Case Name:

R. v. Aulakh

Between
Regina, and
Surinder Pal Singh Aulakh

[2010] B.C.J. No. 2237

2010 BCPC 277

5 M.V.R. (6th) 179

2010 CarswellBC 3091

File No. 82351-1

Registry: Port Coquitlam

British Columbia Provincial Court
Port Coquitlam, British Columbia

B. Dyer Prov. Ct. J.

Heard: October 15, 2010.
Oral judgment: October 15, 2010.

(121 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Roadside screening test -- As soon as practicable or forthwith -- Evidence ruled admissible on voir dire -- Non-uniformed officer happened to be at scene of rear-end collision caused by accused -- He investigated accident and called dispatch for uniformed officers after detecting odour of alcohol -- Initial detention of accused was not unlawful, as non-uniformed officer was not engaged in criminal investigation and was entitled at common law to ask accused if he had been drinking -- 18-minute delay in issuance of roadside demand did not vitiate demand's validity, as non-uniformed officer acted reasonably in seeking dispatch of officers experienced in impaired driving investigations -- Canadian Charter of Rights and Freedoms, s. 9 -- Criminal Code of Canada, s. 254(2) -- Motor Vehicle Act, s. 68.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Evidence ruled admissible on voir dire -- Non-uniformed officer happened to be at scene of rear-end collision caused by accused -- He investigated accident and called dispatch for uniformed officers after detecting odour of alcohol -- Initial detention of accused was not unlawful, as non-uniformed officer was not engaged in criminal investigation and was entitled at common law to ask accused if he had been drinking -- 18-minute delay in issuance of roadside demand did not vitiate demand's validity, as non-uniformed officer acted reasonably in seeking dispatch of officers experienced in impaired driving investigations -- Canadian Charter of Rights and Freedoms, s. 9 -- Criminal Code of Canada, s. 254(2) -- Motor Vehicle Act, s. 68.

Voir dire to determine the admissibility of evidence at the trial of the accused, Aulakh, for impaired driving and driving with an illegal blood-alcohol level. A motorist waited to turn left behind an unmarked police vehicle when he was partially rear-ended by the accused's vehicle, an unoccupied taxi. The police officer was not in uniform. He identified himself, spoke to the motorist and obtained his driver's licence. He then walked back to speak with the accused and obtain his driver's licence. He noted an odour of liquor. He called dispatch and requested a uniformed officer at the scene for an accident and impaired driving investigation. The officers arrived approximately four minutes after the call and 12 minutes after the accident. The other officer conveyed the substance of his observations of the accused and left the scene 20 minutes after the accident occurred. The attending officers spoke with the accused and detected a slight odour of alcohol and glossy eyes. A roadside demand was issued 26 minutes after the accident. The accused registered a "fail" reading shortly thereafter. The accused was arrested. He consulted counsel at the detachment. Subsequent breath samples indicated an illegal blood-alcohol level. The accused sought exclusion of evidence on the basis that he was arbitrarily or unlawfully detained, and the roadside demand was not made forthwith.

HELD: Evidence admissible. The initial detention of the accused was not unlawful. The non-uniformed officer was at the scene of the collision by happenstance. He identified himself as a police officer and initially checked to ensure that neither motorist was hurt. He was entitled to take possession of the motorists' driver's licences under the Motor Vehicle Act due to the collision. At that point, the accused was the subject of an investigation into an accident rather than a criminal investigation. He was not physically restrained, nor singled out by the officer. The officer was entitled at common law to ask the accused if he had consumed alcohol and was entitled to pass on that suspicion to dispatch. Had a wrongful detention been established, the evidence was nonetheless admissible, as the officer acted in good faith. The 18-minute delay between the non-uniformed officer's first detection of an odour of alcohol and the issuance of the roadside demand did not vitiate the validity of the demand. The non-uniformed officer wished to ensure that the investigation was conducted properly by officers experienced with impaired driving investigations and did not have a roadside device at hand.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 9, s. 10, s. 10(a), s. 24(2)

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 252, s. 252(1)(b), s. 254(2), s. 254(2)(b), s. 254(3)

Motor Vehicle Act, RSBC 1996, CHAPTER 318, s. 68, s. 84, s. 224, s. 225, s. 226, s. 227

Counsel:

Counsel for the Crown: J. Fogel.

Counsel for the Defendant: B. Mohan.

Oral Ruling On Voir Dire

1 B. DYER PROV. CT. J. (orally):-- The accused is charged with impaired driving and driving with a blood alcohol level over .08 milligrams percent on March 4th, 2009. He has pleaded not guilty to both charges and his trial commenced before me on June 17th, 2010.

2 At the outset of the trial, Mr. Mohan said that his client took the view that certain of his ***Charter*** rights had been breached on the evening of March 4th, 2009, and as well he said he was taking issue with whether or not the ASD demand that was made in this case was properly made, this latter issue not necessarily involving a ***Charter*** breach.

3 After some discussion, it was agreed that the Crown, Mr. Fogel, would call three witnesses, namely, a civilian, Robert Stevens, and two police officers, Constable Humphreys and Constable Pirmohamed, both with the Coquitlam RCMP, the former for some 29 years and the latter for some two years experience at the date of trial.

4 It was agreed that the first two witnesses would testify in the trial proper and the third, Constable Pirmohamed, would give his evidence in a *voir dire* which I declared only at the start of his testimony and not earlier.

5 In argument, defence said that the issues to be addressed following these witnesses testifying either at trial or in the *voir dire* and following same were as follows:

1. Whether the demand made by Constable Pirmohamed that the accused

give a sample in the approved screening device ("ASD") was made forthwith within the meaning of s. 254(2) of the ***Criminal Code*** and related: if it was not made forthwith whether the Certificate of Analysis was admissible at the trial.

2. Whether or not the accused was detained at the scene between the hours of approximately 7:05 p.m. and 7:26 p.m. The first time is when Constable Humphreys first became involved when he heard the noise of a collision behind him, and the second time is when Constable Pirmohamed made the ASD demand to the accused in the case at bar.
3. If the accused was detained and defence counsel asserted he was, was the detention arbitrary or unlawful?

6 I will deal with the facts disclosed in the evidence, most of which are not in dispute.

FACTS

7 At about 7:05 p.m., one Mr. Stevens was driving eastbound on Prairie Avenue in Port Coquitlam and was stopped behind a vehicle ahead of him waiting to turn left onto Wellington Street. He, too, intended to turn left and had his left turn signal on. Stevens was driving a 1995 Chevrolet truck. Stevens believed the vehicle ahead of him, being driven by Constable Humphreys as it turned out, was a sedan, perhaps a Ford Taurus. It was in fact an unmarked police vehicle.

8 Stevens heard a screech from behind and braced himself. He heard a bang and felt his own car get pushed slightly forward. He turned to his right and saw that a white Toyota Corolla taxi had struck the right rear area of his truck, visibly damaging the right rear bumper and quarter panel. This white car was then more or less beside him.

9 Prairie Avenue at this point is a two-lane roadway, one proceeding eastbound and the other proceeding westbound.

10 It is not clear that the taxi following the impact was then somewhere on the road surface or on the right hand shoulder. There was no left turn lane at this intersection.

11 Mr. Stevens testified that his damage when later repaired cost him just under $1,000. It would seem the force of the impact did not push Mr. Stevens' truck into the sedan immediately ahead of him.

12 The accused did not testify on the *voir dire*. I therefore do not have his version of how and why this motor vehicle accident occurred. Certainly as between he and Mr. Stevens, the accused would seem to be at fault for it. There is no evidence as to why this collision occurred. In common parlance, the accused seems to have partially at least rear-ended Mr. Stevens who was properly stopped waiting and signalling to make a left turn.

13 Stevens got out of his vehicle and initially went to speak to the driver ahead of him who was Constable Humphreys as it turned out. Early on in their initial discussion, he identified himself (according to Stevens) as a police officer. He was not in uniform on the evening in question.

14 Constable Humphreys said he saw Stevens' truck come up behind him and that he was there ten to 15 seconds before he heard a loud bang. He then looked and saw a small, white Belair cab with damage to its front left corner to the right behind him. He got out and walked back and said that he had spoken to Mr. Stevens who had then got out of his truck.

15 After a brief discussion when he asked Stevens if he was okay, he went over to the white taxicab and spoke to the driver who was seated in the driver's seat, and I find that this was the accused. Constable Humphreys noticed that he was trying to undo his seatbelt. He asked if he was okay? The accused got out. Constable Humphreys had some brief discussion with him. He recalled the accused having an odour of liquor on his breath. There is no evidence anyone else was in the white taxi with the accused at any material time to the relevant events.

16 Constable Humphreys asked the accused if he had been drinking. The accused made a response. Constable Humphreys testified that he was then collecting particulars. He had not been dispatched to this accident scene to investigate it. He just happened to be there at the time of the collision. He was then before the impact in the course of performing other police duties, serving summonses and subpoenas. He recalled speaking to Mr. Stevens first and requesting his driving licence according to Stevens. Humphreys recalled then speaking to the accused and again Stevens said the accused provided his driver's licence to Constable Humphreys. Humphreys recalled then speaking to the accused and again Stevens said the accused provided his driver's licence to Constable Humphreys.

17 Constable Humphreys then asked both men to step on to the sidewalk to the right and they did so. He testified he then went ahead to his car, got a cell phone from the dash and placed a call to his Coquitlam Detachment while standing outside his car requesting that a uniformed police officer attend the scene. He estimated this call took approximately one minute to make.

18 He said he told the Detachment dispatch that he had a "68" on a taxi driver. The number 1068 is a police code apparently for an impaired driving investigation and this is what he meant by using the number 68. He did not agree in cross-examination that from the moment he made this call, he was doing an impaired driving investigation. Rather, he was calling his Detachment as he needed two uniformed police officers there to do the investigation. It then crossed his mind that it could be an impaired driving matter.

19 I find that this Constable when he placed his call to the Detachment had only a concern or a mere suspicion that the accused's ability to drive might be impaired by alcohol and that he wanted these officers who were to be dispatched to the scene to be aware of his concern.

20 In cross-examination, he recalled two officers did arrive at the scene about five minutes after

he called, he felt, at 7:12 p.m. He said he placed the call to his Detachment at 7:08 p.m. The two officers who arrived were indeed Constable Pirmohamed and Constable Blakeman, both RCMP officers.

21 Mr. Stevens testified that it was dark out when the collision occurred at 7:05 p.m. on March 4th, 2009. The pavement on Prairie Avenue was slightly wet but it was not raining. There were streetlights along Prairie Avenue. He suggested he could see well enough so as to not stumble on the pavement and to be able to see into the accused's cab.

22 He further agreed that in a police statement made one week later, he had told the officer taking it that on March 4th he did not notice the cab driver to be impaired or swaggering or anything like that. He observed the accused get out of his cab or stand up, and did not then observe him not to have proper balance or to be unsteady on his feet. He did not look into his eyes. He did not tell this officer on March 11th that the accused had a flushed face. He could not really recall talking to the accused on the sidewalk as Constable Pirmohamed then took over.

23 Stevens did recall while he was waiting on the sidewalk with the accused, a second person came over and talked to the accused. He could then smell alcohol, but was unsure from whom the odour came. He did not mention this fact to any officer at the scene or later on March 11th when he gave a statement to the police. He agreed he had seen the accused kneel on the seat of his cab after he first got out and reach across with part of his body within and part out of his cab. He did not know what the accused was doing. It was possible he may have consumed something, but Stevens did not feel he had enough time to do so.

24 I return to Constable Humphreys' evidence.

25 He said he was on the sidewalk with both drivers when the above two Constables arrived at the scene. He recalled speaking to Constable Pirmohamed and telling him which driver belonged to which car and gave him as well the two drivers' licences. He also recalled telling Constable Pirmohamed about his initial observation of the accused and as well his discussions with the accused. I understood by this testimony Constable Humphreys meant in part at least he told Constable Pirmohamed about his observations of the smell of liquor on the accused's breath.

26 Constable Humphreys said after his initial brief chat with Constable Pirmohamed, this newly arrived officer started to deal with the accused. Humphreys felt he left the scene within five minutes of his two colleagues' arrival at about 7:25 p.m.

27 Constable Humphreys said in direct testimony he never lost sight of the accused from the time when he got out of his unmarked police car until the time when Constable Pirmohamed commenced dealing with him. He said in this time period the accused drank nothing and that he did not recall the accused re-entering his car. Other than the time it took to make the call to his Detachment (which he felt was about one minute) he said he was on the sidewalk with the two drivers.

28 In cross-examination, he agreed he made no notes at the scene of his involvement with the accused. He first gave a statement on April 3rd, 2009 as to what occurred on March 4th, 2009 upon receipt of an internal email requesting that he do so. He agreed that at the scene he did not notice the accused taxi driver to have bloodshot or watery eyes, a flushed face or that he was unsteady on his feet. Their conversation was very limited due to a language barrier between the two of them, according to his evidence. He agreed after he smelled liquor on the accused's breath another person came out of a house near the intersection and spoke to the accused.

29 Constable Humphreys believed that to identify himself he showed his badge to both drivers. Mr. Stevens said this did not occur. He could not recall telling both not to move their vehicles. There is no evidence he did so. Likewise, there is no evidence he told either driver why they should wait on the sidewalk or for how long. Based on all Mr. Stevens' evidence, he certainly appeared to understand why they were waiting there.

30 Constable Humphreys agreed he had made no ASD demand of the accused. The reason he gave was that he had not been on the road for 11 years, since 1998, and he knew in March 2009 that the protocol for impaired driving investigations had changed from his day and he wanted two uniformed officers there to do the investigation. By protocol, I understood he meant in his testimony the relevant law and how police officers should properly conduct such investigations. He said he did not detain the accused, but if he had tried to leave (I understood before the two officers arrived) that he probably would have detained him then. There is no evidence the accused did ask to leave the scene at any time.

31 He did not tell the accused he was detained. He felt he was doing an accident investigation. He had not formed an opinion that anyone was impaired, but he agreed when he smelled the odour of liquor on the accused's breath, possibly then it crossed his mind that the accused had committed a criminal offence.

32 He did not agree Constable Pirmohamed arrived on the scene at 7:21 p.m. He believed his arrival was a very short period of time after he called the Coquitlam Detachment at 7:08 p.m.

33 He agreed while he was at the scene with the accused he had not arrested, chartered, or warned the accused. He could not recall the accused telling him he was suffering from diabetes or high blood pressure. There is no evidence the accused did tell these things to Constable Humphreys.

34 When he left the scene he understood Constable Blakeman was assigned to deal with the accident investigation, and Constable Pirmohamed was tasked to deal with the impaired driving investigation. There is no evidence Constable Humphreys assigned these duties at any time to anyone.

35 Constable Pirmohamed testified in the *voir dire*.

36 He was dispatched to a two vehicle accident at the above intersection and said in his direct

testimony that he arrived at 7:11 p.m. according to police dispatch records. On cross-examination, he agreed the trip took ten minutes or less. He said he arrived within ten minutes of his dispatch at 7:11 p.m. at or about 7:21 p.m. There was a chance he had arrived earlier. He agreed after receipt of the dispatch he soon had in his mind the thought that one driver might be impaired. He later made up his mind on this point, but at the scene. On the way, he learned that Constable Humphreys was involved and had a suspicion that one of the drivers may have consumed alcohol.

37 On arrival at the scene he saw a two-vehicle collision and assumed correctly, I think, that one driver had been rear-ended. His first note at the scene was made at 7:23 p.m. He then took down the accused's information; I assume name and licence particulars, things of this sort. On cross-examination he said at this time he was not only speaking with the accused and making notes but forming his suspicions.

38 Constable Pirmohamed admitted he did not speak Punjabi but said he believed the accused understood him speaking in English on the evening in question. There is no evidence before me in the trial or *voir dire* that the accused does not speak or understand English. He had the use of a Punjabi interpreter throughout the trial. I do not find Constable Pirmohamed's testimony on cross-examination that the accused on arrival at the police cells requested an interpreter, evidence that he could not speak English on the night in question.

39 Constable Pirmohamed's testimony as to the information he received on the dispatch to the scene corroborates in my view both Constable Humphreys' evidence that he, Humphreys, was suspicious that the accused had been drinking and that he smelled alcohol on his breath at the scene. Constable Pirmohamed confirmed that Constable Humphreys provided the drivers' licences to him at the scene and identified who drove which vehicle. As well, Constable Humphreys in his presence immediately on arrival at the scene pointed to the accused and told Pirmohamed that "This is the one I think has been drinking", or words to this effect. This brief conversation occurred before 7:23 p.m., within a minute of his arrival, which I find as a fact to be at or about 7:21 p.m., not 7:11 p.m., this earlier time being when he was dispatched. Constable Humphreys did not tell him when the accident occurred.

40 After his brief chat with Humphreys, Constable Pirmohamed took the accused on the sidewalk off to the side to separate him from others present. He had a conversation with him for a couple of minutes; more than a few minutes. During this time, he also detected an odour, not overly strong, of liquor coming from his breath and noted that his eyes were glossy. At 7:23 p.m. he formed a suspicion that the accused had alcohol in his body and had been operating a motor vehicle.

41 He said in cross-examination it took him some time to form the suspicion and before doing so he had to speak to Constable Humphreys and the accused first and note his symptoms. His suspicion was formed not very long after his arrival at the scene, within ten minutes he said in direct evidence.

42 He agreed on cross-examination that at the scene he made no note that the accused was unsteady on his feet or had a flushed face or slurred speech. He could not say for sure the accused's

level of indicia of impairedness. He agreed nonetheless he did not see the accused stumble at the scene but did later at the Coquitlam Detachment. He was cross-examined as to what signs or symptoms of impairment on the part of the accused he (a) observed, and (b) made a note of at the Detachment as distinct from at the scene of the motor vehicle accident. One thing he made a note of at the Detachment at 7:54 p.m. was that the accused had glossy eyes. This was not noted at the scene in the sense that he made a physical note of this condition and nor were other signs of possible impairment such as stumbling noticed at the Detachment.

43 After forming this suspicion, he said in direct evidence that he read the ASD demand from his police card marked as Exhibit A on the *voir dire* at 7:23 p.m. with the accused at his police vehicle and with the ASD device on hand. On cross-examination, he said the ASD demand as per his notes was made at 7:26 p.m. I find as a fact this to be so. There is no issue with respect to the wording of the ASD demand as read to the accused.

44 He said the accused appeared to understand the ASD demand and responded, "Yeah". Constable Pirmohamed had an ASD device with him in his police vehicle which he got out. He explained to the accused how to blow into it and he did so, providing a suitable sample for analysis. A "fail" reading was displayed on the machine at 7:27 p.m., meaning the accused had at least 100 milligrams of alcohol in 100 millilitres of blood in his body in this witness's understanding at the time.

45 I find that the device Constable Pirmohamed had on March 4th, 2009 was an approved screening device and on all the evidence on this *voir dire* or trial, one that was functioning properly and used properly by this police officer who had earlier been trained in its use.

46 Constable Pirmohamed said at 7:27 p.m. he formed reasonable and probable grounds to believe and I understood he meant simply that he then had such grounds to believe that in the previous three hours the accused had been in the care and control of a motor vehicle while his ability to do so was impaired by alcohol.

47 It was suggested in cross-examination that at 7:27 p.m. he was unaware of the time of the accused's driving. He answered that he believed it was within three hours of his arrival at the scene and said that the accident in which the accused was involved had just occurred. Because of the state of traffic he observed, there was no way for the accident not to be recent. I understood his testimony on this point to be in essence that the traffic he saw was not snarled, backed up, or otherwise chaotic as it would have been had the motor vehicle accident not been a recent event.

48 Constable Pirmohamed admitted in a very honest manner I think twice in cross-examination that he did not know the exact time of the accused's driving and said as well that Constable Humphreys had not told him a specific time.

49 Constable Pirmohamed testified in cross-examination he relied on the ASD failure result as a basis to have the above reasonable and probable grounds as well as the symptoms he observed. He

had a suspicion the accused's ability to drive was impaired and admitted he needed to do the ASD test before he had the above reasonable and probable grounds. He arrested the accused for impaired driving after the ASD test failure. He then gave the accused his ***Charter*** rights and police caution from memory. He handcuffed the accused. He then searched the accused and placed him in the rear of his police car. At no time did he search the accused's vehicle.

50 He then got in his car and at 7:31 p.m. read from his police card (Exhibit A) the s. 10(a) ***Charter*** rights with respect to impaired operation of a motor vehicle and the accused indicated that he understood. Immediately thereafter, he read the accused his s. 10(b) ***Charter*** rights. The accused when asked if he understood said "Yeah" and when asked if he wanted to call a lawyer said "Yeah" as well. Constable Pirmohamed next read the standard police warning and asked the accused if he understood and he said "Yeah" again. At 7:33 p.m. he read the s. 254(3) ***Criminal Code of Canada*** breath demand from his police card. He did not then ask the accused any questions but testified the accused nonetheless responded "Okay, yeah" and asked "When?" and Constable Pirmohamed explained. At 7:34 p.m. he read the 24-hour roadside prohibition from the police card. At 7:35 p.m. he departed the scene to go to the police cells in Coquitlam and he arrived there at 7:45 p.m.

51 At the accused's request, Legal Aid was called from the detachment at 7:49 p.m. Ultimately after several tries, the accused spoke with Legal Aid at 8:04 p.m. with the aid of a Punjabi interpreter.

52 At 8:30 p.m. the accused provided a first sample in the Detachment breathalyzer machine, a Datamaster C unit, and at 8:53 p.m. a second sample. I understood on March 4th, 2009 one Constable O'Rourke was the technician who tested the accused. He gave copies of the breathalyzer test and a Certificate of Analysis to Constable Pirmohamed who served same on the accused and explained what he was serving. He said the accused appeared to understand the explanation. The Certificate was filed as Exhibit B on the *voir dire* and the two tickets as Exhibit C disclosing readings of firstly 200 milligrams percent and secondly 210 milligrams percent.

53 Constable Pirmohamed drove the accused home leaving the Detachment at 9:28 p.m. and arriving at his home at 9:42 p.m. on March 4th, 2009.

POSITION OF THE PARTIES IN ARGUMENT

The Defence

54 Mr. Mohan argues that the ASD demand was not made forthwith.

55 I note that s. 254(2)(b) of the ***Code*** does not state the demand is to be made forthwith, rather it calls for a demand to provide forthwith a sample of breath.

56 Mr. Mohan relies on the Supreme Court of Canada decision in ***R. v. Woods***, 2005 SCC 42 and as well ***R. v. Buyco***, 2010 ABPC 8, a decision of Judge Allen in the Alberta Provincial Court which

of course is not binding on me as a judge of this Court.

57 In ***Buyco***, *supra*, at para. 40 reference is made nonetheless to the judgment of Arbour J.A. dissenting in part in the Ontario Court of Appeal case of ***R. v. Pierman*** (1994), 92 C.C.C. (3d) 160 (Ont. C.A.) where she said in part in para. 5 as follows in explaining the difference between the ASD demand pursuant to s. 254(2) of the ***Criminal Code*** in issue in the case at bar and the breathalyzer demand under s. 254(3) of the ***Criminal Code of Canada***:

> [5] This section [and she is referring to s. 254(2) of the ***Criminal*** Code] contemplates an immediate testing, and therefore it cannot accommodate the exercise of the constitutional right to counsel. As the Supreme Court of Canada held in ***R. v. Thomsen*** (1988), 40 C.C.C. (3d) 411, and in ***R. v. Grant*** (1991), 67 C.C.C. (3d) 268, and as this court held in ***R. v. Côté*** (1992), 70 C.C.C. (3d) 280, the breath sample must be taken forthwith after the demand is made, and therefore there is no opportunity to contact a lawyer. This infringement, however, was held to be a reasonable legislative limit on the right to counsel, and the section was declared valid under s. 1 of the ***Canadian Charter of Rights and Freedoms***. In light of that jurisprudence, it seems clear to me that although the section merely requires that the sample be provided forthwith after the demand is made, and does not require that demand itself be made forthwith after the person is stopped, it is implicit that the demand must be made by the police officer as soon as he or she forms the reasonable suspicion that the driver has alcohol in his or her body. This is the only interpretation which is consistent with the judicial acceptance of an infringement on the right to counsel provided for in s. 10(b) of the ***Charter***. If the police had discretion to wait before making the demand, the suspect would be detained and therefore entitled to consult a lawyer. The basis upon which the courts have held that Parliament may infringe on a suspect's right to counsel is that there is no opportunity for the police to accommodate that right if the breath sample must be taken forthwith. It follows, in my view, that for the section to maintain its constitutional integrity, we must assume it also contemplates that there be no opportunity for the suspect to consult counsel before the demand is made.

58 Mr. Mohan argued that as soon as Constable Humphreys identified himself as a police officer and showed the accused and Mr. Stevens his badge, he was acting in the capacity of a police officer, not a "good Samaritan," and restrained the liberty of the accused and Mr. Stevens. He was then -- at or about 7:05 p.m. -- according to the submission involved in a police investigation of impaired driving, and certainly as soon as he smelled alcohol on the accused's breath, which occurred later. Evidence of this is his providing the "68" code to the dispatch when he made the call at or about 7:08 p.m.

59 No immediate ASD demand was made by Constable Humphreys as I have said. It was not

made in fact until about 7:26 p.m. after Constable Pirmohamed arrived at the scene. All the while, his client was detained. During this time the accused was not free to say "I'm leaving", and go. His freedom was therefore constrained according to counsel. His movements were also controlled as Constable Humphreys held his driver's licence. At no time did this police office read him any of his ***Charter*** rights. Constable Humphreys made a call to his Detachment to have several uniformed officers come to the scene but Constable Humphreys did not testify that he told the accused what he was doing or that, for example, he had requested an ASD be brought to the scene. There is of course no evidence Humphreys made this request.

60 Mr. Mohan conceded in argument that Constable Humphreys did have the authority under our British Columbia ***Motor Vehicle Act*** to conduct an investigation of the motor vehicle accident and seemed to suggest this investigation of the collision was shortly in the case at bar operating concurrently with the impaired driving investigation he submitted Constable Humphreys was engaged in and early on.

61 He submitted that this latter investigation became and was Constable Humphreys' main focus, namely, the impaired driving investigation. He invited me to make a finding of fact accordingly that an impaired driving investigation was Constable Humphreys' main focus from 7:05 p.m. to 7:26 p.m. This lapse of 21 minutes was too long for the ASD demand and sample, hence this demand and the provision of the sample was not made forthwith with the immediacy that the law requires. In the result, the demand was not lawfully made and the failure result cannot be relied upon at the trial in evidence for any purpose. In the result, the following s. 254(3) breath demand was likewise made without proper grounds and unlawful and hence the samples got and their subsequent analysis and results are also inadmissible in evidence at the trial.

62 Mr. Mohan also appeared to argue that his client's detention by Constable Humphreys, unless I concluded he was engaged in a motor vehicle investigation, was unlawful as well. All his client was required to do was give his name, driver's licence and insurance particulars and then he was free to go. There is no evidence on the *voir dire* that his vehicle was undriveable, however, likewise I note there was no evidence that it was then functioning properly.

63 The submission overlooks the common law right of police officers to investigate drinking drivers.

64 In the result, Constable Humphreys detained the accused pursuant to an impaired driving investigation according to Mr. Mohan's argument but did not tell him that this was so and without giving him a timeline as to when he would be free to go.

65 I turn now to the position of the Crown.

The Crown

66 The Crown submitted that the accused in the circumstances of this case was not free to simply

provide particulars of his driver's licence and insurance and then go, and refers me to s. 252(1)(b) of the ***Criminal Code of Canada*** which states as follows:

> 252. (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
>
> (a) another person,
>
> (b) a vehicle, vessel or aircraft, or
> (c) in the case of a vehicle, cattle in the charge of another person,
>
> and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

67 There is no evidence anyone involved in this collision was injured to the knowledge of the accused and required any assistance. This legal requirement would therefore tend to support the accused being under a duty to provide his name and address and nothing more. This was clearly the point made in reply by Mr. Mohan for the defence. He said this is the ***Code*** "hit and run" section. That is the evil (my term, not his) this provision seeks to address; the conduct that Parliament sought to prohibit. His client in compliance with this section did stop and did give his name and address. Once done, he ought to have been free to go. This was so whether or not he smelled of alcohol.

68 Crown however states that because in this case, the accused had a smell of alcohol on his breath, he was required to remain at the scene until it was determined whether or not he was committing a criminal act at the time of the motor vehicle accident. No authority was given for this requirement in his submission. Constable Humphreys did not detain the accused according to Crown nor was he ever involved in carrying out a criminal investigation, for example, for impaired driving. He was not legally obliged to start such an investigation. One only started when Constable Pirmohamed arrived at 7:21 p.m.

69 Crown also refers to s. 68 of our ***Motor Vehicle Act*** in support of there being an onus on the accused to remain at the scene of a motor vehicle accident. The section states as follows:

> Duty of driver at accident
>
> 68 (1) The driver or operator or any other person in charge of a vehicle that is, directly or indirectly, involved in an accident on a highway must do all of the following:

(a) remain at or immediately return to the scene of the accident;
(b) render all reasonable assistance;
(c) produce in writing to any other driver involved in the accident and to anyone sustaining loss or injury, and, on request, to a witness

i) his or her name and address,
ii) the name and address of the registered owner of the vehicle,
iii) the licence number of the vehicle, and
(iv) particulars of the motor vehicle liability insurance card or financial responsibility card for that vehicle,

or such of that information as is requested.

[emphasis added]

70 There are similar provisions in the British Columbia ***Motor Vehicle Act***, for example, s. 84 requiring the identity of the driver of a motor vehicle to be given to the police. Sections 224 to 227 of the Act also make it a provincial offence to drive with a blood alcohol reading in excess of 80 milligrams percent.

71 Crown nonetheless said in argument it was not particularly relying on these provincial statutory provisions in the case at bar. Crown argues that the accused caused this accident on March 4th, 2009 and when there is a potential for him to be legally liable, then the accused must stay at the scene. He also gave no legal authority for this statement but I note s. 68 might well apply and particularly that area emphasized.

72 Mr. Fogel argued there was no evidence on the *voir dire* Constable Humphreys created or imposed in some way any mental compulsion on the accused. He relied on the two recent Supreme Court of Canada cases, namely, ***R. v. Grant***, 2009 SCC 32 and ***R. v. Suberu***, 2009 SCC 33 with respect to the applicable legal principles and argued that I ought not to find that the accused must have felt psychologically detained merely because Constable Humphreys flashed his badge. There was no evidence Constable Humphreys, for example, told the accused that he was detained or that he must stay.

73 Mr. Fogel argued that to find an unlawful detention, I at least ought to have evidence that the accused felt detained. Insofar as this might suggest I ought to have evidence from the accused on point I am not certain I accept this submission as an accurate statement of the law in light of ***Grant***, *supra*, and especially ***Suberu***, *supra*, and the test for detention therein and in particular the majority reasons in ***Suberu*** at para. 28 during the course of the Court's discussion of when a detention arises as follows:

[28] As discussed more fully in ***Grant***, in a situation where the police believe a

> crime has recently been committed, the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the ***Charter***. Despite a police request for information or assistance, a bystander is under no legal obligation to comply. This legal proposition must inform the perspective of the reasonable person in the circumstances of the person being questioned. The onus is on the applicant to show that in the circumstances he or she was effectively deprived of his or her liberty of choice. The test is an objective one and the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application. However, the applicant's contention that the police by their conduct effected a significant deprivation of his or her liberty must find support in the evidence.

74 Also relevant and on point is the Court's decision in ***Grant***, *supra*, at para. 32 as follows:

> [32] The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the ***Charter*** and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police "good faith" may become relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a ***Charter*** breach is found.) While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

75 Mr. Fogel therefore invited me to find the accused was not detained or at least not arbitrarily or unlawfully so and nor had his ***Charter*** rights been somehow breached. His detention was clearly not arbitrary if I find his responsibility under s. 252 of the ***Code*** was being dealt with and if he was detained, this was the purpose.

76 If I found the accused had been arbitrarily detained and had not been given his ***Charter*** rights properly, then Mr. Fogel's fallback position pursuant to s. 24(2) of the ***Charter*** was that the disputed evidence, essentially the fail reading and the Certificate of Analysis and test results should be

admitted in any event, as to exclude same would bring the administration of justice into disrepute. He pointed out that certainly after Constable Pirmohamed arrived, the accused's s. 10 ***Charter*** rights were suspended during the ASD investigation, pursuant to the case of ***R. v. Thomsen***, [1988] 1 S.C.R. 640, a judgment of our Supreme Court of Canada.

77 Finally, on a factual basis Mr. Fogel argued it was reasonable on the facts of this case for Constable Humphreys to have done exactly what he did: call for and await the attendance of a colleague who was more current with the legal requirements of a potential drunk driving roadside investigation than was he.

DISCUSSION AND ANALYSIS

78 I wish to deal with a factual point first.

79 Mr. Stevens said in cross-examination that Constable Humphreys had not shown him or the accused his badge. In cross-examination, Constable Humphreys said he had done so on two separate occasions. The accused did not testify on point nor was he required to do so. It is therefore unclear that this event occurred. I found both of these witnesses to be truthful and careful for the most part in the way they testified and I am uncertain on this point whom to believe. Nonetheless, I do accept that at some point during his interaction with the two drivers on the evening in question, Constable Humphreys made it clear to them that he was a police officer, however then not in uniform.

80 I turn now to whether or not Constable Humphreys unlawfully detained the accused between 7:05 and 7:21 p.m. when Constable Pirmohamed arrived on scene on March 4th, 2009 in breach of his ***Charter*** rights, a period of approximately 16 minutes.

81 At the outset I wish to make the finding of fact defence counsel invited me to make, namely, what was Constable Humphreys' purpose in requesting the accused (and Mr. Stevens for that matter) to wait pending the arrival of the two uniformed officers? Was it in the course of conducting a criminal investigation, or was it for some other purpose?

82 It is important to remember in this case that Constable Humphreys was not dispatched to this motor vehicle accident to do any investigation of anything.

83 At the time of the collision, he was involved in doing other police work travelling no doubt to people's residences to serve subpoenas and summonses or like documents. He narrowly escaped being involved in the collision himself which based only on the evidence before me as I have said offered at the trial thus far or in the *voir dire* would seem to have been caused solely by the accused.

84 When Humphreys first got out of his vehicle, he merely wanted to ascertain if anyone was hurt. This is what any normal human being might have done. A chat ensued with both drivers; the victim, Mr. Stevens first, and thence the accused cab driver, who seems to have got out of his cab on his own volition and not pursuant to any order, demand or direction given to him by Constable

Humphreys. These activities would have taken several minutes. At some point prior to approximately 7:08 p.m., Constable Humphreys did several things:

1. He identified himself as a police officer.
2. He asked each driver, the accused and Mr. Stevens, for their driver's licence.
3. He smelled alcohol on the accused's breath and shortly thereafter became suspicious he had been drinking.
4. He asked both men to stand on the sidewalk.

85 At about 7:08 p.m. he says he called his Detachment to get two uniformed officers to come to the scene, I think to investigate two things:

(a) the accident and no doubt reasons for it; and
(b) the potential for an impaired driving charge.

86 The above steps in my view were, as described in ***Suberu***, *supra*, merely the initial part of his encounter with these two men and of a preliminary or exploratory nature (see, for example, ***R. v. Suberu*** at para. 31).

87 Constable Humphreys was engaged in a general enquiry and asked questions that any driver might ask under the circumstances. Insofar as he took possession of the drivers' licences of the two men, likely closer to 7:08 p.m., he was entitled to do so as a police officer having the powers set out under the ***Motor Vehicle Act*** in the face of the collision at hand.

88 I find the accused was not the subject of a criminal investigation then being conducted by Constable Humphreys. At most, he had started a motor vehicle collision investigation.

89 Early on, he had made a personal decision to involve two uniformed officers to do these investigations and this was the purpose of his call at or about 7:08 p.m. I completely accept his reasons for doing so as being sensible in the circumstances. During this initial exploratory period I find that the accused was not detained.

90 At about this time, Constable Humphreys asked both men to stand on the sidewalk to the right. They did so I suspect thereby removing themselves from the road surface to a place of greater safety. Mr. Stevens saw Humphreys place a telephone call from near his vehicle. He and the accused were then on the sidewalk. There is no evidence either had been told to stay there or were given a reason by Constable Humphreys to do so or told they were free or not free to go.

91 Certainly Mr. Stevens' freedom was not so curtailed at this time that he was unable to do other things, for example, take photos of the scene or potentially damage to the two cars: his and the accused's taxi. It is unclear what he was photographing.

92 The accused was at this point was observed by Stevens to lean into his taxi as if to get his

insurance papers. There is no evidence that he and Mr. Stevens exchanged particulars between one another at any time between when Constable Humphreys called his Detachment at about 7:08 p.m. and when Constable Pirmohamed arrived, which I find was in likely not more than ten minutes from when Constable Humphreys called his dispatch or Detachment.

93 Was the accused arbitrarily or unlawfully detained by Constable Humphreys in this approximately ten minute period of time? Was the line between general questioning and the detention crossed? Would Constable Humphreys' conduct in the context of the circumstances or encounter as a whole cause a reasonable person in the same situation to conclude that he was not free to go and that he had to comply with his directions?

94 The applicable legal principles dealing with when a detention is said to have occurred are to be found in ***Suberu***, *supra*, at paras. 21 to 26 as follows:

> [21] In ***Grant***, we adopted a purposive approach to the definition of "detention" and held that a "detention" for the purposes of the ***Charter*** refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state. The recognition that detention can manifest in both physical and psychological form is consistent with our acceptance that police actions short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the ***Charter***.
>
> [22] While a detention is clearly indicated by the existence of physical restraint or a legal obligation to comply with a police demand, a detention can also be grounded when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police. As discussed more fully in ***Grant***, this is an objective determination, made in light of the circumstances of an encounter as a whole.
>
> [23] However, this latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the ***Charter***, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. This Court's conclusion in ***Mann***, [2004] 3 S.C.R. 59, that there was an "investigative detention" does not mean that a detention is necessarily grounded the moment the police engage an individual for investigative purposes. Indeed, Iacobucci J., writing for the majority, explained as follows:
>
> > "Detention" has been held to cover, in Canada, a broad range of encounters

> between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the ***Charter***, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the ***Charter*** are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so. [Emphasis added; at para. 19.]

[24] As explained in ***Grant***, the meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the ***Charter*** right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust ***Charter*** rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the ***Charter***.

[25] For convenience, we repeat the summary set out in ***Grant***, at para. 44:

> 1. Detention under ss. 9 and 10 of the ***Charter*** refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

> [26] Mr. Suberu was not physically restrained prior to his arrest, nor would he have been subject to legal sanction for refusing to comply with the officer's request that he "wait". Thus, the obvious markers of detention are not present and our analysis must consider whether the officer's conduct in the context of the encounter as a whole would cause a reasonable person in the same situation to conclude that he or she was not free to go and that he or she had to comply with the officer's request.

95 I note in passing that the case at bar has some similarities to the type of situation the Supreme Court of Canada referred to in para. 40 of ***Grant****, supra*, as follows:

> [40] A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.

96 As I have said, Constable Humphreys really stumbled into the situation in the case at bar. He was not dispatched to it and therefore did not respond to it in the classic sense.

97 Dealing with the matter of the accused's stop in the case at bar, it would appear that by colliding with Mr. Stevens, he stopped himself. He was not pulled over by the police as, for example, occurred in ***R. v. Orbanski***, 2005 SCC 37. This case clearly states in para. 41 that police have the authority to check the sobriety of drivers.

98 I do not understand that this common law power only exists if police officers first observe the driver driving improperly and then stop him, hence Constable Humphreys in my view was acting lawfully when he asked the accused if he had had anything to drink and passing on his suspicion to

his Detachment dispatch so that Constable Pirmohamed as it turned out could follow up on this concern on his arrival at the scene as he did in conducting a criminal investigation. This common law right and its exercise is part of the overall circumstances of the encounter in issue.

99 I turn to the test in ***Grant***, *supra*, at para. 44 set out above.

100 There was never any physical restraint of the accused by Constable Humphreys; he never touched him or handcuffed him or, for example, directed him to wait inside his unmarked car or indeed inside his own car. While he asked him to wait on the sidewalk, clearly he did not so restrain his movements that he was in any way prevented from entering his own car or, for example, speaking with another man who came out of a nearby residence to speak to him.

101 Constable Humphreys, according to the evidence on the *voir dire*, did not at all material times stand in close proximity to the accused within, for example, touching distance. He merely said he stood on the sidewalk with the two men when not on his cell phone calling his Detachment. There is no evidence he told the accused once on the sidewalk, clearly a place of greater safety than somewhere on the road surface of Prairie Avenue, that he was not free to go or call anyone or talk to anyone. There is no evidence the accused did not understand anything Constable Humphreys said to him at the scene.

102 While the accused did not testify as to his perceptions on the evening in question, the test for detention is an objective one. Nonetheless, the onus is on the applicant to show in the circumstances that he was deprived of his liberty of choice. His failure to testify is not fatal. I do not think the accused in the case at bar had any legal obligation to step up onto the sidewalk when asked to do so by the police officer. He was neither asked nor told to wait based on the evidence or given a reason why he should do so. There was therefore no restrictive request or demand made by Constable Humphreys in the first instance unlike, for example, in ***Suberu***, *supra*. Nor am I able to find that the accused once on the sidewalk did conclude by what Constable Humphreys had done that he had no choice but to comply.

103 In my view, a reasonable person in the place of this accused on the evening in question and based on all the circumstances, would understand that he had just rear-ended another driver and that the police were taking steps to investigate the matter, which investigation would include but not be limited to obtaining the names and addresses of the drivers involved, whether anyone was hurt, the extent of injuries if any to anyone involved, the identity of witnesses, and the likely cause of the collision, and as well seeing to it no doubt that particulars were exchanged between the drivers. Such a reasonable person would understand that he ought to voluntarily wait and give the police a reasonable opportunity to do all this work.

104 I have considered the three factors: (a), (b) and (c) set out in para. 25 of ***Suberu***, *supra*. To some limited extent, Constable Humphreys did provide some general assistance to the two drivers, Mr. Stevens and the accused. He asked if they were okay. He looked at them as part of his enquiry and had a brief chat with them. He got them to move off the road surface to a place of greater

safety, a sidewalk, and he aided in recording particulars of both drivers. He must have maintained some order. I find it hard to see that he singled out the accused for focussed investigation beyond noting his suspicion to dispatch to allow the two uniformed peace officers on arrival to look into it more closely.

105 The encounter was not lengthy. Others were present, namely, Mr. Stevens, and at some point the visiting resident who spoke to the accused. Being familiar with the road in question, I think it likely at 7:05 p.m. other motorists would have been in the immediate area where the accused stood.

106 I have no evidence as to (c) in para. 25 of ***Suberu***, *supra*, beyond noting that the accused appears to be a person of colour and used an interpreter at the trial and *voir dire*. I am not of the view that he has established on a balance of probabilities that he was wrongfully or unlawfully detained at any time on the evening in question in breach of his ***Charter*** rights.

107 If I am wrong and the accused was unlawfully detained I would nonetheless applying and balancing the three factors in ***R. v. Grant***, *supra*, as for example set out in ***R. v. Harrison***, 2009 SCC 34 at para. 2 not exclude either the fail result on the ASD test or the later Certificate of Analysis or test results in the case at bar under s. 24(2) of the ***Charter***.

108 Of particular significance to me in the case at bar is the good faith shown by Constable Humphreys in taking the above steps to ensure the safety and well-being of the accused as well to ensure that a proper investigation be done on all matters by a constable with a current, up-to-date understanding of the accused's legal rights including ***Charter*** rights, something that he did not feel he was sufficiently up to speed with to allow him to carry on the criminal investigation himself in a proper manner.

109 It has not been shown that any alleged ***Charter*** breach should be classed as wilful or egregious conduct on the part of Officer Humphreys. These factors would favour admissibility of the evidence in issue.

110 I also note it has not been argued or shown based on binding legal authority that in every case without exception the first police officer to the scene, whether dispatched or not, must himself or herself complete any criminal investigation including providing an accused in a timely way with all ***Charter*** rights. This of course could include off-duty police officers, police officers being driven to medical appointments by their spouses, or officers en route to another crime scene.

111 Yet it is argued that Constable Humphreys ought to have conducted the criminal investigation in the case at bar and implicit in defence counsel's argument, he ought to have made an earlier s. 234(2) ***Criminal Code*** ASD demand. He was not even asked at trial if he knew what this was.

112 I move to the next issue: was the ASD demand and test done in a timely way?

113 It is not suggested that Constable Pirmohamed lacked the proper grounds to make the demand and for this reason the fail result and all subsequent evidence got be ruled inadmissible on this *voir dire* or at the trial. Rather, Mr. Mohan argues that the test was done too late. It was not done forthwith.

114 Mr. Mohan relies on ***R. v. Woods***, 2005 SCC 42 to the effect that the word "forthwith" in s. 254(2) of the ***Code*** connotes a prompt demand by a police officer and an immediate response by the person to whom the demand is addressed. Drivers who receive ASD demands must comply immediately. ***R. v. Lee***, 2010 BCPC 89 does not deal with an ASD demand. ***R. v. Buyco***, *supra*, can be factually distinguished from the case at bar and as I have said, is not binding upon me. No other cases were provided to the Court by either counsel.

115 As I understand the law relating to ASD demands, while time is of the essence in making the demand in the first instance, peace officers may take a reasonable time to ensure a proper investigation is done so as to have proper grounds as set out in s. 254(2) of the ***Criminal Code***. In one case, ***R. v. Smith*** (1996), 105 C.C.C. (3d) 58, a judgment of the Ontario Court of Appeal, at paras. 82-83, a delay to permit the peace officer to conduct sobriety tests prior to making an ASD demand was found not to be fatal.

116 In my view, the delay from say at or about 7:08 p.m., which is about the time Constable Humphreys would have first smelled alcohol on the accused's breath, to 7:26 p.m. some 18 minutes later when the demand was first made was for two related reasons:

1. Constable Humphreys was not up to speed with impaired driving laws and he wanted an experienced officer to conduct the investigation to see if his suspicion had merit or not and so that it would be done properly.
2. There is no evidence that he in any event had an ASD with him at the scene nor that if he had been prepared to conduct an impaired driving investigation himself, (which he was not) one could have been brought to the scene more quickly than occurred by means of Constable Pirmohamed attending who brought one to the scene at 7:21 p.m.

117 Hence Constable Humphreys' decision to bring in a police officer with more current impaired driving investigation skills from this accused's standpoint has not been shown in my view to have added to any delay in the ASD testing in this case.

118 I do not find on the facts that Constable Humphreys ever had more than a mere suspicion at best that the accused may have been drinking and driving. It has not been shown on the *voir dire* that he at any time held the reasonable grounds to suspect called for in s. 254(2) of the ***Code*** and declined without good reason to administer the ASD test or to do a criminal investigation.

119 Having considered all the circumstances of this case, I do not find that the ASD demand or provision of a sample of breath by the accused was so unduly delayed so as to be other than

"forthwith" as mandated by s. 254(2) of the ***Code*****.** They were done in a timely way in my view in each case.

120 The demand was properly made within the ambit of s. 254(2) of the ***Code*** and was in all respects a valid, lawful, timely demand and the sample was provided forthwith. (This ***Code*** provision overrides the right to counsel: see for example, para. 12 in ***R. v. Misasi*** (1993), 79 C.C.C. (3d) 339 (Ont. C.A.).

CONCLUSION

121 The accused has not shown that any of his ***Charter*** rights were breached. I am satisfied that the ASD demand and sample were made and taken in an entirely proper way. No evidence will therefore be excluded for these reasons at the trial before me, including most importantly the ASD fail result and later Certificate of Analysis and test results.

(ORAL REASONS FOR JUDGMENT CONCLUDED)

cp/e/qlrds/qljzg/qljxr/qlana/qlcas