SCC No. 36771

SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

DION HENRY ALEX

APPLICANT
(Appellant)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

RESPONDENT'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW, STATEMENT OF FACTS AND JUDGMENTS

A. Overview: Case Raises No Issue of Public Importance

1. The respondent agrees with the applicant that this case raises a single issue concerning the applicability of *R. v. Rilling*, [1976] 2 S. C. R. 183 in the *Charter of Rights* era. The issue is whether, absent a *Charter* application for exclusion of evidence of a breath sample, such evidence remains admissible despite an absence of reasonable grounds for the officer's demand for the breath sample, as provided for by *Rilling*. With one minor and insignificant exception, the law relating to this issue is settled and raises no issue of public importance that would warrant this Court granting leave to appeal.

2. With one exception, all provincial courts of appeal that have considered the issue of the continued applicability of *Rilling* in the "post-*Charter*" context have concluded that it remains a binding authority. *Rilling* establishes that a lawful breath demand is not a statutory pre-condition to either the admissibility of breath samples or the operation of breath alcohol presumptions. However, an unauthorized breath demand may be impugned as a s. 8 *Charter* violation, which may in turn lead to exclusion of the breath sample evidence. Moreover, appellate courts have also explained the pragmatic and logical policy reasons that also support this conclusion.

3. The appellant's central theme is that *Rilling* is inconsistent with the *Charter* or undermines access to *Charter* relief in breath sample cases. To the contrary, *Rilling* deprives no accused from accessing potential relief for an established violation of *Charter* rights. In fact, if the appellant's position is accepted, unlawful breath demands would result in automatic exclusion of the breath test results, rather than have exclusion determined by the nuanced application in each case of the multifactorial analysis mandated by s. 24(2) of the *Charter*. It is this interpretation of *Rilling* that would be inconsistent with the *Charter* and its principles.

4. With respect, every assertion made by the applicant concerning public importance in the "Overview" of his application is entirely without foundation. A careful examination of the *Rilling* issue and the jurisprudence undermines his statements.

5. In para. 1 of his Memorandum of Argument (p. 64 of application), the applicant boldly states that *Rilling* has "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." To the contrary, every provincial court of appeal but one, and the three judges of this Court in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, that have considered *Rilling* have not only accepted that it remains good law, but that it operates consistently with the entrenched *Charter of Rights* mechanisms by which accused persons can seek relief from courts to exclude evidential breath samples flowing from unlawful breath demands in appropriate circumstances. Exclusion of unlawfully obtained evidence by means of a *Charter* application is an established hallmark of the Canadian justice system. Automatic exclusion of evidence - which would flow from an acceptance of the applicant's position - is not.

6. In paras. 2, 3 and 5 of his Memorandum of Argument (pp. 64-5 of application), the applicant contends that the principle in *Rilling* gives rise to shocking and surprising results that provide much discomfort to courts. He further suggests that this has prompted many provincial courts of appeal to urge this Court to deal with the role of *Rilling* in a post-*Charter* age. While these statements may reflect the applicant's views of *Rilling*, they do not represent accurate characterizations of what the courts have said.

7. First, the "surprising, if not shocking", quotation from the judgment of Newbury J.A. in the instant case (reproduced at paras. 2 and 3 of the applicant's Memorandum of Argument, at p. 64 of application) is cited completely out of context, especially in light of the additional observations and the ultimate conclusion of the British Columbia Court of Appeal (BCCA). Indeed, the very sentence from which the words are reproduced illustrates how inaccurately the applicant has characterized the BCCA's conclusion. The entire sentence, and the balance of the paragraph, belie the applicant's assertions that the BCCA and other courts are, and that members of the public should be, troubled by *Rilling* (*R. v. Alex*, 2015 BCCA 435 at para. 3):

> While many Canadians would find the application of *Rilling* in 2015 to be surprising, if not shocking, I hasten to emphasize that accused persons are unlikely to be prejudiced by this conclusion. In fact the consequence of upholding *Rilling* is merely procedural: an accused need only invoke s. 8 of the *Charter* at the time the Crown proffers the evidence at trial, and the court will be bound to consider whether its admissibility would bring the administration of justice into disrepute. It is on this basis that the Courts of Appeal of Ontario, Quebec, and Manitoba have rejected the argument that *Rilling* should be regarded as having been superseded or effectively overruled.
>
> [Emphasis added]

8. The BCCA's decision in this case merely represents another in a series of provincial appeal court rulings which have found the application of *Rilling* to be perfectly consistent with established *Charter* principles requiring an application pursuant to the *Charter* for exclusion of allegedly unlawfully obtained evidence, failing which relevant evidence of breath samples taken pursuant to a demand that has been acceded to will be admissible. None of these provincial appeal courts has said that this is either shocking or surprising. Moreover, while some of them have observed that only this Court can properly reconsider the applicability of *Rilling*, none of these provincial Courts of Appeal have expressly said that this court should do so, as stated by the applicant at para. 5 (p. 65 application) and para. 1 (p. 68 application) of his Memorandum of Argument. This is because of the near unanimity of the provincial Courts of Appeal on the issue.

9. In light of this near unanimity of provincial appellate courts concerning the applicability of *Rilling*, florid musings by trial judges of the sort reproduced at para. 6 (p. 65 application) of the applicant's Memorandum of Argument are of no analytical utility nor do they demonstrate that the question is of public importance.

10. Finally, this Court has declined to grant leave to appeal concerning this very same question on two prior occasions in the last two decades: *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.) and *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.). The Crown says the *Rilling* issue is more settled now than it was when those applications for leave to appeal were dismissed. If this Court considered that no issue of national importance was raised on these two earlier occasions, it is hard to conceive of the question having such importance now.

B. Statement of Facts and Judgments

11. For the purposes of this application for leave to appeal, the Crown takes no issue with facts as summarized by the applicant at paras. 10-20 (pp. 65-7 application) of his Memorandum of Argument. The facts and judgment of the summary conviction appeal judge are also briefly and conveniently summarized at paras. 14-22 of the judgment of Newbury J.A. (for the BCCA) in the case at bar: *R. v. Alex*, 2015 BCCA 435 (*Alex* (BCCA)).

12. The essence of judgment of the BCCA is captured in para. 52 of *Alex* (BCCA):

> [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 <u>if</u> 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: QUESTIONS IN ISSUE

13. The applicant lists three issues as follows:

a. Why differing decisions of appellate courts in this country on the applicability of *Rilling*, 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.

b. Why the potential availability of a *Charter* s. 8 declaration of relief by way of exclusion of evidence under s. 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.

c. Why *Rilling* is irreconcilable with other decisions of this Court on the necessity for strict compliance with statutory preconditions for the use of evidentiary presumptions or "shortcuts".

14. The Crown submits that these issues are best captured in one over-arching question: for purposes of an "over 80" offence in s. 253(1)(b) of the *Criminal Code*, is compliance with the statutory conditions for demanding breath samples under s. 254(3) a pre-condition to admissibility of the test results? 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. This answer flows conclusively from the decision of this Court in *R. v. Rilling* and the numerous appellate decisions that apply *Rilling*. The law in this area is settled and there is no legal or policy reason to revisit it. Accordingly, there is no question of public importance or important issue of law to warrant the attention of this Court.

PART III: ARGUMENT

15. The Crown submits that the BCCA correctly concluded that *Rilling* remains binding authority from the Supreme Court of Canada 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 for the demand. Exclusion of the 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*.

16. Before addressing the specific arguments and associated jurisprudence advanced by the applicant, the Crown will address the central theme that underpins his entire submission. It 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 for alcohol screening demands pursuant to s. 254(2) or reasonable grounds for an evidential breath demand pursuant to s. 254(3)).

17. This assertion 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;

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.

18. 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.

A. The *Rilling* Principle

19. 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.

20. *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.

21. 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), 231 C.C.C. (3d) 26 (Ont. C.A.) at paras. 27–40

22. 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]

23. 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.

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

24. 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 has 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 were seized as a result of an unlawful breath demand.

25. The suggestion of the applicant that there are "differing decisions of appellate courts in this country on the applicability" of *Rilling* (p. 69 application) is contradicted by the jurisprudence. 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.)[1]
- 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

26. Some of these cases have noted that since the *Charter* provides no impediment to the application of *Rilling* (and indeed operates consistently with the broad policy of evidentiary exclusion by means of *Charter* application), it is only for this Court to reconsider its decision in *Rilling*. None of these cases have expressly stated any <u>need</u> for this Court to do so.

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[1] The applicant says (para. 27, p. 69 application) 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.).

27. The applicant's attempt (at paras. 33-4, p. 71 application) to conflate the *Wray* principle with the principle in *Rilling* is a red herring that is flawed in two critical respects.

28. 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.

29. 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* cannot. 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.

30. The mere fact that *Searle* – a ruling that operates more favourably to the accused – remains the sole contrary appellate ruling in Canada does not, by itself, mean that the *Rilling* issue is of national or public importance. In view of the overwhelming jurisprudence to the contrary, it is reasonable to expect that a case will arise where the New Brunswick Court of Appeal may be asked empanel five judges to reconsider its ruling in *Searle*, particularly in light of the number of provincial appellate courts that have come to opposite conclusions since that ruling: Manitoba – *R. v. Forsythe*, 2009 MBCA 123; Ontario – *R. v. Charette*, 2009 ONCA 310 and *R. v. Gundy*, 2008 ONCA 284; Quebec – *R. v. Anderson*, 2013 QCCA 2160.

C. *Bernshaw, Dedman* and *Deruelle*: No Rejection of *Rilling*

31. 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 search and seizures dealt with by way of an application for exclusion of evidence pursuant to s. 24(2) of the *Charter*.

32. The applicant argues (at paras. 35-7, pp. 71-2 application) that 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 in the case, "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." This amounts to the applicant saying that *Rilling* and Cory J.'s *obiter dicta* were rejected in those opinions. With respect (and as correctly found by the summary conviction appeal judge in this case – *R. v. Alex*, 2014 BCSC 2328 at paras. 47 and 53) there is no merit to this assertion.

33. 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. 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 in *Bernshaw* expressly disagreed with Cory J.'s reasons as they related to the issue in that case identified in the opening paragraph of each opinion. 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.

34. Further, the paragraphs from the judgments of Sopinka J. and L'Heureux-Dubé J. in *Bernshaw* reproduced by the appellant (at para. 35-6, pp. 71-2 application) 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 precondition 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). The statements of Sopinka J. say nothing concerning the admissibility of breath sample evidence where no *Charter* application is advanced.

35. The applicant (at para. 51, p. 76 application) also relies on statements in *R. v. Girard*, (1999) 47 M.V.R. (3d) 108 (B.C.S.C.) to the effect that the Supreme Court of Canada decision in *R. v. Dedman*, [1985] 2 S.C.R. 2 undermined the applicability of the *Rilling* decision. The Crown

says that this is unsupported by a careful reading of *Dedman*, as correctly concluded by the summary conviction appeal judge in this case – *R. v. Alex*, 2014 BCSC 2328 at para. 54.

36. 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 this 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]

37. Finally, the Crown submits that the summary conviction appeal judge in this case (*R. v. Alex*, 2014 BCSC 2328) was correct in adopting the reasons of the Manitoba Court of Appeal in *Forsythe* which explain how this Court's decision in *R. v. Deruelle*, [1992] 2 S.C.R. 663 is of no assistance in assessing the current applicability of *Rilling*: see *Forsythe* at paras. 19-20.

D. *Charter* ss. 8 & 24: Comprehensive and Appropriate Relief for Unlawful Screening or Evidential Breath Demands

38. Contrary to what the applicant submits at paras. 43-59 (pp. 74-9 application) of his Memorandum of Argument, an application pursuant to ss. 8 and 24(2) of the *Charter* for exclusion of breath sample evidence, based on a breath demand that is alleged to be unlawful because it did not meet the prerequisites required for it to be statutorily authorized, is not pernicious. It is an entirely appropriate mechanism to address the nexus between the unauthorized invasion of privacy engendered by an unlawful breath demand and evidence that may result from an accused's compliance with the demand. Moreover, the fact-sensitive, multi-

factorial and nuanced approach to exclusion of evidence afforded by s. 24(2) once a *Charter* infringement is established, ensures fairness to the accused, the public and the truth seeking function of trials in a way that an automatic exclusionary rule cannot. Yet automatic exclusion is precisely what the applicant's position would entail.

39. The Crown rejects the applicant's submission (at para. 47, p. 75 application) that *Forsythe* effectively collapses all requirements for the admissibility of breath sample evidence into s. 254(3) of the *Code* such that *Rilling* would mandate that non-compliance with any of the requirements 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 admissibility of evidence of breath samples and 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 thoroughly and comprehensively reiterated by the Ontario Court of Appeal in *Charette* and *Gundy* these statutory requirements are separate.

40. 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 provide for the admissibility of breath sample evidence and the operation of the presumptions of accuracy and identity (at paras. 38-44 of *Charette*).

41. *Forsythe*, properly understood, stands for a much narrower proposition than the one asserted by the applicant. The accused in *Forsythe* was arguing that the samples were inadmissible if they were not taken as soon as practicable. 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). Consistent with this Court's ruling in *Rilling* (which was explained comprehensively in

Charette), the court in *Forsythe* simply 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. Under the heading "Decision", Beard J.A. (for the court) stated (at para. 27):

> 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]

42. It may be arguable that *Forsythe* is incorrect in one respect. Section 254(3) of the *Code* clearly mandates reasonable grounds and a demand made as soon as practicable as requirements for a lawful demand. It is perhaps questionable that the requirement that the evidential breath samples be taken as soon as practicable (a prerequisite to the operation of the presumption of identity in s. 258(1)(c)) is also a requirement for a valid breath demand pursuant to s. 254(3). Neither the text of s. 254(3) nor interpretation of the legislative scheme supports such a view. As lucidly explained 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).

43. 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 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: see *Dolezar* at paras. 10-20.

44. Even if *Forsythe* incorporates a requirement that samples be taken as soon as practicable into the requirement for a valid demand pursuant to s. 254(3), any concern about 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*). In fact, the Manitoba Court of Appeal has granted leave to appeal in *R. v. Fenske (HB)*, 2015 MBCA 113 on a ground that will likely canvass whether *Forsythe* correctly incorporated the requirement that samples be taken as soon as practicable into the elements of a lawful s. 254(3) demand. At para. 44 in *Fenske*, the following ground of appeal is stated:

> (ii) Did the appeal judge err in holding that the presumption in section 258(1)(*c*)(ii) of the *Criminal Code* could not be applied to the Crown's case where the certificate of analysis was admitted but there was a finding that the Crown had not proved that the breathalyzer tests were conducted as soon as practicable, where there was no motion or application under the *Charter* to prevent the Crown from relying on that presumption?

E. Statutory Interpretation

45. The applicant appears to suggest (at paras. 38-42, pp. 72-74 application) that *Charter* values should in some fashion inform the question as to whether this Court should reconsider its decision in *Rilling*.

46. It warrants repetition and emphasis that *Rilling* neither deprives access of any accused person to the full panoply of *Charter* remedies, including exclusion of breath sample evidence obtained from compliance with an unlawful demand, nor does it dilute or render such access more onerous. It merely deprives accused persons of the possibility of automatic exclusion of relevant evidence, which has never been a part of Canada's *Charter* jurisprudence, as clarified by this Court's judgment in *R. v. Grant*, 2009 SCC 32.

47. 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, a majority of this Court 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.

48. Further, the Ontario Court of Appeal in *Gundy* and *Charette* has 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 that the none of the provisions admitted of any ambiguity (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).

F. Policy Rationales

49. 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 summarized by Beard J.A. in *Forsythe* at paras 21 – 24:

> 21 There is another reason to reject the accused's position that the evidence in this case should be excluded without a *Charter* analysis under s. 24(2). If that position is accepted, there would be different procedures and different principles governing the exclusion of breathalyzer evidence obtained under s. 254(3) depending on whether the defence motion to exclude related to a lack of reasonable and probable grounds for the demand or the failure to comply with the other requirements of s. 254(3). This would require the defence to make a motion for exclusion under the *Charter* in the first case, but not in the second, and would result in an analysis under s. 24(2) of the *Charter* regarding the admissibility of the evidence in the first case, but not in the second. This would lead to unnecessary confusion and complexity in the law.
>
> 22 The question of the effect of differential treatment to determine admissibility for different parts of the breathalyzer scheme was considered and rejected by the Ontario Court of Appeal in *Gundy* (see para. 29) and *Charette*. While the court in those cases was dealing with differential treatment between s. 254(3) and the presumptions in ss. 258(1)(*c*) and (*g*), the same concerns regarding the avoidance of unnecessary complexity should apply to differential treatment between the various requirements within s. 254(3). As Moldaver J.A. stated in *Charette* (at para. 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. ….

23 He also commented as follows regarding the decision that *Rilling* remains good law, that evidence gathered in contravention of s. 254(3) is not automatically excluded and that the *Charter* should be the mechanism used to challenge the admissibility of the evidence (at paras. 49-51):

> 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.
>
> 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).
>
> 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. ….

24 General support for the use of the *Charter* to determine the admissibility of evidence in preference to automatic exclusion is also found in the Supreme Court's recent decision in *R. v. Grant*, 2009 SCC 32, 245 C.C.C. (3d) 1, albeit in that case, the Court was dealing only with a challenge to the admissibility of evidence under the *Charter*. In *Grant*, the court reviewed the interpretation and application of s. 24(2) of the *Charter*, and McLachlin C.J.C. and Charron J., for the majority, underlined the importance of undertaking a principled review of all of the relevant facts and factors before determining the admissibility or exclusion of evidence rather than having an automatic exclusion for some types of evidence, in particular conscripted evidence – see, for example, paras. 65, 106-07. They also stated that, even if there has been a breach of the *Charter* in the taking of a breath sample, that may not result in the exclusion of the evidence. This further supports the argument that there should not be an automatic exclusion of that evidence in all cases where the requirements of s. 254(3) have not been met.

[Emphasis added]

50. These judicial 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.

G. Conclusion

51. The applicant has not demonstrated that the issue raised in this case is one of national or public importance. The BCCA in this case has merely added another decision to an established body of jurisprudence. As outlined in this submission, the application of *Rilling* in the post-*Charter* era is well settled and, as was the case in both *Dwernychuk* and *Forsythe*, this Court should not grant leave to appeal.

PART IV: SUBMISSIONS CONCERNING COSTS

52. The respondent makes no submissions concerning costs.

PART V: NATURE OF ORDER SOUGHT

53. The Crown submits that this Court should dismiss this application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Rodney G. Garson
Counsel for the Respondent

Dated this 1st day of February, 2016
at Victoria, British Columbia

PART VI: LIST OF AUTHORITIES

PARAGRAPH

PART VII: STATUTES AND PROVISIONS

Criminal Code **R.S.C., 1985, c. C-46**	*Code criminal* **L.R.C. (1985), ch. C-46**
Part VIII **Offences Against the Person and Reputation**	**Partie VIII** **Infractions contre la personne et la réputation**
Motor Vehicles, Vessels and Aircraft	**Véhicules à moteur, bateaux et aéronefs**
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. 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.	**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. 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.
Testing for presence of alcohol or a drug **254(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,	**Contrôle pour vérifier la présence d'alcool ou de drogue** **254(2)** L'agent de la paix qui a des motifs raisonnables de soupçonner qu'une personne a dans son organisme de l'alcool ou de la drogue et que, dans les trois heures pré- cédentes, 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

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. **[…]** **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. 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.	d'haleine que celui-ci estime nécessaire à la réalisation d'une analyse convenable à l'aide d'un appareil de détection approuvé. **[…]** **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 alcoolé- mie, **(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 pré- levés les échantillons de sang ou d'haleine. 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.
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), **[…]** **(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]	**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) : **[…]** **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

(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,	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 : **(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;
[…]	**[…]**
(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	**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) 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	**(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) 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;	**(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;
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.	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.