THE CONFLICT IN DECISIONS RESPECTING THE REQUIREMENT OF REASONABLE AND PROBABLE GROUNDS BEFORE USE OF CERTIFICATE EVIDENCE IN BREATHALYZER OFFENCES

By William H. Watts†

Prosecutions under the breathalyzer legislation have given rise to two different interpretations of the precise effect of section 235(1) of the Criminal Code, R.S.C. 1970, C. C-34, which reads as follows:

> 235.(1) Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under section 234, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable a sample of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such a sample to be taken.

In the case where a person has taken the breathalyzer test subsequent to a demand made pursuant to S.235(1) and a reading of .08 or more has been found, the Courts have split on the question whether the reasonable and probable grounds mentioned in S.235(1) are a condition precedent to a legal demand to take the test.

In *R. v. Wirsta,*[1] Kerans, D.C.J. held at pp. 540-1 that a demand can only be made if reasonable and probable grounds exist, and if the demand is not made on this basis the certificate of the technician is not admissible:

> Section 223 clearly provides that a peace officer is only entitled to make a demand for a breathalyzer test when he believes that a person is committing or has committed an offence under S.222 . . . and that there are reasonable and probable grounds for such belief. Any other demand is not a demand made by the authority of S.223(1). To put any interpretation other than this on the words of S.224A(1)(f) would be to render them meaningless and I think I properly state the law on interpretation of statutes that when Parliament puts words in a statute they presumably put them there for some purpose.
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> Therefore, I am of the view that a certificate is not receivable under S.224A(1)(f) until it is first demonstrated to me that a demand was made for a test by a peace officer believing an offence **had been committed, and having reasonable and probable grounds** for that belief.

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† Third Year Law Student, The University of New Brunswick

1 [1971] 1 C.C.C. (2nd) 538, Alta. D.C.

Section 224A(1) (f) to which the learned Justice refers to above is now S.237 (1) (f) of the Criminal Code and reads as follows:

> 237 (1) (f) where a sample of the breath of the accused has been taken pursuant to a demand taken under subsection (1) of section 235, a certificate of a qualified technician stating:
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> (i) that a chemical analysis of the sample has been made by means of an approved instrument operated by him in which a substance or solution suitable for use in that approved instrument and identified in the certificate was used,
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> (ii) the result of the chemical analysis so made, and
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> (iii) if the sample was taken by him,
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> (A) That at the time the sample was taken he offered to provide to the accused a specimen of the breath of the accused in an approved container for his own use, and, at request of the accused made at that time, such a specimen was thereupon provided to him,
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> (B) the time when and place where the sample and any specimen described in clause (A) was taken, and
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> (C) that the sample was received from the accused directly into an approved container or into an approved instrument operated by him,
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> is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

Kerans, D.C.J. has obviously directed himself to the following part of section 237(1) (f) in coming to his decision:

> 237 (1) (f) where a sample of the breath of the accused has been taken pursuant to a demand taken under subsection (1) of section 235, a certificate of a qualified technician . . . is evidence . . . .

What the judgement says is that to be valid certificate evidence it must be obtained "pursuant to a demand taken under subsection (1) of section 235", and that there can be no valid demand under S.235(1) unless there are reasonable and probable grounds.

Kerans, C.J. also held that the absence of reasonable and probable grounds, while it would render *certificate* evidence inadmissible due to the demand not being made under authority of statute, would not have the same effect on evidence offered *viva voce*:

> Were this the ordinary case of evidence perhaps illegally or unfairly obtained, but nevertheless obtained, the Supreme Court of Canada has very recently, in *The Queen v. Wray*, [1970] 4 C.C.C. 1, 11 D.L.R. (3rd) 673, 11 C.R.N.S. 235, affirmed that, however unfairly obtained, evidence obtained may be used against the accused, and that the trial Court has no right on these grounds to refuse admission of evidence of substantial probative value. If the Crown here were attempting to introduce the results of this breathalyzer test *viva voce*, and not by any procedural short cut, its position would be very strong.[2]

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[2] *Ibid* at p. 540.

In *Reference Re Sections 222, 224 and 224 A of the Criminal Code*,[3] Limerick, J.A. for the Court at pp. 248-49 also includes reasonable and probable grounds as one of the conditions precedent for proving a charge under S.234 of the Criminal Code:

> At this point, it may be convenient to state in general terms the Court's opinion of what should be proved to establish a case under S.224 of the Criminal Code, i.e., a charge that the accused drove or had the care or control of a motor vehicle, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 mg. of alcohol in 100 ml. of blood. These include: 1. A peace officer must show that on reasonable grounds he believed the accused was committing, or at any time within the preceding two hours had committed, an offence under S.222 and for that reason he made a demand of the accused pursuant to S.223(1) to provide a sample of his breath, and to accompany the peace officer for the purpose of enabling the sample to be taken.

The learned Justice made two key statements in what is essentially a reproduction of S. 235(1), formerly S.223(1). He held that a peace officer "must" show reasonable grounds in order that a charge under S.234—formerly S.222—be proved. The word "must" does not occur in S.235(1). The judge also used the phrase "for that reason" to make it clear that the only basis on which a peace officer can make a demand pursuant to S. 235(1) is the existence of reasonable and probable grounds for belief that an offence has been or is being committed. If the peace officer does not connect the demand with reasonable and probable grounds the charge cannot be proven, for this link "must" be proved.

The B.C. Supreme Court has also held that reasonable and probable grounds are a condition precedent to the admissibility of certificate evidence. In the case of *R. v. Manchester*,[4] the N.B. *Reference*[5] case and *R.v. Wirsta*[6] were followed, and the Court held the following, per Munroe, J. at p. 329:

> Clearly then, such certificate is not evidence unless the requirements of S.223 . . . are met. That section authorizes a peace officer to demand a sample of breath from a person where he 'on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under Section 222' (that is, driving or having the care or control of a motor vehicle while his ability to drive is impaired by alcohol or a drug) but not otherwse. Failure at trial to show such belief on the part of the peace officer renders the certificate inadmissible and means that there was no evidence before the Court to disclose the result of the chemical analysis.

It is submitted that the three cases cited requiring reasonable and probable grounds as a condition precedent to a valid demand to take the breathalyzer test give the correct interpretation of S.235(1). If this were not so, the mention of reasonable and probable grounds in S.235(1) would be totally superfluous.

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[3] [1971] 3 C.C.C. (2nd) 243 (N.B.C.A.).

[4] [1971] 4 C.C.C. (2nd) 327.

[5] *Supra*, footnote 3.

[6] *Supra*, footnote 1.

Despite what seems to be the obvious intent of S.235(1), however, there is a line of authority to the effect that reasonable and probable grounds are not a condition precedent to a valid demand to take the test and, therefore, not a requirement for the admissibility of certificate evidence obtained subsequent to a demand made by a peace officer.

In *R. v. Orchard* [7], a decision of the Saskatchewan Court of Appeal, an appeal against a breathalyzer conviction was dismissed. It was held that reasonable and probable grounds were not required.

In *R. v. Showell* [8], a decision of the Ontario High Court, Haines, J. at p. 255 held that reasonable and probable grounds were not a condition precedent to a valid demand under S. 235(1):

> The Respondent alleges that it is a condition precedent to the officer's making a demand that he have reasonable and probable cause to believe that the accused within two hours had been guilty of impaired driving. I must disagree. For a demand to be made pursuant to S.223(1) it is sufficient merely for the officer to say he is asking for a breath sample pursuant thereto. Nothing else is necessary, and were the section construed to mean anything else but that, the problems in enforcing remedial automobile legislation would be virtually insurmountable. Considering the death and destruction caused by drinking drivers, no such intention should be imparted to parliament in the absence of the clearest language.

The validity of the above judgement is questionable. It advocates the interpretation of the breathalyzer legislation in a way that will best facilitate convenience of enforcement. If this approach were accepted, it would constitute a rather novel principle of statutory interpretation. The desire of the judge in this case to see the death and destruction caused by drinking drivers eliminated is no doubt laudable, but it is no justification for flying in the face of the clear wording of S.235(1) requiring reasonable and probable grounds.

At this point, it might be useful to discuss what the Courts have defined as reasonable and probable grounds. This concept was scrutinized in the case of *R. v. Murphy.* [9] In the course of this decision Coffin, J.A. quotes at p.15 from the judgement of O'Hearn, J.M.C.H. in *R. v. Cluney:* [10]

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7 [1971] 13 C.R.N.S. 235.

8 [1971] 4 C.C.C. (2nd) 252.

9 (1972) 3 N.S.R. (2nd) 11 (N.S.C.A.).

10 1971, C.C. 47070. This is Coffin, J.A.'s citation. He gives no page number for the excerpt.

> . . . the demanding officer has to have a belief that the recipient of the demand is committing, or at any time within the preceding two hours has committed an offence under s.222. I discussed what the quality of that belief would have to be in *R. vs. Percy Herbert Jewers*, CC 1 46600, 1971, June 21, unreported, and I adhered to the opinion that it does not have to be a certainty, or even a belief that the defendant is more probably impaired than not, but there must be a belief in a substantial probability that the defendant is committing, or has committed within the time limited, a specified offense.

In clarifying what constitutes reasonable and probable grounds Coffin, J.A. at pp. 15-16 also referred to the judgement of Justice O'Hearn in *R. v. Jewers:* [11]

> The legislative purpose of Criminal Code s.223(1) is to give peace officers a means of subjecting motorists who obviously pose a potential threat to the public because of their consumption of alcohol or a drug to the test provided for in Criminal Code s.224A. That legislative purpose would obviously be frustrated if the officer had to be convinced beyond a reasonable doubt that the suspect was guilty or even if he had to be convinced by a preponderance

According to Justice O'Hearn, therefore, reasonable and probable grounds exist when there is a belief "in a substantial probability" that the suspect is impaired, based on "strong objective grounds". After approving Justice O'Hearn's view of reasonable and probable grounds, Coffin, J.A. went on to hold that there had been these grounds in the case before him, and in so doing gave an indication of what might constitute some of the "strong objective grounds" which could give rise to reasonable and probable grounds for belief on the part of a peace officer that an offence had been or was being committed:

> On arriving at the scene of the accident the Constable noticed that Murphy's eyes were glossy and he noticed the smell of liquor coming from the car. When the appellant walked from his own car to that of Detective Spark, Constable Boutilier noticed the unsteadiness in his gait and that 'He was kind of light on his feet. Just not sure. Like he was placing his feet.' At the Victoria General Hospital he noticed Mr. Murphy's eyes were glossy.
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> In my view these observations, together with the fact that it would be clear to Constable Boutilier that Murphy was behind the steering wheel of a vehicle which had just bumped into the rear end of the taxi, were sufficient to provide Constable Boutilier with reasonable and probable grounds for believing that the appellant was committing or had committed within the preceding two hours an offence under s.222 of the Code, and that he had such reasonable and probable grounds for such belief at the time he gave the appellant the demand. [12]

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[11] 1971 C.C. 46600 at pp. 8-9. Again, this is Coffin, J.A.'s citation of evidence. Viewed in this light, it must surely be sufficient that there are strong objective grounds, although not necessarily conclusive or preponderating, to think that the suspect's ability to drive a motor vehicle is impaired by alcohol or a drug.

[12] *Supra* footnote 9, at p. 16.

It is submitted that requiring such objective grounds as are typified in *R. v. Murphy* [13] to establish reasonable and probable grounds would hardly render the problems of enforcing the breathalyzer legislation 'insurmountable' as was suggested in *R. v Showell* [14] Drunken drivers inevitably betray themselves by the signs of mental and physical dysfunction which accompany impairment through drink, and the requirement of reasonable and probable grounds merely insures that a peace officer will not make a demand to an individual who shows no objective signs of impairment.

So far we have been dealing with the requirement of reasonable and probable grounds in the case where a demand to take the test has been made, and a test taken. Does, then, the requirement of reasonable and probable grounds have any relevance where the test has been refused? There are cases which, while denying the relevance of reasonable and probable grounds to the admissibility of certificate evidence when the test is taken, nevertheless hold that the absence of reasonable and probable grounds constitutes a reasonable excuse for not submitting to the test. This interpretation obviously grows out of S.235(2) of the Criminal Code which reads as follows:

> 235 (2) Every one who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under subsection (1) is guilty of an offence punishable on summary conviction and is liable to a fine of not less than fifty dollars and not more than one thousand dollars or to imprisonment for not more than six months, or both. 1968-69, c.38, s.16.

In *R. v. Verischagin*, [15] for example, it was decided that the absence of reasonable and probable grounds was material only where the test had been refused. Culliton, C.J.S. reasoned at p. 475 as follows:

> The wording of S.223(1) [now S.235(1)] places upon a peace officer the onus of determining whether there are reasonable and probable grounds, in his belief, that a person within the preceding two hours had committed an offence under s.222 of the Criminal Code. If he decides that question in the affirmative, then he may make the demand for the breath sample. If that sample is obtained, then whether or not the belief of the peace officer was well founded is neither open to review by the Court nor material to the admissibility of the relevant certificates. Such sample of breath has been taken pursuant to a demand under S.223(1).
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> Whether or not the belief of the peace officer was well founded would be a material factor when a person is charged without reasonable excuse of failing or refusing to comply with the demand made to him for a sample of his breath. If the evidence failed to establish that there were reasonable and probable grounds for the peace officer's belief, that would constitute a reasonable excuse for his failure or refusal to comply with the demand.

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13 *Supra* footnote 9.

14 *Supra* footnote 8.

15 [1972] 6 C.C.C. (2nd) 473.

The difficulty with this judgement is that there is nothing in S.235(2) (which talks in terms of a "reasonable excuse" for refusing or failing to comply with a peace officer's demand) to connect this reasonable excuse with an absence of reasonable and probable grounds. Unfortunately, S.235(2) does not say that an absence of reasonable and probable grounds constitutes a reasonable excuse under S.235(2). If it is admitted, however, that one cannot have a valid demand to take the breathalyzer test unless there are reasonable and probable grounds the problem is solved. One need not then argue reasonable excuse under S.235(2). An accused could merely say that because there were no reasonable and probable grounds, there was no lawful demand, and because there is no obligation to submit to an unlawful demand, therefore, there was no obligation on him to take the test. He justifies his refusal to take the test, in other words, solely under S.235(1) on the basis that reasonable and probable grounds are there laid down as a condition precedent to a valid demand.

It may very well be that the legislature meant the absence of reasonable and probable grounds to be a reasonable excuse for not taking the test under S.235(2). If this is so, however, the legislation should state it clearly.

In *R.v. Showell*[16] it was again held (at p. 256) that an absence of reasonable and probable grounds was only relevant where the breathalyzer test had been refused:

> In summary, the requirement of reasonable and probable grounds of S.223(1) is not an ingredient of the demand such that the non-existence of the grounds results in the demand not being a S.223(1) demand. Rather, it is a substantive provision setting out a defence for a refusal to give a breath sample. Therefore, even if the demand is made without reasonable and probable grounds it is a S.223(1) demand within the meaning of S.224A(1) (c) and, therefore certificate evidence of the results is admissible.

It is difficult to follow the logic of this judgement. If a demand, as this judgement says, is valid even in the absence of reasonable and probable grounds, then why should a person be able to escape the consequences of refusing to comply with such a legal demand simply by invoking an absence of these same grounds. If there is a legal demand it would seem that this should settle the matter, reaonable and probable grounds or not.

The only way of approaching the problem logically, it is submitted, is to say that the consequence of an absence of reasonable and probable grounds is to render a demand made pursuant to S.235(1) invalid. This approach would reject the holding of the *Showell*[17] case insofar as it says that there can be a valid S.235(1) demand without reasonable and probable grounds.

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16 Supra footnote 8.

17 *Ibid.*

The above suggested approach of invalidating a demand in the absence of reasonable and probable grounds would, on the other hand, give the same result as the *Showell*[18] case where the test had been refused and no reasonable and probable grounds were found. It has the advantage, however, of providing a logical basis for the result inasmuch as it does not state peremptorily that an absence of reasonable and probable grounds is a defence for refusing the test. It gives as a logical basis the interpretation of S.235(1) in such a way as to require reasonable and probable grounds as a condition precedent to a valid demand, and therefore as a condition precedent to any obligation on the part of a citizen to submit to a breathalyzer test.

In conclusion, it can be said that the inclusion of the phrase "reasonable and probable grounds" in S.235(1) of the Criminal Code has given rise to a great deal of confusion in cases resulting from prosecutions under the breathalyzer legislation. We are left with a chaotic situation where the courts of New Brunswick, Alberta, and B.C. have required proof of reasonable and probable grounds before certificate evidence can be admissible, while courts in Ontario and Saskatchewan have decided the opposite. All the courts, on the other hand, seem to agree that the defence of reasonable and probable grounds is available where the test has been refused, whether the defence arises under S.235(1) or S.235(2). However, as pointed out, there could be some clarification in this area. Even though all the courts arrive at the same latter result the reasoning leading to this result is divergent.

It is submitted that the proper course would be for S.235(1) to be amended in such a way as to make it perfectly clear that reasonable and probable grounds are a condition precedent to the validity of a demand to take a breathalyzer test. This would give rise to two important results. In the case where the test is *taken* and reasonable and probable grounds are not proved, certificate evidence would not be admissible. In the case where the test is *refused* and reasonable and probable grounds are not proved, the case would be dismissed on the grounds that the accused was under no obligation to submit to an invalid demand to take the breathalyzer test.

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18 *Ibid.*