14th Annual Osgoode Cup

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Tournament Convener: Andrew Monkhouse
647-700-7394

Osgoode Mooting Society Representatives:
Kendall Andjelkovic

Other Organizers:
Andrea Hossack

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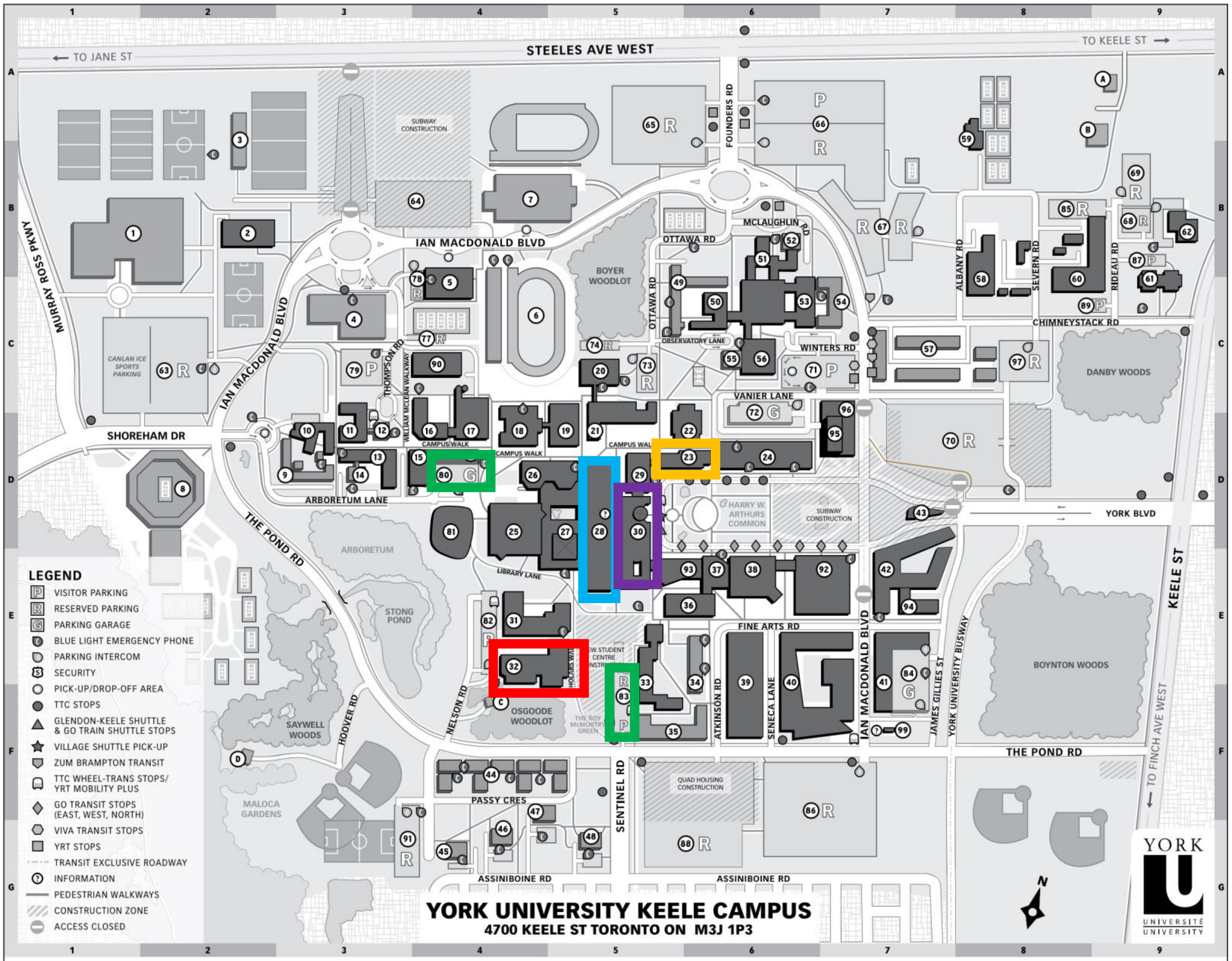
4700 Keele Street, Toronto, Ontario M3J 1P3



Legend

- 32 – Osgoode Hall
- 30 – Vari Hall
- 28 – Ross Building
- 80 & 83 – Arboretum Parking and Atkinson Parking
- 23 – The Underground banquet venue

Welcome to the Osgoode Cup 2018!

Thank you for registering to be a pat of the Osgoode Cup 2018! We hope you have a truly enjoyable experience and learn about the art of mooting.

Below you will find a memorandum on the case you will be mooting this year, along with helpful guidelines and tips for the competition. But before that, we would like to highlight a few things:

Schedule

Mooting will begin on Saturday, March 3rd, 2018. You will be required to attend at 8:15AM to begin the check-in process. At the end of the competition on Saturday, there will be a reception and banquet at the Underground. Final rounds for the competition will be held on Sunday, March 4th, 2018.

Food

While we will try our best to accommodate special dietary requirements, please note that we will not be able to account for everything. If you are concerned that your dietary requirements will not be fulfilled, please bring or purchase your own food for the event.

Competition Format

Each team will consist of two (2) speakers. Each speaker will have 7 minutes to make submissions, for a total of 14 minutes per team. You may divide the issues between the two speakers however you wish, but keep in mind our recommendations in the Issue section.

This is not a research assignment, but rather an exercise in oral advocacy. You **are** expected to read, and be familiar with, the case and relevant *Criminal Code* provisions. You are **not** expected to know the details of the criminal law, criminal procedure or constitutional law. You should find all of the information that you need to make an effective argument within the edited Supreme Court of Canada decision and this memo.

You are **not** expected to read any other cases referenced in the *Alex* decision in their entirety. The information about other cases provided within the decision itself is sufficient. The way to do well in this competition is to organize your submissions well, present them persuasively, and respond to questions from the judges effectively.

Ultimately, this is not an exam or test of your legal knowledge; it is a competition in oral advocacy.

Notes on Style

- Address the judges as “Justice(s)”
- Refer to opposing counsel as “my friends”
- Refer to your partner as “my colleague” or “my co-counsel”
- Your points are not “arguments” but “submissions”
- Try to avoid saying, “I think”, “I feel”, “I believe”, etc. Rather say “I submit” or better yet, just make your point
- Be appropriately respectful of the judges. Do not interrupt a judge who interrupts you to ask questions (and the judges will interrupt you!). Listen to the whole question, pause to collect your thoughts, and then answer.
- The best mooters do not lecture or talk at judges, but engage them in a structured conversation. Your job is to convince the judges of your position and therefore, you should pay attention to whether the judges are being persuaded by your position of if they are struggling with it and adjust accordingly
- Do not be afraid of questions. Welcoming questions and successfully responding to them is the most important part of nay moot since questions reflect what your bench actually cares about (see previous point)
- You must finish at the end of 7 minutes (you will be given a few time signals), unless you ask for, and are granted, a few extra seconds to finish up. Use this time to conclude quickly, do not begin another argument. Always ask for an extension if you see that time is up. Do not just keep talking.

Have fun! This is a great chance to gain experience speaking on your feet in a setting where there is absolutely nothing to lose.

Guide to Good Mooting

Preparation of the Argument

Preparation is crucial to success in any moot. Generally, the more preparation that is done prior to the moot, the less stressful the moot itself will be. The following notes are designed to be of help to those who have just received their moot problem, and don’t know where to begin. Bear in mind that this is by no means a complete guide to legal research.

Analyze the problem

Before any research or arguments can be developed the first task when you receive the moot problem is to analyze it, breaking it down into its constituent parts. With a moot problem, this means looking at the issues and deciding which facts and what areas of law are relevant.

It is important to remember that all submissions in a moot are submissions concerning issues of law and not the facts of the problem. Mooters should assume that the facts as presented in the problem have been found by the trial judge, and an appellate court will not review a finding of fact when it does not have access to witnesses or any other evidence.

Organizing

Once you have read and digested the case, you should begin to organize your submission. Keep the following points in mind:

- List your major submissions. Order your submissions from the strongest to the weakest.
- List what you want the court to accept. You should structure your arguments at all times bearing in mind the desired result.
- Flesh out your arguments with case authorities and any policy arguments you may have. Bear in mind that strong case authorities are likely to be more persuasive than policy arguments lacking support in law.
- Keep your authorities to a minimum. Don't cite every case you have read, choose the most relevant and authoritative.
- If you are faced with an authoritative case that is not in your favour, try to distinguish it (argue that the facts in that case are sufficiently different to the present facts to warrant a different decision).
- If you have a number of cases supportive of your position, but not directly similar to the facts at hand, try to use legal analogy (argue that the points of law in question are the same, even if the factual scenarios differ).

Practice

Brainstorm the questions you expect to get from judges. If you are able to practice in front of judges, have your mooting partner record all the questions asked of you by the judges during practice; this way you will be able to go back, review, and think up great answers for the next time you face the same question (and you will ultimately face the same questions several times during the practice rounds)
Take note of all the feedback you get from the judges – it should help you hone your skills as you continue practicing

Presentation of the Argument & Courtroom Etiquette

A good portion of the evaluation is allocated to speaking ability and delivery. Even the most ingenious of legal arguments can fail if counsel lacks the capacity to communicate those arguments effectively. The following notes cover most aspects of the presentation of the moot itself, from what to expect when you first enter the courtroom, to tips on style and etiquette.

Style

Some people have a natural talent for public speaking, while others have to strive a little harder to achieve the same level of competency. Keep the following points in mind when presenting your submissions:

- Speak **SLOWLY**! While you might (possibly) have a thorough knowledge of the legal issues involved in the problem, the moot judge only has a few minutes to comprehend your arguments. If the judge doesn't comprehend your argument, you don't stand a good chance of winning the moot!
- Maintain eye contact. Make your submissions to the judge, not the lectern.
- Don't read your submission word for word. This is a problem for novices who prefer the security of reading a prepared speech. Not only does reading make eye contact difficult, but it is very easy to lose your place should the judge decides to ask any questions. Try summarizing your submissions in point form, and speak from memory to the best of your ability.
- Try not to fidget. Aside from the odd gesture for emphasis, try not to make any distracting movements.
- The use of humour is ill-advised; it may be interpreted by the judge as a sign of disrespect.
- Watch strong language like "totally", "completely", "obviously." Using softer language will make you appear more credible.
- Pause... often. Pause before answering questions from the bench and after you make key points.

What to wear

There is no formal dress code for the Osgoode Cup, but you should dress in a manner appropriate to the nature of the event. We suggest business attire -- a suit for men and skirt/pants suit for women. Neither advocates nor judges will wear robes.

Order of Appearances

Counsel need not argue in the order in which their names appear on the schedule. It is up to each team to decide the order in which the two oralists will appear. You should give this information to the timekeeper before the oral argument begins.

Other Tips

- Always stand when speaking to the judge. Only one person should be standing at any one time.
- Refer to civil cases as "Donoghue and Stevenson", not "Donoghue v Stevenson".
- Refer to criminal cases as the name of the charged "Samson", not "R v Samson" or "R and Samson"

- As counsel, your opinions carry little weight in court. **Always** couch your arguments in terms of “I submit ...”, “It is respectfully submitted that ...” or “It is my submission that ...” but do not use phrases such as “In my opinion ...”, “I find that ...”, or “I think ...”
- Both sides should make a self-contained argument that stands on its own, and neither should make the other side's argument for it.
- That said, the Respondent's oral argument should be responsive to the Appellant's oral argument. For example, the Respondent might exploit concessions made by the Appellant, or show why the Appellant's arguments are incorrect or undesirable. But a Respondent must have its own story to tell and will seldom win just by criticizing the Appellant's argument.
- Unlike the Respondent, the Appellant cannot respond directly to the Respondent's oral submissions, because it has not heard the Respondent's argument yet. On the other hand, if there are key weaknesses in the Appellants argument that the Respondent is bound to exploit, the Appellant should face up to these weaknesses directly without waiting for the Respondent to raise them.

How to Begin Your Submission

Generally, you would begin your submission with an introduction such as
“Good morning Members of the Court my name is Jane Doe and I am counsel for the Appellant, Her Majesty the Queen today”

If you are the Appellant, you want to ask the Court if they want a recitation of the facts – they won’t – if you go into a recitation of the fact they will probably ask you to move on.

You might want to have a punchy opener
“This case is all about …”
Begin with your roadmap
“I have two submissions for the Court today. My first submission is
…..”

Potential Questions

Here is a list of potential questions that you may be asked regarding the case. This list is not exhaustive but is rather meant to get you thinking about the type of questions that may be asked and how you intend on answering them.

- What are the advantages/disadvantages of the Court adopting a plain meaning approach to statutory interpretation?
- Is s. 8 of the *Canadian Charter of Rights and Freedoms* sufficient to protect individuals from unreasonable seizures of breath samples using the remedy provided by s. 24(2) of the *Charter*?
- How is someone who believes they have been the subject of an unlawful demand for a breath sample expected to proceed?

- Does allowing the use of evidentiary shortcuts when the demand is unlawful place the burden on the average Canadian to determine whether or not they are in fact faced with a lawful demand?
- If the Crown is not permitted to take advantage of the evidentiary shortcuts, will this result in a backlog of impaired driving cases in the Court?
- What is the impact of *R v Jordan* on this decision? Should this consideration be a factor in the Court's decision?
- Does the decision in this case have any impact on the deterrence of drunk driving?
- What is the purpose of the phrase "pursuant to a demand made under s. 254(3)" in the phrasing of s. 258(1) of the *Criminal Code*?
- Is there a reason that Mr. Alex has not challenged the legality or reasonableness of the demand for a breath sample under s. 8 of the *Charter* in this case?

Watch some actual litigation before the Supreme Court of Canada

CPAC has clips online of actual litigation before the SCC. Watching the dialogue between lawyers and the bench is super helpful. (*Note the videos play better in Explorer)

The January 21, 2010 clip features Osgoode's former Dean speaking second.
http://www.cpac.ca/forms/index.asp?
dsp=template&act=view3&pagetype=vod&lang=e&clipID=3612

Recorded moots from the Osgoode Cup: http://www.osgoodecup.com/recordedmoots/

2016 Osgoode Cup Final Round: https://youtu.be/RKsb1yooF2c

2017 Osgoode Cup Final Round:
https://www.youtube.com/watch?v=HSl7P0gLjpI&t=26s

Case Memo: 2018 Osgoode Cup

Introduction

The case to be mooted this year is an appeal from the Supreme Court of Canada decision, *R v Alex,* 2017 SCC 37 [*Alex*]. *Alex* has been appealed to the fictional **Supreme Court of Osgoode Hall**. The Appellant team will represent Mr. Dion Henry Alex and The Respondent team will represent The Crown.

Facts

Mr. Alex was driving his vehicle when he was stopped by police who conducted a typical drinking and driving investigation. Mr. Alex failed an on-scene sobriety test and was taken to the police station where the attending officer demanded that Mr. Alex provide a breath sample.

Mr. Alex provided this breath sample and it was determined that his blood alcohol content was significantly over the legal limit. Mr. Alex was subsequently charged with driving "over 80", contrary to s. 253 of the *Canadian Criminal Code* [*Criminal Code*]. At trial, the Crown sought to introduce the analysis of the breath sample as evidence that Mr. Alex was driving while impaired.

Pursuant to ss. 258(1)(c) and 258(1)(g) of the *Criminal Code*, when an individual gives a breath sample and this sample is analyzed by an approved instrument (a breathalyzer), operated by a qualified technician, and obtained within the prescribed time limits, an evidentiary shortcut can be utilized by the Crown. This evidentiary shortcut does NOT impact whether or not the evidence can be admitted before the Court, it simply impacts the manner of admission.

This evidentiary shortcut is in the form of a certificate that records the accused's blood alcohol content at the time it was measured by the approved instrument (breathalyzer). The Crown can admit this certificate at trial as evidence that the accused was driving under the influence of alcohol. Relying on this certificate prevents the Crown from having to call two expert witnesses to testify, a breath technician and an expert toxicologist, for each and every impaired driving proceeding.

The overriding purpose of having this evidentiary shortcut available to the Crown is to streamline impaired driving proceedings by dispensing with unnecessary evidence. It is argued that requiring expert testimony in every drinking and driving case would cause unreasonable delays and frustrate the administration of justice as a whole.

In the case of *Alex*, it is claimed that the officer's initial demand for the breath sample was unlawful. A demand for a breath sample will be deemed unlawful if the officer lacked the requisite reasonable grounds to believe that the individual was operating a vehicle while impaired at the time the officer made the demand.

Judicial History

At trial, it was uncontested by the defence that Mr. Alex provided the breath samples into the breathalyzer machine which was being operated by a certified technician. However, Mr. Alex argued that the breath sample demand was unlawful because the police lacked reasonable grounds to make it. Rather than bringing a challenge to exclude the evidence under s. 8 of the *Charter of Rights and Freedoms* [*Charter*] he chose to instead argue that the absence of reasonable grounds for the demand deprived the Crown of the evidentiary shortcuts provided by s. 258 of the *Criminal Code*.

At Mr. Alex's trial, the judge found that the grounds to make the breath demand were insufficient, and therefore the demand for the breath sample was unlawful. However, the trial judge applied a common law principle derived from the case of *Rilling v. The Queen* (1976) 2 SCR 183 [*Rilling*], which held that it is unnecessary for the Crown to prove a lawful demand in order to rely on the evidentiary shortcuts.

Mr. Alex was convicted of driving "over 80" or impaired at trial. Successive appeals by Mr. Alex to both the British Columbia Supreme Court and the British Columbia Court of Appeal were dismissed on the basis that *Rilling* remained binding.

The Majority of the Supreme Court of Canada held that it was unnecessary to determine whether or not *Rilling* is good law. They utilized statutory interpretation to analyze s. 258 of the *Criminal Code* and determined that the Crown need not prove that the demand was lawful in order to take advantage of the shortcuts. Therefore, they dismissed Mr. Alex's appeal and upheld his conviction for driving while "over 80" pursuant to s. 253 of the *Criminal Code.*

Issue on Appeal

For the purposes of the Osgoode Cup 2018, the students will focus on **ONE (1) ISSUE:**

[1] Do ss. 258(1)(c) and 258(1)(g) require that the demand for a breath sample is a lawful demand?

Students are free to divide the issue, as well as relevant sub-issues, between the mooters as desired.

The issue must be argued by using only those grounds advanced by the Supreme Court of Canada on appeal. While participants may divide any sub-issues as they desire, it is recommended the following points be addressed in some fashion:

- Is the remedy provided by s. 24(2) of the *Charter,* in the face of an unreasonable seizure prohibited by s. 8 of the *Charter*, an appropriate one?

- What would the implications be for the Crown, and on the administration of justice overall, if they were not permitted to rely on evidentiary shortcuts when the demand was unlawful?
- Should the Supreme Court of Canada's decision in *Rilling* be overturned? In other words, is it necessary for the Crown to prove a lawful demand in order to rely on the evidentiary shortcuts?

Relief Sought

The Appellant, Mr. Alex, is seeking that the appeal is allowed, his conviction set aside, and a new trial ordered.

The Respondent, the Crown, is seeking that the appeal is dismissed and the Supreme Court of Canada's decision that ss. 258(1)(c) and 258(1)(g) of the *Criminal Code* do not require a lawful demand is **upheld.**

Brief Summary of the Law

All legal arguments you will need for this moot are found within the text of the case. Participants should rely on the case and the tools provided to craft their submissions. This memo is meant to highlight major areas of disagreement in the Supreme Court's decision and provide some assistance for competitors. This memo is an aid in reading and reflecting on the actual decision. It is not intended to replace the Supreme Court of Canada case.

The Osgoode Cup Committee will not entertain questions regarding the substantive legal matters outlined in this memo.

The Use of Evidentiary Shortcuts

In *Rilling*, the Court held that it was unnecessary for the Crown to prove a lawful demand in order to rely on the evidentiary shortcuts. The Majority and Dissent in this case disagree as to whether or not *Rilling* needs to be analyzed and overturned.

The Majority in the Supreme Court's decision stated that a loss of the evidentiary shortcuts set out in s. 258 would not provide a meaningful remedy for an unlawful demand of a breath sample as it merely requires that the Crown then call two expert witnesses. The demand being unlawful does not impact the admission of the evidence.

In their decision, s. 8 of the *Canadian Charter of Rights and Freedoms* [*Charter*] protects individuals from unlawful search and seizure and therefore, from unlawful seizures of breath samples. In their judgment, the appropriate remedy for an individual who has had their s. 8 *Charter* rights violated by an unlawful demand is found under s. 24(2) of the *Charter.*

S. 24(2) of the *Charter* allows for the Court to remedy a s. 8 *Charter* breach by excluding evidence, in this case the impugned breath samples, when the evidence is obtained in a manner where its admission would bring the administration of justice into disrepute.

Statutory Interpretation

Part of what this case hinges on is how the Majority versus the Dissent approaches statutory interpretation. Ss. 258(1)(c) and 258(1)(g) plainly states that "where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3) …" Essentially, the Majority is advocating for a plain text interpretation of this provision, where there is no requirement in the language used for the demand to be lawful. In their view, Parliament easily could have used the language "pursuant to a lawful demand" if it intended that these evidentiary shortcuts were only permitted in instances when the demand was in fact lawful.

The Majority does acknowledge that plain meaning alone is not determinative and the context, purpose and relevant legal norms must also be considered. Given that the overriding purpose of the provision is to streamline proceedings and the preconditions are related to the reliability of the evidence, the lawfulness of the demand has no bearing on these matters.

However, the Dissent states that clearly Parliament did not intend for *any* demand to suffice. Under this plain meaning interpretation, an illegal demand or a demand made by a child would engage this right to the evidentiary shortcuts.

The wording in s. 258(1) of the *Criminal Code* states that "where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)." It is the Dissent's position that this reference to s. 254(3) of the *Criminal Code* is referring to the reasonable grounds, the requirement for a lawful search, mentioned in s. 254(3) of the *Criminal Code*. Therefore, by using the language of "pursuant to s. 254(3)" in s. 258(1), the Dissent states that Parliament intended for reasonable grounds to be a requisite condition for the evidentiary shortcuts.

The Majority takes the position that the reference to s. 254(3) in the opening words of s. 258(1), is to clarify the specific sample to which the provision is meant to apply, specifically a breath sample.

Refuse to Comply Offence – s. 254(5)

S. 254(5) of the *Criminal Code* sets out that it is an offence for an individual to refuse to comply with a demand for a breath sample without reasonable excuse. With respect to this offence, if the demand is unlawful that would provide the necessary "reasonable excuse" required for the defence provided within this provision.

The Dissent states that allowing for the unlawfulness of a demand to provide a defence to the charge of refusal to comply under s. 254(2) of the *Criminal Code* but not for an individual who does comply and then it is determined that the demand was unlawful is inconsistent and therefore an unlawful demand should prohibit the Crown from relying on the evidentiary shortcuts under s. 258 of the *Criminal Code*.

The Majority in *Alex* deals with this analogy by stating that the refusal to provide a breath sample relates to disobedience while the offence of driving while "over 80" relates to the fact of drinking and driving. In regard to the "over 80" offence, the evidentiary shortcut in question doesn't relate to the actual act of the offence but rather the way this offence is supported through evidence at trial.

In conclusion, the Majority states:

"Therefore, it is not unfair that a person who refuses to comply with an unlawful demand is acquitted, but if that same person complies and is prosecuted for an 'over 80' offence, the evidentiary shortcuts continue to apply. This does not discourage compliance with breath demands. It remains a dangerous gamble for an individual to deliberately refuse a breath demand. If the demand is later found to be lawful, that person may be convicted, even if he or she was actually under the proscribed limit."

Policy Considerations

The reason the s. 258 evidentiary shortcuts exist is to streamline impaired driving proceedings and to increase the efficiency of the justice system. One of the policy considerations here is to weigh the benefits of streamlining this type of proceeding with the cost that individuals charged with impaired driving may face in the form of allowing the Crown to utilize shortcuts despite the demand for evidence being unlawful.

Another main policy consideration is the impact that the case *R v. Jordan*, [2016] SCC 27 [*Jordan*], will have on impaired driving proceedings should the Crown not have the ability to rely on evidentiary shortcuts. *Jordan* sets out a hard-line approach to trying cases in a reasonable time pursuant to s. 11(b) of the *Charter*. The hard-line ceilings are 18 months for cases tried in provincial court and 30 months for cases in the superior court, unless exceptional circumstances justify the delay.

If the Crown is unable to utilize evidentiary shortcuts and forced to call two expert witnesses for every impaired driving proceeding, there is the risk that the timeline of these cases will exceed the hard-line ceilings set out by *Jordan* and impaired driving cases will be thrown out due to unreasonable delay.

Please feel free to explore other policy considerations that you feel are relevant to these arguments. You are not confined to making the same policy arguments as were made by the parties in this case.

SUPREME COURT OF CANADA

CITATION: R. *v.* Alex, 2017 SCC 37

APPEAL HEARD: December 8, 2016
JUDGMENT RENDERED: July 6, 2017
DOCKET: 36771

BETWEEN:

Dion Henry Alex
Appellant

- and –

Her Majesty the Queen
Respondent

- and –

Attorney General of Ontario and Criminal Lawyers' Association (Ontario)
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Cote, Brown and Rowe JJ.

REASONS FOR JUDGMENT: (paras. 1 to 51)	Moldaver J. (Karakatsanis, Wgner, Gascon and Cote JJ. Concurring)
DISSENTING REASONS: (paras. 52 to 102)	Rowe J. (McLachlin C.J. and Abella and Brown JJ. Concurring)

****NOTE TO PARTICIPANTS OF THE OSGOODE CUP****

This is an edited version of the original decision.

<u>Participants must use the edited decision and refrain from relying on the original decision when crafting their oral arguments.</u>

Only the background of the case, as delivered by Moldaver, has been reproduced below.

I. Background and Overview

[1] Each year, drunk drivers cause tremendous suffering and loss of life on Canada's roadways. Tragically, drinking and driving offences remain one of the most common crimes in Canada — and they place a substantial burden on the criminal justice system.

[2] To address the challenges posed by the large number of drinking and driving offences, Parliament has, over the years, taken steps to simplify and streamline the trial process. One such step, which dates back to 1969, involved the introduction of evidentiary shortcuts into the *Criminal Code*, R.S.C. 1985, c. C-46.[1] These shortcuts, now found in ss. 258(1)(c) and 258(1)(g) of the *Code*, permit the Crown to establish an accused's blood-alcohol concentration at the time of the alleged offence by filing a certificate recording the accused's breath readings.

[3] In the case of "over 80" charges,[2] this relieves the Crown from having to call two witnesses at every trial: (1) a breath technician to attest to the accuracy of the breath readings; and (2) an expert toxicologist to relate the readings back to the time when the alleged offence occurred.

[4] To ensure that these evidentiary shortcuts yield reliable evidence, Parliament built a number of preconditions into the scheme, the most notable being that the breath samples have to be taken within a prescribed period of time following the alleged offence; the samples have to be provided directly into an approved container or instrument; and the instrument has to be operated by a properly qualified technician.

[5] The issue in this appeal is whether, in addition to the three preconditions just mentioned, the Crown must also establish that the demand for the breath sample made by the police was a "lawful" demand before it can take advantage of the evidentiary shortcuts.

[6] In *Rilling v. The Queen*, 1975 CanLII 159 (SCC), [1976] 2 S.C.R. 183, a majority of this Court held that it was unnecessary for the Crown to prove a lawful demand in order to rely on the evidentiary shortcuts. This appeal raises the question of whether *Rilling* remains good law.

[7] The facts of the present case are straightforward. On April 21, 2012, the police stopped a vehicle driven by the appellant, Mr. Alex, and conducted a typical drinking and driving investigation. After Mr. Alex failed a roadside screening device test, the police officer demanded that he accompany the officer to the police station to provide

samples of his breath. Mr. Alex complied and registered readings significantly over the legal limit. Accordingly, Mr. Alex was charged with driving "over 80", contrary to s. 253 of the *Code*.

[8] At trial, it was uncontested that Mr. Alex provided the breath samples into an approved instrument operated by a qualified technician within the prescribed time periods, and that the readings were reliable. However, Mr. Alex argued that the breath sample demand was unlawful because the police lacked reasonable grounds to make it. Rather than bringing a challenge to exclude the evidence under s. 8 of the *Canadian Charter of Rights and Freedoms*, he chose instead to argue that the absence of reasonable grounds for the demand deprived the Crown of the s. 258 evidentiary shortcuts.

[9] Although the trial judge agreed that the grounds were insufficient, he applied *Rilling* and permitted the Crown to file a certificate of analysis as proof of Mr. Alex's blood-alcohol concentration at the time of the alleged offence. Mr. Alex presented no defence and he was convicted of driving "over 80".

[10] Successive appeals by Mr. Alex to the British Columbia Supreme Court (2014 BCSC 2328 (CanLII), 71 M.V.R. (6th) 228) and British Columbia Court of Appeal (2015 BCCA 435 (CanLII), 377 B.C.A.C. 301) were dismissed on the basis that *Rilling* remained binding. Before this Court, Mr. Alex submits that *Rilling* is no longer good law. He says it was wrongly decided and should be reversed.

[11] With respect, unlike my colleague Justice Rowe, I find it unnecessary to determine whether *Rilling* was correctly decided under the law as it existed over four decades ago. When ss. 258(1)(c) and 258(1)(g) are analyzed in accordance with the modern principles of statutory interpretation, I am satisfied that the Crown need not prove that the demand was lawful in order to take advantage of the shortcuts. If the taking of the samples is subjected to *Charter* scrutiny, and the evidence of the breath test results is found to be inadmissible by virtue of ss. 8 and 24(2) of the *Charter*, that will end the matter. Resort to the evidentiary shortcuts will be a non-issue. On the other hand, if the taking of the samples is subjected to s. 8 *Charter* scrutiny, and the breath test results are found to be admissible in evidence — either because no s. 8 breach occurred or because the evidence survived s. 24(2) *Charter* scrutiny — the shortcuts should remain available to the Crown.

[12] The singular effect of concluding otherwise would be to require two additional witnesses to attend court to give evidence on matters which have no connection to the lawfulness of the breath demand — and only serve to add to the costs and delays in an already overburdened criminal justice system. No one gains under this approach — but society as a whole loses out as precious court time and resources are squandered. The evidentiary shortcuts were designed by Parliament to simplify and streamline drinking and driving proceedings. A lawful demand requirement does not further Parliament's intent; rather, it serves to frustrate it.

[13] I would accordingly dismiss the appeal.

II. Analysis

A. *The Statutory Regime*

[14] The provisions at the centre of this appeal are found in ss. 254 and 258 of the *Code*. They are reproduced in the Appendix. I propose to review only the relevant portions of each.

[15] Section 254(3) authorizes the police to demand a breath sample from an individual. It sets out the statutory preconditions that must be met for the demand to be lawful, including the precondition at issue in this case, namely, that the police must have reasonable grounds to believe the person is committing or has committed a drinking and driving offence under s. 253 of the *Code:*

> **254. . .**
>
> . . .
>
> **(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. . . .

[16] Sections 258(1)(c) and 258(1)(g) of the *Code* contain the three evidentiary shortcuts at issue in this appeal:

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

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

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

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was . . . the concentration determined by the analyses . . .

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

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

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

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

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

(B) the time when and place where each sample . . . 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;

[17] Section 258(1)(g) creates a statutory exception to the common law hearsay rule. It permits a certificate of analysis, which sets out the accused's breath test results, to be filed for the truth of its contents without the need for *viva voce* evidence.

[18] Section 258(1)(c) then provides two inferences that may be presumptively drawn from the certificate. The first inference, referred to as the presumption of accuracy, is that the breath readings in the certificate are accurate measures of the accused's blood-alcohol concentration. This presumption dispenses with the need to call the qualified technician who administered the tests to verify their accuracy.

[19] The second inference, known as the presumption of identity, provides that the breath test results also identify the accused's blood-alcohol concentration at the time of the alleged offence. This presumption avoids the need to call an expert toxicologist to interpret or "read-back" the breath readings with a view to identifying the accused's blood-alcohol concentration at the time of the alleged offence.

[20] The three evidentiary shortcuts streamline the trial proceedings by permitting an accused's blood-alcohol concentration at the time of the alleged offence to be presumptively proven through the filing of a certificate of analysis. To be clear, these shortcuts do not affect whether the accused's breath readings are admissible or not. They affect only the *manner of admission* — specifically, whether the Crown must call two additional witnesses: one to verify the accuracy of the certificate and enter it as an exhibit, and the other to opine on the accused's blood-alcohol concentration at the time of the alleged offence — matters which have no connection to the lawfulness of the breath demand. This was made clear in *R. v. Deruelle*, 1992 CanLII 73 (SCC), [1992] 2 S.C.R. 663, at pp. 673-74, where the Court observed that the breath readings remain admissible at common law through *viva voce* evidence, irrespective of whether the shortcuts apply.

[21] The central question in this appeal is whether the opening words of each s. 258 evidentiary shortcut — "where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)" — refer specifically to a *lawful* demand made under s. 254(3), which among other things, is predicated on the police having reasonable grounds to make the demand.

B. *Mr. Alex's Position*

[22] Mr. Alex advances three main submissions in support of his interpretation that a lawful demand is required under s. 254(3) for the evidentiary shortcuts to apply. First, he submits that the plain meaning of the opening words of the text, referred to in the preceding paragraph, requires that the demand be shown to be lawful. Second, he revives the dissenting opinion in *Rilling* that Parliament intended the provisions to include a lawful demand precondition to provide "another protection of the accused" in the face of police powers of compulsion (*Rilling*, at p. 194), adding that the adoption of the *Charter* should reinforce the importance of this protection. Finally, he contends that this interpretation is necessary to achieve harmony, both textual and as a matter of policy, with the s. 254(5) offence of refusing to comply with a breath demand.

[23] These arguments are addressed in turn below. With respect, I find each to be unconvincing.

C. *Statutory Interpretation*

[24] The modern approach to statutory interpretation is now well established. It requires that the words of a provision 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": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

(1) The Opening Words of the Provisions

[25] Beginning with the text of ss. 258(1)(c) and 258(1)(g), Mr. Alex argues that the phrase "pursuant to a demand made under subsection 254(3)" in the opening clause of each provision unambiguously supports his position that the evidentiary shortcuts apply only where a lawful demand is made under s. 254(3). When this phrase is viewed in isolation, I acknowledge that his position is arguable. However, two considerations cast doubt on Mr. Alex's plain reading of the text.

[26] First, Parliament could easily have specified that the sample had to be taken "pursuant to a lawful demand". There are many examples throughout the *Code* where Parliament has done just that. For instance, in s. 127(1) of the *Code*,[3] Parliament has made it clear that to convict a person for disobeying a court order, the underlying order must be "lawful":

> **127 (1)** Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of
>
> **(a)** an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> **(b)** an offence punishable on summary conviction.

[27] Second, Mr. Alex's interpretation is in tension with the structure of the provisions. Each includes an opening part followed by a specific list of preconditions that must be met before the evidentiary shortcuts can apply (ss. 258(1)(c)(i) to (iv) and 258(1)(g)(i) to (iii)). These preconditions share a common theme of ensuring that certain procedures are followed in the taking and recording of a breath reading, all of which bear directly on the reliability of the evidentiary shortcuts. In particular, they set out requirements pertaining to the timing, method, instrument type and operator qualifications. The lawfulness of a breath demand does not mesh with this theme. It has no bearing on the reliability of the evidentiary shortcuts. Moreover, there is nothing in the text of the provisions to indicate that the various reliability-related preconditions listed in each are meant to be non-exhaustive. Mr. Alex's interpretation does not conform to this basic structure of the provisions. Instead, it calls for fragmented preconditions in separate clauses.

[28] In view of these considerations, it is not clear to me that a plain reading of the provisions supports Mr. Alex's position that the evidentiary shortcuts depend on a lawful demand.

[29] Mr. Alex submits, however, that unless his interpretation is adopted, the words in the opening clause are rendered meaningless. My colleague shares this view (para. 89).

[30] Respectfully, I disagree. In my view, the phrase "pursuant to a demand made under subsection 254(3)" simply identifies the bodily sample to which the provisions apply — that is, a breath sample. This reading finds support in the legislative history of the provisions. At the time of their initial enactment in 1969, they contained references to blood, urine, breath and other bodily samples. The opening words therefore played a meaningful role in clarifying the specific sample to which the provisions were meant to apply.

(2) Plain Meaning Is not Determinative

[31] This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 43; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 S.C.R. 140, at para. 48; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 20-41. In the words of McLachlin C.J. and Deschamps J. in *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141, this is necessary because (para. 10):

> Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

[32] Ruth Sullivan makes a similar point in *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 2.9:

> At the end of the day . . . the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

[33] In sum, while Mr. Alex's interpretation may be an arguable reading of the opening words, it cannot prevail if it is at odds with the purpose and context of the provisions.

(3) The Purpose and Context of the Evidentiary Shortcuts

[34] When the plain meaning of the provisions is read harmoniously with their purpose and context, Parliament's intent becomes clear: the Crown need not establish the lawfulness of a breath demand for the evidentiary shortcuts in ss. 258(1)(c) and 258(1)(g) to apply. The overriding purpose of the evidentiary shortcuts is to streamline proceedings by dispensing with unnecessary evidence. The preconditions governing the evidentiary shortcuts are concerned with the reliability of the breath test results and their correlation to the accused's blood-alcohol concentration at the time of the offence. The lawfulness of a breath demand has no bearing on these matters. This purpose is distinct from that of s. 254(3), which establishes and defines police powers, including the prerequisites for a lawful breath demand. Although the general objective of the statutory drinking and driving regime is the same, "the specific purposes of each mechanism are different": *Deruelle*, at p. 672. As I will explain, the overriding purpose of the evidentiary shortcuts — streamlining trial proceedings — would be frustrated by importing a lawful demand requirement.

(4) The Overriding Purpose of Streamlining Proceedings Would Be Frustrated by Importing a Lawful Demand Requirement

[35] Requiring the Crown to prove the lawfulness of the breath demand before the evidentiary shortcuts can apply would frustrate their overriding purpose: to streamline the trial process in this heavily litigated and complex area of the law. In *R. v. Vanderbruggen* (2006), 2006 CanLII 9039 (ON CA), 206 C.C.C. (3d) 489 (Ont. C.A.), Rosenberg J.A. urged a sensible and practical approach to interpreting the drinking and driving statutory regime, stating at para. 16:

> To conclude, these provisions, which are designed to expedite trials and aid in proof of the suspect's blood-alcohol level, should not be interpreted so as to require an exact accounting of every moment in the chronology. We are now far removed from the days when the breathalyser was first introduced into Canada and there may have been some suspicion and scepticism about its accuracy and value and about the science underlying the presumption of identity. These provisions must be interpreted reasonably in a manner that is consistent with Parliament's purpose in facilitating the use of this reliable evidence. [Emphasis added.]

This sentiment has been echoed in other cases: *R. v. Ware*, 30 C.R.N.S. 308 (Ont. C.A.), at p. 315; *R. v. Forsyth* (1973), 15 C.C.C. (2d) 23 (Man. C.A.), at p. 26.

[36] The evidentiary shortcuts are intended to avoid needless delays in drinking and driving proceedings. Yet if the Crown is required to prove that the demand is lawful before they can apply, this purpose will be frustrated with some frequency, given that the distinction between reasonable grounds and the absence of such grounds is often a fine one. Two witnesses will be required to attend court in order to prove that which a certificate of analysis reliably establishes. And this, in turn, will lead to unreasonable delays that are counterproductive to the administration of justice as a whole, without any compelling justification.

[37] I disagree with my colleague's suggestion that a loss of the evidentiary shortcuts will merely cause "inconvenienc[e]" to the Crown and make it take "longer to prove its case" (para. 98). The potential consequences of Mr. Alex's position should not be underestimated. In theory, the need for these extra witnesses would be confined to a limited minority of cases where a trial judge determines an unlawful demand was made. But in reality, because the lawfulness of a demand remains uncertain until a determination is made at trial, the practical consequences manifest themselves much earlier in the proceedings at the point of trial scheduling. And in drinking and driving cases, the lawfulness of a breath demand, and specifically the officer's grounds, are frequently in issue and can arise at any point, including during an officer's testimony at the trial.

[38] As a result, in many cases, trial scheduling would have to account for the possibility that two additional witnesses would be required to testify. This would extend estimated lengths of trial proceedings: one day trials would become two day trials, two day trials would become three days, and so on. In addition, the Crown would have to be prepared to call a breath technician and toxicologist in every case and limitations on their availability could add to the delay. And the effects do not end there. The consequences of trial scheduling are pervasive, creating backlogs and congestion throughout the justice system as a whole. This raises the following question: For what purpose? The answer, as I will explain, is none, other than to provide an accused with a hollow form of protection against police misconduct which the *Charter* now accounts for in a much more satisfactory and meaningful way.

(5) The *Charter* Now Addresses the Concerns that Animated the Minority in *Rilling* about Providing Protection Against Unlawful Breath Demands

[39] In *Rilling*, this Court addressed a similarly worded evidentiary shortcut found in what was then s. 237(1)(f) of the *Code* (current s. 258(1)(g)).A majority of the Court (Martland, Judson, Pigeon, Beetz and de Grandpré JJ.) concluded that the presumption of accuracy continued to operate regardless of whether an officer had the grounds needed to make a demand.[4]

[40] Justice Spence (Laskin C.J. and Dickson J. concurring) reached the opposite conclusion. The minority's reasons were driven by concerns that the majority's interpretation would remove a "protection of the accused" against unlawful breath demands:

> The result of the judgment of the Appellate Division from which this appeal is taken as well as some of the decisions in other Provinces cited therein is to effectively remove another protection of the accused. I am of the opinion that the requirement in both s. 237(1)(c) and s. 237(1)(f) that the test should have been made pursuant to the demand under s. 235(1) was inserted by Parliament with the intention of limiting those cases where the analysis could be proved by a certificate of a qualified technician and then that such analysis would provide *prima facie* proof of the proportion of alcohol in the blood of the accused only to those cases where the peace officer had, on reasonable and probable grounds, believed that the accused was or had been driving while impaired. This was only a proper requirement when the test was one which the citizen was required to submit to on penalty of committing an offence if he refused. [Emphasis added; p. 194.]

[41] This position is revived by Mr. Alex and the Criminal Lawyers' Association (Ontario) and is reinforced, in their opinion, by *Charter* values. Accordingly, Mr. Alex asks this Court to overrule *Rilling* as wrongly decided.

[42] In my view, it is unnecessary to determine whether *Rilling* was correctly decided under the law as it existed at that time and I would decline to do so. It is clear that the concerns about removing a safeguard against unlawful breath demands which animated the minority in *Rilling* have been addressed in the present day context. As the intervener the Attorney General of Ontario points out, in the years since *Rilling*, the scientific reliability of the results of properly administered breath tests is now firmly established: see *R. v. St-Onge Lamoureux*, 2012 SCC 57 (CanLII), [2012] 3 S.C.R. 187, at paras. 40 and 72; *R. v. Phillips* (1988), 1988 CanLII 198 (ON CA), 42 C.C.C. (3d) 150 (Ont. C.A.); *R. v. Paszczenko*, 2010 ONCA 615 (CanLII), 103 O.R. (3d) 424, at paras. 42-47 and 65. And today, s. 8 of the *Charter* provides a comprehensive and direct protection against unreasonable searches and seizures, including those of breath samples: see *R. v. Shepherd*, 2009 SCC 35 (CanLII), [2009] 2 S.C.R. 527, at paras. 13-16 and 24. In combination with s. 24(2), s. 8 provides an effective recourse for challenging the lawfulness of breath demands and a meaningful remedy in the form of excluding the breath test results. Thus, s. 8 also addresses my colleague's concerns about ensuring that police are "conforming to the requirements of the law", including the "other requirements of s. 254(3), such as the requirement that the demand be made by a peace officer or that the demand be made as soon as practicable" (paras. 99 and 90).

[43] This role that s. 8 fulfills in relation to unlawful breath demands is consistent with the approach taken when the police fail to comply with the requirements of other statutory provisions governing their authority. For example, non-compliance with the statutory search warrant requirements does not result in automatic loss of the evidence — rather it is subject to challenge under s. 8 of the *Charter*: see *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, at pp. 278 and 280.

[44] By contrast, a loss of the s. 258 evidentiary shortcuts does not provide a meaningful remedy for an unlawful demand by the police. Indeed, I would hesitate to characterize it as a remedy at all. In reality, eliminating these evidentiary shortcuts achieves

no substantive or procedural benefit for an accused. It merely requires the Crown to call two unnecessary witnesses — a breath technician and toxicologist — in order to arrive at the same result.[5]An unlawful breath demand does not affect the reliability of the inferences that flow from the shortcuts so as to make testimony from these witnesses necessary.

[45] In some cases, practical or resourcing limitations may prevent the Crown from being able to produce these two witnesses — and this could result in the case being lost. In my view, we should avoid an interpretation that forces the Crown to call unnecessary witnesses and promotes an outcome not based on the merits, but rather on the limitations of an overburdened criminal justice system. Indeed, such an approach would be antithetical to this Court's recent jurisprudence emphasizing the importance of participants in the criminal justice system working together to achieve fair and timely justice: *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 S.C.R. 631, at paras. 2-3 and 19-28.

[46] The minority in *Rilling* may have been influenced by the notion that a loss of the evidentiary shortcuts could provide a means of regulating police conduct in making breath demands. However the *Charter* now fulfills the role of regulating the lawfulness of police breath demands in a more effective and logical manner.

(6) The Comparison to the Section 254(5) Refusal Offence

[47] Finally, Mr. Alex submits that the s. 254(5) offence of refusing to provide a breath sample is relevant to the interpretation of the s. 258 evidentiary shortcuts. Section 254(5) states:

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

Mr. Alex points to the similarity between the opening words of the s. 258 evidentiary presumptions and the reference in s. 254(5) to "a demand made underthis section". The Criminal Lawyers' Association (Ontario), in turn, relies on jurisprudence that has recognized a lawful demand as an element of the refusal offence: citing *R. v. MacDonald* (1974), 22 C.C.C. (2d) 350 (N.S.C.A.), at para. 35; see also *R. v. Moser* (1992), 1992 CanLII 2839 (ON CA), 7 O.R. (3d) 737 (C.A.), per Doherty J.A., concurring in the result. In addition, as a matter of policy, Mr. Alex submits it would be unfair and anomalous if the Crown only had to establish the lawfulness of a demand if an accused refused, but not if the accused complied with the demand.

[48] I have difficulty with this comparison for a number of reasons. First, the textual argument assumes that the language of s. 254(5) requires the lawfulness of the demand to be an element of the offence. In my view, however, this element is better thought of as arising from the general nature of the refusal offence — an offence which criminalizes disobedience in response to lawful compulsion. Notwithstanding the words

“made under”, disobedience with unlawful compulsion is simply not criminal. For example, the unlawfulness of an arrest can provide a complete defence to the charge of resisting arrest under s. 270 of the *Code*: *R. v. Plamondon* (1997), 1997 CanLII 3175 (BC CA), 121 C.C.C. (3d) 314, at para. 29 (B.C.C.A.); see also *R. v. Plummer*(2006), 2006 CanLII 38165 (ON CA), 83 O.R. (3d) 528, at paras. 1, 48-49 (C.A.).

[49] This exposes a logical flaw in the analogy. While the refusal offence is part of the same statutory regime, it is different from other drinking and driving offences in substance. Culpability for the refusal offence is based on disobedience with lawful compulsion, whereas culpability for an “over 80” offence is based on driving with a blood-alcohol concentration over the legal limit. The lawfulness of the breath demand has no logical bearing on culpability for an “over 80” offence. As this Court observed in *R. v. Taraschuk*, 1975 CanLII 37 (SCC), [1977] 1 S.C.R. 385, conflating the elements of the two offences “invites a self-defeating construction of [s. 254(5)] and would wipe out the difference, clearly made in [ss. 253 and 254(5)], between culpability under the one and under the other” (p. 388). As a result, I do not find this textual comparison to be persuasive.

[50] The distinct nature of these offences also undermines Mr. Alex’s submission that it is unfair that a person who refuses to comply with an unlawful demand is acquitted, but if that same person complies and is prosecuted for an “over 80” offence, the evidentiary shortcuts will continue to apply. Moreover, Mr. Alex’s suggestion that this fosters absurdity in the law by discouraging compliance with breath demands is unpersuasive. For decades, the law under *Rilling* has been applied and there is no foundation to the practical concern about discouraging compliance with breath demands. Indeed, it remains a dangerous gamble for an individual to deliberately refuse a breath demand. If the demand is later found to be lawful, the refuser may be convicted, even if he or she was actually under the proscribed limit: *Taraschuk*, at p. 388.

III. Conclusion

[51] In this case, the trial judge, the British Columbia Supreme Court and the Court of Appeal correctly concluded that a lawful demand was not a precondition to the s. 258 evidentiary shortcuts (albeit for different reasons than I have set out). In view of the foregoing analysis, there is no basis for appellate interference and Mr. Alex’s conviction must be upheld. Accordingly, I would dismiss the appeal.

The [dissenting] reasons of McLachlin C.J. and Abella, Brown and Rowe JJ. were delivered by

ROWE J. —

II. Facts

[53] The trial judge made the following finding of facts; these are not in dispute.

[54] Mr. Alex was pulled over during a seatbelt check in Penticton, British Columbia. He registered a fail on an approved screening device ("ASD") administered by Constable Caruso. At the police station, Mr. Alex's breath samples registered 140 mg and 130 mg of alcohol per 100 ml of blood, respectively.

[55] Constable Caruso testified to the circumstances leading up to the ASD demand, including: an odour of liquor as he approached the vehicle; an open beer can on the floor near the passenger side; Mr. Alex had "red cheeks" and "watery eyes". Constable Caruso did not identify any other indicia of impairment; Mr. Alex had no difficulty parking and exiting the vehicle. Constable Caruso made no notes about how he came to form a suspicion that Mr. Alex had alcohol in his body, but he testified that he knew he had formed a reasonable suspicion because he would not have made the demand otherwise.

[56] Mr. Alex failed the ASD. The officer then made a breath demand, and drove Mr. Alex to the police station where two observation periods and two samples of breath were obtained.

III. Relevant Statutory Provisions

[57] The following provisions of the *Criminal Code* are engaged by this appeal:

> **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.
>
> **(2)** For greater certainty, the reference to impairment by alcohol or a drug in paragraph (1)(a) includes impairment by a combination of alcohol and a drug.
>
> **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, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

. . .

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

(a) to provide, as soon as practicable,

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

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

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

. . .

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]

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

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

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

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

. . .

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

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

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

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

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

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

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

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

V. Issue

[71] In a prosecution under s. 253(1)(b), for an "over 80" charge, is the requirement for "reasonable grounds" to demand a breath sample under s. 254(3) a precondition to the operation of the presumptions in s. 258(1)(c) and (g)?

VI. Submissions

[72] Mr. Alex argues that the majority decision in *Rilling* was based on the principle (affirmed in *R. v. Wray*, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) that relevant evidence obtained by a police officer in a manner that is not lawfully authorized is nonetheless admissible. As such, Judson J.'s majority reasons in *Rilling* render the statutory term "reasonable grounds", as a precondition to making a breath demand, meaningless. By contrast, Spence J.'s dissenting reasons in *Rilling* give effect to Parliament's intention that "reasonable grounds" operate as a precondition to a breath demand, thereby protecting citizens from unwarranted police action. In the appellant's submission, the "reasonable grounds" requirement should operate as a statutory protection against unlawful search. Thus, the ruling in *Rilling* runs contrary to a plain reading of s. 254(3). Mr. Alex submits that admitting unlawfully obtained evidence only accords with law if such evidence is nonetheless admissible, i.e. what was affirmed by this Court in *Wray*.

[73] The Criminal Lawyers' Association (Ontario) ("CLA") intervened in support of the appellant. The CLA argued that *Rilling* should be overturned, as compliance with the requirement for "reasonable grounds" in order to demand breath samples under s. 254(3) is clearly a statutory precondition to the presumptions in s. 258(1)(c) and (g).

[74] The CLA challenged the Crown's argument that overturning *Rilling* would severely disrupt the administration of justice. The CLA argued that, *inter alia*, requiring that a demand be made in accordance with the precondition of "reasonable grounds" before being able to rely on the evidentiary presumptions in s. 258(1) is no more than what the Crown must already do to rely on other evidentiary presumptions. Similarly, overturning *Rilling* would not result in automatic exclusion of evidence and acquittals. The presumptions in s. 258(1) do not deal with admissibility of

evidence concerning breath samples *per se*; rather they only provide "shortcuts" to the proof of the certificate's contents, which it is open to the Crown to prove by other means. Moreover, the Crown's argument is based on the unproven assertion that requiring the Crown to lead evidence that the officer had "reasonable grounds" to make a breath sample demand would cripple the justice system.

[75] The Crown argues that *Rilling* should be affirmed as good law and that applying *Rilling* merely deprives accused persons of the chance to defeat s. 258(1) presumptions for reasons entirely unconnected to their rationale and the text of the provisions. The Crown relies on *Rilling* for the proposition that while absence of reasonable and probable grounds for belief of impairment may afford a defence to a refusal to provide a breath sample charge under s. 254(5), it does not render the certificate inadmissible and the presumptions inoperative. The motive that actuates a peace officer to make a demand under s. 254(3) is not a relevant consideration when the accused has complied with the demand. Relevant evidence of an "over 80" offence is *prima facie* admissible unless a legal rule provides for its exclusion, and s. 254(3) contains no such rule. In essence, the Crown restated the rationale relied on by Judson J. in *Rilling*.

[76] The Attorney General for Ontario intervened in support of the Crown arguing that *Rilling* should not be overturned. The interpretation in *Rilling* is consistent with Parliament's intent; had Parliament intended a valid demand to be a precondition to the reliance on the evidentiary presumption in s. 258(1)(c), then reasonable grounds for a breath sample demand would be an enumerated requirement under s. 258(1) itself.

VII. Analysis

[77] In a prosecution under s. 253(1)(b), for an "over 80" charge, is the requirement for "reasonable grounds" to demand a breath sample under s. 254(3) a precondition to the operation of the presumptions in s. 258(1)(c) and (g)? The answer to this turns on the status of *Rilling*. Unless *Rilling* is overturned by this Court, it is dispositive of the issue under appeal.

[78] This Court has previously considered when it should overrule one of its decisions (see *Ontario (Attorney General) v. Fraser*, 2011 SCC 20(CanLII), [2011] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609; and *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101). There are several, non-exhaustive factors this Court can consider to determine this. Essentially, there is a balancing between the values of correctness and certainty. The Court must ask whether it is "preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error" (*Canada v. Craig*, 2012 SCC 43 (CanLII), [2012] 2 S.C.R. 489, at para. 27). In my view, for the reasons that follow, the need to correct the law predominates in this case.

A. *The Rule in R. v. Rilling*

[79] The majority in *Rilling* took the view that relevant evidence is admissible even if it is unlawfully obtained. In doing so, the majority incorrectly conflated the issues of admissibility under common law (as per *R. v. Wray*) with the operation of the evidentiary shortcuts (per s. 258(1) of the *Code*).

[80] In *Wray*, the accused, Mr. Wray, was arrested for the murder of his brother, who had been shot. Under "duress" by police (which I take to mean the use of force or the threat of force), the accused made a statement and showed police where he had discarded the gun. Ballistics showed it was the murder weapon. The gun was received into evidence, as was that part of Mr. Wray's statement that was confirmed by the gun. Mr. Wray was acquitted at trial as the trial judge refused to admit the evidence of Mr. Wray's involvement in finding the murder weapon.

[81] In the Crown's appeal, the Ontario Court of Appeal held that trial judges have a discretion to exclude evidence where there is unfairness to the accused or where receiving the evidence would bring the administration of justice into disrepute. It affirmed the acquittal:

> In our view, a trial [j]udge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute, the exercise of such discretion, of course, to depend upon the particular facts before him. Cases where to admit certain evidence would be calculated to bring the administration of justice into disrepute will be rare, but we think the discretion of a trial [j]udge extends to such cases. [1969 CanLII 37 (ON CA), [1970] 2 O.R. 3 (C.A.), at p. 4]

[82] In the Crown's appeal to this Court, the division in the Court foreshadowed that in *Rilling*. Spence J., dissenting, wrote in favour of the Ontario Court of Appeal's approach. Hall J. and Cartwright C.J., each wrote separate reasons to similar effect. The majority (in two sets of reasons, one by Judson J., and one by Martland J.) rejected the Ontario Court of Appeal's approach; they affirmed the traditional rule that relevant but illegally obtained evidence is admissible.

[83] In *Rilling*, in his reasons for the majority, Judson J. adopted the analysis of the appeals court, including its reliance on *R. v. Orchard*, 1970 CanLII 576 (SK QB), [1971] 1 W.W.R. 535 (Sask. Dist. Ct.), aff'd 1971 CanLII 787 (SK CA), [1971] 2 W.W.R. 639 (C.A.), *R. v. Showell*, 1971 CanLII 512 (ON SC), [1971] 3 O.R. 460 (H.C.J.), and *R. v. Flegel* (1971), 5 C.C.C. (2d) 155 (Sask. Q.B.), aff'd (1972), 7 C.C.C. (2d) 55 (C.A.). In effect, Judson J. was affirming what he had written in *Wray*, that it does not matter that evidence was obtained illegally.

[84] However, the majority erred by making the rule affirmed in *Wray* the cornerstone of their reasons. An interpretation of s. 258(1) that conflates admissibility with the pre-conditions for evidentiary presumptions is incorrect and has been attenuated by a

later decision of this Court, *R. v. Deruelle*, 1992 CanLII 73 (SCC), [1992] 2 S.C.R. 663, which identifies the distinction between admissibility and preconditions to evidentiary shortcuts.

[85] In *Deruelle*, this Court considered the meaning of the time limit within which a breathalyzer demand must be made by police under s. 254(3) of the *Code* (pp. 665-66). The interpretative question, before the Court, was "whether the two-hour limit referred to in s. 254(3) . . . applies to the making of the breath or blood sample demand, or to the formation of the peace officer's belief on reasonable and probable grounds that a person is committing or has committed as a result of the consumption of alcohol, an offence under s. 253 of the *Code*" (p. 671).

[86] In considering competing lines of analysis regarding the meaning of the time limits under s. 254(3), the Court noted that the specific purpose of s. 254(3) "which goes to the admissibility of the sample into evidence, can be distinguished from the purpose of the time limit in the presumption section, s. 258(1)(c)" (p. 672). As explained by Justice La Forest, writing for the Court, whereas s. 258(1)(c) is a procedural shortcut, it is not concerned with admissibility (p. 672).

[87] Thus, by implicitly endorsing the rule affirmed in *Wray*, the majority in *Rilling* erred in deciding the issue on the basis of admissibility of evidence at common law rather than on an interpretation of the evidentiary shortcuts in the *Code*. In doing so, the majority failed to engage in a statutory interpretation of the relevant sections of the *Code*. The provisions of the *Code* at issue in this appeal set out where a certificate can be admitted, in the absence of *viva voce* testimony, and the evidentiary presumptions that follow. The interpretation and application of this provision properly turns on a statutory interpretation exercise.

B. *Statutory Interpretation*

[88] The holding in *Rilling* has also been attenuated by subsequent jurisprudence of this Court, namely, *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, which sets out the modern approach to statutory interpretation: the words of the provision must be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Reading s. 258(1)(c) and (g) in this way, the reasoning in *Rilling* cannot withstand scrutiny. Whether or not a demand was made by an officer who had reasonable grounds to do so is an express precondition to the applicability of the evidentiary presumptions set out in s. 258(1)(c) and (g), the opening words of which read: ". . . where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3) . . . "

[89] The *Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007) defines "pursuant to" as "consequent and conforming to; in accordance with"

(p. 2412). The French version of s. 258(1)(c) and (g) is to similar effect, using the phrase "*conformément à*". For the meaning of "pursuant to", see also: *Dastous v Matthews-Wells Co.*, 1949 CanLII 61 (SCC), [1950] S.C.R. 261; *Minister of National Revenue v. Armstrong*, 1956 CanLII 71 (SCC), [1956] S.C.R. 446, at p. 447. If the reasonable grounds referred to in s. 254(3) are not a precondition to the operation of s. 258(1)(c) and (g), then why is there a reference to s. 254(3) at all? That such words are meaningless is not plausible. If reasonable grounds under s. 254(3) are not a precondition, then what does the reference to "pursuant to" in the opening words of both s. 258(1)(c) and (g) mean? That such words have no legal effect is implausible. My colleague, Justice Moldaver, finds that these words simply identify the sample to which the provision applies (para. 30). In my respectful view, this cannot be the case.

[90] This alternate interpretation would mean that the other requirements of s. 254(3), such as the requirement that the demand be made by a peace officer or that the demand be made as soon as practicable, are also not required for the evidentiary shortcuts to apply. This would mean that the Crown would have the benefit of the evidentiary presumptions for any sample, irrespective of the conditions under which the demand was made. The scheme of the legislation is clear: a lawful demand under s. 254(3) is a precondition to reliance on s. 258(1)(c) and (g).

[91] This is consistent with what this Court held in *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254. Justice Sopinka, writing for the majority, at para. 51, noted the importance of a statutory precondition being satisfied to ensure a lawful search and seizure, albeit in the context of s. 8 of the *Charter*:

> 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. [Emphasis added; last emphasis in original.]

[92] In her concurring reasons, Justice L'Heureux-Dubé agreed with Justice Sopinka that "'reasonable and probable grounds' is not only a statutory precondition to a breathalyzer demand but also a touchstone of the *Charter*" (para. 96 (emphasis added)).

[93] Furthermore, this interpretation that "pursuant to" imports the conditions under s. 254 as a pre-condition of the evidentiary presumptions under s. 258(1) is consistent with the position Spence J. endorsed in *Rilling* and with the Court of Appeal of New Brunswick's decision in *R. v. Searle*, 2006 NBCA 118 (CanLII), 308 N.B.R. (2d) 216.

[94] Mr. Searle had appealed, *inter alia*, that the summary conviction appeal judge erred in finding that the breathalyzer samples were taken lawfully and that the Crown could rely on the presumption found at s. 258. Mr. Searle did not, at trial, seek the

exclusion of the certificate of the technician on the grounds of a *Charter* violation. Nevertheless, the court found:

> 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. Thus, the Crown has failed to prove the element of the offence under s. 253(b) of the Code. To summarize: the certificate is still admissible but the prosecutor is not, however, entitled to use the presumption under s. 258(1)(c). The accused must, therefore, be acquitted of the charge under s. 253(b) of the Code. [para. 25]

[95] On the foregoing basis, I would reverse *Rilling*. This is in accordance with the principle that this Court may depart from earlier decisions where the earlier decision has been been attenuated by later decisions of this Court (*R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, at pp. 855-56, citing *Reference re Agricultural Products Marketing Act*, 1978 CanLII 10 (SCC), [1978] 2 S.C.R. 1198).

C. *Reversing Rilling Will Not Undermine Effectiveness of the Statutory Scheme*

[96] The Crown has argued that if this Court reverses *Rilling*, this will undermine the effectiveness of the statutory scheme. Specifically, the Crown argues that policy considerations militate in favour of allowing only *Charter* challenges to exclude certificates of analysis, and that to allow an accused to argue that the evidentiary presumptions are not available absent a *Charter* challenge is to promote "trial by ambush" (*Charette*, at para. 45). These concerns were referred to in *Charette* at the Ontario Court of Appeal (see discussion at paras. 44-46). My colleague, Justice Moldaver, in his reasons, also points to policy concerns in overruling *Rilling*, namely that requiring the Crown to prove the lawfulness of a breath demand before the evidentiary shortcuts apply would frustrate their overriding purpose (paras. 35-36). Of course, none of this detracts from the right of an accused to rely on the *Charter*, notably the protections against illegal search and seizure.

[97] For the reasons that follow, I cannot agree with the Crown that reversing *Rilling* would undermine the efficacy of the statutory scheme, or that it would disrupt the proper administration of justice.

[98] In prosecuting "over 80" charges, where the peace officer acted without reasonable grounds, if *Rilling* is overturned, the Crown will not be able to rely on the evidentiary shortcuts. It will take the Crown longer to prove its case; that follows from not being able to rely on the shortcuts. But it will still be able to prove its case where it has the evidence to do so. Thus, no injustice will arise. The Crown may be inconvenienced, but

is it not more important that these provisions of the *Code* be given their proper meaning and effect? To ask the question is to answer it.

[99] To reverse *Rilling* is to do no more than affirm that the "reasonable grounds" referred to in s. 254(3) are a precondition for the reliance on the evidentiary presumptions in s. 258(1)(c) and (g). The Crown will simply need to prove the statutory precondition of reasonable grounds. Neither the police nor the Crown should object to conforming to the requirements of the law.

[100] As well, today's criminal procedure framework is different from that which was in place when *Rilling* was decided. As submitted by the CLA, current procedures, such as disclosure, charge screening and pre-trials, ensure that parties are aware of issues before a trial begins.

[101] If the rule in *Rilling* no longer applies, the evidentiary presumptions will not apply unless the statutory preconditions in s. 254(3) are met, i.e. the police officer had reasonable grounds to demand the breath sample. This is a distinct issue from whether the certificate would be *admissible*, which is governed by the rules of evidence subject to any s. 8 *Charter* applications.What is key is that these issues would be sorted out when the Crown seeks to have the certificate received in evidence. Thus, there would be no "ambush" after the Crown had closed its case. None of this would undermine the statutory scheme. In short, the effects of reversing *Rilling* would not be those suggested by the Crown.

VIII. Disposition

[102] In light of the foregoing, I would allow the appeal, set aside Mr. Alex's conviction and order a new trial.

APPENDIX

***Criminal Code*, R.S.C. 1985, c. C-46**

Definitions

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

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

approved container means

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

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

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

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

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

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

qualified technician means,

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

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

Testing for presence of alcohol or a drug

(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

Video recording

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

Samples of breath or blood

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

(a) to provide, as soon as practicable,

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

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

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

Evaluation

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

Video recording

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

Testing for presence of alcohol

(3.3) If the evaluating officer has reasonable grounds to suspect that the person has alcohol in their body and if a demand was not made under paragraph (2)(b) or subsection (3), the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable, a sample of breath that, in the

evaluating officer's opinion, will enable a proper analysis to be made by means of an approved instrument.

Samples of bodily substances

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

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

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

Condition

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

Failure or refusal to comply with demand

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

Only one determination of guilt

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

Proceedings under section 255

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

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

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

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

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

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

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

> **(i)** at the time the sample was taken, the person taking the sample took an additional sample of the blood of the accused and one of the samples was retained to permit an analysis of it to be made by or on behalf of the accused and, in the case where the accused makes a request within six months from the taking of the samples, one of the samples was ordered to be released under subsection (4),
>
> **(ii)** both samples referred to in subparagraph (i) were taken as soon as practicable and in any event not later than two hours after the time when the offence was alleged to have been committed,
>
> **(iii)** both samples referred to in subparagraph (i) were taken by a qualified medical practitioner or a qualified technician under the direction of a qualified medical practitioner,

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

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

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

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

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

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

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

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

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

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

(e) a certificate of an analyst stating that the analyst has made an analysis of a sample of the blood, urine, breath or other bodily substance of the accused and stating the result of that analysis is evidence of the facts alleged in the certificate

without proof of the signature or the official character of the person appearing to have signed the certificate;

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

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

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

> **(i)** that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,
>
> **(ii)** the results of the analyses so made, and
>
> **(iii)** if the samples were taken by the technician,
>
> > **(A)** [Repealed before coming into force, 2008, c. 20, s. 3]
> >
> > **(B)** the time when and place where each sample and any specimen described in clause (A) was taken, and
> >
> > **(C)** that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

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

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

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

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

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

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

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

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

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

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

Evidence of failure to give sample

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

Evidence of failure to comply with demand

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

Release of sample for analysis

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

Testing of blood for concentration of a drug

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

Attendance and right to cross-examine

(6) A party against whom a certificate described in paragraph (1)(e), (f), (f.1), (g), (h) or (i) is produced may, with leave of the court, require the attendance of the qualified medical practitioner, analyst or qualified technician, as the case may be, for the purposes of cross-examination.

Notice of intention to produce certificate

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

Appeal dismissed, MCLACHLIN C.J. *and* ABELLA, BROWN *and* ROWE JJ. *dissenting.*

Solicitors for the appellant: Mott Welsh & Associates, Penticton.

Solicitor for the respondent: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Jonathan M. Rosenthal, Toronto.

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