PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Fraser,* 2018 NSPC 35

Date: 2018-06-05

Docket: 2769994

Registry: Sydney

Between:

Her Majesty the Queen

v.

Francis Todd Fraser

Judge: The Honourable Judge A. Peter Ross

Heard: January 16, 2017, December 11, 2017 and March 2, 2018 in Sydney, NS

Decision: June 5, 2018

Charge: s.254(5) *Criminal Code of Canada*

Counsel: Mr. Darcy MacPherson, for the Crown

Mr. Vincent A. Gillis, for the accused Fraser

Summary

[1] Accused is charged with refusal of a s.254(3) breath demand. He was arrested at roadside for impaired operation of a motor vehicle, after certain observations. Accused gave evidence contradicting police on his appearance and actions at the scene. Accused was read proper rights to counsel, given the demand, taken to the local police detachment, and afforded the opportunity to contact a lawyer. Accused refused to speak with duty counsel. Police evidence would suggest that Accused was not making *bona fide* attempts to obtain legal advice once it was clear that his lawyer of choice was unavailable. Accused claims he was diligent in his efforts, had attempted to call other counsel, and wished to have a private lawyer. He says police did not allow him a reasonable opportunity to exercise his s.10(b) *Charter* right before putting him to a final choice to either provide samples or be charged with refusal. He made an application for *Charter* relief based on this alleged breach. The matter proceeded as a 'blended' trial and *Charter voir dire*.

Issues

(1) Whether Accused's actions constituted a "constructive" refusal of the breath demand (2) Whether police violated the implementation component of the s.10(b) right to counsel

Result

[2] The credibility assessment, based upon the evidence at the scene as well as at the detachment, favoured the police. With respect to the alleged *Charter* violation, Accused failed to show that he was diligent in the exercise of his right to counsel. With respect to the substantive offence, although Accused did not explicitly refuse to provide samples, his actions constituted a constructive refusal. He did not establish any excuse for this refusal. The rights and obligations of police and Accused, and the various burdens of proof on the *Charter* and offence components are discussed.

DECISION

INTRODUCTION

[3] Francis Todd Fraser is charged with failing to comply with a demand made to him by a police officer to provide, as soon as practicable, samples of his breath in order to determine whether the concentration of alcohol in his blood exceeded the legal limit, contrary to s.254(5) of the *Criminal Code*.

[4] This decision considers the tension between (1) the state's legitimate interest in obtaining evidence of possible impaired driving and (2) a person's right to consult with legal

counsel before supplying such potentially incriminating evidence. Police demanded breath samples from Mr. Fraser because they believed he had operated a motor vehicle while impaired by alcohol. Defence asserts that his *Charter* right to counsel was infringed in the course of their attempts to procure the samples, and that the evidence fails to show a clear refusal of the demand. Crown contends that Mr. Fraser's right to counsel was duly observed and that the accused's efforts to contact a lawyer were disingenuous, an attempt to frustrate a legitimate investigation.

[5] In this case the facts and law, with respect to both the substantive offence and the *Charter* issues, are closely intertwined. What one side sees as the exercise of a right the other sees as a constructive refusal of a breath demand. By agreement, the *Charter* application and the trial proper were heard at one and the same time. Certain parts of the evidence are relevant to the *Charter* issues, certain parts are relevant to proof of the offence, some parts are relevant to both. A "blended" hearing permits the trier of fact to deal with all the issues at once and to assess the credibility of witnesses across the whole of the evidence.

THE EVIDENCE

[6] Factually the case is relatively simple, although there are some important differences between the police version of events and that of the accused.

At the scene / in the police car – the Police version

[7] Two Cape Breton Regional Police officers were on patrol in the early hours of August 6th, 2014 in the former town of New Waterford. They were looking for an ATV which had driven up 8th Street. They saw another vehicle stopped by the side of the road, brake lights on, about four or five blocks away. Police stopped at each cross street to look for the ATV. Meanwhile, the subject vehicle, a Hummer, had not moved. Its engine was running.

[8] Curious, the police pulled alongside. It was 2:40 a.m. Cst. Abraham was driving; Cst. MacKay was in the passenger seat. MacKay rolled down his window, and so did the driver of the Hummer, Mr. Fraser. There was a female in the front passenger seat of the Hummer.

[9] MacKay asked if "everything was ok". The accused said, "what's going on." MacKay says he noticed a smell of alcoholic beverage, like he "got slapped in the face" with it. He says Mr. Fraser had bloodshot eyes and was slurring his speech. Abraham described his speech as "heavy" and suspected, like MacKay, from the smell, speech and eyes that he had been drinking. These observations occurred over the course of 45 to 60 seconds while all parties were inside their respective vehicles. Abraham backed up the police car,

positioned it behind the Hummer, engaged the lights and "proceeded as with any such stop."

[10] After Abraham "ran the plates" he and MacKay both went to the driver's side of the Hummer to engage the accused. It was now about 2:45. Mr. Fraser was known to MacKay from another matter. They asked for the usual paperwork. The observations they had made moments earlier were reinforced – a strong smell of alcohol, bloodshot eyes, slurred speech. They noticed four cans of unopened beer in the back seat. The vehicle was still running.

[11] Wanting to know which of the two occupants was the source of the smell, the police asked Mr. Fraser to step out of his vehicle. According to MacKay he "swayed", "took a step to catch himself" and stood by the driver's door. He had level pavement underfoot. They asked him to step to the back of his vehicle. He took small steps and police noted a smell of alcohol from his breath.

[12] Based on these observations, MacKay believed that Mr. Fraser's ability to operate a motor vehicle was impaired by alcohol. MacKay took him to the police car under arrest for impaired driving and read him the usual right to counsel and police caution from a standard issue card. Mr. Fraser said he understood. The time was now 2:47. Abraham's recollection was that MacKay had given the rights and caution at the rear of the Hummer. I accept MacKay's evidence on this point, although nothing turns on it.

[13] At about 2:50, as they headed out to the police station, MacKay read Mr. Fraser a standard demand for breath samples. They stopped at the New Waterford office where Abraham got out and MacKay took over as driver. They proceeded to Central Division to procure the samples. This detour was brief and immaterial.

[14] Although told that he did not have to say anything, Mr. Fraser engaged in some conversation with Mackay en route. According to MacKay he said that he would drag out the process of getting a lawyer until MacKay's shift was over.

At the scene / in the police car – the Accused's version:

[15] Mr. Fraser offers a different view of events. He testified that the previous night he had left his Hummer with a friend in New Waterford who took it to The Rack and Roll, a local billiards bar. The next night his mother drove him from South Bar to the bar to retrieve it. He got there around 12:30 a.m. and had a beer, his only drink. On the way out he met a girl, Kayla. They stayed and chatted for about an hour. She wanted to party at a friend's house; the accused offered her a drive. He first took her to her place, on 8th Street, so that she could get some liquor. Kayla came out with four beer and a half-pint

of vodka. They were still there, parked by the side of the road, flirting and chatting, when the police came by.

[16] The police pulled up, asked if everything was ok, and then "sat there" behind the Hummer for about two minutes. They then put on their lights, came to the Hummer, and asked for papers. Mr. Fraser said they "immediately arrested me for impaired driving" and "cuffed me right away" at the side of his vehicle.

[17] Mr. Fraser noted that his vehicle was much higher than the one driven by the police. He said he did not stumble getting out or his vehicle or walking to the police car. He noted that the running board on this vehicle, which was about two feet off the ground, had been bent such that one "could easily slide off" and it "was tricky getting out."

[18] Mr. Fraser says he was "baffled" by the whole episode because he was never asked if he was drinking, he had been legally parked, and was not doing anything wrong. In response to the suggestion that he had to "catch himself", he alluded to the bent the running board. He says his short "stutter steps" resulted from being cuffed behind the back.

[19] Mr. Fraser denies that his foot was on the brake, suggesting that the police confused brake lights with the running lights on the vehicle. This is possible but is ultimately of no importance. He doesn't think his eyes were bloodshot and denies his speech was slurred. He acknowledges that Kayla had been drinking, but "doesn't see how the police could have smelled liquor" given the difference in the height of the two vehicles. He denies threatening to delay the process on the drive to the Detachment. He says he was arrested at his driver's door, not at the rear of the car.

At the Detachment – the police version

[20] According to the police they arrived at the Central "lockup" at 3:07 a.m. Mr. Fraser was searched, taken to a private room, and offered a call. He was adamant about calling Mr. Vincent Gillis; he was given a phone book. MacKay saw him looking through it.

[21] MacKay records 3:16 as Fraser's first attempt to contact Mr. Gillis. He said the accused would dial a number, hang up, dial again, hang up, dial again, etc. He records calls at 3:16, 3:17, 3:18, 3:20, 3:22, 3:25, 3:25, 3:26, and 3:28. MacKay then knocked on the door, entered and "explained that he might not be able to get his own lawyer." MacKay called the duty counsel number, made contact with a Mr. Fitch, and then offered Mr. Fraser the phone. Fraser refused to speak to Mr. Fitch. At 3:33 MacKay himself looked up and called Mr. Gillis' office number; he got a recording. Mr. Fraser did not

have a cell phone number for Mr. Gillis. MacKay again "tried to explain" but Mr. Fraser "kept saying he wanted *his* lawyer."

[22] At this point Cst. Vokey, the breath technician, entered the room. Having received a call that his services were needed he had been preparing the instrument for the test. He went to the room where the accused was using the phone "because things seemed to be taking a while." MacKay showed him the list of times Mr. Fraser had called out.

[23] According to Vokey he advised MacKay to call duty counsel and watched as he did. MacKay testified that Vokey entered the picture after the call to Mr. Fitch. I do not consider the difference to be of any significance.

[24] Vokey then engaged the accused in a conversation about "the process" and explained that he could be charged with refusal. Mr. Fraser kept saying that he wanted to speak to his lawyer. At 3:39 Mr. Fraser was taken to a cell and advised that he would be charged with refusal. He was never taken into the breathalyzer room.

[25] MacKay says that he too told the accused that he'd be charged with refusal, that "it was obvious that he has not having any conversations" and that "all he'd say in response to us asking him if he'd take the test is 'I want to speak with my lawyer'." Both police officers indicate that the accused was single-minded in his desire to speak with Mr. Gillis.

At the Detachment – the Accused's version

[26] Mr. Fraser agrees that he was given a phone book and a chance to call a lawyer. He says he "left a message once or twice" with Mr. Gillis. He says he tried Mr. Nash Brogan, another private lawyer. He agrees it is possible that he made nine calls. He recalls that Vokey said "that's enough, we're charging you."

[27] Mr. Fraser says that he twice said to Vokey "I'm not refusing, I just want to speak to my own counsel." About the calls he said, "it's not like I tried a lot – it was just a few minutes." He says he refused to speak with duty counsel because he believed a salaried lawyer would not serve his interests as well as private counsel. He said that Fitch was "his (MacKay's) lawyer, not my lawyer."

[28] Asked if he would have taken the test had he been brought into the breathalyzer room, Mr. Fraser said "maybe I wouldn't have." Asked why he did not blow if he'd only had one beer, he said he thought he was being wronged and harassed.

[29] It seems to be common ground that at no point did Mr. Fraser say outright "I'm refusing." This is a case of so-called constructive refusal. There appears to be no dispute that the breath demand, the police caution and the advice about his s.10(b) rights were appropriate and adequate. He is not claiming a lack of privacy. Mr. Fraser knew his legal jeopardy. He knew the reason for his arrest. He understood that to refuse a valid demand was an offence.

THE LEGAL FRAMEWORK

[30] To secure a conviction the Crown must prove each constituent element of the offence beyond a reasonable doubt. These elements include the validity as well as the refusal of the breath demand.

[31] As with all criminal charges the offence is comprised of *actus reus* and the *mens rea* – the acts themselves and the state of mind which must accompany the acts. There appears to be some division of opinion in the caselaw over just what the *mens rea* for the offence of refusal entails.

[32] It has been suggested that the Crown must prove that the accused had "no reasonable excuse" to refuse a valid breath demand. I adopt the view that since Mr. Fraser claims he had a reasonable excuse to refuse, the onus is on him to establish this - see *R. v. Goleski*, 307 CCC (3d) 1 (BCCA).

[33] In this case the accused alleges a breach of a *Charter* right. The onus is on Mr. Fraser to prove, on a balance of probabilities, that his right to counsel under s.10(b) of the *Charter* was infringed. If a breach is proven only then does the Court consider the possible remedy of exclusion of evidence under s.24(2). Here, that would be the evidence of the refusal itself, which in turn would be fatal to the Crown's case. (Alternatively, I suppose, a stay of proceedings could be entered.)

[34] One might think that if a breach of Mr. Fraser's 10(b) right is proven, such would constitute, *ipso facto*, a "reasonable excuse", with no need to consider a *Charter* remedy. Some cases suggest otherwise – see, for example *R. v. Lunn*, [2012] N.S.J. No. 257 at par.35.

[35] In a *Charter* application involving an arrest, the onus of proving reasonable and probable grounds to arrest is generally put on the Crown, despite the fact that the overall onus of proof is with the accused. This is done as a matter of simple fairness - the grounds are something within the knowledge of the police themselves, and an accused should be allowed to cross-examine them about it.

[36] Lastly, an accused must be diligent in the exercise of his or her rights and must be able to prove this, depending on how the case unfolds. This principle was established by the Supreme Court in early *Charter* jurisprudence.

[37] Where police have sufficient reason to believe that someone is operating a motor vehicle while impaired by alcohol, they have legitimate means by which to obtain incriminating evidence against such a person – they may make a demand for breath samples. The accompanying arrest activates the person's right to counsel. This right includes access to free and immediate legal advice (duty counsel) but also the right to speak to other counsel of choice. Police, upon arrest, have a positive obligation to advise a person of the right to counsel and must facilitate the exercise of the right by affording the person access to a telephone, by giving him or her the number of duty counsel for free and immediate legal advice, by providing an opportunity to speak in private, and by providing reasonable assistance in calling other counsel of choice, if that is what the person wishes to do.

[38] As noted, once the person has been advised of the right, and provided means by which to exercise it, s/he must show reasonable diligence. Like all rights, the right to counsel is not absolute. A person's lawyer of choice might not be available; s/he may need to seek advice elsewhere. Police hope to obtain samples within two hours of the time of operation because this gives the Crown the benefit of an evidentiary presumption in the *Criminal Code* – s.258(1)(c). While this may not trump the right to counsel it is a relevant consideration. Presumptions aside, once a person has been put before a telephone, advised of the right, and given the information needed to contact counsel, police should not be required to wait indefinitely. They have law enforcement duties which extend beyond that one arrest. Police are not required to babysit a malingering suspect indefinitely.

FINDINGS OF FACT AND APPLICATION OF LAW – THE *CHARTER* ISSUE

[39] Early in the proceedings Defence suggested that the accused was arbitrarily detained at roadside in violation of s.9 of the *Charter*. If proven, this might vitiate the legal basis for the breath demand which Mr. Fraser is charged with refusing. However, this argument was not pursued. The live *Charter* issue is whether the police breached Mr. Fraser's s.10(b) right to counsel. I will deal with this first; conceivably it could deprive the Crown of evidence it needs to prove the offence and thus, in effect, decide the case.

[40] Defence submits that "Mr. Fraser had a right to consult with counsel of his choice and not one chosen by the officer. Mr. Fraser was well within his rights when he opted not to speak with duty counsel, Mr. Fitch. His refusal to consult duty counsel was not a waiver of his right to counsel. Quite the contrary, it was merely him asserting his right to counsel of his choice."

[41] As to whether the accused was diligent in pursuit of his 10(b) rights, Defence says "The evidence supports an affirmative answer. Mr. Fraser made nine telephone calls over a period of 12 to 14 minutes. Whether he attempted to call one lawyer or more than one should bear little weight when assessing his diligence, considering the time the officers granted him. . . "

[42] Defence also points out that "The police were well within the presumption timeline and not even remotely nearing it. They had plenty of time. Any sense of urgency was self-imposed. Whether they believed Mr. Fraser was stalling was not a belief worthy of much consideration as the clock was not even close to running out . . . they chose not to afford Mr. Fraser sufficient opportunity to exercise his rights. That was their decision, not his, and it should not be condoned."

[43] These are all valid and well-constructed arguments. However, they contain some characterizations that I do not entirely share.

[44] Firstly, I find that the first encounter police had with Mr. Fraser on 8th Street went essentially as they described. Despite Mr. Fraser's professions to the contrary, I am convinced by the testimony of the police that they did note a strong smell of alcohol emanating from the vehicle and moments later from Mr. Fraser himself. Mr. Fraser's mention of the bent running bar, which he used to exit his vehicle, seemed to me an attempt to justify his observed unsteadiness; the fact that police did not say he stumbled *while exiting* makes Mr. Fraser's detailed description of the running bar all the more curious.

[45] On Mr. Fraser's account he had consumed but one pint of beer some 1.5 to 2 hours before he encountered the police. If true, there is virtually no chance that police would have smelled alcohol from him. He suggests that the smell from the vehicle came from the other occupant, Kayla. Kayla was not called to testify. Left as I am to assess the testimony of the witnesses against each other and against all the evidence in the case, I find the accused lacks credibility on this point and conclude that police did detect the odour of alcohol directly from him when he was outside his vehicle.

[46] With respect to the time allowed to Mr. Fraser to contact counsel, I agree that on its face, particularly in light of the fact that police were still well within the two hour 'presumption' time frame, it appears meagre. However, this 17 minutes – from the accused's first call at 3:16 to MacKay's call to Mr. Gillis at 3:33 - must be put in context with the other evidence.

[47] I agree that someone wanting "my lawyer" would not necessarily have in mind any particular person. However, I find that the only name Mr. Fraser mentioned to police was Mr. Gillis. Police reasonably believed that this is who he wanted to contact. This is who MacKay himself called. The accused testified that Mr. Gillis was his preferred

counsel. His testimony that he placed a call to Mr. Brogan seemed an afterthought and did not indicate to my mind that he was truly open to exploring other possibilities besides Mr. Gillis. The phone book he was given presumably contained white pages as well as yellow. He gave no evidence that he attempted to call any lawyer at a home number. It was the middle of the night. Given that he and MacKay were unable to get more than a recorded message from Mr. Gillis' office, he could not reasonably believe that anything more would be gained by repeatedly dialing the same number. Yet on the evidence, including his own, this is what he did.

[48] MacKay asserts that the accused threatened to drag out the process even before they arrived at the Detachment. The accused denies making such a remark. If it were only the word of the police officer to weigh against the denial of the accused, it would be impossible to determine whether such a comment was made. However, this bit of evidence does not sit in isolation from the whole of the evidence any more than does the 17 minutes, or the claim to want to speak to "my lawyer." Considered in light of the evidence about Mr. Fraser's conduct at the Detachment I conclude that such a comment was made. My finding of credibility concerning the smell of alcohol at the scene assists in arriving at this conclusion.

[49] Mr. Fraser was not a weak or vulnerable detainee. He was not overwhelmed by the situation. He was neither confused nor cowed by the police. He presented at trial as savvy and self-composed. I infer from all the evidence that Mr. Fraser was not as much interested in obtaining legal advice as he was in avoiding the measurement of alcohol in his blood.

[50] The precise "greeting" from Mr. Gillis' answering service was not given in evidence, but the message was clear: Mr. Fraser, through no fault of the police, did not have access to his counsel of choice. One can't always get what one wants. But in such circumstances duty counsel may provide the advice one needs. There is no credible evidence of genuine attempts to contact some other private lawyer, nothing beyond a rather vague mention, at trial, of one call to Mr. Brogan.

[51] Defence has argued that police failed to meet the "implementational" duties imposed on them by s.10(b) to facilitate an accused's exercise of the right to counsel. In some instances, possibly as a matter of practice, police "take over" the process of contacting counsel. Where this has occurred, courts have found that police must then be held to the same standard of diligence as would an accused, for they are then, in effect, acting as his or her agent. This principle is noted in *R. v.Matiel* [2016] O.J. No. 4789 at par. 43:

> (1) If the police did not assume this responsibility, those in detention would be expected to exercise reasonable diligence in contacting their lawyer of choice. Where the police take on this function on behalf of the detainee, it seems eminently sensible to subject their efforts to the same standard. Anything less

would encourage token efforts by the police and imperil the right of those in detention to consult a lawyer of their choosing. In that regard, I completely agree with the comments of Justice Horkins, who noted:

i. When the police, as an institution, decide to take control of the Accused's means of accessing counsel of choice, they also assume the obligation to pursue that constitutional right with all the same effort and diligence that the Accused himself would apply.

(2) I believe this standard is in keeping with the duty upon the police to facilitate contact with a detainee's counsel of choice. I therefore intend to apply it in assessing the adequacy of the police efforts in this case.

[52] However, I do not think that police assumed such responsibilities here. They simply phoned duty counsel and provided Mr. Fraser the opportunity to get advice from that source. Nor is this a case where an accused was "channeled" toward duty counsel, in effect being deprived of the right to contact counsel of choice. Mr. Fraser steadfastly refused the opportunity to speak with duty counsel. While he was under no obligation to consult with duty counsel, his decision to eschew this option left him with the responsibility to find another.

[53] The interplay between the implementational duties of the police and the diligent exercise of the 10(b) right has been discussed in a number of reported cases. One passage which has found favour is in *R. v. Blackett* [2006] O.J. No. 2999 at par 29 where the judge says:

(1) . . . if the police breached their duty because they made some effort but it is found not to constitute "reasonable diligence", the trial judge must next decide whether the Accused fulfilled his or her duty to act diligently to exercise the right to counsel. If the answer is yes, then a s. 10(b) breach is made out. If the answer is no, then this trumps the breach of duty by the police and there is no breach of s. 10(b):

[54] The judge in *Blackett* referred to *R. v. Richfield* [2003] O.J. No. 3230 in support of this view. In that case the Ontario Court of Appeal found that the accused had not been reasonably diligent in exercising his right to counsel in a situation where his preferred counsel was unavailable and police had provided him access to duty counsel. While the facts of *Richfield* are not identical to the facts before me, the following passage at par.12 is instructive:

(1) The appellant, upon being informed that the lawyer that he had asked the police to call had not called back, did not ask to make a further call to his counsel of choice or to another counsel. When asked if he wished the assistance of duty counsel, the appellant indicated that he did not. The appellant was not reasonably diligent in exercising his right to counsel in the circumstances. The fact that the police could have made greater efforts earlier does not detract from the appellant's own lack of diligence at a later stage in exercising his right to counsel.

[55] Taken in isolation, a time allowance of 17 minutes is not much; certainly Mr. Fraser could have been given more. However, the police obligation to facilitate the exercise of a 10(b) right goes hand in glove with a detainee's responsibility to exercise it diligently. This is a right which requires both the police, and the person they have arrested, to do something.

[56] Some may think that police should have afforded Mr. Fraser some additional time with the telephone, even if it would probably have been a *pro forma* exercise, even if the parties would be in the same situation after an additional 30 minutes or so. However, I think this view of the situation is too one-sided. Section 254(3)(a) requires a person subject to a valid demand "to provide, as soon as practicable" samples of breath (etc.) This legislated obligation does not take precedence over the *Charte*r right to counsel, but it does provide some legal context within which to assess how that right should be exercised and construed.

[57] In this *Charter* application the onus of proof - where it is positioned and who bears it - matters to the outcome. The Crown has met the onus of proving that the police had reasonable and probable grounds for the arrest; they had a credible belief that Mr. Fraser was operating a motor vehicle while impaired. It has also met the burden of showing that the accused was advised of his *Charter* rights properly and promptly. It has also proven that the accused was afforded a reasonable opportunity to exercise this right. What is reasonable must be assessed in light of Mr. Fraser's own attempts to avail himself of the opportunity afforded to him.

[58] When it emerges from the evidence that a detainee's attempts may not have been *bona fide*, there is an onus on him or her to show that s/he acted with reasonable diligence – the shoe is on the other foot, so to speak. While circumstances will vary, every detainee exercising a 10(b) right should make a realistic appraisal of his or her situation and act diligently. I think that Mr. Fraser was well aware of his situation, but his evidence fails to persuade me that he acted diligently in light of what he knew. Partly, his failure to meet the onus of proof is a result of his diminished credibility, assessed on the totality of the evidence.

[59] Concerns about Mr. Fraser's *bona fides* are fatal to the contention that his s.10(b) *Charter* right was violated. The evidence does not establish a breach of his right to counsel. The case thus falls to be decided on the evidence adduced at trial, absent any consideration of *Charter* remedies.

PROVING THE OFFENCE – REFUSAL

[60] The other issue for determination is whether Mr. Fraser failed or refused to comply with the breath demand. Crown bears the burden of proving this element of the offence beyond a reasonable doubt. The section constituting the offence, s.254(5), permits "a reasonable excuse". An accused who pleads this should prove it on a balance of probabilities.

[61] The phrase "fails or refuses" should be read as one. The charge as worded is "did fail". The offence may be committed in either way, regardless of the wording of the charge. I use the term "refusal" to encompass both modes of commission.

[62] As noted, there is overlap between this issue and the previous one. Although some additional considerations come into play, my findings of fact and observations of credibility on the *Charter* motion pertain here as well.

[63] Defence argues that in both word and deed Mr. Fraser's response to the breath demand was ambiguous, that the evidence does not prove a clear refusal, and that the police should have taken further steps to ascertain which course of action Mr. Fraser was choosing - to refuse or to comply.

[64] This is a case of "constructive refusal" in that Mr. Fraser did not explicitly and unequivocally state that he was refusing to comply. The court is asked to infer a refusal from his words and actions. Most commonly this arises when a person pretends to blow into the instrument, without making a *bona fide* attempt to provide proper air. Here, by rough analogy, Crown argues that Mr. Fraser was pretending to exercise his 10(b) right once he knew that his first choice of counsel was not available. It argues that his actions at the Detachment were largely a charade, and taken together with the comment made to MacKay in the police car serve to prove beyond reasonable doubt a constructive refusal to the breath demand.

[65] In some cases where an accused's words did not provide a clear response, where no clear choice emerges from the accused's actions, courts have found that a refusal was not proven. Counsel raised *R. v. Fletcher*, 2016 ABQA 315, *R. v. Dunn*, [1978] P.E.I.J. No. 81, and *R. v. Shaw* 2010 NSPC 95.

[66] In *Fletcher* the summary conviction appeal court parsed out a distinction between the accused's clear abuse of his right to counsel and his act of refusal. It said that once police concluded the accused was not sincere in his efforts to obtain legal advice they should have given him an option of providing a breath sample or not.

[67] In *Dunn* the accused spoke to a lawyer and told police he was advised not to blow. The court did not take this to be a refusal from the accused himself. It held that police ought to have presented the instrument to the accused and put him to a clear "yes"

or "no" choice. (As an aside I note that in *R. v. Hurley*, [1980] N.J. No. 44, on virtually identical facts to *Dunn*, the NLCA expressed a contrary view.)

[68] In *Shaw* the accused wanted a specific lawyer, spoke with duty counsel, was unsatisfied with the call, and subsequently said, in response to at least two further demands to take the test, that "I am not taking the test but I am not refusing". Police recorded this in notes as "did not answer with a clear yes or no". The court found ambiguity in the words and conduct. It suggested that in the circumstances the police should have gone further and presented the instrument to the accused and asked her to blow.

[69] Given the words and conduct of Mr. Fraser up to 3:39 a.m., when he was taken to a cell and told he would be charged with refusal, I do not think it was incumbent on police to do more. The law does not require, as a condition of refusal, that an accused be put in sight of the instrument, and I do not think that doing so would have given more clarity to Mr. Fraser's position. *R. v. Dwane*, 2007 BCJ. No. 112 (cited in *Shaw*) speaks to giving the detainee "a reasonable period of time to consider his options." It appears to me that Mr. Fraser was considering his options from the time he was *en route* to the Detachment. He knew, or at the very least was willfully blind to the unavailability of his lawyer of first choice. He declined duty counsel. He did not demonstrate, either on the day in question nor in testimony at trial, that he was making genuine efforts to contact other private counsel. His obfuscation was meant to delay a choice which had been explained to him and which he fully understood. He wanted to frustrate a due process by which evidence could be obtained and used against him. The law does not permit a person in Mr. Fraser's situation to do this; rather it makes it an offence.

[70] On the evidence before me I find proof to the criminal standard of a constructive refusal of the breath demand. The evidence fails to persuade me that the accused had any lawful excuse for this refusal. In the result Mr. Fraser is found guilty of the offence, as charged.

Dated at Sydney, N.S. this 5th day of June 2018

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Judge A. Peter Ross