NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. McKeen, 2001 NSCA 14]

Docket: CA 163007
Date: 20010125

Roscoe, Hallett and Flinn, JJ.A.

BETWEEN:

THOMAS IAN MCKEEN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Joseph A. MacDonell, for the Appellant Kenneth W.F. Fiske, Q.C., for the Respondent
Appeal Heard:	November 14, 2000
Judgment Delivered:	January 25, 2001
THE COURT:	The appeal is dismissed as per reasons for judgment of Flinn, J.A., Hallett, J.A., concurring; and, Roscoe, J.A., dissenting by separate reasons.

Reasons for judgment:

[1] This is an appeal pursuant to s. 839(1) of the **Criminal Code** from a decision of Justice Margaret Stewart, sitting as a Summary Conviction Appeal Court, who dismissed an appeal from conviction entered by Judge John Embree, of the Provincial Court, on a charge of refusing a breathalyzer demand, contrary to s. 254(5) of the **Criminal Code**.

Facts

[2] Two Crown witnesses testified at the trial and there was no conflict in their evidence. No defence evidence was called. The appellant's sister-in-law testified that on July 9, 1999 the appellant arrived at a family party in Enfield, Nova Scotia, at approximately 8:30 in the evening. He arrived at the party in a van owned by him but driven by his friend. He had been drinking. Sometime between 10:00 and 10:30 p.m., the appellant had an argument with others at the party and then left the house and walked towards the van which was parked in the driveway. Sometime later, the van moved. Her nephew and the appellant scuffled with each other at the driver's door of the van. Her niece called the police. On cross-examination the

witness indicated that she did not see whether the appellant was in the driver's seat of the van when it moved and she could not see if there was anyone else in the van at the time.

[3] Constable Paul Comeau of the R.C.M.P. testified that he arrived at the McKeen party at approximately 10:30 p.m. in response to a complaint of an impaired driver and a fight between family members. When he arrived the appellant and another man were standing near the driver's door of a van and were "arm-locked". It was obvious to him that they were involved in a confrontation. The appellant was "notably intoxicated", quite upset and yelling with slurred speech. The officer was informed by others that the appellant was drunk, had moved the vehicle and they were trying to prevent him from driving. The officer detained the appellant who became physically and verbally combative. It was necessary to handcuff him. As he was leading the appellant to the police car, he gave him a "quick Charter warning", not read from a card, but from memory. He locked the appellant in the back seat of the police car for twenty minutes or more while he spoke to the witnesses.

[4] The appellant was still "causing quite a stir" in the back seat of the cruiser, so after completing the investigation, the officer drove a few hundred feet from the house and stopped on the side of the road. At that time, he read the complete **Charter** warning from his card, that is, he informed him that he was under investigation for impaired driving and causing a disturbance and advised him of his right to retain and instruct counsel without delay. He also advised him of the right to obtain legal assistance through Legal Aid. It was then 10:57 p.m. When asked if he understood, the appellant pretended that he did not understand English, and spoke in what the officer thought may have been German. The officer told the appellant of his right to remain silent. When he asked the appellant if he wanted to call a lawyer, the appellant would not acknowledge that he understood and kept speaking German. The officer read the right to counsel advice at least three times.

[5] Next, Constable Comeau read the breath demand to the appellant:

> . . . I demand you to accompany me to the Enfield Detachment and to provide samples of your breath suitable to enable analysis to be made in order to determine the concentration, if any, of alcohol in your blood. Should you refuse this demand, you will be charged with the offence of refusal.

[6] The appellant told the officer:

> . . . That's a definite refusal and I wasn't behi ... I didn't, ah ... I wasn't behind no goddamn wheel.
>
> . . .
>
> . . . What was I driving? No doubt, it's going to be a refusal.

[7] The officer's evidence continued:

> I explained to him the refusal, the consequences of a refusal, again, in more layman's terms. I then, again, asked him if he was going to provide a sample of [his] breath, and then he, ah, continued to speak in German. ... He called me a liar and said he never did the things that I'm accusing him of and that he was not behind the wheel of any vehicle.
>
> . . .
>
> At that point, I accepted his refusal. He made it very clear he wasn't going to provide a sample, and at 2304 we left for the office. At 2309 arrived at the office, asked him if he wanted to call a lawyer, um, and at that point, he said, 'Yes, if you're going to charge me, I'll call a lawyer'. . .

[8] The appellant was provided with a phone and assistance in calling and:

> He came out of...he came out of the phone room then about 2337 hours and I had asked him if he got a hold of a lawyer...spoke to his lawyer. He said

> he had, and that he, ah...at that point, he had indicated that he, ah, changed his mind and he wanted to provide a sample of his breath. I discussed that with him for a short time and explained to him that I already accepted his refusal.

[9] The demand was made pursuant to s. 254(3)(a) of the **Code** which reads:

> 254. (3) Samples of breath or blood where reasonable belief of commission of offence - Where a peace officer believes on reasonable and probable grounds that a person is committing, or at the time within the preceding three hours has committed, as a result of consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as it is practicable.
>
> (a) such samples of the person's breath as in the opinion of the qualified technician, or
>
> . . .
>
> such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

[10] The offence of failing or refusing to provide a sample is pursuant to s. 254 of the **Code** which reads:

> 254. (5) Failure or refusal to provide sample - Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.

[11] On cross-examination, Constable Comeau agreed that the appellant told him several times that he had not been driving. He did not advise the appellant that, even though he was not driving, he could still be charged with refusal. He also agreed that the appellant never indicated that he did not want to call a lawyer. Constable Comeau did not advise the appellant that he had accepted the refusal until after the appellant said he wanted to provide a breath sample.

[12] Judge Embree dismissed the appellant's motion to exclude the evidence of the refusal on the basis of a violation of his s. 10(b) right to retain and instruct counsel without delay. As well, he found that the Crown had proven all the elements of the refusal charge beyond a reasonable doubt and thus entered a conviction. The trial judge said:

> In my view there were reasonable and probable grounds for Cst. Comeau to give a breathalyzer demand to Mr. McKeen. I'm satisfied he did give Mr. McKeen a proper breathalyzer demand and I'm satisfied from all of the evidence here that Mr. McKeen clearly and unequivocally refused to comply with that demand and that the consequences of refusing to comply were clearly explained to him . . . I don't conclude, from his words about the fact that he wasn't driving the motor

> vehicle as part of the explanation for refusal, much of anything in the circumstances. It could be that Mr. McKeen was under some mistake in law that that was somehow an essential element which backed up the Constable's right to give the demand in the first place. That doesn't give him a defence to a charge of refusal . . .

[13] The trial judge referred to this court's decision in **R. v. Bowman** (1978), 25 N.S.R. (2d) 716, and concluded that this was not a case where during a continuous conversation or ongoing transaction the suspect at first refused and then changed his mind. Here, he said, there was an unequivocal refusal in the face of the opportunity to contact counsel and an explanation of the consequences of refusing, and the officer had a right to accept that.

[14] The appellant was acquitted by the trial judge of the impaired driving charge pursuant to s. 253(a) of the **Code** because there was insufficient evidence of care and control.

[15] In dismissing the summary conviction appeal, Justice Stewart found that the facts of this case were very similar to those in **R. v. Schmautz**, [1990] 1 S.C.R.398; 53 C.C.C.(3d) 556, and concluded on that basis that there was no breach of the appellant's s. 10(b) **Charter** rights. With respect to the argument

that the trial judge had erred in finding that the appellant had refused the demand to provide a breath sample, she said:

> It seems to me that Judge Embree succinctly and appropriately applied the law as stated in **R. v. Bowman** to the facts as he found them to be. On consideration of all of the circumstances, he found that the appellant made a clear and unequivocal refusal even in the face of the opportunity to contact counsel and an explanation of the consequences of the refusal. The officer accepted the refusal at 11:04. The appellant's willingness to take the test some thirty-six minutes later is a separate and distinct event and does not provide a defence to the refusal charge arising out of the earlier unequivocal refusal.

(emphasis added)

Issues

[16] The points in issue are enumerated in the appellant's notice of application for leave to appeal dated April 6, 2000, as follows:

> 1. THAT the learned Appeal Court Judge erred in upholding the learned trial Judge's decision that the Appellant's right to retain and instruct counsel without delay granted pursuant to s.10 of the Canadian Charter of Rights and Freedoms had not been violated;
>
> 2. THAT the learned Appeal Court Judge erred in upholding the learned trial Judge's decision to not to declare inadmissible the evidence of Refusal obtained as a result of the violation of the Appellant's Charter Rights (s.10);

3. THAT the learned Appeal Court Judge erred in upholding the learned trial Judge's finding that the Appellant had refused the breathalyzer demand.

Ground 1 - Charter, s.10(b)

[17] The appellant submits that the police officer violated his right to retain and instruct counsel pursuant to s.10(b) of the **Charter** by:

(1) failing to advise him of his right to counsel after making the breathalyzer demand, and

(2) by failing to provide the opportunity to speak to counsel before accepting the appellant's comments as a refusal.

[18] Both the appellant and the respondent refer to **Schmautz**, ***supra,*** as the guiding authority. In that case, two police officers came to the accused's house and advised him that they were investigating a hit and run accident. The police asked him if they could come in and he agreed. The police advised the accused of his right to remain silent and his right to

retain and instruct counsel. After 10 minutes of questioning about the accident and whether he had been drinking, they demanded that he accompany them to the police station for the purpose of providing breath samples. The accused said he would not go with them. They said he would be charged with refusal and he ushered them out of his house.

[19] In the Supreme Court of Canada the issues were whether Mr. Schmautz was detained at the time of the demand and if so, whether the advice regarding the right to retain and instruct counsel was sufficient, considering that it was given before the demand. As to the first issue, Gonthier, J. for the majority stated at para. 19:

> . . . What this kind of detention involves is the psychological or moral constraint resulting from the demand. In **Therens** and **Thomsen,** Le Dain J. held that criminal liability for refusal to comply constitutes the effective compulsion or coercion required for a finding of detention. The requirement that access to counsel must be prevented or impeded is also fulfilled by virtue of that fact of criminal liability. The breathalyzer demand automatically and instantly puts the person to whom it is directed into a unique situation of legal jeopardy in which he or she is required to provide forthwith an answer which in itself might be a criminal offence. In this context, the right to be informed of the right to counsel takes on a particular meaning and I think that a purposive approach to s. 10 of the Charter requires that the recipient of the demand be aware of his right to counsel.

[20] On the question of whether the **Charter** advice was adequate in the circumstances, the majority was of the view that the warning was not insufficient for the "sole" reason that it was given before the detention. Gonthier J. concluded by writing at para. 28:

> In this case, by serving both the police and the Charter warnings on the appellant at the outset of the short interview, the police officers alerted him that he was suspected and was being investigated in relation to a serious offence. These warnings made him aware that all he would say could incriminate him and that he had the right to remain silent and to instruct counsel on every aspect of the interview that followed. The situation that arose with the breathalyzer demand was directly connected to the investigation. Indeed, the demand generated the type of situation where the appellant might be expected to take advantage of the warning given to him a few minutes earlier. The demand itself, together with the fact that he was also advised of the criminal consequences of a refusal, would normally trigger the consideration of the appellant of whether or not to instruct counsel. The appellant never mentioned that he wished to contact a lawyer.

[21] In response to the suggestion by the Crown that Mr. Schmautz was not detained while in his own home, because the officers were not doing anything to prevent him from accessing advice from counsel, Justice Gonthier wrote at para. 18:

> . . . At first glance, it may seem difficult to admit in this case that the state assumed control over the movement of the appellant so as to prevent him from instructing counsel. In **Thomsen**, the detainee was faced with the demand on the roadside and was forced into making a decision as to whether or not he should blow in the screening device, with no material

> possibility to have access to counsel. In the present case, the respondent argued, the appellant had access to his own telephone and was free to use it at all times.
>
> It might be true that the appellant was at no time physically prevented from using his telephone, but this is clearly beside the point. Physical constraint bears no relation with the kind of detention arising from criminal liability for refusal to comply with a demand . . .

[22] Although Justice Stewart indicated that **Schmautz** was "on all fours" with the facts of this case, and that as to the availability of the telephone, "[l]ocation in the home or location on the roadside is immaterial", I respectfully disagree. The specific issue to which the availability of a telephone was immaterial for Justice Gonthier was whether the accused was detained. He was not dealing with whether the accused was given a reasonable opportunity to consider, or exercise, his right to counsel, which are the issues in this case.

[23] Lamer, C.J.C. in **R. v. Bartle** (1995), 92 C.C.C. (3d) 289 said at para. 16:

> The purpose of the right to counsel guaranteed by s. 10(b) of the **Charter** is to provide detainees with an opportunity to be informed of their rights and

> obligations under the law, and most importantly, to obtain advice on how to exercise those rights and fulfill those obligations.
>
> (emphasis added)

[24] At para. 17 he lists three distinct duties of the police once a person has been detained:

> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances), and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

> (See, for example, **Manninen**, at pp. 391-2; **R. v. Evans** (1991), 63 C.C.C. (3d) 289 at pp. 304-5, [1991] 3 S.C.R. 869, 4 S. CR (4th) 144, and **Brydges**, at pp. 340-1.)...

[25] The first of these criteria is said to be an informational duty and the second and third are implementation duties.

[26] This appeal concerns all three duties. On the facts in this case where a breathalyzer demand is made and where refusing is the offence, the issue is whether in those circumstances an accused should be given a reasonable opportunity to consider whether he or she wants to exercise the right to counsel.

[27] The second duty, as quoted above, begins with "if a detainee...". It is a duty that is only engaged if and when a detained person expresses an indication that he or she wishes to exercise the right. **Bartle** dictates that the police duties to provide the opportunity to exercise the right and to refrain from eliciting evidence do not arise unless the detainee invokes the right and is reasonably diligent in exercising

it. In the circumstances of this case, the time available to the appellant in which to make that intention known is critical. Two questions arise:

(1) Is it reasonable in the context of a breathalyzer demand that the time be limited to the few minutes in the police car on the roadside between the reading of the rights regarding counsel and the reading of the breath sample demand, even though there was apparently no telephone, and no breathalyzer or technician available at that point? If so, it was proper for the police officer to demand (and accept) the appellant's refusal in those few minutes.

(2) Or, was the time still running until the arrival at the police station five minutes after the demand, when the police officer asked if he wanted to call a lawyer? If not, it is difficult to understand why the officer asked the appellant once more if he did want to contact counsel.

[28] In considering these questions one should keep in mind the following comment by Lamer, C.J.C. at para. 60 of **Bartle**:

> What is singular about the refusal offence in the impaired driving context is that it punishes a person who refuses to incriminate him - or herself.

[29] We were not referred to any case with identical facts or any where a refusal was “accepted” at roadside and then minutes later, after consulting counsel, the detainee asked to take the breathalyzer test. In most of the reported breathalyzer cases where the right to counsel is in issue, it appears that the refusal is not accepted until the return to the police station. However, some assistance in answering the specific questions raised in the preceding paragraph can be gleaned from a few cases with analagous circumstances.

[30] **R. v. Tremblay** (1987), 37 C.C.C.(3d) 565 (S.C.C.) is one of the cases referred to by Lamer, C.J. in **Bartle,** as authority for the proposition that the police must provide a reasonable opportunity to exercise the right to retain and instruct counsel. In that case, the accused had expressed a wish to contact a lawyer after having the demand for a breath sample read to him. Upon arriving at the detachment, he was provided with a telephone and called his wife to ask her to get him a lawyer. Immediately after that call, he was asked to provide the sample,

which he did. The Supreme Court of Canada agreed with the District Court Judge that there had been a denial of s.10(b) rights but found the test results admissible. Lamer, C.J., for the Court said at p. 567:

> From the moment the accused was intercepted on the road to the moment he was asked to give the first sample of his breath his behaviour was violent, vulgar, and obnoxious. A reading of the record and the findings of fact below satisfy me that, while the police, following the request for counsel, did not, as they must, afford the accused a reasonable opportunity to contact a lawyer through his wife before calling upon him to give a breath sample, their haste in the matter was provoked by the accused's behaviour. Indeed, throughout this encounter with the police, the accused, as was found by the trial judge as a matter of fact, "was deliberately attempting to make the investigation difficult" and "was actively obstructing it". As testified to by a police officer, it appeared to the police that the accused was stalling when he was given the telephone to contact a lawyer.
>
> Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this court's decision in **R. v. Manninen** (1987), 34 C.C.C. (3d) 385, 41 D.L.R. (4th) 301, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath. While this is not the case here, the accused's conduct was, to some degree, misleading in that regard. While the police hastiness does not change the fact that the detainee's right to counsel was violated, the reasons therefor make it understandable and are relevant when one addresses the s. 24(2) issue. In my view, the admission of the evidence obtained would not, having regard to all of the circumstances, bring the administration of justice into disrepute.

[31] In **R. v. Woods** (1989), 49 C.C.C. (3d) 20 (Ont.C.A.) (leave to appeal refused (1990), 60 C.C.C. (3d) vi), the accused was advised of his right to retain

and instruct counsel and he said he understood. Then he was immediately asked if he had stabbed someone that night. He replied that he had. With respect to that statement, Griffiths, J.A. for the court said:

> It is fundamental that once the detainee has been informed of his right to counsel, some reasonable time should be allowed to permit him to consider his rights before any further questioning begins, if for no other reason than to be satisfied that the detainee fully understands his rights. Here, as the trial judge found, the time gap between the advice as to his rights following his arrest and the next "somewhat provocative" question was "inappropriately short".
>
> (emphasis added)

[32] In **R. v. Forsythe** (1992), 109 N.S.R. (2d) 179, this court dismissed an appeal from a conviction for refusing to provide a breath sample. The appellant was in his home when the police arrived and after determining that they had reasonable and probable grounds to believe that he had just previously been driving while impaired, demanded that he accompany them to the police station to provide a breath sample, and then advised him of his right to retain and instruct counsel. He said: “I’m going to refuse. I’m in my own home.” He was asked if he wanted to contact counsel and he said he would. The police indicated he could call from the police station. Then the phone rang and the appellant wanted to answer it. The

police prevented him from answering the phone and as a result, an altercation ensued. The appellant was taken to the local jail where he made a call to counsel, within earshot of the officers. There apparently was no further discussion and the appellant was charged with refusal. The trial judge found that the accused had given a complete and full refusal prior to asking to exercise his rights. In dismissing the appeal, Chipman, J.A. concluded that none of the evidence on which the conviction was based was obtained in violation of the **Charter**. Presumably the violation of the **Charter** right was the failure to provide privacy for the phone call.

[33] The application of the principles developed in these cases to the facts of this case, necessitates further emphasis of two factors: the appellant was reasonably diligent in exercising his rights as soon as a telephone was made available and in this case, the Crown did not seek to prove that the appellant had waived his right to counsel.

[34] This case is distinguishable from **Forsythe**, ***supra***, because in that case the advice respecting the right to counsel was given after the demand. Then, there was a complete refusal followed by a breach of the right to make a private phone call.

Here the demand was made after the advice regarding counsel. The refusal was accepted without the accused having indicated that he did not want to exercise his right to counsel, before, in my opinion, he was given a reasonable opportunity to consider whether he wanted to exercise that right.

[35] In conclusion, on this issue, in my opinion, there was no infringement of the appellant's s.10(b) rights based only on the fact that no further advice respecting the right to counsel was given after the reading of the breathalyzer demand. However, I would answer the questions raised in paragraph 23 herein, by concluding that the time period during which the appellant had to make known his desire to exercise his right to consult counsel, was still running upon arrival at the police station, some 12 minutes after first being advised of his rights.

[36] It can be inferred from the invitation to use the telephone to call counsel after arrival at the station, that the officer thought the appellant's opportunity to indicate a desire to exercise his rights, in order to engage the implementation duties described in **Bartle,** was still open at that time. When asked why he asked the appellant if he wanted to call a lawyer, the officer explained that, "It's always my

practice immediately upon arrival to cells to ask that question." As well, the fact that the appellant's acceptance of that offer was stated to be on the basis that "... if you are going to charge me...", and earlier had said "... it's going to be a refusal", allows for the inference that the appellant thought he still had time to both exercise his right to counsel and determine whether he should provide the breath sample. The appellant had not been advised that the refusal had been accepted before he completed his phone call. By accepting the appellant's initial reaction to the demand for a breath sample, as the foundation for the refusal charge, the duty of the police to provide the appellant with a reasonable opportunity to consider his rights to counsel, before eliciting evidence from him, was breached. By making the breathalyzer demand immediately after receiving no meaningful response to the **Charter** advice, the officer did not provide the appellant with a reasonable opportunity to consider his right to counsel. The appellant was therefore denied the rights granted in s.10(b) of the **Charter**, and it was an error in law to have determined otherwise.

Ground 2 - Charter, s. 24(2)

[37] In its factum, the Crown concedes that evidence such as a refusal of a breath demand obtained from an individual as a result of an infringement of the right to

counsel faces almost certain exclusion under s. 24(2) of the **Charter**. It is contended, however, that as a result of the disruptive and uncooperative conduct of the appellant, following **Tremblay**, ***supra***, the evidence of the refusal should be admitted. I disagree. The conduct of the appellant, in my opinion, while possibly obnoxious, and certainly not entirely compliant, could not be described as vulgar or violent. If, as he protested, he had not actually been driving the vehicle, his behaviour is perhaps understandable. Furthermore, he was charged and pleaded guilty to assaulting a police officer as a result of his actions prior to the detention. To use that behaviour as a reason to admit the evidence despite the **Charter** breach, would be rather like double jeopardy.

[38] In **R. v. Shaw** (1988), 82 N.S.R. (2d) 407, this court dealt with a situation where the police gave the roadside demand for a breath sample, which the accused immediately refused. Then he was told of his right to retain and instruct counsel. No request to exercise those rights was made and no offer to use a telephone was extended by the police. While all members of the panel agreed that there was a violation of the accused's s.10(b) rights, Chipman, J.A. for the majority found that the evidence of the refusal should, in any event, be admitted. Macdonald, J.A.,

dissenting, would have relied on s. 24(2) to exclude the evidence. Justice Chipman indicated beginning at para. 29:

> In my respectful opinion, the decision of the learned trial judge was not unreasonable. We are not dealing with a case where the rights were never given. It is true that the delay in giving those rights may have permitted the appellant to commit the offence of refusal. Had he consulted counsel, he may well have avoided committing that offence. However, one must consider the significance of the fact that the rights were given almost immediately after the refusal. The appellant did not at that time purport to exercise the right to counsel which Constable Mosher had then given him. Indeed, he gave some evidence in cross-examination which suggested he was not entirely unaware of the fact that somewhere in the process he should be advised of his rights to counsel.
>
> We were referred on argument to **R. v. Bowman** (1978), 25 N.S.R. (2d) 716; 36 A.P.R. 716, where Macdonald, J.A., said at p. 721:
>
> > "In my opinion the law is correctly stated in the **Rowe** and **Projac** cases. There can be no doubt that the recipient of a demand is entitled to reasonable time in which to decide whether or not he is going to comply. Once, however, he decides he is not going to comply with the demand and makes such decision known to the peace officer the offence of refusal is complete. It is no defence to the charge that he later changed his mind and offered to supply a breath sample. I would, however, add to the foregoing the following caveat. If a person refused to comply with a s. 235(1) demand but immediately thereafter indicated a change of mind and a willingness to take the test then, since the refusal and the subsequent change of heart occurred almost simultaneously, both really comprise the reply to the demand, i.e., form but one transaction, and there would not therefore, in my view, be a refusal in law."
>
> The fact that the appellant upon receiving his rights belatedly did not then seek to exercise them or change his answer persuades me that if Constable Mosher had

> ensured, as he should have done, that the rights were given before calling upon the appellant to answer, the result would have been no different.

[39] In this case, since the appellant did ask to take the breathalyzer test immediately after his telephone conversation with counsel, we can surmise that the result would have been different if the **Charter** breach had not occurred. Although he may have then been charged with failing the breathalyzer test, at least in that event, he would have had the opportunity to argue that he did not have care and control of the vehicle.

[40] In the circumstances of this case, I agree with the submission of the appellant that the remedy for the breach of his right to retain and instruct counsel should be the exclusion of the evidence that formed the basis for the charge of refusal.

Ground 3 - Refusal

[41] It is not necessary to deal with the third ground of appeal.

[42] I would allow the appeal and enter an acquittal.

Roscoe, J.A.

FLINN, J.A.:

[43] I have had the benefit of the reasons for judgment of my colleague, Justice Roscoe. Respectfully, I do not agree with her conclusion that the appellant was denied his s. 10(b) **Charter** rights. In my opinion, Justice Stewart, the Summary Conviction Appeal Court judge, made no error in law in upholding the decision of Judge Embree, the trial judge, who found the appellant guilty of refusing to comply with a breathalyzer demand contrary to s. 254(5) of the **Criminal Code**.

[44] Justice Roscoe has set out the factual circumstances which give rise to this matter, and I will not repeat those here. However, for the purpose of these reasons, I will set out portions of the trial transcript which in my view are particularly relevant.

[45] Constable Paul Jeffrey Comeau, whose evidence the trial judge accepted, testified as to the observations he made of the appellant when he arrived on the scene at approximately 10:30 p.m. on the night in question:

A. Well, it was obvious that he had been fighting with the individual that he was arm-locked with. They were still quite heated up at that point, and it was obvious to me that he was very agitated and worked up, and also notably intoxicated....

A. Um, I took him aside at that point and...to talk to him, he became very agitated with myself....

Q. Okay.

A. ... and my partner was there at the time, and at that time as they had identified him as being dr...had driving...driven a motor vehicle...excuse me...it was obvious to me he was impaired and they had indicated he was impaired. I had detained him for an investigation at that point, and he was combative with me. In fact, we had to physically put him down on the ground and struggle with him to get the handcuffs on him and place him in the back of the police vehicle and the whole time he was yelling and screaming and....

Q. What was he yelling?

A. Obscenities...just obscenities...you know, he was...just screaming.

[46] In the course of his discussions with other parties at the scene Constable Comeau had been given information that the appellant had been driving a motor vehicle prior to the constable's arrival on the scene. His testimony continued as follows:

Q. Okay. What did you do then once you came to the conclusion that he...his ability to operate or have care and control of a motor vehicle was impaired by alcohol or drug and that he had been driving shortly before your arrival?

A. Yeah. So, based on the witnesses who were there indicated that he had been driving, I had taken him aside, as I said earlier, and detained him for the investigation, and that's when he became physically combative and verbally combative with me and we had to wrestle a little bit to get him in the back of the police car. Once he was in the back of the police car, he was handcuffed and, ah, he had a quick verbal warning...Charter warning from myself at that point. I d...

Q. Okay. What time...what time did you give me a quick....

A. Going...going in the back of the police car.

Q. Okay.

A. Yeah.

Q. What...so, what time....

A. And it was just....

Q. ...how long after you arrived would this all have....

A. It would only have been a minute or two.

Q. Okay.

A. Yeah. It wouldn't have been very long.

Q. Okay. And what did you say to him at [t]his point, when you were putting him in the back of the police car?

A. "You are being detained for the investigation of..." I believe I said, "Cause disturbance" at that point, "and impaired driving" because I didn't know exactly what all we were involved with and, ah, he had the...he had certain... "...right to call a lawyer and Legal Aid, and need not say anything, but anything said could be used in evidence." I did not read that from a card at that point. I just said...

Q. You just...

A. ...verbally, from memory.

Q. Okay.

A. Yeah.

Q. Okay.

A. And he was yelling and screaming the whole time.

Q. Okay. What happened then?

A. I locked the...closed the police vehicle, ah, door and left him in the back seat so I could talk...further talk to the witnesses that were present.

[47] Constable Comeau then spent approximately 20 minutes talking to witnesses at the scene and his testimony continued:

Q. Okay. What...what did you then do after having those further conversations?

A. I didn't take any written statements from anyone at that point. He was very...very excitable in the back of the police car and causing quite a stir there still, yelling and screaming, etc. I felt it best to just remove him from the situation there. So, after talking to the family for fifteen, twenty minutes, I drove him down the road about, maybe two or three hundred yards. I just drove out on Bakery Lane and pulled over on the side of the road, turned on the interior lights so we could see each other and then I re-read his complete Charter warning directly from card.

Q. Okay. What exactly...now, what are all the things that you read him at this point and what time would this be?

A. Okay. It was 2257 hours as I recall. I read him the police Charter and warning as it...as I have it directly on my card. It's in my wallet now.

Q. Do you have that with you?

A. Yes, I do.

Q. Okay. If you could just read from...

A. Yes.

Q. ...from the same card. Read now what you read to Mr. McKeen at around 10:57 on July 9th.

A. I said to Mr. Keen (sic),

> "You are under arrest for the investigation of impaired driving and causing a disturbance. You have the right to retain and instruct counsel without delay. You have the right to apply for legal assistance without charge through the Provincial Legal Aid Program."

I asked him at that point, "Do you understand?" He was, ah...he wouldn't acknowledge...an acknowledgement of this demand. He was screaming and yelling continually, and also he kept repeating, "...(inaudible)..." whatever German or...I don't understand German, but it sounded like German to me.

Q. Okay.

A. And, um, he was pretending that he didn't understand English. Of course, we had communicated in English prior to this fine, and then I...so, I would re-read him the dema...the Charter and ask him if he understood, he did that again, and then I would say it in more layman's terms, and then he continued to be uncooperative, and I asked him, ah, if he wished to call a lawyer and he would, again, "...(inaudible)..." and he would just talk in German or whatever and he wasn't acknowledging it and I told him that, ah, "he need not say anything."

> "You have nothing to hope from any promise or favour and nothing to fear from any threat. Whether or not you say anything, anything you say may be used as evidence."

I asked him if he understood that police warning, again, he wouldn't acknowledge understanding that, and this went on for a few minutes, three or four minutes, and ah, it was obvious to me that he was intentionally, ah...he understood, he was just intentionally being uncooperative.

Q. Okay. To your knowledge, is he a German speaking...or sorry...an English speaking person from Hants County. Is he?

A. Yes.

Q. Okay. The...sorry...what all did you read him about his right to counsel? If you could just...I'm not sure I got the whole thing.

A. Sure. After I told him he was under arrest,

> "You have the right to retain and instruct counsel without delay. You have the right to apply for legal assistance without charge, the Provincial Legal Aid Program. Do you understand? Do you wish to call a lawyer now? Do you understand? I can provide you with the telephone number and an opportunity to call a Legal Aid office including the phone number if need be..."

As it's after hours, I told him we had a 1-800 number. We could provide that for him.

Q. Okay. And what was his reply to all of those things?

A. He wouldn't acknowledge understanding. That's when he kept repeatedly speaking German to me. I recall reading him the complete Charter and warnings at least three times.

[48] Constable Comeau then gave the breathalyzer demand to the appellant, and his evidence in that regard is as follows:

Q. Okay. What happened then?

A. I read him the breath demand at that time directly from the card as well.

Q. Okay. What exactly did you read to him?

A. "I demand you to accompany me to the...(inaudible)...detachment and to provide samples of your breath suitable....

Q. To where?

A. Pardon me?

Q. Where did you....

A. Oh, sorry, that was my last posting. Enfield Detachment, Your Honour. I'm still working in BC, I guess.

> "...I demand you to accompany me to the Enfield Detachment and to provide samples of your breath suitable to enable analysis to be made in order to determine the concentration, if any, of alcohol in your blood. Should you refuse this demand, you will be charged with the offence of refusal."

Q. And did...what did he say in relation to that, after you read that....

A. He...he made some comments and, um, um...I'd have to refer to my notebook to quote them, but it was in reference to, "I'm definitely going to refuse that. It's definite refusal. I didn't drive no goddamn vehicle or no...I wasn't behind no goddamn wheel..." or words to that effect. I did write them down in my notebook, Your Honour, at the time.

Q. What you've said here, is that an accurate representation of what he said to you then is...without...or do you want to look at your notes?

A. Yeah, he...he said, “That’s a definite refusal and I wasn’t behi...I didn’t, ah...I wasn’t behind no goddamn wheel.”

Q. What time did you read the breathalyzer demand to him?

A. It was, um, exactly...I would have to refer to my notebook for the exact time, but, ah....

Q. Okay. Well, perhaps do that, just....

A. ...it would have been shortly after 2301 is what I recall.

Q. And these are notes made at the time in your own handwriting?

A. Yes.

Q. Okay. May he refer to those to refresh his memory, Your Honour?

THE COURT: Yes, if he needs to.

A. Looking for the time of the demand?

MR. HAGELL: Yes.

A. Yeah. 2301.

Q. Yes, Okay. What...and then he made these statements about, “...it’s definitely a refusal.” What happened then?

A. I explained to him the refusal, the consequences of a refusal, again, in more layman's terms. I then, again, asked him if he was going to provide a sample of your breath, and then he, ah, continued to speak in German. Then he said, um...actually this is where he made the comment about not being the wheel of no goddamn vehicle. He called me a liar and said he never did the things that I'm accusing him of and that he was not behind the wheel of any vehicle.

Q. Okay. This is all still at the side of the road?

A. Yes, it is.

Q. Okay.

A. Yes.

Q. What happened then?

A. At that point, I accepted his refusal. He made it very clear he wasn't going to provide a sample, and at 2304 we left for the office.

[49] The appellant, being under arrest, was then taken by the constable to the cells at the detachment. There is no evidence of any further discussion between Constable Comeau and the appellant, nor any comment or question by the appellant, after the appellant's refusal to take the breathalyzer test, and during the drive from the roadside to the detachment which took approximately five minutes.

[50] Constable Comeau's testimony continues:

> At 2309 arrived at the office, asked him if he wanted to call a lawyer, um, and at that point, he said, "Yes, if you're going to charge me, I'll call a lawyer."

[51] In cross-examination Constable Comeau testified:

> Q. Okay. And then at 2309, you asked him at the office at the detachment in Enfield if he wanted to call a lawyer?
>
> A. Yes. It's always my practice immediately upon arrival to cells to ask that question.

[52] Constable Comeau then assisted the appellant in arranging his telephone access to a lawyer and then concluded his direct testimony as follows:

> A. He came out of...he came out of the phone room then about 2337 hours and I had asked him if got a hold of a lawyer...spoke to his lawyer. He said he had, and that he, ah...at that point, he had indicated that he, ah, changed his mind and he wanted to provide a sample of his breath. I discussed that with him for a short time and explained to him that I already accepted his refusal.

[53] On the question of whether the appellant's s. 10(b) **Charter** rights had been infringed, the trial judge said the following:

Mr. McKeen, in my view, was properly informed of his rights under s. 10(b) of the **Charter**. Cst. Comeau asked him if he understood, asked him if he wanted to call a lawyer now, told him he could provide him with numbers, etc. Mr. McKeen at that time didn't acknowledge any of those statements or questions, pretended to be speaking German or asking the officer if he spoke German and he as well, being the officer, informed Mr. McKeen, via the police warning, of his right not to say anything. Again, that brought a response in German from Mr. McKeen. In all, the officer said he read the **Charter** and police warning three times before he read the breath demand.

. . .

Based on all of these circumstances and what took place subsequently at the detachment, there's no basis in the evidence here for me to conclude that there's a lack of understanding on Mr. McKeen's part as to anything that was read to him by Cst. Comeau. The officer read the breathalyzer demand properly and Mr. McKeen responded to that. That was a choice on Mr. McKeen's part; he indicated that he was going to refuse, that that was a definite refusal, that he's not going to take it and the officer thereupon explained the consequences of a refusal to Mr. McKeen, presumably for the purpose of giving him an opportunity to reconsider at that point and Mr. McKeen maintained his position throughout. The officer said: "I accepted the refusal.", and then he said: "I drove to the office and arrived there approximately 2309".

In that course of conduct, Cst. Comeau did nothing to infringe or deny any rights under s. 10(b) that Mr. McKeen had. He fully informed him and took a great deal of care and time to inform him of his rights and of the breathalyzer demand and of the consequences of refusing that demand. Mr. McKeen's actions in responding to that demand, having been informed of his right to counsel, having been asked if he wanted counsel, having been told that he could be supplied with a telephone number to contact counsel, were Mr. McKeen's choices. Responding to that in those circumstances was Mr. McKeen's choice and he made that. . . .

Once an accused indicates a desire to contact counsel, then certain obligations fall to police authorities not to question an individual, not to elicit evidence from them that might be incriminating, or in fact any evidence from them, until such time as

> they've had a reasonable opportunity to consult with counsel. That's not the circumstances here. The officer didn't do that and the evidence here establishes, in my view, no infringement of s. 10(b).

(emphasis added)

[54] As to the breathalyzer demand the trial judge said the following:

> In my view there were reasonable and probable grounds for Cst. Comeau to give a breathalyzer demand to Mr. McKeen. I'm satisfied he did give Mr. McKeen a proper breathalyzer demand and I'm satisfied from all of the evidence here that Mr. McKeen clearly and unequivocally refused to comply with that demand and that the consequences of refusing to comply were clearly explained to him. I'm not suggesting that there's a legal obligation on the officer's part to do that, but in the circumstances here, even after making the demand, he did do that. What Mr. McKeen's belief was in refusing I don't have any direct evidence on other than the testimony of the Constable and his words. I don't conclude, from his words about the fact that he wasn't driving the motor vehicle as part of the explanation for refusal, much of anything in the circumstances. It could be that Mr. McKeen was under some mistake in law that that was somehow an essential element which backed up the Constable's right to give the demand in the first place. That doesn't give him a defence to a charge of refusal. Based on Mr. McKeen's actions throughout, as they related to his dealings with Cst. Comeau and Cst. Comeau's, I think, accurate assessment of Mr. McKeen's behaviour as being the behaviour of somebody who set out to be and was uncooperative with the officer, that one can take much stock of any comments that Mr. McKeen made, whether those or others.

[55] As to the whether the circumstances in this case were such that the appellant's subsequent offer to take the test was so closely connected to his earlier words of refusal that the court could decide that both responses comprise the reply

to the demand, and the reply should not be treated, in law, as a refusal, the trial judge said the following:

> One of the leading decisions in this Province about the issue of what constitutes a refusal is the Court of Appeal's decision in the late 1970's in **R. v. Bowman**. That case, as the best of my recollection allows me to paraphrase it, stands for the proposition that a police officer is entitled, and the court is entitled, to take a clear and unequivocal refusal as just that, a refusal. However, if what transpires is an ongoing conversation whereby an individual says: "well I'm not going to take this test", but a conversation continues which results in a change of mind and it can be looked at as one ongoing transaction, the ultimate result of which is an agreement to take the test, then a Court shouldn't, in fairness, look at that as a refusal, and I don't have any quarrel with that. That's not the circumstance here. Mr. McKeen made a clear and unequivocal refusal even in the face of the opportunity to contact counsel and an explanation of the consequences of refusing and the officer had a right to accept that. He had no basis to conclude, after reading the demand at 2301 and getting the statements, that anything more was going to happen. There was no equivocation on that. Mr. McKeen was clear in his refusal and up to that point, clear in his desire not to be cooperative in general. Approximately 36 minutes after the demand was read, when Mr. McKeen came out of whatever room he was in where he had been apparently consulting with counsel and indicated a willingness to do so, in my view, doesn't fall into the category of what **Bowman** suggested or changed the nature of the refusal that was initially made. There's not an absolute right to categorically refuse and then sometime down the road later change your mind. There was no legal requirement on the officer to give Mr. McKeen an opportunity to take the test subsequent to 2337 and in the circumstances here, Mr. McKeen had earlier made a clear and unequivocal refusal which, in my view, makes him guilty of the offence under s. 254(5).

[56] The reference by the trial judge to **R. v. Bowman** is to the decision of MacDonald, J.A. of this court in **R. v. Bowman** (1978), 25 N.S.R. (2d) 716.Justice MacDonald said at p. 721:

> In my opinion the law is correctly stated in the *Rowe* and *Projac* cases. There can be no doubt that the recipient of a demand is entitled to reasonable time in which to decide whether or not he is going to comply. Once, however, he decides he is not going to comply with the demand and makes such decision known to the peace officer the offence of refusal is complete. It is no defence to the charge that he later changed his mind and offered to supply a breath sample. I would, however, add to the foregoing the following caveat. If a person refused to comply with a s. 235(1) demand but immediately thereafter indicated a change of mind and a willingness to take the test then, since the refusal and the subsequent change of heart occurred almost simultaneously, both really comprise the reply to the demand, *i.e.,* form but one transaction, and there would not therefore, in my view, be a refusal in law.
>
> In the present case the appellant indicated unequivocally that he was not going to comply with the demand. He was asked by Constable Welch if he was sure and indicated he was. A period of at least seven minutes then elapsed before he indicated that he wanted to take the test. The two events are separated by sufficient time to constitute, in my view, two separate and distinct events and therefore the subsequent indication by the appellant that he was prepared to comply with the demand cannot avail as a defence to a charge arising out of his earlier unequivocal refusal.

[57] The trial judge decided that the Crown had established all of the elements of the offence, beyond a reasonable doubt, and found the appellant guilty of refusing to comply with a breathalyzer demand contrary to s. 254(5) of the **Criminal Code**.

[58] On the appellant's appeal to the Summary Conviction Appeal Court, Justice Stewart upheld the trial judge's decision. As to whether the appellant was properly advised of his right to counsel, she relied on the decision of the Supreme Court of Canada in **R. v. Schmautz,** [1990] 1 S.C.R. 398. I will say more about this case

later in these reasons. She agreed that the decision of the trial judge (on the issues of whether the appellant unequivocally refused to take the test, or whether his subsequent offer to take the test was severable from his earlier refusal) met the reasonableness test.

[59] On the appellant's appeal to this court, his grounds of appeal are stated in his factum as follows:

> 1. THAT the learned Appeal Court Judge erred in upholding the learned trial Judge's decision that the Appellant's right to retain and instruct counsel without delay granted pursuant to s. 10 of the Canadian Charter of Rights and Freedoms had not been violated;
>
> 2. THAT the learned Appeal Court Judge erred in upholding the learned trial Judge's decision to not to declare inadmissible the evidence of Refusal obtained as a result of the violation of the Appellant's Charter Rights (s. 10);
>
> 3. THAT the learned Appeal Court Judge erred in upholding the learned trial Judge's finding that the Appellant had refused the breathalyzer demand.

[60] Section 10 of the **Charter** provides as follows:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reason therefor;

> (b) to retain and instruct counsel without delay and to be informed of that right.

[61] In **R. v. Bartle,** [1994] 3 S.C.R. 173 Chief Justice Lamer said the following concerning the duties under s. 10 of the **Charter** at p. 191-192:

> This court has said on numerous previous occasions that s. 10(*b*) of the Charter imposes the following duties on state authorities who arrest or detain a person:
>
> > (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;
> >
> > (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances), and
> >
> > (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).
>
> (See, for example, *Manninen*, at pp. 391-2; *R. v. Evans* (1991), 63 C.C.C. (3d) 289 at pp. 304-5, [1991] 1 S.C.R. 869, 4 C.R. (4th) 144, and *Brydges*, at pp. 340-1.) The first duty is an *informational* one which is directly in issue here. The second and third duties are more in the nature of *implementation* duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel.

> Importantly, the right to counsel under s. 10(*b*) is not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duty on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565 at p. 568, 45 D.L.R. (4th) 445, [1987] 2 S.C.R. 435; *R. v. Black* (1989), 50 C.C.C. (3d) 1 at pp. 13-4, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97.
>
> (emphasis added)

[62] It is abundantly clear, on the evidence, that when the constable first arrested the appellant he advised the appellant that he was under arrest for the investigation of impaired driving and causing a disturbance. The constable also gave the appellant a "quick verbal warning" (from the constable's memory of the full **Charter** warning - as opposed to reading the full **Charter** warning from the card). He told the appellant that he was being "detained for impaired driving and causing a disturbance", that he had a "right to call a lawyer and Legal Aid", and "need not say anything but anything he said could be used in evidence."

[63] Further, it is clear on the evidence, that the constable properly informed the appellant of his right to retain and instruct counsel without delay, and of the availability of Legal Aid. Further, he told the appellant that he could provide him with a telephone number for Legal Aid, and since it was after hours he could provide the appellant with a 1-800 number. In fact, the constable gave the

appellant the full **Charter** warning, not once but three times. These three full **Charter** warnings were in addition to the **Charter** warning which the constable gave to the appellant "from memory" when he first arrested the appellant.

[64] It is further clear, on the evidence, that at no time before, or during, these three full **Charter** warnings, nor prior to giving the breathalyzer demand, nor at the time of the breathalyzer demand itself, nor after the constable advised the appellant of the consequences of refusal, did the appellant give any indication whatsoever that he wished to exercise his right to counsel. Instead, the appellant was "intentionally being uncooperative," according to the constable's evidence which was accepted by the trial judge. Had the appellant indicated that he wished to exercise his right to counsel it would have triggered the second and third implementation duties referred to in **Bartle**. The constable would have been under a duty to provide the appellant with a reasonable opportunity to exercise that right, and the constable would have been under a duty not to elicit a response from the appellant to the breathalyzer demand, until the appellant had that reasonable opportunity. The fact that there was no telephone at the roadside, where this was taking place, is irrelevant. If the appellant had invoked his right to counsel the

constable had an obligation to provide a reasonable opportunity for him to contact a lawyer.

[65] Since the appellant, after three full **Charter** warnings, gave no indication that he wished to exercise his right to counsel, then in the words of Chief Justice Lamer in **Bartle**, "the correlative duty of the police to provide a reasonable opportunity and to refrain from eliciting evidence either [did not] arise in the first place, or [was] suspended."

[66] The constable then gave the breathalyzer demand to the appellant. The appellant refused. The constable then explained "in layman's terms" the consequences of refusal. The appellant refused again. The constable accepted the refusal, and took the appellant to the cells at the detachment.

[67] The essence of the appellant's submission with respect to his s. 10(b) **Charter** rights is found in § 32 and 33 of his factum where the following is stated:

> 32. It is clear from the evidence at p. 44- p. 47 that the Constable did not feel it incumbent on him to ascertain whether Mr. McKeen wished to speak to counsel before accepting his answer as a refusal of the demand. Yet at 2309, after accepting a refusal, Cst. Comeau asked Mr. McKeen upon arriving at the detachment whether he wanted to call a lawyer.
>
> 33. The Appellant submits that it then follows that Cst. Comeau should have waited for Mr. McKeen to decide whether to consult with counsel upon arriving at the detachment in Enfield, before accepting Mr. McKeen's comments as a refusal.

[68] This is essentially the same position which my colleague takes in her reasons for judgment where she concluded:

> ... the time period during which the appellant had to make known his desire to exercise his right to consult counsel, was still running upon arrival at the police station, some 12 minutes after first being advised of his rights. . . .
>
> By accepting the appellant's initial reaction to the demand for a breath sample, as the foundation for the refusal charge, the duty of the police to provide the appellant with a reasonable opportunity to consider his rights to counsel, before eliciting evidence from him, was breached.

[69] With respect, I do not agree. I would agree that if the appellant had given the constable any indication that he wished to consult with a lawyer, the constable, in the circumstances of this case, should have taken the appellant to the detachment, given him a reasonable opportunity to consult with a lawyer, and refrain from giving the breathalyzer demand until the appellant had that reasonable

opportunity. However, I know of no authority for the proposition that where, as here, the appellant repeatedly refused to invoke his right to counsel, that the constable is required to wait until he gets the appellant to the detachment before he gives the breathalyzer demand, or before the appellant has to give a response to the breathalyzer demand.

[70] The decision of the Supreme Court of Canada in **Schmautz** (supra) is relevant here. In the course of their investigation of a hit and run accident two police officers went to Mr. Schmautz' residence. They told him they were investigating an accident and that he had the right to remain silent and the right to retain and instruct counsel. For approximately ten minutes the police questioned the appellant about the accident and the amount of alcohol he had consumed. One of the police officers then demanded that Mr. Schmautz accompany him to the police station so that a sample of his breath could be taken. Mr. Schmautz refused and was advised that he would be charged with failing to comply with the breathalyzer demand. Mr. Schmautz ushered the police officers out of the house and they left.

[71] Both parties agreed that while the police officers were at Mr. Schmautz' residence, in the course of their investigation, Mr. Schmautz was not "detained" within the meaning of the **Charter**.

[72] There were two issues in this case:

> 1. Was Mr. Schmautz "detained" within the meaning of s. 10 of the **Charter** as a result of the breathalyzer demand? and
>
> 2. If Mr. Schmautz was so detained was the initial **Charter** warning sufficient, or was the officer required to give Mr. Schmautz a further warning before accepting his response to the breathalyzer demand?

[73] The court held that Mr. Schmautz was detained within the meaning of s. 10 of the **Charter** as a result of the breathalyzer demand being made upon him. The court further held that the **Charter** warning given to Mr. Schmautz at the outset of the questioning was sufficient compliance with s. 10(b) of the **Charter**.

[74] In the course of his reason Justice Gonthier (writing for himself and five other members of the court) said the following at p. 416-417 [1990] 1 S.C.R.:

> In this case, by serving both the police and the *Charter* warnings on the appellant at the outset of the short interview, the police officers alerted him that he was suspected and was being investigated in relation to a serious offence. These warnings made him aware that all he would say could incriminate him and that he had the right to remain silent and to instruct counsel on every aspect of the interview that followed. The situation that arose with the breathalyzer demand was directly connected to the investigation. Indeed, the demand generated the type of situation where the appellant might be expected to take advantage of the warning given to him a few minutes earlier. The demand itself, together with the fact that he was also advised of the criminal consequences of a refusal, would normally trigger the consideration of the appellant of whether or not to instruct counsel. The appellant never mentioned that he wished to contact a lawyer.
>
> The situation, then, was not one where another more serious offence was suddenly being investigated because of changed circumstances external to the encounter and destructive of the close factual linkage relating the prior advice to the detention. In this case, the demand arose directly and immediately out of the inquiry; it was part of a single incident at which the appellant was fully made aware of his rights.
>
> Given the circumstances of the case, I would therefore conclude that the warning served on the appellant amounted to sufficient compliance with s. 10(*b*) of the *Charter*.
>
> (emphasis added)

[75] In the matter before this court, the appellant (in addition to the brief warning given to the appellant immediately upon being detained) had three full **Charter** warnings given to him prior to the breathalyzer demand being made. Here, as in **Schmautz**, the breathalyzer demand was directly related to the matter which the constable told the appellant was the subject of his investigation. The demand arose directly and immediately out of the inquiry. I do not agree with my colleague that

the jeopardy which the appellant was facing with the breathalyzer demand had "changed significantly" from that which the officer was initially investigating. Therefore, the **Charter** warnings given to the appellant prior to the breathalyzer demand were sufficient compliance with s. 10(b) of the **Charter**.

[76] As I indicated in my review of the evidence from the time the appellant refused the breathalyzer demand until his arrival at the cells in the detachment, there was no evidence of any discussion between the appellant and the constable, nor any comment by the appellant. For example, there was no evidence that the appellant was having second thoughts about whether he should contact counsel, or whether he should have refused the breathalyzer, or whether he needed time, or any similar expression which would cast any doubt on what the appellant had done. He had chosen, of his own free will, to ignore repeated opportunities to consult counsel, and he had refused to take the breathalyzer test. I mention this because, in the circumstances of this case, it is irrelevant - for the purpose of determining whether the appellant's s. 10(b) **Charter** rights were breached - that the constable later asked the appellant, at the detachment, if he wished to call a lawyer. That question by the constable did not arise from any ongoing discussion between he and the appellant concerning the breathalyzer demand. From the constable's point

of view the offence of refusal was complete. The appellant had been properly warned at roadside. There were reasonable and probable grounds for the constable to make the breathalyzer demand. The demand was made and the appellant refused to comply. The consequences of refusal had been explained by the constable in "layman's terms" and the appellant still refused to comply, without reasonable excuse. The constable accepted the appellant's refusal. All of the essential elements of the offence of refusal are there. As Justice MacDonald said in **Bowman**, once the appellant decided that he was not going to comply with the demand, and made that decision known to the peace officer, the offence of refusal is complete. It is no defence to the charge that he later changed his mind and offered to supply a breath sample.

[77] The question by the constable in the detachment, as to whether the appellant wished to call a lawyer, arose because, as the constable testified, it is always his practice to ask that question to those who he brings to the detachment's cells. During the submissions to the trial judge on the **Charter** application, counsel for the Crown characterized the constable's question to the appellant, as to whether he wished to contact a lawyer, this way:

> Constable Comeau testified that it's his practice once people are in cells to let them...to give them a chance to phone a lawyer. I took that to be something quite apart from whatever they're dealing with. "You're now in custody, you're in jail, do you want to talk to a lawyer."

[78] Defence counsel did not take issue with that characterization.

[79] My colleague has stated in her reasons:

> It can be inferred from the invitation to use the telephone to call counsel after arrival at the station, that the officer thought the appellant's opportunity to indicate a desire to exercise his rights, in order to engage the implementation duties described in **Bartle,** was still open at that time. When asked why he asked the appellant if he wanted to call a lawyer, the officer explained that, "It's always my practice immediately upon arrival to cells to ask that question." As well, the fact that the appellant's acceptance of that offer was stated to be on the basis that "... if you are going to charge me...", and earlier had said "... it's going to be a refusal", allows for the inference that the appellant thought he still had time to both exercise his right to counsel and determine whether he should provide the breath sample.

[80] With respect, I do not accept that these are reasonable inferences from the proven facts.

[81] In the case of the appellant, he did not testify at any **voir dire** prior to the **Charter** ruling by the trial judge. There is, therefore, no evidence from the appellant as to what he meant by the words attributed to him by the constable. We

do know from the evidence which I have quoted ("I'm definitely going to refuse that," "it's definite refusal," and "that's a definite refusal") that from the constable's point of view the appellant had "made it very clear he wasn't going to provide a sample." The trial judge considered this evidence to be a clear and unequivocal refusal.

[82] In the case of the constable since he had accepted the appellant's refusal at roadside, he could not have thought that the appellant's right to consult with counsel - with respect to the breathalyzer demand - was still open when they arrived at the detachment cells.

[83] In my opinion, a reasonable inference from the proven facts would be that, at the detachment cells, the appellant came to the realization that he was going to spend some time in the cells and that he should contact a lawyer to get some advice on all of the problems he was facing.

[84] I agree with the submission of the Crown on this appeal that the appellant had been arrested and was in custody and about to be placed in the detachment's cells. The refusal of a breath sample demand was not the only legal difficulty

which the appellant faced at that time. He had been told that he was under arrest for both causing a disturbance and impaired driving, and had been told this before the circumstances which gave rise to the refusal charge. He must also have realized that he was in some difficulty over his behaviour which had forced the police to physically restrain and handcuff him. With these other potential criminal charges hanging over his head, it was only prudent of the policeman to provide the appellant an opportunity to discuss these other difficulties with a lawyer, irrespective of the refusal of the breath sample demand.

[85] Under these circumstances, the fact that the constable asked the appellant, at the detachment, if he wished to contact a lawyer, had nothing to do with the breathalyzer demand, and did not revive a right which the appellant had, previously, refused to exercise. At this point the offence of refusal was complete.

[86] For these reasons I reject the appellant's first ground of appeal.

[87] Having decided that the appellant's s. 10(b) **Charter** rights have not been breached, it is not necessary for me to deal with the appellant's second ground of

appeal relating to the inadmissibility of the evidence of refusal obtained as a result of a breach of the appellant's s. 10(b) **Charter** rights.

[88] The appellant's third ground of appeal is that the Summary Conviction Appeal Court judge erred in upholding the trial judge's finding that the appellant had refused the breathalyzer demand.

[89] In my opinion there is no merit to this ground of appeal.

[90] The Summary Conviction Appeal Court judge made no error in law in upholding the trial judge's decision that the appellant made a clear and unequivocal refusal to comply with the breathalyzer demand. That decision is amply supported by the evidence. As Constable Comeau testified, and his evidence was accepted by the trial judge, "He made it very clear he wasn't going to provide a sample." Further, the appellant can hardly be heard to say that he did not unequivocally refuse the breathalyzer demand when, approximately 36 minutes later - after he had consulted with his lawyer - he told the constable that he had "changed his mind and he wanted to provide a sample of his breath."

[91] In summary, an appeal to this court on a summary conviction offence is on the basis of error of law alone. In my opinion the Summary Conviction Appeal Court judge made no error in law by upholding the decision of the trial judge. I would grant leave to appeal, but I would dismiss the appeal.

Flinn, J.A.

Concurred in:

Hallett, J.A.