

***An Update has
Arrived in Your
Library for:***

**Please circulate this notice to anyone
in your office who may be interested
in this publication.**

Distribution List

	<input type="checkbox"/>

**A Guide to
BREATHALYZER CERTIFICATES
IN CANADA**

**Alan Pearse
Release No. 42, February 2019**

What's New in this Update:

Recent case law was added throughout the book. As always, case law that benefits both the defence and the Crown have been updated without favour or prejudice.

Highlights

The defence bar will want to review *R. v. Ramnath* (2018), 2018 ONCJ 858, 2018 CarswellOnt 20592 (Ont. C.J.). The accused was detained in an impaired driving investigation. The accused was initially arrested by a peace officer working for a local nuclear power plant. Following the

THOMSON REUTERS CANADA®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

Email CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

arrest, the powerplant officer conducted a pat down search and handcuffed the accused until the local police arrived. The police arrived and took custody of the accused, but did not believe that there were sufficient R.P.G. to arrest the accused for impaired driving. However, the police independently formed a reasonable suspicion that the accused had alcohol in his body and made an A.S.D. demand. After the accused failed the A.S.D., the officers formed the R.P.G. to arrest the accused for operating “over 08.” From the moment the accused was arrested by the powerplant officer until the time he was booked at the station, the accused’s hands were handcuffed behind his back. This lasted at least 36 minutes. At trial, the accused argued that the powerplant officer did not have reasonable and probable grounds to arrest the accused, and that the manner in which the roadside breath samples were seized was unreasonable due to the prolonged period of time that the accused spent in handcuffs. Likewise, the accused argued that the manner in which he was detained at the roadside was arbitrary. The accused argued that because more than one *Charter* right was breached, and because of the serious nature of the breaches, both the roadside breath sample and the breath samples obtained at the police station ought to be excluded and the accused should be acquitted. The court accepted that the powerplant officer had the subjective belief that there were reasonable probable grounds for the arrest for impaired driving. However, that belief must be supported by objective facts. The objective component is satisfied when a reasonable person in the position of the officer would be able to conclude that there were reasonable grounds for the arrest. When assessing whether reasonable and probable grounds existed, it is not proper to engage in a dissection of the officer’s grounds looking at each observation in isolation. An assessment of whether the officer’s subjective belief was objectively reasonable does not involve the equivalent of an “impaired driving scorecard” adding up the presence or absence of all the usual indicia of impairment. The absence of some indicia that are often found in impaired driving cases does not necessarily undermine a finding of reasonable grounds based on other observed indicia and available information. In the context of a breath demand, the reasonable grounds standard is not an onerous test. An officer need not have anything more than reasonable grounds to believe that the driver committed the offence of impaired driving or driving “over 08” before making a breath demand. The Crown does not have to prove that the officer had a *prima facie* case before pursuing an investigation. Similarly, is neither necessary nor desirable to conduct an impaired driving trial as a threshold exercise when determining whether the officer’s belief was reasonable. An officer’s subjective beliefs need not be the only inference that can be drawn from a particular constellation of factors, but it must be a reasonable inference.

While the court accepted that the powerplant officer observed some slightly abnormal speech and confusion, it could not have been too significant since two police officers who took custody of the accused 21 minutes later did not notice any difficulties. Although the powerplant officer acted in good faith, he did not have an objectively discernible constellation of factors to support his subjective belief. In the absence of any smell of alcohol prior to the accused's arrest or any additional information about when he consumed alcohol or the amount of alcohol, the collection of other observances was equivocal and could have just as easily been attributed to him being tired or lost. It is also relevant that two independent police officers dealing with the accused shortly thereafter did not form the subjective belief that there were sufficient grounds to continue the arrest, although there were certainly sufficient grounds to form a reasonable suspicion that the accused had been operating a motor vehicle with alcohol in his system. If the powerplant officer had detained the accused without handcuffs pending the arrival of the police, there would have been no *Charter* complaint. The powerplant officer's subjective assessment was not objectively reasonable, and this was a breach of the accused *Charter* protected rights. While the responding officers initially made the right choice to reevaluate the grounds for the accused's arrest, they failed to recognize that they were continuing to treat the accused as though he was lawfully in police custody for a criminal charge. They ought to realize that their authority to detain him and the manner of his detention was limited to an investigative detention. Neither of the police officers could provide any reason to justify why handcuffs remained on a coherent, cooperative and respectful detainee who they only suspected of having alcohol in his system while operating a motor vehicle. The *Charter* violations in this case were not limited to the initial unlawful arrest by the powerplant officer. Rather, they involve a broader consideration of the Constitutional integrity of the use of force options with detainees who are not even suspected of committing offenses. Recent case law has provided the police with significant guidance and have repeatedly emphasized the unique consideration with this type of investigation. Rather, the police need only suspect the person of having alcohol in their system while operating a motor vehicle, which in and of itself is not a crime unless a person is impaired or has more than the legal limit in their system. As result, the courts have been very sensitive to the manner in which police interact with detainees during roadside breath testing. The case law has narrowly constrained the authority of the police to use handcuffs before a person has been arrested for drunk driving. Although a motorist subject to an A.S.D. is subject to a lawful detention, such a motorist is not under arrest. Therefore, unless a motorist's conduct gives rise to objectively

grounded safety concerns, for example, where the person's behavior causes a police officer to reasonably believe that they pose a threat to the police, the public, or themselves, is not reasonably necessary to use handcuffs. Without reasonable justification, restraining a motorist in handcuffs during roadside breath testing is unlawful. Even though a motorist subject to a valid approved screening device breath demand is lawfully detained, the use of handcuffs escalates the incursion on that person's liberty. Handcuffs represent a far more coercive form of state compulsion. If handcuffs are applied, this transforms a detention that that initially takes the form of psychological restraint into an encounter marked by physical restraint. If the police unjustifiably handcuff a motorist subject to an A.S.D. demand, the result is an unlawful interference with that person's liberty. In such circumstances, the detention that begins lawfully becomes unlawful. The police power to check for sobriety, as any other power, is not without its limits. The totality of the circumstances in the case at bar show that the accused was not belligerent, uncooperative, impolite or difficult in any manner at any point. He did not present as an individual who was a flight risk, public safety risk or an officer safety concern. Moreover, the initial application of the handcuffs arose from an arbitrary arrest which the more experienced and better trained police officers quickly realized shortly after they began interacting with the accused. The coercive physical restraint of continuing to keep handcuffs on the accused was completely unnecessary. The original breach of the accused C.R.F. s. 9 rights was significantly exacerbated by the arbitrary continued application of handcuffs and the unreasonable manner in which the police officers obtained the roadside breath tests. This is a breach of C.R.F. ss. 8 and 9. The evidence was excluded via C.R.F. s. 24(2).

Crown prosecutors will want to review *R. v. Oar* (2018), 2018 ABPC 245, 2018 CarswellAlta 2561 (Alta. Prov. Ct.) The accused was charged with impaired operation, "over 08," and various other offenses. The accused argued that the demanding officer did not have sufficient reasonable suspicion for the A.S.D. The accused also argued that there was insufficient evidence that the device used at the roadside was, in fact, an A.S.D. The court rejected these arguments. The accused's rights were not violated in any way. The officer effectively expressed his suspicion that the accused had alcohol in his body, even though he did not use that exact wording. Although the Constable did not testify out right that he believed he was using an A.S.D., the only rational explanation for his behavior during the investigation and for his trial testimony was that he believed just that. The accused was convicted.