

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Slaunwhite, 2010 NSPC 71

**Date:** December 21, 2010

**Docket:** 1884428, 1884429

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Bradley Slaunwhite

**Judge:** The Honourable Judge Marc C. Chisholm

**Heard:** January 29, 2010 & September 22, 2010, in Halifax,  
Nova Scotia

**Written decision:** December 21, 2010

**Charge:** CC. 253(a) & CC. 254(5)

**Counsel:** Darrell Martin, for the Crown  
Warren Zimmer, for the Defense

**By the Court:**

- [1] The accused is charged with having the care or control of a motor vehicle while his ability to operate the motor vehicle was impaired by alcohol or drug and failing or refusing, without reasonable excuse to comply with an approved screening device (ASD) demand. The charges arose when the accused drove his motor vehicle to a traffic checkpoint on Prospect Road, Hatchett Lake, Halifax, Nova Scotia shortly before 2:00 am on February 9, 2008.
- [2] The Crown called three witnesses, all peace officers who had contact with Mr. Slaunwhite at the checkpoint. The Defense called one witness, the accused. The following issues arose on the section 254(5) charge: (1) What took place at the checkpoint (credibility and reliability of each witness' evidence); (2) Whether the Crown established that a lawful demand was given to the accused pursuant to section 254(2); (3) What is the mental element of the offence under section 254(5) of the Code and has the Crown proven it beyond a reasonable doubt; and (4) If the *actus reus* and *mens rea* have been proven beyond a reasonable doubt, has the accused established a reasonable excuse on a balance of probabilities? On the impaired driving charge the sole issue was whether the Crown had established beyond a

reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.

**Position of the Parties:**

- [3] **The Crown** submits that the total circumstances known to the demand officer provided reasonable grounds for him to suspect that the accused had alcohol in his body, and therefore, to make a lawful ASD demand. The Crown submits that the *mens rea* for section 254(2) is "to knowingly fail to provide a suitable sample of breath". The Crown submits that this element has been proven beyond a reasonable doubt. In the alternative, the Crown submits that, if the *mens rea* is "an intentional failure to provide a suitable sample of breath" the evidence has met this standard. The Crown submits that the accused has failed to establish a reasonable excuse for failing to provide a suitable sample of his breath.
- [4] The Crown made no submission on the section 253(1)(a) charge.
- [5] **The Defense** submits that the demand officer had an insufficient objective basis upon which to suspect that the accused had alcohol in his body. The Defense submits that the officer relied upon a smell of alcohol from inside the accused's motor vehicle as the basis for his suspicion, which is

inadequate. The Defense submits that the *mens rea* for the section 254(2) offense is “an intentional failure to provide a suitable sample of breath” and that the Crown has failed to prove this element of the offense. In the alternative, if the Court finds that the *actus reus* and *mens rea* have been proven beyond a reasonable doubt, the Defense submits that the accused has established a reasonable excuse for failing to provide a suitable sample of his breath based upon:

- (1) his medical condition; and/or
- (2) the breach of his right to counsel.

[6] The Defense made no submission on the section 253(1)(a) charge.

**Review of the Evidence:**

[7] **Cst. Kelly Zacharkiw**, RCMP, was the first officer to have contact with the accused. She testified that the accused was the driver and lone occupant of a vehicle stopped at the checkpoint, at 2:04 am, according to her notes made at 2:41 am that day. Her description of her interaction with the accused is at p. 9 of the trial transcript:

“I asked Mr. Slaunwhite for his driver’s license. I could detect an odour of liquor coming from Mr. Slaunwhite. He found his wallet. He dropped his driver’s license and his cards. He handed me his driver’s license, and he continued to search through his wallet. I asked what he was looking for, and he stated his driver’s license. I had the driver’s license in my left hand and I had it in front of him so he could see it, and I informed him that I had his driver’s license. He continued to search for his driver’s license. I again informed him, what was he looking for? He said his driver’s license still, and I showed him yet again that I had his driver’s license. I asked him if he had anything to drink that night, and he stated that he had two beer to me.”

[8] Cst. Zacharkiw testified that while she was speaking with Mr. Slaunwhite, Cst. Cathcart was standing to her right. She stated that Cst. Matthews was retrieving the roadside screening device and was out of sight until he retrieved the device. She testified that she noted that Mr. Slaunwhite had “glassy eyed and slurred speech”.

[9] Cst. Zacharkiw took Mr. Slaunwhite’s identification and went to the police car to enter it into their database. She wasn’t certain whether Mr. Slaunwhite was out of his vehicle or still seated in his vehicle when she left. According to her evidence both Cst. Cathcart and Cst. Matthews were then speaking to the accused.

[10] She testified that ( at page 11 of the transcript):

“While I was in my police car running his information, I would glance up periodically and see Cst. Matthews, he was trying to administer the ASD roadside device, and there was pauses, and then I would watch Mr. Slaunwhite put his mouth towards the device and shake his head from left to right slightly.”

[11] On cross she stated that she wasn't sure if she asked Mr. Slaunwhite for his registration and insurance. The following exchange is at page 16 of the transcript:

“Q. Okay. Can you think of any reason why you might omit to ask for the other two documents, given that you're there to check on all three of them?

A. Because I asked for his driver's license, and he gave me his driver's license.

Q. So you're saying that you can actually recall not asking for the others?

A. I can't say that I did.

Q. Okay. So it may very well be he was continuing to look for the other documents that you'd asked for? Possible?

A. It's possible.”

[12] On cross she testified that she didn't recall asking the accused to step out of his vehicle and she couldn't recall if she heard another officer do so. She couldn't recall whether part of her conversation with the accused occurred after he was out of his vehicle. She could not recall hearing a demand being given to the accused. She stated that Mr. Slaunwhite was beside his vehicle

when he was blowing but she couldn't recall exactly what part of the vehicle.

[13] She testified that while other officers were attempting to obtain a sample from the accused, she went to where Mr. Slaunwhite was standing with the officers for a brief time to hand the accused's license to one of the officers.

[14] She couldn't recall which officer.

[15] Cst. Zacharkiw had been a peace officer for less than a year at the time of this incident.

[16] **Cst. Donald Matthews** was the demand officer. He is a member of the RCMP. He had been a peace officer for less than a year at the time of the incident.

[17] Cst. Matthews evidence regarding his contact with the accused begins at page 57 of the transcript.

"I noticed to my right Zacharkiw had a vehicle stopped that was proceeding westbound on Prospect Road. I heard Cst. Zacharkiw ask the driver for his license, at which point I walked over to the vehicle to see what the issue was. As I approached the driver's window of that vehicle, I could detect an odour of liquor from the vehicle. I noted that the driver seemed agitated and confused in trying to locate a driver's license from his wallet. I then went to my..."

[18] There was an interruption by the Court and then Cst. Matthews continued:

“The driver seemed a little bit agitated, confused as he was looking for a – it appeared to be his driver’s license in his wallet. I left that vehicle, went back to my police car and removed the roadside screening device that I carried to return to the vehicle to administer a roadside screening test.”

[19] Cst. Matthews testified that the accused was the sole occupant of the vehicle.

He said that there was the smell of liquor coming from the vehicle, from the driver, which, in his view, warranted a roadside screening test.

[20] Cst. Matthews testified that upon retrieving the ASD he approached the driver, who was still seated in the motor vehicle, and advised him that he was going to be conducting a roadside test. When asked exactly what he said to the accused, he stated ( Transcript at page 60):

“I advised Mr. Slaunwhite that I had reason to believe that he consumed alcohol tonight, and I was going to administer a roadside test.”

[21] He then removed his card and read the approved screening device demand to Mr. Slaunwhite. The demand is set out at page 63 of the Transcript. Cst. Matthews recalled Cst. Zacharkiw and Cst. Cathcart both being present at the time.



- [22] According to Cst. Matthews, he read the ASD demand to Mr. Slaunwhite, from his card, at 1:55 am. He estimated the demand was read less than five minutes after his first contact with the accused.
- [23] Cst. Matthews testified that the accused's response to the demand was to question what would happen if he refused. The officer did not make note of the exact words. Cst. Matthews testified that he explained that the penalty was the same for refusing as for failing. He testified that the accused asked what would happen if he passed or if he failed. Cst. Matthews said that he answered the accused's questions. Cst. Matthews testified that Mr. Slaunwhite repeated the same questions. Cst. Matthews stated that after providing answers to Mr. Slaunwhite he asked him if he understood and was he willing to provide a sample or not.
- [24] Cst. Matthews testified that at 1:59 am Mr. Slaunwhite advised that he would not provide a sample. This occurred while Mr. Slaunwhite was still seated in his motor vehicle.
- [25] Cst. Matthews testified that he then advised Mr. Slaunwhite that he would be charged with refusal. He didn't recall whether he or Cst. Cathcart directed the accused to step out of his vehicle but the accused did so. Cst. Matthews left to go to his police vehicle to contact his supervisor to advise of what was

happening. Cst. Cathcart, who was standing beside Cst. Matthews, assumed the arrest procedure of Mr. Slaunwhite. Cst. Matthews was not present when the accused was arrested.

[26] After speaking with his supervisor Cst. Matthews returned to the accused and Cst. Cathcart. He was advised by Cst. Cathcart that the accused had been arrested, Chartered and cautioned. Mr. Slaunwhite was, at that time, seated in the rear of a police vehicle.

[27] Cst. Matthews testified that Mr. Slaunwhite told him that he has anxiety and was suffering from stress and he didn't like to be in a confined area like the back of the police car. Cst. Matthews replied that he could've avoided all that by simply providing a sample. Mr. Slaunwhite then asked if he could provide a sample. Cst. Matthews agreed to let him provide a sample. Cst. Matthews stated that he started the process of obtaining a sample at 2:15 am. He later corrected himself and said that he completed the testing process at that time.

[28] In relation to the attempts to obtain a breath sample from Mr. Slaunwhite, Cst. Matthews had Mr. Slaunwhite step out of the rear seat of the police vehicle. He then explained the device to him and how it worked [Transcript

at page 69]. The interaction between Cst. Matthews and the accused, as testified to by Cst. Matthews, begins at page 70 of the Transcript:

“A. Okay. I advised Mr. Slaunwhite - - I presented him - - showed him the actual Alcotest and the new mouthpiece still in the plastic bag, advised, “This is a clean mouthpiece. I will now insert it to the top of this device...”

Q. Yes.

A. “...at which point I want you to take a deep breath and blow a strong steady stream into the mouthpiece. When you do so, you’ll hear a tone from the machine. As long as that tone is going steady, it shows that you’re supplying an adequate amount of air, and keep blowing until I tell you to stop.”

Q. Okay. Did Mr. Slaunwhite indicate to you whether he understood this or were you able to ascertain whether he understood what you were asking of him?

A. I - - again, I asked him, you know, “Are you ready?” He said, “Yes, I understand.” Or not understand., “Yes, I’m ready,” and proceeded.

Q. Continue. And if you can, go through everything in as much detail as possible what you said, what Mr. Slaunwhite said during the testing procedure.

A. Okay. The first attempt, Mr. Slaunwhite started to blow, at which point he started moving his head to the left and right. And the machine, Alcotest, started to give a tone indicating there was an adequate amount of air, and within a couple of seconds after, it started giving the warning beep, which is a continuous beeping sound, and E zero appeared on the screen indicating that the air flow was interrupted and inadequate. I removed the mouthpiece from Mr. Slaunwhite’s mouth and told him that the sample was inadequate as he wasn’t blowing properly.

[29] I recall something along the lines that - - again, he was saying he had trouble with asthma, anxiety. He had trouble blowing into the machine. I advised Mr. Slaunwhite that we’ve had old women with one lung that could blow into this machine. There’s no problem for him to do it. So he agreed to

provide a second sample. Again, he started to blow, and as soon as the machine started to make a tone, he stopped blowing and the error message came up.

[30] At this point I advised Mr. Slaunwhite that, you know, “You’re not providing a sample. You’re shaking your head, and you need to keep your head steady, a seal on the opening on the mouthpiece and blow a steady stream until I tell you to stop.”

[31] A third attempt was made with Mr. Slaunwhite. Again, the same results. Within a few seconds, as soon as the machine started to make the tone that the air supply was adequate, he stopped. I received the error message and noise. I warn - - excuse me. I warned Mr. Slaunwhite this will be the last test, and I will change the mouthpiece to ensure that the mouthpiece was working adequate. I changed the mouthpiece in front of him, put in a new one, and asked him to provide another sample. Again, Mr. Slaunwhite mentioned about he’s having trouble doing this because of his asthma and anxiety issues.

[32] A fourth test was started. Again, within a few seconds of providing a steady stream, Mr. Slaunwhite stopped. I received the error message and the warning tone. And I advised Mr. Slaunwhite - - Mr. Slaunwhite that this - -

it is his intention not to provide a sample and he would remain charged with refusal.

Q. Was it your opinion that he was not providing an adequate sample?

A. It was my opinion, yes, that he was not.

Q. Why was - - why did you formulate that opinion?

A. For the reason that the air flow was very minimal, and every time that Mr. Slaunwhite would go to provide a sample, he would shake - - he would shake his head left to right and not make a seal over the mouthpiece.

Q. Did you observe Mr. Slaunwhite shaking his head from left to right at any other time during your dealing with him other than when he had the mouthpiece near his mouth?

A. No, he did not.

Q. Was he shaking his head from left to right on all four attempts?

A. Yes, he was.

Q. You told - - you told us that at one point you told him not to shake his head.

A. Yes.

Q. Did you do that more than once or...

A. Well, every - - I assume every time I would have made the same comment, "Don't shake your head." He accused me at one point of me shaking the machine, not him shaking his head.

Q. What did you tell him about you shaking the machine?

A. I advised him that the machine was being held steady and the only movement was from him, not the machine.

- [33] Cst. Matthews testified that Mr. Slaunwhite asked to hold the ASD while he gave a sample. This request was denied per RCMP policy which is in place to avoid the possibility of the expensive equipment being dropped and damaged.
- [34] Cst. Matthews testified that he was qualified to operate the ASD and that the device was working properly. He stated that he checked the calibration expiry date and tested the device before leaving the detachment that night. He testified that he also tested the instrument before Mr. Slaunwhite initially refused and again before attempting to obtain a sample from Mr. Slaunwhite [Transcript at page 75].
- [35] On cross-examination Cst. Matthews stated that to provide a proper sample requires a steady blow for a duration of 8 to 10 seconds. He testified that for Mr. Slaunwhite to have provided a proper sample would've required him continuing to blow for another four seconds longer than he did. After each attempt to obtain a sample Mr. Slaunwhite would speak of his being unable to do it, his anxiety or the officer shaking the instrument, the order of reasons changing each time.
- [36] Cst. Matthews acknowledged that a person could blow into the ASD but with insufficient air to cause the buzzing sound. He stated that "it would be

a very light blow..” [Transcript at page 88]. He went on to state that with each attempt to obtain a sample from Mr. Slaunwhite the tone was “almost instant every time” when he began to blow.

- [37] **Cst. Wayne Cathcart** testified that he and Cst. Zacharkiw and Cst. Matthews were conducting the checkpoint on Prospect Road on the morning of February 9, 2008. He had about 18 months experience as a peace officer to that time. He is, and was as of February 2008, a qualified ASD operator.
- [38] He testified that he approached the accused’s outbound vehicle just seconds after Cst. Zacharkiw. He said the time was 1:55 am. He heard Cst. Zacharkiw ask that the accused produce his driver’s license. He noted the accused fumbling for his license and then produce it to Cst. Zacharkiw. He observed that three or four other cards fell from the accused’s wallet. The accused had some difficulty trying to collect them. He heard Cst. Zacharkiw ask the accused what he was looking for and heard the accused reply that he was looking for his driver’s license. He detected a faint smell of alcohol from the accused. He said that Mr. Slaunwhite’s speech was slurred. He asked the accused where he was coming from and whether he’d had anything to drink. He stated that the accused said he was coming from a friend’s place and had two drinks.

- [39] While speaking with the accused, Cst. Matthews approached and asked him if he wanted Cst. Matthews to get the ASD from his vehicle to which he replied in the affirmative.
- [40] When Cst. Matthews returned with the ASD Cst. Cathcart stated that he asked Mr. Slaunwhite to step out of his vehicle. He testified that he probably would have asked the accused if he was willing to provide a sample of his breath to determine if he had any alcohol in his system.
- [41] Cst. Cathcart stated that he didn't actually give Mr. Slaunwhite a roadside screening demand. He stated that Cst. Matthews did that at 2:05, 2:08 hours. [Transcript at page 30]. Later in his evidence, after referring to his notes, he stated that Cst. Matthews gave the ASD demand to Mr. Slaunwhite at 1:58 am. Initially Cst. Cathcart indicated that Mr. Slaunwhite refused to comply with his informal demand and was arrested. Later in his evidence he testified that the arrest occurred after the formal demand by Cst. Matthews was refused.
- [42] When asked how much time transpired between his forming his opinion that an ASD demand ought be given to the accused and Cst. Matthews returning with the ASD, Cst. Cathcart initially said "approximately 10 to 15 minutes" but moments later said that it may have been a minute for Cst. Matthews to



go to his vehicle and return with the ASD. He did not explain this inconsistency.

[43] Cst. Cathcart stated that, once Mr. Slaunwhite was out of his vehicle, he observed that his eyes were glossy and he was swaying, unsteady on his feet.

[44] Cst. Cathcart stated that after the accused got out of his vehicle Cst. Matthews read the ASD to the accused. It was explained to Mr. Slaunwhite what was required of him. Cst. Cathcart testified that the accused said that he didn't want to provide a sample. Cst. Cathcart then placed the accused under arrest for refusal and impaired driving and, from his memory, gave the accused the police caution and his Charter.

[45] Cst. Cathcart was asked if he remembered the exact words used by Mr. Slaunwhite in responding to Cst. Matthews request that he provide a sample. Cst. Cathcart replied [ Transcript at page 34]

"I can't remember the exact words, no. It was something to the effect of how the device actually worked, from my recollection."

[46] Cst. Cathcart went on to explain that Mr. Slaunwhite didn't immediately refuse (as one might have inferred from his earlier testimony) but, said, sure, he would provide a sample. Then he asked questions regarding how the

machine worked and what would happen if he passed or if he failed. After the series of questions, which were answered by Cst. Matthews, Cst.

Matthews asked Mr. Slaunwhite whether he was going to provide a sample of his breath. According to Cst. Cathcart, Mr. Slaunwhite refused. Cst.

Cathcart testified that he then arrested Mr. Slaunwhite for refusal and noted the time to be 2:00 am.

[47] Cst. Cathcart testified that, after being arrested, the accused became somewhat more cooperative, saying he was willing to provide a sample. Cst. Cathcart didn't recall the accused's exact words but indicated that the accused said that he would blow into the device or he'd try to provide a sample. This was after a period of roughly three to five minutes of conversation about what was going to happen to him, after he was arrested.

[48] Cst. Cathcart testified that Cst. Matthews decided to allow Mr. Slaunwhite to take the test and explained to Mr. Slaunwhite what was required of him in terms of his blowing into the instrument and what the device would determine.

[49] Cst. Cathcart stated that after two or three failed attempts the accused became somewhat frustrated. He felt that the machine wasn't working properly. Cst. Cathcart testified that the accused was told that there was no

issue with the machine. According to Cst. Cathcart, Cst. Matthews advised Mr. Slaunwhite that he wasn't blowing long enough. Mr. Slaunwhite said he was trying his best but was nervous and anxious. Cst. Cathcart advised Mr. Slaunwhite to try to calm himself, to relax. Cst. Matthews inserted a new mouthpiece and , again, attempted to obtain a sample from Mr. Slaunwhite.

[50] The following excerpt of Cst. Cathcart's evidence begins at page 33 of the Transcript:

“Mr. Slaunwhite put his lips on the mouthpiece, started blowing. The device was making its usual buzzing sound. Meanwhile Mr. Slaunwhite was shaking his head back and forth, to his left and to his right, and then stopped. Cst. Matthews explained that you don't need to shake your head, you don't need to touch it or move, all you have to do is just blow for a limited duration of time. Mr. Slaunwhite attempted to provide another sample, stopped, explained that he had anxiety issues and that he wasn't able to do so because he had recently lost his mother. Again, we were compassionate and, you know, felt sorry for that mishap, but explained that that shouldn't be a reason not to be able to provide an accurate sample. After - - I believe that was the third or fourth attempt at obtaining a sample, Mr. Slaunwhite was becoming argumentative. His demeanor changed to be somewhat aggressive. We - - I ended up placing him under arrest and placing him in the back of my police vehicle. Once inside the vehicle, I read him the Charter of Rights, police caution.”

[51] Cst. Cathcart testified that when Mr. Slaunwhite was shaking his head there was absolutely no air going into the machine. That occurred on two of the attempts. He stated that on those two attempts Mr. Slaunwhite did not blow properly. On the earlier attempts he did not blow long enough.

- [52] Cst. Cathcart explained that the buzzing sound can be heard from the ASD when a person is blowing into the instrument. When the person has provided an adequate amount of air into the instrument, then it automatically shuts off. According to Cst. Cathcart, an adequate sample requires that the person blow for “ I believe it’s eight to ten seconds”.
- [53] Cst. Cathcart testified that the period of time during which attempts were made to obtain a sample from the accused was between ten and fifteen minutes.
- [54] **Mr. Slaunwhite** testified in his own Defense. He admitted that he was operating a motor vehicle on the morning of February 9, 2008 and stopped at a police checkpoint on the Prospect Road, Halifax, Nova Scotia. He admitted that during the late evening of February 8<sup>th</sup>, 2010, and/or early morning of February 9<sup>th</sup>, 2010 he consumed alcohol. He testified that he told the police that he’d had two drinks. Cst. Zacharkiw recalled him telling her that he’d had two beer. Cst. Cathcart testified that Mr. Slaunwhite said he’d had two drinks. Cst. Cathcart also testified that Mr. Slaunwhite said that he was coming from a friend’s place. The accused said that he’d been at his uncle’s place.

[55] He stated that he left his home in Terrance Bay at some point in the evening of February 8, 2008, after his son fell asleep. He didn't recall what time that was but said that his son's normal bedtime is between 7:00 or 8:00 pm ( maybe a little later on weekends). He drove to Spryfield to visit his uncle. He estimated the trip at 30 minutes duration. He said he was there for "a couple hours. Something like that." [Transcript at page 105] He said that, while there, he had two little tiny table glasses of white wine. He estimated each drink to be two or three ounces. He said that, in total, he drank less than half the amount in a can of pop. He didn't recall taking any medication that day.

[56] He testified that after leaving his uncle's apartment he went to the Tim Horton's in Bayer's Lake and got a cup of tea and a lemon cranberry muffin. He was on his way home when he was stopped at the road check. He gave evidence that he thought it was around 1:00 am when he was stopped. On cross-examination it was suggested that he was stopped at around 2:00 and if he'd left home around 7:00 pm he could have been at his uncle's place for five or six hours. His response, at page 119 of the Transcript was:

"Well, that's probably - - I wasn't - - I mean, I was up to Tim Horton's. There's people there, like, that sit outside there and you talk to them."

Q. Yeah, Okay.

A. You know what I mean. They just hang up there.”

[57] Mr. Slaunwhite testified that he could have avoided the police checkpoint by proceeding into a sub-division before getting to the checkpoint. He stated that when he stopped at the police check point the female officer approached his vehicle and asked him for his driver’s license only. He stated, at page 108 of the Transcript:

“A. Well, she walked up to my side, then when I handed her my license, she just stepped back for a minute there, and she was, like, looking at it, and that’s when I proceeded to dig for my other stuff. And then when I turned around, she was gone after that because she walked back to the car. She didn’t ask me for the rest of my information.”

[58] He testified that the other officers came over and just talked amongst themselves. Then the female officer returned and gave him a breath demand. He gave evidence that she said “Would you mind blowing a breathalyzer?” to which he responded “Not a problem.” [Trial transcript at page 109].

[59] Mr. Slaunwhite testified that he never refused to take the test [Transcript page 125]. He stated that he was never arrested for refusal, until after he had

attempted, four times, to provide a sample of his breath [Transcript at page 127].

[60] Mr. Slaunwhite gave evidence that he understood the demand. The following excerpt begins at page 126 of the Transcript:

“A. I never refused the breathalyzer once.

Q. Okay.

A. I asked him questions, like, what...what was the normal procedure. Like, what would happen.

Q. Okay.

A. What would does - - you know, what's refusal mean.

Q. Yeah. So you understood what they were doing the whole time throughout?

A. Yes.

Q. You being anxious or nervous didn't interfere with you understanding what they were asking you to do?

A. I did what they asked me. I mean, I was nervous, but I still did what they asked me.

Q. Okay.

A. I wasn't going to argue with them, right?

Q. That's not my question. My question is, you understood them?

A. I understood what they said to do.

[61] Mr. Slaunwhite stated that he did as asked, blowing long and hard. He said “It didn't work”. He did that four times and it still didn't work [ Transcript

at page 110]. After the second time and it didn't work he said that they changed the mouthpiece and then there were two more tries. And then he gave the following evidence at page 111 of the Transcript:

“[T]he other officer was like, “Go get another” - - the lady officer said, “Go get another breathalyser out of the other car” to one of the guy - - male officers, and he wouldn't go get it. She asked him about three or four times. And then they gave me the refusal. Later in his evidence he testified that all of the officers were present, within arms reach when the female officer asked to have another breathalyser and none of them would go get one. They refused [Transcript at page 135-6].

[62] Mr. Slaunwhite gave evidence that he suffers from a medical condition, he's unsure of it's name, for which he's been medically tested. He said there were lots of medical records. He said it was like panic attacks. He almost has a seizure. His chest gets tight, like he's having a heart attack. He gets numb and tingly. He used puffers but they ran out. He said the condition is always there but stress makes it worse. He said his chest was tight before his encounter with the police that night. Seemingly to support this statement he said that at his uncle's there were “short conversations” [page 131] and at the Tim Horton's he took “short breaths”[ page 131].

[63] Mr. Slaunwhite testified that on the morning of February 9<sup>th</sup>, 2008, when in the company of the police he felt tight in the chest. He said he was nervous



and worried after he blew in the breathalyzer so many times and it didn't work [ Transcript at page 112]. When he was told that refusal was the same as failing that panicked him even more.

[64] Mr. Slaunwhite testified that he tried his best to provide a suitable sample of his breath. He said he blew as hard as he could for as long as he could. He said that he didn't stop blowing while still having air in his lungs. He stated that he shook his head from side to side because he was straining to blow as hard as he could [“straining his guts out, pretty much” Transcript at page 128]. He said he couldn't blow any longer than he did. He said that he wanted to continue to try but no one would go get the other breathalyser and they wouldn't give him another chance to blow.

**Rebuttal Evidence:**

[65] The Crown called Cst. Matthews in rebuttal. He testified that, as far as he recalled, Cst. Zacharkiw was present during the testing procedures. He stated that there was no mention of a second roadside screening device during the testing procedure.

[66] On cross-examination he stated that he was able to state this fact unequivocally, without reference to any note or report, even though the

event was more than two years ago, because there were no other roadside screening devices available to the officers at the police check point that night. He had the only ASD at the scene.

**Assessment of Credibility:**

[67] It is trite to say that just because three or more people say something is so, it doesn't make it so. And just because one person says something different than several other persons doesn't mean it isn't so. The assessment of credibility and making findings of fact is not a numbers game. There is no formula to follow. A police witness is not entitled to any different consideration than any other witness because they are a police officer. The Court need not accept any of the witness' versions of the event. The Court may accept some, all or none of each witness' evidence. The Court must assess the evidence of each witness in the context of the evidence as a whole.

[68] This incident occurred more than a year and a half before the trial. Peoples memories fade over time. Details of matters not viewed as significant are more likely to fade with time. People remember things differently. Some inconsistencies in person's recollection of an event is normal and to be

expected. Evidence of a faulty memory may cause the Court to question the reliability of the witness' evidence, however, memory can be fact specific and, therefore, a failure to accurately recall, or recall at all one point, may not cause the court to doubt the witness' reliability on another point, especially if there is some specific reason for them to recall that point. On the other hand, if the Court finds that the witness has intentionally embellished their evidence or been untruthful on any point it is likely to affect the Court's assessment of the witness' overall credibility.

[69] I am conscious of the test to be applied in relation to credibility and proof beyond a reasonable doubt **R v. W(D)**, [1991] 1 S.C.R. 742 (SCC).

[70] There were inconsistencies in the evidence of the Crown witnesses. Cst. Cathcart gave his evidence in a confusing manner. His evidence was inconsistent on a number of points and he did not always provide an explanation/clarification. I have considered these inconsistencies in assessing the evidence.

[71] I will begin with the evidence of Mr. Slaunwhite. His evidence differed from that of the three Crown witnesses on many points.

[72] Did Mr. Slaunwhite say that he was looking for his driver's license after already giving his license to Cst. Zacharkiw?

- [73] Mr. Slaunwhite acknowledged that Cst. Zacharkiw asked him for his driver's license only. He said he gave it to her. He said in getting his license out he dropped a number of other cards that were in his card holder, which looked like a small wallet. He mentioned no other conversation with Cst. Zacharkiw or the two male officers about his license.
- [74] Cst. Zacharkiw testified that she asked him what he was looking for, twice, and that twice he said he was looking for his license, which he'd already given to her. Cst. Cathcart stated that he heard the accused say he was looking for his license, after he'd given it to Cst. Zacharkiw.
- [75] Which officer, informally asked Mr. Slaunwhite if he would provide a sample of his breath?
- [76] Mr. Slaunwhite testified that Cst. Zacharkiw asked if he would "blow the breathalyzer". Cst. Cathcart testified that he, informally, asked the accused if he would provide a breath sample, and that Cst. Matthews gave the accused the formal ASD demand. Cst. Matthews testified that he gave Mr. Slaunwhite a formal ASD demand. Neither male officer testified that Cst. Zacharkiw asked Mr. Slaunwhite if he'd provide a breath sample. Cst. Zacharkiw testified that she left the area of Mr. Slaunwhite's car to run a

check on his license. She didn't testify to having given any ASD demand/request nor recall hearing one being given.

[77] Did Mr. Slaunwhite refuse the demand, get placed under arrest and put in the rear seat of the police car?

[78] Mr. Slaunwhite testified that he was given an ASD demand which he understood and did his best to comply. He stated that at no time did he say he wouldn't provide a sample. He said he responded "sure" and asked questions about what would happen if he refused, etc. He testified that at no time was he arrested prior to the attempts to provide a sample.

[79] Both Cst. Cathcart and Cst. Matthews gave evidence that in response to the demand Mr. Slaunwhite asked questions about what would happen if this or that occurred and then he refused to provide a sample. Each made a note of the time of the refusal. Cst. Matthews testified that he then went to radio his supervisor. He testified that when he returned Mr. Slaunwhite was in the rear of Cst. Cathcart's police vehicle. Cst. Cathcart advised Cst. Matthews that the accused had been arrested, Chartered and cautioned. Cst. Cathcart testified that he arrested Mr. Slaunwhite for refusal.

[80] Was Mr. Slaunwhite told not to shake his head while blowing?

- [81] There is no dispute about Mr. Slaunwhite moving his head side to side during the testing. Mr. Slaunwhite testified that he moved his head side to side because he was straining to provide an adequate sample. He didn't state whether he was told not to do so.
- [82] Cst. Matthews gave evidence that he told Mr. Slaunwhite not to move his head from side to side. He said that Mr. Slaunwhite moved his head on every attempt and he "assumed" he told him not to do so after each attempt. Cst. Cathcart gave evidence that Mr. Slaunwhite was told by Cst. Matthews why each sample was inadequate and that he didn't have to shake his head [Transcript at page 33].
- [83] Did Mr. Slaunwhite ask to hold the ASD while blowing? Did he accuse Cst. Matthews of moving the ASD while he blew into it?
- [84] Mr. Slaunwhite did not give evidence of asking to hold the ASD or of accusing Cst. Matthews of moving the device while he was attempting to provide a sample. Cst. Matthews gave evidence of such a conversation. Cst. Cathcart stated that Cst. Matthews told Mr. Slaunwhite he didn't need to shake his head or touch the machine [Transcript at page 33].
- [85] Did Mr. Slaunwhite blow as hard as he could for as long as he could?

[86] Mr. Slaunwhite said that was the case on each attempt. That he stuck out his neck and strained to do as directed. That his head shaking was due to his trembling from the strain of blowing as hard as he could for as long as he could.

[87] Cst. Matthews testified that Mr. Slaunwhite would blow and then stop. He said that the air flow was very minimal. He said the air entered the instrument almost instantly with Mr. Slaunwhite starting to blow but he stopped blowing and by moving his head failed to maintain a proper seal on the mouthpiece. Cst. Cathcart testified that on two attempts Mr. Slaunwhite didn't blow long enough and on two attempts he did not blow properly into the mouthpiece resulting in no air entering the ASD. Neither officer gave any evidence that they observed any physical manifestation of the strenuous effort Mr. Slaunwhite stated that he was making on each attempt. There was no evidence by Mr. Slaunwhite of him gasping for air after blowing into the ASD and expelling all the air in his lungs. In my assessment, Mr. Slaunwhite exaggerated the effort he made in blowing into the ASD.

[88] Did Cst. Zacharkiw request a second ASD be obtained?

[89] Mr. Slaunwhite testified that he questioned whether the ASD was working properly. He testified that the three officers talked about whether the ASD

was working properly and that Cst. Zacharkiw asked that one of the male officers retrieve another ASD from one of the other police cars. Cst.

Cathcart testified that Mr. Slaunwhite questioned the working of the ASD and he told him the machine was fine. He gave no evidence of any discussion of obtaining another ASD nor a refusal to go get one. Cst.

Zacharkiw testified that she was present only briefly during the testing, when she was turning the accused's license over to one of the other officers.

She did not give evidence of requesting another ASD. On direct and cross-examination Cst. Matthews gave no evidence of any discussion about getting a second ASD. On rebuttal, Cst. Matthews testified that there was only the one ASD at the scene and there was no discussion between the officers of getting a second ASD.

[90] Cst. Matthews' evidence was the only evidence regarding the number of ASD's at the scene.

[91] I accept the evidence of Cst. Matthews that there was only one ASD available to the officers at the traffic checkpoint that early morning. That being so it makes no sense that there would've been a discussion, in the presence of Cst. Matthews, about retrieving another ASD, without him saying something and recalling it. I reject the accused evidence that Cst.



Zacharkiw, or any officer requested a second ASD. I find that the accused's evidence was an embellishment of the fact that there was a discussion, initiated by him, about the functioning of the ASD.

[92] The act of contacting his supervisor supports his evidence that something significant had happened. I have no doubt that Mr. Slaunwhite, after asking a number of questions, initially, refused to provide a sample in response to the ASD demand read to him by Cst. Matthews. I also have no doubt that he was arrested and placed in the rear of Cst. Cathcart's police vehicle. Cst. Matthews evidence on this part of the case was thoroughly convincing. I accept his evidence that, upon Mr. Slaunwhite refusing the demand, he left Mr. Slaunwhite with Cst. Cathcart to go and advise his supervisor of their situation. The evidence of Cst. Cathcart while confusing and inconsistent on several points proves significant corroboration of Cst. Matthews' evidence of these events.

[93] I accept Cst. Matthew's evidence that, upon returning to Cst. Cathcart's car, he had a conversation with Mr. Slaunwhite which led him to allow Mr. Slaunwhite to exit the police car and attempt to provide a sample of his breath. Cst. Matthews evidence is corroborated, in the main part, by Cst. Cathcart's evidence. I reject Mr. Slaunwhite's evidence that he never

verbally refused to provide a sample of his breath and that he was not arrested prior to the attempts to provide a sample.

[94] When being questioned on cross-examination about what he'd done before arriving at the checkpoint and it being suggested that his evidence didn't cover the full time period, in my view, Mr. Slaunwhite was searching for an explanation and his suggestion that he spent a long period at the Tim Horton's talking to other customers I viewed as an unconvincing change in his evidence.

[95] Mr. Slaunwhite didn't directly address the evidence of the Crown witnesses that he was looking for his license after giving his license to Cst. Zacharkiw. I am convinced that such a conversation would stand out and, therefore, be memorable. I believe the evidence of the officers that such a statement was made by Mr. Slaunwhite at least once.

[96] Mr. Slaunwhite did not give evidence of whether or not he asked to hold the ASD while he blew into it. Mr. Slaunwhite did not address Cst. Matthews' evidence that he accused the officer of shaking the ASD when Cst. Matthews warned him not to move his head from side to side. In my opinion, it would not make any sense for Cst. Matthews to move the ASD while Mr. Slaunwhite was blowing. Cst. Matthews had agreed to give Mr.

Slaunwhite an opportunity to provide a sample even after an initial refusal. There is no logical reason for him to then move the ASD to sabotage the testing process. Cst. Cathcart, in part, corroborated Cst. Matthews' evidence on this point. I accept Cst. Matthews evidence that Mr. Slaunwhite asked to hold the ASD while he blew into it and accused him of moving the ASD in response to him cautioning Mr. Slaunwhite not to move his head from side to side while blowing into the ASD.

- [97] While Cst. Matthews and Cathcart testified that Mr. Slaunwhite said he had an anxiety/stress condition there is nothing in their evidence of their observations of Mr. Slaunwhite that provides support for his evidence that he suffers from such a condition.
- [98] The only evidence that Mr. Slaunwhite suffers from an anxiety/stress condition was the testimony of Mr. Slaunwhite. The only evidence that Mr. Slaunwhite's medical condition, if he has one, prevented him from providing a suitable sample of his breath in response to the ASD demand was the testimony of Mr. Slaunwhite. Corroboration is not required. The accused mentioned that he'd had numerous medical tests done on him and been seen by doctors and his condition was well documented. No documents setting out the accused's condition were presented to the Court nor any doctor's

letters or evidence of any medical practitioner(s) or any persons familiar with the accused's condition.

[99] Considering the accused's evidence, in the context of the totality of the evidence, I found the accused's evidence not credible. I reject his evidence on all significant points in dispute.

[100] It would not be unusual for a person in police custody to be anxious. Mr. Slaunwhite may be someone more inclined than other persons to experience anxiety. However, I did not find the accused's evidence that he, because of an anxiety/stress condition, was unable to provide a suitable sample of his breath to be credible. I reject that evidence.

[101] Mr. Slaunwhite's actions, including his changes of mind about taking the test, claims that the ASD wasn't working properly, his claim that Cst. Matthews' was moving the instrument, and his claims of not being able to blow any longer due to health issues, I find were all tactics to avoid providing a suitable sample of his breath. Mr. Slaunwhite's evidence that he consumed only a small quantity of alcohol, had nothing to hide - no reason not to provide a sample of his breath, and that he could've avoided the checkpoint was unconvincing and did not raise any doubt.

[102] I found Cst. Zacharkiw's evidence, generally, credible and reliable. She readily acknowledged being uncertain on several points. Many of those points were such that her uncertainty was not surprising, given the passage of time.

[103] The evidence Cst. Zacharkiw gave of her discussion with the accused regarding his license was quite unusual and, therefore, memorable. Cst. Zacharkiw's evidence on that point was confirmed, in part, by that of Cst. Cathcart. I accept her testimony that the accused continued to search for something in his wallet after giving her his driver's license and indicated, at least once, that he was looking for his license, after being told and shown by Cst. Zacharkiw that he's already given her his license.

[104] There were differences between the evidence of Cst. Zacharkiw and the other officers regarding the time of certain events occurring. There was no evidence as to whether the officers were referencing different time pieces to record times, but, I think that likely. The time differences I found to be of little significance.

[105] I found the evidence of Cst. Matthews to, generally, be credible and reliable.

[106] Because Cst. Matthews stated that he "assumed" he warned Mr. Slaunwhite not to shake his head after each failed attempt to obtain a breath sample, I'm

not convinced he was recalling that aspect of the incident rather than speculating on what he did or would normally do. I was not convinced by the evidence of Cst. Matthews that Mr. Slaunwhite shook his head during each of the four attempts nor that Cst. Matthews told him not to do so after each attempt to obtain a sample as Cst. Cathcart noted head movement on only the last two attempts. I accept Cst. Matthews evidence that the head movement by Mr. Slaunwhite occurred during at least the last two attempts to obtain a sample. I accept Cst. Matthews' evidence that Mr. Slaunwhite was told at least twice, by Cst. Matthews, not to do so.

[107] The evidence of Cst. Matthews was inconsistent with the evidence of Cst. Cathcart as to whether air was introduced into the ASD on each attempt by Mr. Slaunwhite. Cst. Matthews said that on each occasion Mr. Slaunwhite blew, the air flow was almost instantly sufficient to make the instrument buzz. Cst. Cathcart gave evidence that, on the last two tests, when Mr. Slaunwhite moved his head left and right, there was no air entering the ASD. Both officers indicated that when Mr. Slaunwhite moved his head side to side it resulted in him not maintaining a proper seal on the mouth piece. The evidence of the two officers differed on whether no air or a small amount of air was blown into the ASD by Mr. Slaunwhite on each of the last two

attempts. While I prefer the evidence of Cst. Matthews I'm not certain whether no air or a small amount of air was blown into the ASD by the accused on the last two attempts. I accept Cst. Matthews' evidence that a suitable sample was not provided by Mr. Slaunwhite on any of the four attempts.

[108] I found numerous parts of Cst. Cathcart's evidence inconsistent and confusing. By way of example, he gave evidence it took either 10-15 minutes or one minute for Cst. Matthews to retrieve an ASD. Cst. Cathcart seemed to initially indicate that Mr. Slaunwhite promptly refused to comply with the formal demand made to him by Cst. Matthews. This was followed by his evidence that Mr. Slaunwhite initially said he would comply with the demand, asked a series of questions, then was given an informal demand and refused. Initially it was not clear to the Court whether Cst. Cathcart arrested the accused before or after he was given a formal ASD demand by Cst. Matthews. On Cst. Cathcart's evidence he may have re-arrested Mr. Slaunwhite after the attempts to obtain a sample of breath. Cst. Cathcart's testimony was marked by his use of expressions such as, I believe, going from memory, I probably would've, etc. His use of these expressions and

the inconsistency of his evidence negatively affected the Court's assessment of the reliability of his evidence.

[109] Based upon my assessment of the evidence I make the following findings of fact.

**Findings of Fact:**

[110] On the early morning of February 9, 2008 the accused drove a motor vehicle to the traffic checkpoint on Prospect Road, Halifax, Nova Scotia. Some time prior to his attendance at the checkpoint the accused had consumed some alcohol such that, when at the checkpoint, there was a smell of alcohol on his breath.

[111] The demand officer, Cst. Donald Matthews, while near the open driver's window, detected a smell of alcohol coming from within the accused's motor vehicle, and noted that the accused was the only person in the vehicle and that the accused appeared slightly agitated and fumbled with his papers.

[112] Cst. Matthews formed the suspicion that the accused had alcohol in his body and went to retrieve an ASD. He returned to the accused's vehicle within one or two minutes.



[113] The accused was told or asked informally by either Cst. Cathcart or Cst.

Matthews or both that they wanted him to provide a sample of his breath.

[114] The accused, initially, verbally agreed to comply.

[115] At approximately 1:55 am Cst. Matthews gave a proper ASD demand to Mr.

Slaunwhite. Mr. Slaunwhite indicated an intention to comply. Mr.

Slaunwhite then asked Cst. Matthews several questions regarding the

operation of the machine and what would happen if he failed or if he

refused, etc. Cst. Matthews answered the accused's questions. The

questions became repetitive. Cst. Matthews then asked Mr. Slaunwhite for

an answer, would he provide a sample of his breath or not. Mr. Slaunwhite

indicated that he would not. The exact words used by Mr. Slaunwhite are not

before the Court. This occurred within five minutes of the formal demand.

[116] Cst. Matthews advised Mr. Slaunwhite that he would be charged with

refusal. Cst. Cathcart arrested Mr. Slaunwhite for refusal, brought him to the

police vehicle and placed him in the rear seat thereof. Cst. Cathcart gave

Mr. Slaunwhite his Charter and caution. Cst. Cathcart did not indicate what

he said to Mr. Slaunwhite in relation to the "Charter" or caution.

[117] Within three to five minutes of the verbal refusal, following further

discussion with Cst. Cathcart and Cst. Matthews, Mr. Slaunwhite requested

an opportunity to provide a sample, indicating that he was willing to do so.

Cst. Matthews agreed not to treat the initial refusal as final and agreed to give Mr. Slaunwhite the opportunity to provide a sample of his breath.

[118] Mr. Slaunwhite was removed from the rear seat of the police vehicle. The ASD testing procedure was explained to him. Mr. Slaunwhite fully understood what was required of him.

[119] Mr. Slaunwhite was given four opportunities to provide a suitable sample of his breath and failed to do so.

[120] Mr. Slaunwhite was given an explanation how to provide a suitable sample of his breath which he understood.

[121] On the first two attempts Mr. Slaunwhite stopped blowing before a suitable sample was obtained. Mr. Slaunwhite was advised that he was not blowing properly. On the third attempt Mr. Slaunwhite did not blow any or a sufficient amount of air into the ASD. He moved his head from side to side and did not maintain a proper seal on the mouthpiece. He was told not to move his head while providing a sample. He was told he would be given one further attempt to provide a suitable sample. On the fourth test Mr. Slaunwhite did not provide any or sufficient air into the ASD. He moved his head side to side and failed to maintain a proper seal on the mouthpiece.

[122] Mr. Slaunwhite accused Cst. Matthews of moving the ASD while he was attempting to provide a sample. He questioned whether the ASD was working properly.

[123] I find that Mr. Slaunwhite failed to provide a suitable sample of his breath.

[124] Intention may be imputed from the one's actions. The accused was given four opportunities to provide a suitable sample of his breath and did not do so. His evidence that a medical condition prevented him from doing so was not credible and was rejected. On the totality of the evidence that I accept, I infer that Mr. Slaunwhite intentionally blew in a manner that he knew would not provide a suitable sample. I so find.

### **The Law:**

#### **Reasonable Grounds To Suspect:**

[125] Section 254(2) provides authority for a peace officer to make an ASD demand when the officer has "reasonable grounds to suspect that a person has alcohol or a drug in their body..."

[126] The requirement of reasonable grounds imports a subjective and objective element into the test. The demand officer must have a suspicion that the

person has alcohol in their body and the suspicion must be objectively reasonable. The question of what constitutes sufficient grounds for a suspicion that someone has alcohol in their body is one of fact. The assessment is to be made on the totality of the circumstances known to the demand officer. (See *R v Singh* [2006] O.J. No. 5133 (Ont.S.C.J.).

[127] The smell of alcohol from a vehicle in which the accused was situated has been viewed as a factor to be considered in assessing the grounds for a reasonable suspicion (See for example *R v Cooper*, [1993] O.J. No. 501).

[128] In *R v Zoravkovic*, [1998] O.J. No. 2668 (Ont.C.A.). The Ontario Court of Appeal ruled that an odour of alcoholic beverage on the breath of the driver is not a pre-condition to a valid ASD demand.

### **Provisions of a Suitable Sample:**

[129] It is a question of fact whether or not the accused blew adequately or whether there is some other explanation for the accused's failure. *R v. Levesque* (1985), 22 C.C.C. (3d) 559 (BCCA).

### **Mens Rea of the offense under section 254(5) of the Code:**

[130] Section 254(5) states:

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

[131] The case law is divided on whether a failure to provide a sample due to a medical issue constitutes a reasonable excuse or a lack of mens rea because the defendant did not intend to produce a failure. ( Reasonable excuse see **R v Malica**, [2004] O.J. No. 6016 (Ont.S.C.); **R v Oheme**, [2003] O.J. No. 3829 (Ont.C.J.); **R v Bichon**, [2003] O.J. No. 5840 (Ont.C.J.); *Mens rea* see **R v Brown**, [2004] O.J. No.4423 (Ont.S.C.); **R v Stanley**, [2003] O.J. 2076 (Ont. S.C.); **R v Sullivan**, [2001] O.J. No. 2799 (Ont.C.J.).

[132] This issue was argued by counsel and the Court was referred to Nova Scotia decisions supporting each position (**R v Phinney** (1979), 49 C.C.C. (2d) 81 (NSSCAD); **R v Warnica** (1980), 56 C.C.C. (2d) 100 (NSSCAD); **R v Bain**, [1985] N.S.J. No. 215 (NSCA); **R v Assaf**, [1987] N.S.J. No. 482 (NSCA); **R v Peck**, [1994] N.S.J. No. 39 (NSCA); **R v William Allen Goodwin**, unreported decision January 5, 2004 (NSPC); **R v Barkhouse** [2008] NSJ No. 12; **R v Comeau** [2009] N.S.J. No. 465 (NSPC); **R v Basha**, [2009] N.S.J. No. 550).

[133] Given my findings of fact, I find it unnecessary to decide this issue in order to resolve this case and, therefore opt not to do so.

**Reasonable Excuse - Right to Counsel:**

[134] Based upon the testimony of Cst. Cathcart, the Defense contends that Mr. Slaunwhite was arrested before a formal ASD was made to him.

Consequently the Defense submits that Mr. Slaunwhite was entitled to be informed of his section 10(b) Charter rights and provided an opportunity to exercise those rights. ( *R v Brownridge*, [1972] S.C.J. No 68 (SCC) and *R v Grant*, [1991] S.C.J. No. 78 (SCC)).

[135] The Defense argument rests on the court being satisfied, on a balance of probabilities, that the events happened in the sequence alleged by the Defense. I am not convinced that it is more likely than not that the events happened in that order.

[136] Cst. Cathcart initially indicated that he made an arrest before a formal ASD demand but he subsequently changed his evidence on that point after referring to his notes, made contemporaneous to the event. His evidence, in my view was less reliable than that of Cst. Matthews who testified that the arrest occurred after the formal demand and verbal refusal. The accused

testified that he never verbally refused the demand and was not arrested until after the failed attempts to provide a sample.

[137] On that evidence I am not persuaded that an arrest occurred before a formal demand.

[138] There was one other point, not argued by counsel, that I wish to address. In this case the accused verbally refused to provide a sample, was arrested and “chartered and cautioned”. The accused then changed his mind and requested an opportunity to blow. His request was granted. In these circumstances, does the accused have a right to exercise his right to counsel before attempting to provide samples?

[139] The accused had been detained but his rights upon detention were suspended, because the provisions of the Code requiring an individual who has been given a section 254(5) demand, to comply before retaining and instructing counsel, are a reasonable limit of the right to counsel *R v Thomson*, [1998] 1 S.C.R. 640 (SCC) ). In my view, to find that, a person who refuses to provide a sample at roadside, is arrested and then promptly changes his mind and offers to provide a sample, is entitled to speak with a lawyer before providing a sample, would undermine the purpose of the legislation. I’m not persuaded that is a correct statement of the law. In my

view the change of mind by the accused, accepted by the officer, results in a further suspension of the right to counsel while testing occurs.

**Application of the Law to the Facts:**

[140] In relation to the objective aspect of the reasonable grounds test the Court may consider all of the circumstances known to the demand officer, whether or not he mentioned them as part of the basis for his belief. Based upon the totality of the circumstances known to Cst. Matthews, I am satisfied beyond a reasonable doubt that reasonable grounds existed for his suspicion that the accused had alcohol in his body. I find that the demand which he gave to Mr. Slaunwhite was lawful.

[141] I am satisfied beyond any reasonable doubt that the elements of the offence under section 254(5) of the Criminal Code have been proven. Cst. Matthews made a lawful demand to the accused pursuant to section 254(2) of the Criminal Code. Mr. Slaunwhite understood what was required of him in order to comply with the demand. Mr. Slaunwhite was given a reasonable opportunity to comply. Mr. Slaunwhite failed to provide a suitable sample of his breath. Mr. Slaunwhite's failure to provide a suitable sample of his breath was intentional.



[142] I am not satisfied that Mr. Slaunwhite had a reasonable excuse for failing to provide an adequate sample of his breath. Mr. Slaunwhite's evidence, including the extent of any medical condition affecting his ability to provide a suitable sample, was not credible and not accepted by the court. The totality of the evidence did not establish a reasonable excuse based upon the accused's medical condition.

[143] I am not satisfied that there was a breach of the accused's right to counsel. I am, therefore, not satisfied that the accused had a reasonable excuse based upon a violation of his right to counsel.

[144] On the totality of the evidence I am satisfied beyond any reasonable doubt that the accused is guilty of the charge under section 254(5) of the Criminal Code. I enter a conviction on that charge.

**Impaired Driving:**

[145] The sole issue on the impaired driving charge was whether or not the Crown had proven beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug.

[146] The Crown called three witnesses, each of whom had contact with the accused.

[147] Cst. Zacharkiw testified that there was a odor of liquor from the accused, his eyes were glassy and his speech slurred. She stated that he fumbled and dropped his cards and twice told her that he was looking for his driver's license after he'd given his driver's license to her. Cst. Zacharkiw watched the accused pull up to the checkpoint and made no comment on the manner of his driving. There is no evidence of bad driving.

[148] Cst. Cathcart testified that when he got close to the accused's vehicle he could detect a faint odor of alcohol. He stated that the accused's eyes were glossy and he was swaying or unsteady on his feet. Cst. Cathcart testified that Mr. Slaunwhite fumbled with his cards, dropping some and told Cst. Zacharkiw that he was looking for his driver's license after he'd already given it to her.

[149] Cst. Matthews was not asked any questions regarding indicia of impairment and offered no evidence on that issue.

[150] The only evidence that Mr. Slaunwhite was unsteady on his feet and swayed was the testimony of Cst. Cathcart.

[151] Based upon my assessment of the reliability of Cst. Cathcart's evidence, I am not convinced that Mr. Slaunwhite swayed or was unsteady on his feet while outside of his motor vehicle. The discussion between Cst. Zacharkiw

and the accused regarding his license, which may have occurred only once, demonstrated some mental confusion on the part of the accused which may relate to alcohol impairment and/or nervousness. The odor of liquor, or faint odor, is indicative of some prior consumption of liquor but not, in itself, indicative of impairment.

[152] The evidence, in its totality, does not satisfy me beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. I enter an acquittal on the 253(1)(a) charge.