PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Boyd, 2013 NSPC 5

Date: 20130107
Docket: 2169651-9652
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Paul Deblois Boyd

Judge: The Honourable Judge Theodore K. Tax, J.P. C.

Oral Decision: January, 7, 2013

Charges: On the 5th day of April, 2010, at or near Sackville, NS, have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, did unlawfully without reasonable excuse, fail or refuse to comply with a demand made to him by a Peace Officer to provide samples of his breath suitable to enable an analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code

Counsel: Alex Keaveny, for the Crown
Robert Cragg, for the Defence

By the Court:

INTRODUCTION:

[1] Mr. Paul Boyd stands charged with the care and control of a motor vehicle while his ability to operate that vehicle was impaired by alcohol contrary to section 253(1)(a) of the **Criminal Code** and failing or refusing, without reasonable excuse, to comply with a demand to provide samples of his breath for analysis contrary to section 254(5) of the **Criminal Code**. Both offences are alleged to have occurred on the evening of April 5, 2010, at or near Sackville, Nova Scotia.

[2] At that time, Mr. Boyd was operating a motorcycle when he was stopped for speeding by Const. McGuire on Highway 101. After the police officer engaged his emergency equipment, Mr. Boyd pulled over and stopped. Const. McGuire saw Mr. Boyd stumble as he got off the motorcycle and he noticed an open can of beer in a side saddlebag of the motorcycle as he approached Mr. Boyd. When he spoke with Mr. Boyd about the speeding ticket, Const. McGuire detected a moderate odor of alcohol on his breath. Based upon that information, he made a demand for Mr. Boyd to provide a sample of breath into an Approved Screening Device ("ASD").

[3] Shortly after making the ASD demand, Const. McGuire asked Mr. Boyd when he had his last drink. However, the police officer had also seen an open, partially full can of beer on the side of the motorcycle, so he decided to wait until 15 minutes had elapsed from his first contact with Mr. Boyd. When the ASD test was conducted and Mr. Boyd registered a "Fail," Const. McGuire arrested him for impaired driving and made a breathalyzer demand to Mr. Boyd to accompany him to the police detachment to provide samples of his breath to determine the concentration, if any, of alcohol in his blood. At the police station, after Mr. Boyd spoke with legal counsel, he refused to provide any samples of his breath and he was charged with the refusal offence.

[4] The issue in this case is whether the ASD demand and the sample of Mr. Boyd's breath were provided "forthwith" as required by section 254(2)(b) of the **Criminal Code**. A second issue to be determined is whether Const. McGuire had reasonable grounds to make a breathalyzer demand pursuant to section 254(3) of the **Criminal Code**, and if not, then there would be no legally valid demand

under that section which could sustain the charge of failing or refusing to provide a suitable sample of breath to enable proper analysis. In addition, there is an issue as to whether the Crown has established, beyond a reasonable doubt, that Mr. Boyd actually operated his motorcycle while his ability to do so was impaired by alcohol contrary to section 253(1)(a) of the **Criminal Code**.

POSITIONS OF THE PARTIES:

[5] It is the position of the Crown that Const. McGuire acted reasonably in waiting 15 minutes from the time of the traffic stop for the speeding violation before administering the ASD test. The Crown Attorney submits that Const. McGuire acted on an honest and reasonable belief to eliminate the possibility that Mr. Boyd had some residual mouth alcohol in order to ensure that the ASD provided a reliable reading. Therefore, the ASD test was administered "forthwith" and Const. McGuire could rely on the results of that test and other information which was available to him to make a legally valid demand for Mr. Boyd to provide samples of his breath in order to determine the concentration, if any, of alcohol in his blood. Since Mr. Boyd unequivocally refused to provide samples of his breath for analysis, it is the position of the Crown that the refusal charge contrary to section 254(5) of the **Criminal Code** has been established beyond reasonable doubt.

[6] Defence counsel submits that the facts and circumstances of this case do not support a finding that the ASD test was administered "forthwith" as required by section 254(2) of the **Code**. It is the position of the Defence that the totality of the circumstances of this case establish that it was objectively unreasonable for Const. McGuire to wait 15 minutes before administering the ASD test in order to allow time for possible residual mouth alcohol to dissipate. The Defence submits that the ASD test was not administered "forthwith" as required by the **Criminal Code** and therefore, Const. McGuire could not rely on result of an unlawful test as it would breach his client's section 8, 9 and 10 **Charter** rights.

[7] Therefore, it is the position of the Defence that the results of the ASD should be excluded and in the absence of any other indicia of impairment or erratic driving, Const. McGuire did not have reasonable grounds to believe that Mr. Boyd had committed an offence under section 253 within the preceding three hours. In these circumstances, Mr. Boyd had a reasonable excuse to refuse an unlawful

demand to provide a sample of his breath for analysis. Finally, in terms of the impaired operation charge, Defence counsel submits that there is no evidence of impaired operation contrary to section 253(1)(b) of the **Code** and therefore Mr. Boyd should be found not guilty of both charges before the court.

TRIAL EVIDENCE:

[8] Const. Paul McGuire of the Royal Canadian Mounted Police was the only witness to testify during this trial.

The evidence established that shortly after 8 PM on April 5, 2010, Mr. Boyd was operating his motorcycle and traveling on Highway 101 in the direction of Halifax/Bedford. At that time, Const. McGuire of the RCMP was conducting speed enforcement duties by utilizing stationary radar to track the speed of vehicles approaching the back of his police car. The police car was parked near Sackville, Nova Scotia, on Highway 101, between exits 2 and 3, near the Landfill Road. At about 8:13 PM, Const. McGuire detected a motorcycle traveling at 156 km/h in an area with a posted 110 km/h speed limit. He activated his emergency equipment and the operator of the motorcycle, later identified as Mr. Paul Boyd, immediately pulled over to the side of the road in front of the police car. When Mr. Boyd got off his motorcycle, Const. McGuire noted a slight stumble and as he approached Mr. Boyd, the police officer saw an open can of beer in a left-side saddlebag on the motorcycle. While he spoke face-to-face with Mr. Boyd about the speeding ticket, the police officer also detected a moderate odor of alcohol on his breath.

[9] At 8:18 PM, Const. McGuire removed the open can of beer from the saddlebag and noted that it was partially full. Based upon the fact that Mr. Boyd was the only person on the motorcycle and the location of the open can of beer on the motorcycle, Const. McGuire believed that the beer can was accessible and within Mr. Boyd's reach while he was operating the motorcycle. On cross examination, Const. McGuire confirmed that Mr. Boyd had told him that the open can of beer had been in his saddlebag for several days.

[10] Const. McGuire made an ASD demand pursuant to section 254(2) of the **Criminal Code** at 8:20 PM. The police officer advised Mr. Boyd that he had demanded the roadside screening device test because he had detected the odor of an alcoholic beverage on his breath and he had seen the open, partially full can of beer which was on the side of the motorcycle.

[11] After conducting a pat-down search for officer safety, Const. McGuire placed Mr. Boyd in the back of his police car to administer the ASD test. While seated in the police car, Const. McGuire explained the ASD test and the possible outcomes of that preliminary test including the impact of a refusal to provide a breath sample. At 8:23 PM, prior to administering the ASD test, Const. McGuire asked Mr. Boyd when he had his last drink. Mr. Boyd explained that he had his last drink at a pub in Windsor, Nova Scotia. However, because Const. McGuire had located a half-full, open can of beer which was, in his opinion, accessible to Mr. Boyd and "could have been recently consumed," Const. McGuire decided to delay the administration of the ASD test until 15 minutes had elapsed from the time that he first met with Mr. Boyd [see transcript at pages 18-19 and at pages 64-65].

[12] The officer stated that he waited the 15 minutes in order to allow any residual mouth alcohol to dissipate and then administered the ASD test at 8:29 PM. On this specific point, during his direct examination, Const. McGuire stated at page 19, lines 7 to 19 of the transcript:

> "If someone says their last drink was that far long ago, factoring in the distance, and there's no open liquor container, then I'm going to do the test right away. But with the open can of beer…
>
> And we're always determining, like, if it's an empty that's been sitting in the car for a while or is it a beer that could have been consumed recently… If it's, you know, boiling hot empty with nothing in it, then we know it hasn't been… but this one had beer in it.
>
> And so I explained that I had to wait 15 minutes from the time I stopped him to remove… to allow any potential (amount?) of alcohol to be absorbed so it wouldn't affect the reading on the approved screening device."

[13] On cross examination, it was evident that Const. McGuire did not accept or rely upon Mr. Boyd's explanation that his last drink was at the pub in Windsor Nova Scotia, given the fact that the open can of beer could have been recently consumed before the police officer conducted the traffic stop for speeding. Const. McGuire's specific comments on these points, during his cross examination are found at page 63, lines 5-15 of the transcript:

> "We're limited. He has not been Chartered and cautioned yet, and I'm conducting a roadside investigation, and I'm limited into what I can ask him. I can ask him about recent alcohol consumption.
>
> I have to… I'm obliged to do the best job as an investigator I can. I was satisfied that there was an open can of beer with enough beer in it to indicate to me that it could have been consumed.
>
> I don't have an expectation that he is going to admit that he was drinking it on the road, whether he was or not, or that he stopped and opened it, you know what I mean, that he had it on-the-go.
>
> So I have to err to the side of caution and rule out the possibility of fresh-mouth alcohol by waiting."

[14] On further cross-examination, Const. McGuire added that since he is allowed to ask about recent consumption before administering a roadside screening test, he will ask when the person had their last drink. In this case, if Mr. Boyd had said that it was at the pub in Windsor, and "had there not been that open can of beer, there would have been no issue. The roadside would have been administered, and we would have gone from there." [See transcript at pages 65-66]

[15] At 8:29 PM, which Const. McGuire noted was "15 clear minutes" from the time of the traffic stop, Mr. Boyd made two unsuccessful attempts to provide breath samples for analysis. On the third attempt at 8:30 PM, Mr. Boyd provided a suitable sample and the ASD displayed an "F" meaning Fail. Const. McGuire showed Mr. Boyd the result of the ASD test. The police officer concluded from the "fail" display on the ASD as well as the speeding, the stumble getting off the motorcycle and the moderate odor of alcohol on Mr. Boyd's breath that his ability to operate a motor vehicle was impaired by alcohol. At 8:33 PM, the officer made a breath demand pursuant to section 254(3) of the **Criminal Code** to Mr. Boyd to accompany him to the police detachment in order to provide samples of his breath for analysis to determine the concentration, if any, of alcohol in his blood.

[16] After they arrived at the police station at 8:51 PM, Mr. Boyd was provided with several opportunities to call his own legal counsel as well as the

Legal Aid duty counsel. When Mr. Boyd completed those calls at 9:44 PM, he told Const. McGuire that he would not be providing a sample of his breath for analysis. Mr. Boyd was advised that, if he refused to provide a sample of his breath, he would be charged with the offence of refusal to provide a suitable sample of his breath contrary to section 254(5) of the **Criminal Code**. Mr. Boyd indicated that he understood the consequences of refusing to provide samples of his breath, and repeated that he was not going to provide a sample. He was charged and released.

ANALYSIS:

[17] As I previously indicated, the central issue in this case is whether the Crown has proven, beyond a reasonable doubt, that Const. McGuire made a legally valid demand for a roadside screening device or ASD test. More specifically, this case turns on the question of whether the ASD test at the roadside was administered "forthwith" as required by paragraph 254(2)(b) of the **Code**.

The relevant text of paragraph 254(2)(b) of the **Criminal Code** reads:

> "(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or drug in their body and that the person has, within the preceding three hours, operated a motor vehicle… or had the care or control of a motor vehicle…, whether it is in motion or not, the peace officer may, by demand, require the person… (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device, and, if necessary, to accompany the peace officer for that purpose." (Emphasis is mine)

THE FORTHWITH REQUIREMENT:

[18] The "forthwith" requirement and the constitutional concerns regarding the roadside detention of motorists have been the subject of much debate at all levels of court in Canada for many years. The Supreme Court of Canada has focused on this issue on several occasions in order to address the myriad of factual, contextual and legal issues which arise around the interpretation of the sections in the **Criminal Code** which provide the police with a powerful tool to investigate and prosecute drinking and driving related offences: see for example, **R. v. Thomsen**, [1988] 1 SCR 640; **R. v. Grant,** [1991] 2 SCR 139; **R. v. Bernshaw**, [1995] 1 SCR 254 and **R. v. Woods**, 2005 SCC 42 (CanLii).

[19] **Thomsen** was an early case that dealt with constitutional concerns regarding the roadside detention of motorists and the absence of a reasonable opportunity to consult counsel prior to the compliance with the ASD demand. The Court held that there was a violation of section 10(b) of the **Charter**, but that breach was justified under section 1 of the **Charter** as a reasonable limit because of the importance of roadside testing in detecting and reducing the dangers of impaired driving. Le Dain J., writing for the Court at page 655, held that the word "forthwith" meant that the ASD sample of breath should be provided "as quickly as possible."

[20] In **Grant**, the "forthwith" requirement arose in the context of an officer who had stopped an accused, but did not have the ASD in his car. It took 30 minutes for another officer to deliver an ASD. During that time, the accused was detained in the police car. Speaking for the Court, Lamer C.J. said, at p. 150:

> "The context of section 238(2) [now section 254(2)] indicates no basis for departing from the ordinary, dictionary meaning of the word "forthwith" which suggests that the breath sample is to be provided immediately. Without delving into an analysis of the exact number of minutes which may pass before the demand for a breath sample falls outside of the term "forthwith," I would simply observe that where, as here, the demand is made by a police officer, who is without an ALERT unit and the unit does not, in fact, arrive for one half hour, the provisions of the section 238(2) of the Code will not be satisfied." (Emphasis is mine)

[21] In **Bernshaw**, *supra*, the Supreme Court of Canada again addressed the "forthwith" requirement in the context of the roadside screening test and whether the officer must ascertain when the driver consumed the last drink or wait at least 15 minutes before administering the test in order to eliminate the possibility of residual mouth alcohol. With respect to the issue of potential inaccuracy of the roadside screening test, Justice Sopinka, writing for the majority of the Supreme Court of Canada adopted the "flexible approach" taken by Arbour J.A. of the Ontario Court of Appeal. He concluded, at para. 73:

> "In my view, it is in accord with the purpose of the statutory scheme and ensures that a police officer has an honest belief based on reasonable and probable grounds prior to making a breathalyzer demand. Waiting 15

> minutes is permitted under section 254(2) of the **Code** when this is in accordance with the exigencies of the use of the equipment. This applies when an officer is aware of the potential inaccuracy in the particular case." (Emphasis is mine)

[22] With respect to his interpretation of "forthwith" in the context of the administration of the roadside screening device, Sopinka J. stated, at para.74:

> "Although there is no doubt that the screening test should generally be administered as quickly as possible, it would entirely defeat the purpose of Parliament to require the police to administer the screening test immediately in circumstances where the results would be rendered totally unreliable and flawed. The flexible approach strikes the proper balance between Parliament's objective in combating the evils of drinking and driving, on the one hand, and the rights of citizens to be free from unreasonable search and seizure." (Emphasis is mine)

[23] In **Woods,** *supra*, the "forthwith" requirement arose in the context of an ASD demand pursuant to section 254(2) of the **Code.** Mr. Woods had initially refused to provide breath sample into an ASD at the roadside, but changed his mind at the police station and provided a breath sample into an ASD, about one hour and 20 minutes after his arrest for refusing to provide a sample at the roadside. Fish J. writing the unanimous judgment of the Court held, at para. 29, that in interpreting the "forthwith" requirement, the Court must bear in mind Parliament's intention to strike a balance in the **Code** between the public interest in eradicating driver impairment and the need to safeguard individual **Charter** rights.

[24] The Supreme Court of Canada recognized in **Woods**, at para 43 that the "forthwith" requirement, in the context of section 254(2) of the **Code**, may in "unusual circumstances be given a more flexible interpretation then its ordinary meaning strictly suggests." Justice Fish added that "a brief and unavoidable delay of 15 minutes can thus be justified when this is in accordance with the exigencies of the use of the equipment: see **Bernshaw**."

[25] Looking at those Supreme Court of Canada cases regarding the "forthwith" requirement contained in section 254(2) of the **Code**, I concluded in **R. v. Beals**, 2010 NSPC 66 at para. 29 that the trial judge should bear in mind that

Parliament's intention and the Supreme Court of Canada's interpretation of that provision leads to the conclusion that an ASD test should generally be completed as soon as possible at the roadside. Furthermore, it is clear that the Supreme Court of Canada has also recognized that there must be some flexibility in the interpreting the "forthwith" requirement in situations where, for example, it is necessary to accommodate the "exigencies of the ASD test" in order to ensure accurate and reliable results. For those reasons, I concluded that it is not simply a matter of examining the number of minutes that elapsed from the time that the demand was made until a breath sample was provided or refused. Therefore, the trial judge must examine the totality of the surrounding circumstances and determine whether some "unusual circumstances" were present which would militate in favour of a more flexible interpretation to the "forthwith" requirement than the ordinary meaning of that word would strictly suggest.

[26] Recently, LaForme J.A. of the Ontario Court of Appeal reviewed the foregoing Supreme Court of Canada cases and he concluded, at paras. 45-49 in **R. v. Quansah**, 2012 ONCA 123 (CanLii) that the "forthwith" or "immediacy" requirement contained in section 254(2) of the **Code** necessitates a consideration of five things:

> (1) The analysis of this requirement must always be done contextually.
>
> (2) The demand must be made by a police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body.
>
> (3) The "forthwith" requirement connotes a prompt demand and immediate response, although in "unusual circumstances a more flexible interpretation may be given."
>
> (4) The immediacy requirement must take into account all the circumstances which may include a reasonably necessary delay where breath test cannot immediately be performed because an ASD is not immediately available or where a short delay is needed to ensure an accurate result of an immediate ASD test or where short delay is required due to articulated and legitimate safety concerns. These are examples of delays that are no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.

> (5) The court must consider whether the police could realistically have fulfilled their obligation to implement the detainee's section 10(b) **Charter** rights before requiring the sample. If so, the "forthwith" criterion is not met.

[27] In his brief, Defence counsel referred to several cases which interpreted the meaning of the "forthwith" requirement in the context of circumstances similar to those present in **Grant**, where the police officer who made the ASD demand at the roadside, did not have the ASD at the time of the demand. I find that, while those cases may provide some additional factual scenarios where courts have interpreted the "forthwith" requirement, those decisions can be distinguished on the basis that they do not relate to facts and circumstances of this case. In this case, I find that Const. McGuire had an ASD unit in his police car and that he had been trained and was properly qualified to operate an ASD.

[28] Defence counsel also referred to several other cases where courts have ruled that the "forthwith" requirement was not met where the police officer had formed a reasonable suspicion that a person had alcohol in their body and operated or had care or control of a motor vehicle, but delayed the administration of the ASD test to write notes, do license checks, become involved in another investigation or to brief another officer who might assist in the ASD test. I find that those decisions are also based upon different factual circumstances and, as such, they can also be distinguished from the circumstances of this case. However, I find those decisions do underline the importance of the court examining the totality of the circumstances of the case to determine whether there was an unreasonable delay in complying with the "forthwith" requirement.

[29] In this case, I find that the evidence established that Const. McGuire initially stopped Mr. Boyd at 8:13 PM on April 5, 2010 for operating his motorcycle at 156 km/h in a 110 km zone. After activating his emergency lights to signal Mr. Boyd to pull over and stop, I find that Const. McGuire informed Mr. Boyd of the speeding offence and confirmed that Mr. Boyd was the driver and only person on the motorcycle by comparing him to the photo ID on the Nova Scotia driver's license that he produced. During Const. McGuire's face-to-face conversation with Mr. Boyd, the evidence established that Const. McGuire

detected a moderate odor of alcohol on Mr. Boyd's breath. I also find that, the evidence established that at 8:18 p.m., Const. McGuire noticed an open can of beer in the left side saddlebag of the motorcycle and lifted it up to verify that the beer can was still half full.

[30] I accept Const. McGuire's testimony that he had reasonable grounds to suspect Mr. Boyd had alcohol in his body while operating the motorcycle and that he had the grounds to make an ASD demand. I find that the officer's reasonable suspicion was based upon the slight stumble as Mr. Boyd got off the motorcycle, the moderate odor of alcohol on his breath and the officer's belief that the open can of beer was accessible to Mr. Boyd. I find that the evidence established that this ASD demand to provide a breath sample pursuant to section 254(2) of the **Code** was made at 8:20 PM. Following that demand, I accept Const. McGuire's testimony that it took a minute or so to conduct a pat-down search and place Mr. Boyd in the back seat of the police car where he explained the nature and potential consequences of the ASD test. Once that was done, I accept Const. McGuire's evidence that, at 8:23 PM, he asked Mr. Boyd when he had his last drink of alcohol. Furthermore, I accept the officer's evidence that he decided to delay the administration of the ASD test until 8:29 PM, because he believed the open can of beer was accessible to Mr. Boyd and "could have been recently consumed." As a result, I find that Const. McGuire was aware that there might be an issue of residual mouth alcohol and that he honestly believed that the slight delay in the ASD test was necessary to ensure the accuracy of the ASD results.

[31] Based upon his belief that Mr. Boyd could have consumed some beer in the 15 minutes before the test, I accept Const. McGuire's evidence that he decided to wait until 15 minutes had elapsed from the time that he first had continual visual observation of Mr. Boyd's activities, that is, from the time that he conducted the traffic stop for the speeding violation. As a result, I find that Const. McGuire delayed the administration of the ASD test for a total of nine minutes following the demand to provide a breath sample for the sole purpose of eliminating the possibility that the presence of residual mouth alcohol might affect the reliability and accuracy of the ASD test results.

[32] Since Const. McGuire's stated reason for the short delay in the administration of Mr. Boyd's ASD test was to eliminate the possibility of residual mouth alcohol, the issue to be determined in this case is whether Const. McGuire's

short delay in the administration of the ASD test for that reason was reasonably necessary and whether it is appropriate to apply the "flexible approach" with respect to the "forthwith" requirement of section 254(2) of the **Criminal Code**.

RESIDUAL MOUTH ALCOHOL:

[33] In this case, I find that Const. McGuire formed a reasonable suspicion that Mr. Boyd had alcohol in his body while operating his motorcycle and then he made a demand to Mr. Boyd to provide a sample of his breath approximately seven minutes after initiating a traffic stop of Mr. Boyd for speeding. Mr. Boyd's ASD test was administered nine minutes later and the results of that test indicated an "F" or Fail. In doing so, I find that Const. McGuire advised Mr. Boyd, at the roadside, that his reason for delaying the ASD test was to eliminate the possibility of an unreliable ASD test result due to the possible presence of residual mouth alcohol.

[34] Although the scientific details of the issues around residual mouth alcohol were not addressed by counsel, I find that it is evident that in **Bernshaw**, *supra*, at paras. 54-59, the majority of the Supreme Court of Canada was well aware of the RCMP training manuals, the manufacturer's manual and other scientific evidence which established the impact of residual mouth alcohol on the accuracy of an ASD test. The court noted that all of those materials warned that an ASD will provide inaccurate results where a suspect has consumed alcohol within the 15 minutes prior to the administration of the ASD test.

[35] In **R. v. Einarson**, 2004 CanLii 19570 (ONCA), the court was faced with a similar situation to the instant case. The Defence argued that the officer could not rely on an ASD test which registered "fail" because he could not exclude the possibility that the accused had consumed alcohol in the 15 minutes prior to taking the test. The Defence also contended that absent the results of the ASD, the officer did not have reasonable and probable grounds to arrest the accused or to make the breathalyzer demand. In that event, the Defence submitted that the breathalyzer results should be excluded from the evidence and an acquittal should be entered.

[36] The Ontario Court of Appeal in **Einarson**, *supra*, essentially took judicial notice of the residual mouth alcohol issue and its impact on the accuracy of an ASD test. Doherty J.A. stated at para. 14:

> "It is well known by police officers that where a driver has

> consumed alcohol in the 15 to 20 minutes before the test is administered; the result of the test may be unreliable because of the presence of residual mouth alcohol. The whole purpose of administering the test under section 254(2) is to assist the officer in determining whether there are reasonable and probable grounds to arrest the driver for a drinking and driving offence. If the officer does not, or reasonably should not, rely on the accuracy of the test results, it cannot assist in determining whether there are reasonable and probable grounds to arrest. Administering the test without delay in those circumstances would be pointless and would defeat the purpose for which the test is administered."

[37] After reviewing the factual similarity of **Einarson** and **Bernshaw**, the Ontario Court of Appeal held that the flexible approach adopted by Sopinka J. requires a case-by-case analysis of whether the demanding officer should have waited or not waited before administering the ASD test. This, in my opinion, requires the court to consider the police officer's subjective opinion and to make an objective assessment of the facts and circumstances which were available to the officer at the time that the demand was made. In **Einarson**, Doherty J.A. formulated the issue to be analyzed in the following manner at para. 33:

> "If an officer honestly believes that some delay is necessary to obtain an accurate sample and if that belief is reasonable in the circumstances, a test administered after an appropriately brief delay remains within the scope of section 254(2)."

[38] Following the decisions in **Bernshaw** and **Einarson**, Durno J. sitting as a Summary Appeal Court Judge in **R. v. Mastromartino et al**, 2004 CanLii 28770 (ONSC) dealt with 4 cases involving the ASD "forthwith" demand, the issue of residual mouth alcohol and whether the officer knew or ought to have known that the driver had consumed alcohol within 15 minutes of the ASD sample being obtained. Looking at **Bernshaw** and **Einarson**, Justice Durno summarized the general principles established in those cases at para. 23:

> 1. Officers making ASD demands must address their minds to whether or not

they would be obtaining a reliable reading by administering the test without a brief delay.

2. If officers do not, or reasonably could not, rely on the accuracy of the test results, the results cannot assist in determining whether there are reasonable and probable grounds to arrest.

3. Officers making ASD demands may briefly delay administering the test if, in their opinion, there is credible evidence which causes them to doubt the accuracy of the test result unless the test was briefly delayed.

4. Officers are not required to wait before administering the test in every case where a driver may have been in a bar shortly before being stopped. The mere possibility that a driver consumed alcohol within 15 minutes before taking the test does not preclude an officer from relying on the accuracy of the screening device.

5. Whether or not officers are required to wait before administering the screening test is determined on a case-by-case analysis, focusing on the officer's belief as to the accuracy of the test results if the tests were administered without delay, and the reasonableness of that belief.

6. The fact the driver is observed leaving a bar is a relevant circumstance and determining whether it was reasonable for the officer to delay the taking of the test in order to obtain an accurate sample. However, officers are not required to ask drivers when they last consumed alcohol.

7. If the officer decides to delay taking the sample and that delay is challenged at trial, the court must decide whether the officer honestly and reasonably felt that an appropriately short delay was necessary to obtain a reliable reading.

8. If the officer decides not to delay taking the sample and that decision is challenged at trial, the court must decide whether the officer honestly and reasonably believed that he could rely on the test result if the sample was taken without delay.

[39] Both counsel made submissions based upon the 8 general principles which were summarized by Justice Durno in **Mastromartino.** In applying those

general principles to the facts and circumstances of this case, I find that:

(1) After making the ASD demand, Const. McGuire clearly addressed his mind to whether the test would provide a reliable reading without a brief delay.

(2) This principle is not applicable, as Const. McGuire relied upon the accuracy of the test results as part of his reasonable and probable grounds to arrest, because he had delayed the ASD test for a period of 15 minutes.

(3) In this case, the presence of the open, partially full can of beer, which in the officer's opinion was accessible to Mr. Boyd, constitutes "credible evidence" of the possibility of residual mouth alcohol, which in turn, caused him to doubt the accuracy of the ASD test unless the test was briefly delayed.

(4) This general principle does not apply in this case because the police officer did wait to administer the ASD test.

(5) With respect to this general principle, Const. McGuire subjectively believed that possible residual mouth alcohol would affect the accuracy of the ASD test. I am satisfied that the officer honestly held a subjective belief that was objectively reasonable in the totality of the circumstances which included, the moderate odor of alcohol on Mr. Boyd's breath indicating some recent consumption of alcohol, the presence of a open beer can which had been partially consumed and was accessible to Mr. Boyd, and that there was no one else on the motorcycle, other than Mr. Boyd who could have been consuming the beer that evening.

(6) This general principle does not apply in this case as Const. McGuire did ask Mr. Boyd when he had his last drink.

(7) As I indicated above, I am satisfied that Const. McGuire clearly had an honest belief that residual mouth alcohol might be present. For the reasons stated with respect to principle number 5 above, I am satisfied that the police officer's belief was reasonable in all the circumstances of this case.

(8) This general principle does not apply in this case, as Const. McGuire did delay the administration of Mr. Boyd's ASD test.

[40] After having considered the foregoing principles which were gleaned from **Bernshaw** and **Einarson** with respect to the issue of residual mouth alcohol and the reliability and accuracy of an ASD, I conclude that Const. McGuire acted on an honest belief which was reasonably supported by credible evidence that a short delay was necessary to obtain an accurate ASD breath sample. In this case, I find that the brief delay of nine minutes in the administration of Mr. Boyd's ASD test was required to ensure an accurate result of an immediate ASD test due to the possibility that Mr. Boyd might have some residual mouth alcohol.

[41] Bearing in mind the considerations mentioned by the Ontario Court of Appeal in **Quansah**, I find that, taking into account all of the circumstances of this case, a brief delay in the "forthwith" requirement was needed in order to ensure an accurate result of an immediate ASD test. I find that the delay of nine minutes in this case was no more than was reasonably necessary to enable Const. McGuire to properly discharge his duties in the context of balancing the public interest in eradicating driver impairment and the need to safeguard individual **Charter** rights.

[42] As a result, I find that Const. McGuire made a legally valid demand to Mr. Boyd to provide a sample of his breath to be analyzed by means of an ASD. I also conclude that Const. McGuire could rely upon the "fail" result of the ASD test together with the other facts and circumstances known to him at the time of the ASD demand, to formulate his reasonable grounds to make a legally valid breathalyzer demand under section 254(3) of the **Code**.

[43] In concluding that Const. McGuire had made a legally valid breathalyzer demand, I find that Mr. Boyd was required to accompany Const. McGuire to the police station to provide samples of breath for analysis by a qualified technician to determine the concentration, if any, of alcohol in his blood. After consulting with counsel, I find that Mr. Boyd unequivocally refused to provide samples of his breath for analysis. Given my conclusion that there was a legally valid demand for Mr. Boyd to provide samples of his breath for analysis and that he did not have any reasonable excuse for failing or refusing to do so, I am satisfied that the Crown has established, beyond a reasonable doubt, that Mr. Boyd is guilty of the offence of failing or refusing to comply with a demand made contrary to section 254(5) of the **Criminal Code**.

[44] As Mr. Boyd was also charged with operation or care or control of a

motor vehicle while his ability to do so was impaired by alcohol contrary to section 253(1)(a) of the **Criminal Code**, and I have found him guilty of the failure or refusal to comply with a demand to provide a samples of his breath, I enter a conditional stay of the section 253(1)(a) **Code** charge.

Order Accordingly,
Judge Theodore K. Tax
Judge of the Provincial Court