontario, Manitoba, Nova Scotia and Alberta, say ***Rilling*** is still part of the law of Canada (***R. v. Charette***, 2009 ONCA, 94 OR (3d) 721, 243 CCC (3d) 480; ***R. v. Forsythe***, 2009 MBCA 123, 250 C.C.C. (3d) 90; ***R. v. Marshall***, (1989) 91 NSR (2d) 211; ***R. v. Dwernychuk (MK)***, (1992) 135 AR 31.)

28. The main reasons for this division, we submit, is the tension between the laws on plain reading of statutes and of the necessity for crown, when proving a case beyond a reasonable doubt, to strictly comply with preconditions for any statutory "shortcuts", with the ***Wray/Rilling*** analysis that, so long as the evidence is relevant, it does not matter what Parliament when enacting the *Criminal Code* says about what you need to do to prove it.

29. And those appellate courts that have felt bound by ***Rilling***, have often said it is a matter for this court. The BCCA in this case said (@ [3]): "Given that ***Rilling*** has not been reversed by the Supreme Court of Canada – despite opportunities to do so – it is my view that we are bound to answer this question in the affirmative" [affirm ***Rilling*** as good law]. The ABCA in ***R. v. Dwernchuk*** [supra] @ [7] said: "In our view it is only the Supreme Court of Canada which could, if persuaded to do so, accept the appellant's argument and thus in effect reverse ***Rilling***"- yet this court refused leave. The NLCA in ***R v. Gale*** (1991) 65 CCC (3d) 373 @ [56] said: "It may be that the decision in ***Rilling*** needs to be revisited in the light of modern developments in jurisprudence", and in ***R. v. Langdon*** [supra] (@ 3d last paragraph) specifically gave notice that in its opinion, "[t]here is a question as to whether ***Rilling*** remains good law in the post-*Charter* era", urging this court to decide. And in what has been the leading appellate case, post-*Charter*, ***R. v. Charette***, [supra] @ [44] the court said: "***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."

30. The *Charter* has added to and changed the rules respecting statutory construction, by requiring that statutes be interpreted in a manner consistent with it. The issue which some court have grappled with, and for which direction is needed from this court, is whether by necessary implication this eradicates the principle emanating from ***Wray*** from Canadian criminal law. It can no longer be the case that, as Martland J. stated in ***Wray*** @ 287-288:

"I am not aware of any judicial authority in this country or in England which supports the proposition that a trial judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the

administration of justice into disrepute. … the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

31. The majority decision in ***Rilling*** was based completely on this principle in ***Wray***. The majority in ***Rilling*** briefly approved the reasoning of the court below, which in turn relied on three prior decisions to conclude that while "…absence of reasonable and probable grounds for belief of impairment may afford a defence to a charge of refusal to submit to a breathalyzer test laid under subs. (2) of s. 235 [now 254(5)] of the *Code*, it does not render inadmissible certificate evidence in the case of a charge under s. 236 [now 253] of the *Code*. The motive which actuates a peace officer in making a demand under s. 235(1) is not a relevant consideration when the demand has been acceded to" [***Rilling*** @ p. 198].
32. In other words, the statutory term "reasonable grounds" as precondition to making a breath demand becomes meaningless.
33. One of the cases that the ABCA relied on in dismissing the appeal in ***Rilling*** is ***R. v. Flegel***, (1971), 5 C.C.C. (2d) 155 (Sask. Q.B.), where the court states at 158-159: "It has long been established in our law that the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained; ... [T]he question is not by what means the evidence was produced; but it is whether the things proved are evidence, and, thereupon, whether the accused is guilty."
34. This is the ***Wray*** principle that we submit cannot be good law since the advent of the *Charter*. The *Charter* provides constitutional authority that necessarily overrides the judicial authority of ***Wray*** and its progeny, ***Rilling***.
35. While arguably in a different context, that constitutional authority was highlighted in the concurring reasons of L'Heureux-Dubé J. in ***R. v. Bernshaw,*** [1995] 1 SCR 254 @ [96] who said: "I agree with my colleague Sopinka J. that 'reasonable and probable grounds' *is not only a statutory precondition to a breathalyzer demand but also a touchstone of the Charter*." [emphasis added]

36. Sopinka J. for the majority stated @ [51]: "The requirement in s. 254(3) that reasonable and probable grounds exist is not only a statutory but a constitutional requirement as a precondition to a lawful search and seizure under s. 8 of the Canadian *Charter of Rights and Freedoms*. Section 8 requires that reasonable and probable grounds exist in fact and not that their presence can be deemed to exist notwithstanding the evidence."

37. We submit these comments by both judges suggest that, on both a statutory and a constitutional basis, the results of an unlawful demand cannot be admitted, whether the *Charter* is specifically engaged through a court application or not. As L'Heureux-Dubé J. further states in ***Bernshaw***:

[90] …Given that the plain language of the provisions gives this Court little guidance regarding Parliament's intention in such a situation, I propose to address this problem by reference to, firstly, the spirit and purpose of the legislation and, secondly, the underlying *Charter* values with which we must strive to remain consistent (***Hills v. Canada (Attorney General***, [1988] 1 S.C.R. 513, at p. 558; ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038, at p. 1078).

[91] …In so doing, it must find a way to reconcile the requirement that the screening test be administered "forthwith" with the requirement that a breathalyzer demand be based on "reasonable and probable grounds" in a manner that is consistent with the particular context in which these terms are used in the *Code* yet not inconsistent with *Charter* values.

[93]… In my view, however, having regard to the purpose of the ALERT scheme and to this Court's obligation to prefer interpretations that are consistent with *Charter* values over those that are not, this rule cannot be absolute.

38. The SCC said in ***Hills v. Canada (Attorney General)***, [1988] 1 SCR 513:

"Appellant, while not relying on any specific provision of the *Charter*, nevertheless urged that preference be given to *Charter* values in the interpretation of a statute, namely freedom of association. I agree that the values embodied in the *Charter* must be given preference over an interpretation which would run contrary to them

(***RWDSU v. Dolphin Delivery Ltd.***, 1986] 2 S.C.R. 573; ***Manitoba (Attorney General) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110)."

39. We submit that the courts below in this case have confused the statutory interpretation issue, looking at whether the sections are ambiguous in light of ***Rilling's*** conclusion in pre-*Charter* times that lack of grounds is irrelevant if the accused cooperates in the testing. The real issue is whether those sections, as they are actually worded in the *Code*, and absent the ***Rilling*** "take" on them, can and should be read in a way consistent with the *Charter* to require reasonable grounds before a demand can be made.

40. As stated in ***Application under s. 83.28 of the Criminal Code (Re),*** 2004 SCC 42 where this court considered the principles of statutory interpretation of legislation and the presumption that it is enacted to comply with the constitution:

[34] The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. ...

[35] Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*: R. Sullivan, Sullivan and Driedger on the *Construction of Statutes* (4th ed. 2002), at p. 367. This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted ...

41. We submit that the sections, read without the gloss of ***Rilling***, clearly mandate reasonable grounds. That is exactly what they say. The issue that then flows is whether that interpretation takes precedence over the interpretation given in ***Rilling*** in pre-*Charter* times, or whether the decision of the minority should be preferred, for as Spence J (for Laskin J. and himself) said (@ p. 195):

"Yet all the Courts below are agreed, and the stated case so stipulates, that there was no evidence whatever adduced to show that the arresting officer had any reasonable grounds for believing that the accused was driving while impaired. It is difficult to understand how such a test could have been taken and such a certificate issued 'pursuant to a demand under subsection 235(1)'. It is, in fact, exactly contrary to a demand made pursuant to that section."

42. To quote from and experienced trial judge in ***R. v. Rochon***, 2010 BCPC 320:

[13]... As many jurists have pointed out, … a *Charter*-consistent interpretation of the technical requirements of section 258 might be expected to import a principle that "a demand not made with reasonable grounds is not a demand pursuant to Section 254(3)"... Given that section 258 permits the Crown to take a number of evidentiary shortcuts, a strict interpretation might arguably also accord with common sense.

Issue 2: Why the potential availability of a *Charter* section 8 declaration and relief by way of exclusion of evidence under section 24(2) does not provide an adequate reason to continue to apply the decision in *Rilling* where no reasonable grounds exist for an ASD or a breath demand.

43. We submit that this Section 8 argument, central to the decisions in ***Charette*** and ***Forsythe***, and followed in this case by the BCCA is pernicious. Taken to its logical conclusion (where these decisions have almost taken it), it leads to the complete undermining of Parliament's wording of sections 254 and 258 of the *Code* and to a situation where an accused can be convicted without the crown having to do anything but submit the certificate of analyst.

44. ***Charette*** sums up the consequences against the presumption of innocence well:

[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)* [emphasis added] unless the accused brings a *Charter* application challenging the admissibility of the test results."

45. In ***Forsythe*** the MBCA expanded this lack of onus on the crown to prove its case to the requirement of "as soon as practicable", saying:

[25] Finally, the Crown argued, and I agree, that if any of the requirements of s. 254(3) should be a pre-condition to admissibility, one would expect that it would be the requirement that the police have reasonable and probable grounds for making the demand in the first place. That requirement is the basis upon which the police are permitted to detain an accused and to interfere with his right to proceed on his way. The requirement that the police act as soon as practicable arises only after the police have detained an accused. If a groundless demand for a breath sample does not trigger the automatic exclusion of evidence (as found in the cases referred to above), it is difficult to see why the failure to act "as soon as practicable" does.

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.

46. Section 254(3) has three requirements for a valid breath demand. The first is reasonable grounds. The second is that the demand be made as soon as practicable. The third is to require the accused to provide breath samples, as soon as practicable, to a qualified technician.

47. But with ***Forsythe*** expanding this analysis to any requirement, it follows that there need be no requirements. Our provincial appellate courts are using the ***Rilling*** analysis to abandon them all. Where will this lead? Will the police, told of this interpretation of the section, decide not to use a qualified technician if there is a member who is trained but whose designation has lapsed or who was never designated? Are we telling our police forces that they can "ASD" anyone; bring anyone in for a breath test? Is this the message we want our courts to send out to law enforcement and the public? We are lucky police are generally invested in seeing the system work. We should support that. But we submit that this is the logical outcome of the ***Charette/Forsythe*** reasoning. None of the

legislated prerequisites matter. The trial courts should just let the evidence in and, if the accused requests it, analyze matters in a *Charter* application.

48. We submit that the *Charter* was never meant to take up this role – as the "catch-all" whenever legislation is not followed. Legislation should be read in its context and applied under normal rules of statutory interpretation.

49. This is particularly the case in the present era where so many persons have to represent themselves in court. Does it create a fair and reputable legal system if the crown can file its certificate evidence, with no worry about compliance with any stated legislative requirements, against those who have no legal training and are likely read the sections literally, not realizing that, according to ***Rilling***, as applied by ***Charette*** and ***Forsythe***, they mean nothing?

50. And as noted, a person who refuses a demand that lacks reasonable grounds has a complete defence, whereas a person who complies does not. Does it create a fair and reputable legal system if the person who refuses to comply with an unlawful demand will *always* be acquitted while those who comply will be convicted unless they make a section 8 *Charter* application and are able to fully argue the complex law around it, for a chance that the certificate evidence will not be admitted? This again is a huge challenge for the self-represented accused who cooperates at the scene with the police, as opposed to the person who is non-cooperative.

51. It is for this reason that certain judges have noted the comments of this court in ***R. v. Dedman***, [1985] 2 SCR 2 that those who comply with a demand of a police officer should not be placed in a worse situation than those who do not. As summarized by Smith J. (now J.A.) in ***R. v. Girard*** (1999) 47 MVR (3d) 108 (BCSC):

> [21] The majority and minority in ***Dedman*** … both agreed that in the absence of the police officer acting with lawful authority, an accused should not be subsequently precluded from attacking the validity of a demand by a police officer even where he or she has complied with that demand. In fact, they concluded, for public policy reasons it is preferable that an individual not

challenge a police officer's authority to make a demand at the time the demand is made, but rather wait until after the demand has been complied with.

52. ***Charette*** relies on what we submit is a chimera of an argument to bolster why the route to challenging lack of reasonable grounds must mandate a section 8 challenge. It says:

[46] … 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.* [emphasis added] 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 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.* [emphasis added]

53. We submit that this reasoning is fallacious, without factual foundation and pernicious.

54. Firstly, in a jurisdiction like BC where the crown charges offences, the "charge approval" crown is obliged to review the circumstances to determine if they meet charge approval standards – a substantial likelihood of conviction and in the public interest. Evidentiary frailties will be canvassed as part of that process and the proper evidence can be arranged from the beginning.

55. Secondly, at least in BC, the crown always goes through all the reasons behind the officer's demand as part of its central case.

56. As stated by the learned summary conviction judge below:

> [40] Mr. Alex's counsel argues that for impaired driving prosecutions in British Columbia, the concerns underlying this policy argument are illusory. As was observed in ***R. v. Rochon***, 2010 BCPC 320 (C. Baird Ellan, P.C.J.), in this province at least the Crown leads the investigators' grounds for their various investigative steps in impaired driving cases as a matter of course, and there would be no meaningful difference in that practice if the defence could rely on the absence of grounds for the demand to oust the operation of one of the presumptions (or the certificate) itself, without needing to make a *Charter* application.

57. Thirdly, there is no reason for any "ambush". The issue of lack of grounds is one for a *voir dire* and justly so. As stated by this court in ***Erven v. The Queen***, [1979] 1 SCR 926:

> **"The Efficient Administration of Criminal Justice**
>
> I suspect that in a trial by judge sitting without a jury there is a tendency, in what is thought to be the interests of trial economy, to lose sight of the distinction between *voir dire* and trial. The distinction is just as important when the judge is sitting alone (and assumes also the jury function of trier of fact) as when he is presiding at a trial with jury, and the same rules apply so far as the *voir dire* is concerned .... The distinction between a "formal" and an "informal" *voir dire* was firmly rejected by this Court in ***Powell***, at p. 368, where Mr. Justice de Grandpré said: ...

It is sometimes urged that the holding of a *voir dire* results in delay and, therefore, a loss in trial economy. I have some doubt whether trial economy would be achieved by recognition of an exception, expressed in terms of "volunteered" or "obviously voluntary", to the general requirement of a *voir dire*. The normal response, if a *voir dire* were denied, would be an appeal, with consequent cost in time and money. Accepting, *arguendo*, that a *voir dire* entails delay in the judicial process, it does not necessarily follow that efficient administration of justice should be sought at the expense of the legitimate rights of an accused."

58. A simple rule can be implemented that, where the accused intends to argue lack of reasonable grounds, (or that the demand was not made as soon as practicable, or that any other requirement of section 254(2) or (3) was not met) the defence must give the crown reasonable notice of a *voir dire* and the reason for it. While in most cases crown should have already realized the evidentiary problem for the reasons noted earlier, this requirement takes away any suggestion of "ambush." The decision on the *voir dire* then allows crown to adjust how it presents its evidence.

59. Fourthly, the inability of crown to prove its case by a simple filing of the certificate where there is non-compliance is not an exclusion of evidence under section 24(2), and to suggest, (as does ***Charette*** and the cases that follow it), that a section 8 and 24(2) analysis is the proper route blurs the difference between the loss of an evidentiary presumption and the exclusion of evidence. We submit this court needs to clarify the distinction, and to delineate the respective roles and the interplay of interpreting legislative requirements for "shortcut" means of presenting proof of facts on the one hand, and the exclusion of evidence for *Charter* breaches on the other. The court in ***Charette,*** as noted earlier, actually stated that, "... an attack on the presumption of identity does not technically involve an application to exclude evidence..." yet, taking a cue from the comments of Cory J. in his minority decision in ***Bernshaw***, [supra], (paras. [39-[42]), it seeks to "shoehorn" an issue of how evidence is presented into a section 24(2) analysis for exclusion of evidence that was never intended for this role.

Issue 3: Why *Rilling* is irreconcilable with the other decisions of this court on the necessity of strict compliance with statutory preconditions to the use of evidentiary presumptions or "shortcuts."

60. Neither the BC Supreme Court judge nor the Court of Appeal addressed this argument. They left unanswered the conflict at the intersection of the law around statutory evidential "shortcuts" and the conclusion in ***Rilling***. We submit they failed to address the legal principle that in a criminal case in particular, one who seeks to rely on a statutory benefit must comply strictly with the preconditions for its use.

61. The crown takes the benefit of a statutory evidentiary shortcut with its ability to rely on the certificate of analyst. The principles engaged are the same as arise, for instance, under s. 258(7) with the necessity of proof by the crown of reasonable notice to the defence of a crown intention to produce the certificate. To quote from ***R. v. Noble***, [1978] 1 S.C.R. 632:

"The effect of s. 237 both before and after the amendment is to establish the conditions under which the certificate of a qualified technician is admissible, without further evidence, as proof of the proportion of alcohol in the blood of the accused. These provisions are obviously designed to assist the Crown in proving its case, and as they serve to restrict the normal rights of the accused to cross-examination and saddle him with the burden of proving that the certificate does not accurately reflect his blood alcohol content at the time of the alleged offence, they are to be strictly construed and, where ambiguous, interpreted in favour of the accused."

62. As noted in ***R. v. St. Pierre***, [1995] 1 S.C.R. 791:

[23] The scheme established in the *Criminal Code* for proving the offence of "over 80" contains presumptions to assist the Crown in surmounting two important evidentiary hurdles. But for these presumptions, the Crown's task would be significantly more difficult. It is crucial, therefore, to keep in mind that presumptions are merely legal or evidentiary shortcuts designed to bridge difficult evidentiary gaps, and that they are rebuttable upon the leading of "evidence to the contrary". If such evidence to the contrary is led, the Crown can still proceed to try to prove its case without the benefit of these evidentiary shortcuts."

63. In ***R. v. Egger***, [1993] 2 S.C.R. 451, the S.C.C. said:

[38] The purpose of s. 258(1)(d) is to give the Crown the benefit of an evidentiary presumption where certain conditions are met in order to facilitate the prosecution of offences which involve driving while under the influence of alcohol.

[40]... Being denied the benefit of the presumption clearly does not derail "over 80" prosecutions. It simply requires the Crown to prove them by recourse to the evidential tools on which it would ordinarily have to rely in the absence of the presumption. As the Ontario Court of Appeal held in ***Montgomery***, supra, at pp. 238-39: "While the Crown may lose the evidentiary advantage of the presumption in s. 258(1)(d) and be precluded from using certificate evidence of the result of the analysis as proof of the concentration of alcohol in an accused's blood at the time the offence was allegedly committed, the Crown remains free to prove the accused's guilt through *viva voce* evidence."

64. As stated in ***R. v. Deruelle***, [1992] 2 S.C.R. 663 @ p. 672ff on statutory evidentiary "shortcuts" in impaired driving offence cases:

"Because alcohol is metabolized by the human body, the result of a breath or blood sample analysis in actual fact is not the same as the alcohol/blood concentration at the time the accused committed the alleged offence. *Section 258(1)(c) and (d) provides the Crown with a procedural shortcut in the form of a presumption that the concentration of alcohol in the blood of the accused at the time of the alleged offence was the same as determined by the breath or blood analysis. The benefit of the presumption saves the Crown from calling expert evidence as to what the actual blood-alcohol concentration was at the time the alleged offence was committed based on the results of the analysis of the sample of blood or breath. In order to take advantage of this presumption, the prosecution must establish amongst other things that the breath or blood samples were taken not later than two hours after the alleged offence was committed. Where, as here, the breath or blood sample is taken more than two hours after the commission of the alleged offence, the Crown loses the benefit of the presumption* [emphasis added] but nothing more, ... *it is now settled law that a failure to comply with the provisions of s. 258 robs the Crown of the benefit of the*

presumption therein but nothing more. [emphasis added] The evidence obtained is still admissible."

65. We submit that it is the minority decision in ***Rilling*** that is in line with these other decisions of this court, not that of the majority. As Spence J. (@ p. 191) stated: "It will be seen that if the certificate is admissible then it alone is evidence of the statements contained therein and was sufficient to prove the Crown's case. Apart from the provisions of this paragraph of the subsection, the certificate of course would not have been admissible and the Crown would have had to adduce the *viva voce* evidence of the technician. There is no issue here whether such *viva voce evidence* would have been admissible … The simple problem here is whether the Crown in the exact circumstances of this case may prove the guilt of the appellant by the mere production and filing of the technician's certificate."
66. We submit that ***Rilling***, which was not reasoned in detail by the majority judges (who adopted the reasons of the court below), and did not address the principle of strict compliance with statutory preconditions to evidential shortcuts, is at wide variance with principles articulated by this court in subsequent years. ***Rilling*** needs to be reconsidered on this basis as well.
67. As Hutcheon JA of the BCCA stated in ***R. v. Bernshaw***, (1993) 85 CCC (3d) 404 @ [20] (without reference to ***Rilling*** or the *Charter*): "In my opinion, the failure of the police officer to take the precautions necessary to ensure the reliability of the test by the screening device leads to the conclusion that he did not have reasonable and probable grounds to make the demand under s. 254(3). It follows that the evidence of the breathalyzer readings is not admissible."
68. McEachern CJBC agreed @ [23]: "In my respectful view the results reached by Hutcheon JA in this case is legally correct … The *Code* establishes a procedure to obtain a breath sample for analysis. This must be followed before the results of the analysis become admissible at trial."
69. The principle of strict compliance with statutory evidential shortcut preconditions is the foundation of these decisions and fully supports this conclusion, and while the this court reversed in ***Bernshaw*** on other grounds, it did not address the issue of such evidentiary "shortcuts."

70. Certain comments in *Searle* are of importance here:

> [25] Since the demand was not made in strict compliance with s. 254(3) of the Code, it is unlawful. The Crown cannot rely on the presumption found in s. 258(1)(c) unless the officer had reasonable and probable grounds to make the breathalyzer demand in the first place. Without this presumption, there is no evidence of the concentration of alcohol in the accused's blood at the time the offence was alleged to have been committed...To summarize: the certificate is still admissible but the prosecutor is not, however, entitled to use the presumption under s. 258(1)(c).

71. It accords with due respect for the law and the administration of justice that a failure to comply with the grounds for admissibility of a certificate should invalidate its use, while still giving the crown the benefit of proving its case by traditional routes of evidence. As noted earlier, we do not suggest an exclusionary rule of evidence, but a need to comply strictly with rules for reliance on evidentiary shortcuts. ***R. v. Rilling*** [supra] is inconsistent with these established principles and for this reason as well cannot stand.

PART IV: SUBMISSIONS WITH RESPECT TO COSTS:

72. The applicant is not seeking costs.

PART V: ORDER SOUGHT:

73. That leave to appeal be granted.

Dated at Penticton, British Columbia, this 17th day of December, 2015.

Michael F. Welsh
Counsel for the Applicant.

PART IV – TABLE OF AUTHORITIES **Page**

PART VII: STATUTORY PROVISIONS

Criminal Code, sections 253 to 258;