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COURT OF APPEAL FOR ONTARIO

Doherty, LaForme and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Tammy Degiorgio

Appellant

Adam Little, for the appellant

Greg Skerkowski, for the respondent

Heard: March 24, 2011

On appeal from the judgment of Summary Conviction Appeal Judge Nancy Backhouse of the Superior Court of Justice dated March 11, 2010, dismissing the appeal from the conviction entered by Justice David Cole of the Ontario Court of Justice dated January 27, 2009.

**H.S. LaForme J.A.:**

**INTRODUCTION**

[1] Blair J.A. granted leave to the appellant to appeal to this court. In doing so, he described the issue for appeal as: “whether [the police officer’s] demand was valid, given the [summary conviction appeal judge’s] finding that there was no evidence an approved screening device could be available ‘forthwith’.”

[2] Thus, the question of law in this appeal focuses on the interpretation of the offence of refusing to provide a breath sample pursuant to s. 254(5) of the *Criminal Code* and the interpretation of the “forthwith” requirement in s. 254(2). Specifically, the question is whether the demand made by the police officer pursuant to s. 254(2) was valid in the absence of evidence that an approved screening device (“ASD”) could be made available “forthwith”.

## **BACKGROUND**

[3] The facts at trial were straightforward. Two witnesses testified: the police officer and the appellant. Given the focus on this appeal, only the evidence that has some bearing on the issues will be recited.

[4] This case began with P.C. Fielding’s receiving information at 7:32 a.m. on September 23, 2007 that someone was slumped over the steering wheel of a motor vehicle in front of a driveway; the lights of the vehicle were on and its motor was running. At 7:37 a.m. P.C. Fielding arrived on the scene and approached the vehicle. He observed that the window was down and the appellant was sitting in the driver’s seat, alert. Her eyes were glassy and there was a strong odour of alcoholic beverage coming from the area of her mouth.

[5] The appellant denied having consumed alcohol that day. She said she was tired, and that she came from her friend’s house. She seemed confused about where she was.

[6] At 7:39 a.m. P.C. Fielding concluded that he had reasonable grounds to suspect that there was alcohol in the appellant’s body, and made the demand that she provide a

sample of her breath into an ASD pursuant to s. 254(2). The language used in his demand was as follows:

I demand that you provide a suitable sample of your breath directly into an approved screening device forthwith to enable a proper analysis of your breath to be made and that you accompany me for the purpose of enabling a sample to be taken. Do you understand?

[7] The appellant's response was, "Yes, but I am not blowing into anything". After requesting that she step out of the vehicle, P.C. Fielding asked her if she understood his ASD demand. She stated a second time, "Yes, I'm not blowing into anything".

[8] At this point, P.C. Fielding advised her that refusing to comply with the demand was a criminal charge with the same penalty as impaired driving or driving over the legal limit, and that it would result in an automatic 90-day driver's license suspension. He made it very clear that, by law, she had to provide a sample of her breath. He advised her that if she provided a sample and passed, she would be free to go. If she provided a sample and failed, she would be charged with over 80.<sup>1</sup>

[9] P.C. Fielding then re-read the demand as set out above, and asked the appellant if she understood. She stated a third time, "Yes, but I'm not blowing into anything."

[10] At 7:42 a.m. P.C. Fielding arrested the appellant for refusing to provide a sample of breath into an ASD. He advised of her right to counsel. When he asked the appellant

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<sup>1</sup> A contentious point at trial was whether P.C. Fielding said that she would be charged or said that she would be arrested. The trial judge found that he said she would be charged. He noted in his reasons that this was wrong – if she failed it would be premature to charge her; instead, she would be taken to the station for a breathalyser.

if she understood, the appellant stated, “Yes, whatever. Don’t you have better things to do? I only had three glasses of wine at midnight. Come on.”

[11] At 8:00 a.m. the appellant was released on an appearance notice. She left the scene of the arrest at 8:20 a.m. in a taxi. Throughout this entire time period, P.C. Fielding did not have an ASD with him. The appellant was charged with refusing to provide a sample breath pursuant to s. 254(5).

### **The evidence**

[12] In examination-in-chief, P.C. Fielding testified that during the events surrounding the appellant’s being charged, he did not have an ASD in his possession or in his vehicle. Nor did P.C. Fielding take steps to locate an ASD after the appellant was arrested. However, he also testified that during his brief interaction with the appellant, he was aware that another officer, P.C. Vanderhart, had been dispatched to the scene, and that he had observed an ASD in the front seat of P.C. Vanderhart’s vehicle prior to leaving the police station earlier, but he did not know whether P.C. Vanderhart was one of the officers who attended the scene.

[13] The other officers who were at the scene did not testify. As a result, there was no evidence that any police officer had an ASD at the scene; whether an ASD was immediately available; or if not, how long it would have taken for one to be made available.

### **The trial decision**

[14] The trial judge found that the appellant did not have a “reasonable excuse” for refusing to comply with the ASD demand and found her guilty of the offence of refusing to provide a breath sample pursuant to s. 254(5). The issue of the validity of the demand, however, was never directly argued before him, although in his reasons for judgment he did observe:

So he made a demand that she provide samples into a road-side testing device, which he did not presently have with him (although [defence counsel] has not made anything of that).

[15] While the trial judge did not make any findings surrounding the issue of the unavailability of the ASD, the evidentiary record supports a finding that an ASD was never available at the scene. Indeed, the Crown fairly concedes this.

### **The summary conviction appeal decision**

[16] At the summary conviction appeal, the appellant conceded that the trial judge did not commit an error in finding that the appellant did not have a “reasonable excuse” for failing to comply with the ASD demand made to her by P.C. Fielding. However, the appellant argued that, nevertheless, the trial judge was in error when he convicted her because the demand itself was invalid as it was non-compliant with s. 254(2) of the *Criminal Code*.

[17] The appellant argued that she was under no legal obligation to comply with the demand and, therefore, did not commit an offence contrary to s. 254(5) by refusing. Essentially, the appellant argued that although she refused to comply with the demand,

there was no evidence that P.C. Fielding was in a position to administer the ASD test “forthwith” as he did not have access to an ASD.

[18] While the issue of the availability of the ASD was not raised at trial, the Crown did not object to it being raised on the summary conviction appeal. As I said, the Crown conceded that at no time was an ASD available at the scene.

[19] The Summary Conviction Appeal Judge disagreed with the appellant’s arguments and held that the offence was complete when she refused to comply with the demand.

The appeal judge’s reasons are brief and are set out in full:

The appellant submits that the trial judge erred in entering a conviction for breach of s. 254(2)(b)<sup>2</sup> of the *Criminal Code* because, although the appellant refused to comply with the demand, the arresting officer did not have an approved screening device (ASD) with him. There was no evidence that an ASD could be available “forthwith”, i.e., without delay. (*R. v. Woods* [2005], 2 S.C.R. 205).

In my respectful opinion, the offence is complete once the demand, which conforms with the conditions in s. 254(2) - reasonable grounds to suspect that a person has alcohol or drugs in their body and has operated a motor vehicle or had its care or control within the preceding three hours - is not complied with.

If an accused agreed to provide a sample and one is not taken “forthwith”, the sample cannot be used in evidence.

To require the Crown to prove that a sample can be taken forthwith whenever an accused has refused to provide a sample engages a theoretical exercise; whereas, if the accused complies with the demand and a sample is not taken forthwith, the Court adjudicates the actual facts.

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<sup>2</sup> On July 2, 2008, s. 254(2) was amended to s. 254(2)(b) of the *Criminal Code*. The wording used by the Summary Conviction Appeal Judge was based on the amended version.

Although a pre-Charter decision, I agree with the reasons in *R. v. Matthews* (1974), 14 C.C.C. (2d) 1 (Man. C.A.).

The appeal is dismissed.

[20] On this appeal the appellant submits that the appeal judge erred in law when she reasoned that the “forthwith” requirement mandated by s. 254(2) does not arise in the context of an outright refusal.

### **ARGUMENT**

[21] The issue was described by counsel in the form of a question.

[22] The appellant frames the question as: is a police demand valid where there is no evidence that an ASD could be available “forthwith” as expressed in s. 254(2)? The appellant argues that if the appeal judge was correct, the following would occur:

[W]here a police officer makes a demand under s. 254(2), but does not have an ASD, calls for one to be brought to the scene, an outright refusal ensues, the officer could then cancel the request for an ASD and the accused would be charged and convicted under s. 254(5).

[23] Moreover, the appellant contends that the reasoning of the appeal judge is not supported by the prior jurisprudence of this court, other provincial appellate courts and the Supreme Court of Canada.

[24] The Crown puts it this way. Were the police required, even after the appellant had unequivocally refused to provide a sample, to continue with the process of locating or deploying an ASD to the scene? The Crown says that the appellant’s refusal to provide an ASD sample was immediate and unequivocal; that the time between the demand and

the refusal was only three minutes, which is sufficient to constitute the offence. And, although no ASD was presented to the appellant – or even at the scene during this three minute period – the time is well within the guidelines of this court regarding whether a sample has been taken “forthwith”.

## **DISCUSSION**

[25] The appellant submits that case law has consistently interpreted the “forthwith” requirement in s. 254(2) as imposing a duty on the police to be in a position to administer the test forthwith. She says that if they are not, then the demand is not within the scope of what the subsection contemplates and is not valid. If the demand is not valid under 254(2), she argues that she cannot be convicted under s. 254(5).

[26] In support of her arguments, the appellant relies primarily on *R. v. Grant*, [1991] 3 S.C.R. 139 and numerous authorities from this court: see, for example, *R. v. Cote* (1992), 6 O.R. (3d) 667 (C.A.); *R. v. Latour* (1997), 34 O.R. (3d) 150 (C.A.); and *R. v. George* (2004), 187 C.C.C. (3d) 289 (Ont. C.A.). Factually, she says that an ASD never arrived during the 41 minutes the appellant was at the scene, which is clearly outside the time range of “forthwith” established by the jurisprudence.

[27] The key statements in the authorities the appellant relies on have been cited many times. They are, first, that “where ... the demand is made by a police officer who is without an [ASD] and the unit does not, in fact, arrive for a half hour, the provisions of s. [254](2) will not be satisfied”: *Grant* at p. 150. Second, this court in *Cote* at p. 671 held that, “if the police officer is not in a position to require that a breath sample be provided

by the accused before any realistic opportunity to consult counsel, then the officer's demand is not a demand made under s. [254](2)".

[28] Indeed, these statements of law and their application are the foundation of this appeal. Again, the appellant asserts that a valid demand only exists where the police are in a position to administer the ASD test forthwith.

[29] I disagree with the appellant's submissions. As I will explain, I believe that her counsel misapprehends the authorities and the law that flows from them in terms of their application to the circumstances of her case. The appellant's position is unsustainable and I would dismiss her appeal.

### **Section 254 of the *Criminal Code***

[30] Before turning to the text of ss. 254(2) and (5), it will be useful to consider s. 254 as a whole. The most recent examination of how s. 254 operates is found in the Supreme Court of Canada's decision in *R. v. Woods*, [2005] 2 S.C.R. 205. In *Woods*, Fish J. restates the purpose of the legislation, examines some of the more significant authorities that have interpreted it, and provides guidance on how any analysis of these provisions should be undertaken.

[31] At paras. 30 and 31, Fish J. observes that in s. 254, Parliament created a two-step detection and enforcement procedure that necessarily interferes with rights and freedoms guaranteed by the *Charter*, but only in a manner that is reasonably necessary to protect the public's interest in keeping impaired drivers off the road. First, s. 254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to

provide breath samples for testing on an ASD. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted.

[32] Second, s. 254(3) allows peace officers who have the requisite reasonable and probable grounds to demand breath samples for a more conclusive breathalyzer analysis. And as Fish J. notes, breathalyzers determine precisely the alcohol concentration in a person's blood and thus permit peace officers to ascertain whether the alcohol level of the detained driver exceeds the limit prescribed by law.

[33] The breathalyser results then provide the police with the evidence to charge the motorist with driving offences such as s. 253(b) – operating a motor vehicle with more alcohol in one's blood than the law permits.

[34] The admissibility of breathalyzer results evidence depends on whether the police first had reasonable and probable grounds to make the breathalyzer demand. In cases such as those in the majority of the authorities relied on by the appellant, the only evidence of reasonable and probable grounds for the breathalyzer demand is the ASD results obtained by the police.

[35] There are two ways in which an ASD breath sample can be legally obtained: (i) by way of a valid demand under s. 254(2); and (ii) voluntarily. Finally, and directly related to the instant appeal, s. 254(5) provides that “[e]veryone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.”

[36] Fish J. notes at para. 13 that “forthwith” means “immediately” or “without delay” and affirms, at paras. 33-36, the correctness of the statements from *Grant* and *Cote* set out above.

[37] The “forthwith” requirement in s. 254(2), Fish J. reminds us, is what allows for its constitutional integrity. If it were not for the immediacy requirement, s. 254(2) would violate ss. 8, 9 and 10 of the *Charter*. He goes on to say – and I think it is of some significance – that the “forthwith” requirement is a corollary of the fact that there is no opportunity for contact with counsel prior to compliance with the ASD demand. Further, both the police demand and the driver’s response must be “forthwith” or immediate; the requirement is for “a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed”: *Woods* at para. 44.

**The text of ss. 254(2) and (5)**

[38] The argument advanced by the appellant, that in order for the demand to be valid there must be evidence that an ASD could be available “forthwith”, must come either from the text of ss. 254(2) or (5) or the cases that have considered them. I start by examining the text of the provisions and the policy rationale for them, without incorporating – for the moment – constitutional considerations.

[39] The relevant part of s. 254(2) reads:

If a peace officer has reasonable grounds to suspect that a person has alcohol ... in their body and that the person has, within the preceding three hours, operated a motor vehicle ... the police 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 added.]

[40] Section 254(5) creates an offence in these terms:

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

[41] The meaning to be given to s. 254(5) must be informed by its purpose. The section criminalizes a refusal to provide potentially incriminating evidence. In doing so, it provides the police with a powerful tool in their efforts to curtail, investigate and prosecute drinking and driving related offences. The deaths and substantial societal costs associated with drinking and driving fully justify the existence of this extraordinary criminal offence.

[42] The conduct criminalized by s. 254(2) consists of a proper s. 254(2) demand and an unequivocal refusal to comply with that demand. The offence is completed when the refusal is given: *R. v. Woods*, [2005] 2 S.C.R. 205 at paras. 40-42. There is nothing in the language of s. 254(2) that would require the Crown to prove that had the driver not refused to provide the sample, the demanding police officer could have complied with his or her obligation to take the sample "forthwith". Nor can I understand why, as a matter of criminal law policy, a driver who has unequivocally refused to forthwith provide a breath sample should escape criminal responsibility for that refusal based on events subsequent and totally unrelated to the refusal. How is the culpability of the person who

refuses to comply with a demand reduced because, as events may have developed, the officer may not have been able to take the sample forthwith?

[43] I read the text itself of s. 254(5) as requiring the Crown to prove the following constituent elements of the offence:

1. The preconditions set out in s. 254(2);
2. A demand that the individual “provide forthwith a sample of breath”;
3. The individual of whom the demand was made understood the demand;
4. The individual refused to comply with that demand; and
5. The individual did not have a reasonable excuse for failing to comply with the demand.

[44] I note that points 1 and 5 are not at issue on this appeal. Neither can it be suggested that the appellant did not understand the demand being made or that the refusals were in any way conditional. The police officer made the demand in the exact language of the section saying to the appellant:

I demand that you provide a sample of your breath directly  
into an approved screening device forthwith ...

[45] The appellant immediately, unequivocally and three times refused to provide the demanded sample even when told of the potential penal consequences. The appellant’s immediate refusal implies that she clearly understood that she was being required to provide the sample then and there. There was no cross-examination of the officer on the meaning of the demand as that issue did not develop until the first level of appeal.

**“Forthwith”: The cases**

[46] Having outlined the text and purpose of the relevant provisions, I turn to the substance of this appeal: What does “forthwith” mean or require, and what are the principles regarding the “forthwith” period that flow from the cases, particularly from the statements above from *Grant* and *Cote*? The “forthwith” period is the time in which *Charter* rights are justifiably infringed, i.e. the time in which a detained person can be required to comply with an ASD demand and the time in which a person’s response to that demand – be it blowing and registering a Fail, or be it refusing or failing to blow – can incur criminal liability that is unaffected by the *Charter*.

[47] As I mentioned above, *Woods* reminds us that what would otherwise be an impermissible violation of *Charter* rights is rendered justifiable because of the “forthwith” requirement. In *Grant*, the refusal itself came 30 minutes after the demand was made; in *Cote* the refusal came 14 minutes after, where there had clearly been time for the driver to contact counsel. These refusals were not made within the “forthwith” period; that is, at the time each refusal was made, the corresponding demand was no longer a valid one, and therefore there was no obligation to comply.

[48] In these cases, the question to be decided was: were the police in a position to receive into an ASD the breath sample the suspect was prepared to provide – or had not refused to provide – during the period of time that no realistic opportunity to consult counsel existed, i.e. “forthwith”.

[49] *Grant* and *Cote* shed light on the interaction between the right to counsel protected by s. 10(b) of the *Charter* and cases involving an outright refusal to provide a sample. The right to counsel is triggered upon detention at the roadside. That right is, however, effectively suspended by operation of s. 1 of the *Charter* for the time period captured by the requirement that the sample be taken “forthwith”. If the demand is made and the sample provided within the forthwith window of time, the *Charter* is not breached. If, however, the forthwith window expires, then the taking of a sample without first providing the detainee an opportunity to contact counsel is an infringement of s. 10(b) that cannot be saved by s. 1.

[50] The analysis in refusal cases should be the same. If the demand is otherwise proper and the outright refusal occurs during the “forthwith” timeframe, the accused’s 10(b) rights are not engaged and cannot affect the accused’s liability under s. 254(5). In *Cote* and *Grant*, the refusals were made outside of the “forthwith” timeframe and consequently did engage *Charter* rights. In this case, the appellant’s outright refusal followed immediately after the demand and within the “forthwith” timeframe.

[51] To emphasize, there is a clear factual difference between *Grant* and *Cote* on the one hand, and our case on the other hand, that affects how the statements in those cases apply here. In those cases, the refusals did not immediately follow the demand; instead, the drivers refused only when presented with the ASD.

[52] Instead of supporting the submission of the appellant – that a demand is not a 254(2) demand unless the officer is in a position to administer the test forthwith – *Cote* and *Grant* hold that a refusal at a time when the sample could no longer be taken “forthwith” is not a refusal to comply with a s. 254(2) demand.

[53] There is a well-established line of authority holding that where an accused is charged with refusing to provide a sample, the Crown does not have to prove that the sample could in fact have been taken in accordance with the provisions of the *Criminal Code* to secure a conviction on a charge of refusing to comply with the demand: see *R. v. Lemieux* (1990), 41 O.A.C. 326 (C.A.); *R. v. McCauley* (1997), 161 N.S.R. (2d) 154 (C.A.); *R. v. Wilson* (1999), 121 B.C.A.C. 111 (C.A.).

[54] There is no requirement that a police officer have a reasonable belief that he or she could “make the demand good” at the time it is made: *Latour* at paras. 30-33. Contrary to the submissions of the appellant, neither is there a requirement for the Crown to prove that the police *could have made* the demand good (i.e. that an ASD would have been available) within the “forthwith” period. Such a requirement is not apparent from the text or purpose of the provision; neither can it be necessitated by *Charter* considerations, because during the “forthwith” period any such considerations are validly suspended under s. 1.

[55] I turn now to this court's reasons in *Danychuk*. While at first glance they appear to partially support the appellant's submission, I will explain how they are entirely consistent with what I have set out above.

[56] In *Danychuk*, the police officer demanded a sample forthwith from the driver of the vehicle. The driver refused to provide the sample and was charged with refusing to provide a sample. When the officer made the demand, the ASD was beside the police officer on the front seat of the vehicle. The officer had not, however, tested the device and he did not present the device to the driver and explain the purpose of the test. The trial judge convicted on the charge of refusing to provide the sample. The Summary Conviction Appeal Court Judge quashed the conviction, holding that the Crown was obligated to prove that the device was not only present at the scene, but ready to be used and that the officer making the demand had presented the device to the driver and explained its purpose.

[57] This court restored the conviction. In doing so, Blair J.A. described the nature of the offence created by s. 254(5), at para. 22:

In *Lemieux, supra*, at 328 O.A.C., the court agreed with the Crown's submission that "the gravamen of the offence under s. 254(2) and (5) of the *Criminal Code* is failure or refusal to comply with the demand of a peace officer": see also *McCauley, supra*. It is the failure or refusal to comply with the demand to provide the breath sample that is at the core of the infraction, not the failure or refusal to provide the breath sample "forthwith". The word "forthwith" in subsection 254(2) does not define the substance of the offence. Rather, it imposes on the person to whom the demand is made an

obligation to comply in a timely fashion, and on the authorities an obligation to conduct the test in a timely fashion once the request is honoured in order that the detainee's right to counsel under s. 10(b) of the *Charter* are minimally impaired. [Emphasis added.]

[58] I agree entirely with the language quoted above. On that view of the offence created by s. 254(2), the police officer's ability to actually take the sample in accordance with the demand is not relevant to culpability on a charge of refusing to provide the sample.

[59] The subsequent observations of Blair J.A. at paras. 26 and 27 can, however, be read as supporting the appellant's position on this appeal:

A timely demand is validly made pursuant to subsection 254(2), in my opinion, where (a) the individual to whom the demand is made has been operating a motor vehicle, or has care or control of that vehicle, (b) the peace officer who makes the demand reasonably suspects that the individual to whom the demand is being made has alcohol in his or her body, and (c) the police officer is ultimately in a position to require that the breath sample be provided before there is any realistic opportunity to consult counsel. Where, as here, there has been an outright refusal to provide a breath sample, it is not a prerequisite to such a demand that the Crown establish the approved screening device was present at the scene, tested and ready to accept a sample, or that the police officer presented the device to the driver and explained the purpose of the test and the consequences of a failure to provide a sample.

On the facts of this case the trial judge found that the screening device was available forthwith for Mr. Danychuk to provide a sample of his breath into it. [Emphasis added.]

[60] Read alongside the earlier description of the nature of the offence of “refusing to blow” provided in para. 22, I do not think the above-quoted passage was intended to make the officer’s ultimate ability to administer the test in compliance with s. 254(5) an element of the offence of refusing to blow. I think the passage responds to the specific arguments made in *Danychuk*. As described above, the trial judge had found that the police officer had an ASD immediately available and could have taken the sample forthwith. The Summary Conviction Appeal Court Judge would have required the officer to go much further than that to secure a conviction on the refusal charge. In paras. 26 and 27 of his reasons, Blair J.A. holds that the trial judge’s findings justified the conviction. I do not think he declares that all of the trial judge’s findings were essential to the conviction.

[61] In my view, the question of whether the Crown has to lead evidence that a sample could be taken “forthwith” to secure a conviction on a refusal charge was not before this court in *Danychuk*. *Danychuk* decided that evidence that the sample could have been taken forthwith was certainly sufficient to support a conviction under s. 254(5) and rejected the additional requirements favoured by the Summary Conviction Appeal Court Judge. The description of the offence created by s. 254(5) in *Danychuk* certainly suggests that evidence that the test could in fact be administered “forthwith” is not an element of that offence.

[62] I should also address two other cases relied on by counsel for the appellant: *R. v. Roy*, [1994] O.J. No. 1127 (Gen. Div.), leave to appeal refused, [1995] O.J. No. 1192

(C.A.) and *R. v. Matar*, [1999] O.J. No. 4224 (S.C.). In both cases, Summary Conviction Appeal Court Judges held that a person could only be convicted of refusing to provide a sample if at the time of the refusal the device was at the scene and available to be used for the taking of the sample. Both cases predate *Danychuk*. *Matar* was referred to in *Danychuk* at para. 18. The analysis in *Danychuk*, at paras. 19-25, is a clear rejection of the holding in *Matar*.

[63] In *Roy*, the Superior Court justice appears to have interpreted the *Criminal Code* provision as requiring that the ASD be available in order to avoid what the judge referred to as “the chaos” that would occur if the demand could be made absent the immediate availability of the device. He said, at para. 14:

One can easily speculate as to the chaos which would develop if police officers could demand a breath sample, even though they do not have [an] A.L.E.R.T. machine available to them. If the driver refuses, he is automatically convicted for refusing, and if he agrees he may never have to take the test.

[64] I cannot see the “chaos” envisioned in *Roy*. Nor do I see anything inherently unfair in either result contemplated in the passage quoted from *Roy*.<sup>3</sup> I would hold that *Roy* and *Matar*<sup>4</sup> are wrongly decided.

[65] The offence created by s. 254(2) is complete upon the refusal. In the face of such a refusal, the police are not obliged to carry on as if there had been no refusal and the

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<sup>3</sup> I am not referring to cases where an officer makes a demand never intending to actually take a sample, but hoping that the driver will refuse so that he can charge the driver with refusing to provide a sample. That case, should it ever occur, would raise significant abuse of process concerns.

<sup>4</sup> In *Matar*, the Summary Conviction Appeal Court Judge suggests the procedure that should be followed by the police in cases where a roadside demand is made. In coming to the conclusion that *Matar* is wrongly decided in law, I do not intend any comment on the manner in which *Matar* suggests the police should proceed.

court is not obliged to speculate as to what might have happened had the police officer carried on. The offence is complete upon proof that the preconditions to the demand in s. 254(2) existed, the officer demanded a sample “forthwith”, and the appellant unequivocally refused, without any reasonable excuse, to provide that sample.

[66] The appellant argues that if her position is rejected, an improper result could occur where a police officer who does not have an ASD makes a demand under s. 254(2) and calls for one to be brought to the scene, and then an outright refusal ensues: the officer could then cancel the request for an ASD and the accused would be charged and convicted under s. 254(5). I must admit I do not see the police conduct post refusal as relevant to culpability – absent abuse of process concerns, and assuming the demand was valid – if it is indeed an outright refusal. The refusal ends the inquiry for the purposes of s. 254(5).

**Conclusion: our case**

[67] From the authorities relied on in this case, there are two scenarios that are contemplated involving ss. 254(2) and (5). The first is a demand and the legitimacy of the process thereafter of the motorist’s providing self-incriminating evidence of an offence; the second is a demand and a refusal or failure to comply.

[68] In the first scenario, both the police demand and the driver’s compliance must be accomplished “forthwith” or immediately. That is to say, the police officer must be able to receive the breath sample, which the person has agreed to provide or has not refused to

provide, before there is any realistic opportunity for the detained person to consult counsel.

[69] In the second scenario, where there has been an outright refusal to provide a breath sample, the offence is made out if the demand was properly made. The Crown is not required to establish that the ASD was present at the scene, or that it could have been present at the scene within the “forthwith” period.

[70] The appellant’s immediate response of, “Yes, but I am not blowing into anything” on three occasions after demands made by P.C. Fielding are clear and they amount to outright refusals. The appellant’s case is undeniably within the second scenario. And as this court has established in *Danychuk*, her appeal must fail.

## **DISPOSITION**

[71] For these reasons, I find that after the appellant had categorically refused to provide a breath sample, the police were not required to continue with the process of locating or deploying an ASD to the scene. The summary conviction appeal judge was correct in dismissing the appellant’s appeal from her conviction of the offence of refusing to provide a breath sample pursuant to s. 254(5) of the *Criminal Code*. Accordingly, I would dismiss the appeal.

RELEASED:

“JUL 20 2011”  
“DD”

“H.S. LaForme J.A.”  
“I agree Doherty J.A.”  
“I agree G. Epstein J.A.”