C.D. #2500

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

LAWRENCE KEVIN ELLIOTT

RESPONDENT

HEARD: At Digby, Nova Scotia, on January 25th, 1989

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 238(5) of the Criminal Code

DECISION: The 6th day of February, A.D. 1989

COUNSEL: Mr. Lloyd Tancock, Esq., for the Appellant

Ms. Michele Cleary, for the Respondent

D E C I S I O N O N A P P E A L

HALIBURTON, J.C.C.

This is an appeal on behalf of the Crown against the acquittal of the Accused on a charge that he did without reasonable excuse refuse to comply with a demand to provide samples of his breath suitable for a breathalyzer analysis under s. 238(5) of the Criminal Code. The acquittal was based on a breach of s.10(b) of the Charter of Rights and Freedoms.

The background of the matter, briefly, is that the Accused, who testified on his trial, was detained by Constable Emeno of the R.C.M.P. in Freeport, Digby County. Freeport is a village on Long Island and is approximately one hour in travelling time from Digby.

The Accused, in his evidence, conceded that at the time in question, he had "a buzz on" as a result of drinking. Because of a dispute, he drove his own motor vehicle into that of a former girlfriend. The Accused then left the scene of that incident, and a complaint was made to the police. He was located by Constable Emeno still operating his vehicle some 40 or 45 minutes later.

Constable Emeno testified that he followed the vehicle which had a shattered windshield and, when it was stopped, he found the Accused to be the operator. In direct examination, the Constable testified (page 11):

> ...he smelled of alcoholic beverage, ah, somewhat unsteady on his feet, ah, at 8:00 p.m. I gave him his rights and the ALERT demand.

After the Accused failed the ALERT, a breathalyzer demand was made. As a result of that demand, Constable Emeno testified (page 12):

> He said that he wasn't going to take the breathalyzer.

And later:

> I went through it again just, I didn't read the demand again, but I explained to him that, ah, if he didn't take the test, basically he would be charged with the same charge as if he had taken it and failed the breathalyzer test. He then decided that he, he would take the test. He said, "ok, I'll take it".

The Constable then described the behaviour of the Accused who was generally cooperative. In the vehicle of the Accused, he observed that there was a 24-bottle beer case containing 11 sealed beer bottles.

Of significance in this appeal is the following exchange between the Prosecutor and witness (page 13):

> Question: Um, at this stage, was there any discussion of counsel?
>
> Answer: Ah, nothing further to his initial (sic) being advised that he had the right, ah, to speak to counsel.

On cross-examination, Defence Counsel pursued the Charter question more fully. (page 16):

> Question: Did he say anything to you in relation to your having told him about his Section 10(b) rights?

Answer: Pardon me?

Question: Did you ask him if he understood?

Answer: Yes.

Question: His Section 10(b) rights?

Answer: Yes.

Question: What did he say?

Answer: He acknowledged that he understood and I was satisfied that he understood.

And later, page 18:

Question: Did you ask him if he wanted to talk to a lawyer?

Answer: I don't recall if I did or not.

Question: Did he say anything to you about wanting to talk to a lawyer at that time?

Answer: No.

Question: Did he say anything about not wanting to, did he make any reference to that at all, that you recall?

Answer: Not that I recall.

And again:

Question: Did he at any point in your conversations with him throughout this procedure indicate to you anything about wanting to see a lawyer?

Answer: No.

The Accused, as indicated earlier, gave evidence himself. With respect to the subject of his "right to Counsel", his evidence was essentially a denial that his s. 10(b) rights had been communicated to him at all. (page 32):

> Question: Ah, do you recall any discussion with him about your right to retain and instruct counsel without delay?
>
> Answer: No, he never asked me that.
>
> Question: Did you remember him asking you that before he gave you the ALERT demand?
>
> Answer: No, he didn't because if he had've I would have asked to go into Lindsay's house and call a lawyer.

Irrelevant to the particular issues raised on this appeal is the Accused's testimony that on reaching the R.C.M.P. Detachment in Digby, he was advised of his right to counsel and did, in fact, speak to Counsel.

After speaking to Counsel, he furnished one sample in response to the breathalyzer demand which yielded a reading of 160 milligrams per cent and refused to provide a further sample.

GROUNDS OF APPEAL

The Notice of Appeal sets forth the following grounds:

> 1. That the learned Trial Judge erred in holding that the accused's rights were violated by the peace officer's not allowing the accused to contact counsel prior to being transported to the police detachment;
>
> 2. That the learned Trial Judge erred in holding a peace officer must, after giving a demand for a breath sample, give the subject the immediate opportunity to exercise his rights to counsel regardless of where he is;
>
> 3. That the learned Trial Judge erred in holding that had the accused been given the opportunity to use a telephone at the place of arrest the necessity of transporting the accused to Digby may have been avoided thereby violating the accused's immediate rights to receive counsel;

4. Such other grounds as may appear upon examination of the transcript.

At the time of argument, it appeared that the real essence of the appeal is reflected in the position advanced on behalf of the Crown that:

> In the absence of some explicit or implied indication by the accused of a desire to exercise his right, there was no obligation upon the peace officer to go further and provide the accused with a reasonable opportunity and time to retain and instruct counsel "at the point of detention".

The decision of Judge Nichols on the trial is hereunder set forth in full:

> Well, I'm going to dismiss it on that basis, having read Menzies and McKane that you cited, 49 M.V.R. 10, and 49 M.V.R. 1, I think Constable Emeno said he gave him his rights, but he said he's not going to, his right to counsel until he got back to the office, and yet Mr. Elliott was handy a phone, could have used the phone, and might have saved transportation all the way into the, into the detachment. **Well, a perusal of the case law seems to indicate that when you give them the demand, you have to give them their rights and give them the opportunity to exercise those rights, regardless of where you are and notwithstanding you might be on the Island or somewhere else.**

In response to the issue advanced by the Crown, Defence Counsel responds with the following question as being the essential issue:

> Did the Learned Trial Judge err in law in finding that the accused was not offered a reasonable opportunity to retain and instruct Counsel "without delay"?

She argues that the decision at the conclusion of the trial "was a finding of fact". Counsel's interpretation is that the Trial Judge concluded that the Accused "was not afforded a reasonable opportunity to exercise his right to Counsel. This decision was based on the evidence and is supported by the evidence." R. v. Hamilton (1985), 39 M.V.R. 69 decided by my brother, Hall J.C.C., is cited as supporting the proposition "that a **reasonable opportunity** must be extended **at the time of detention** and not an hour later".

The arguments advanced by Counsel for the Respondent/Accused in this case render it necessary to consider the facts as found by the Trial Judge and the evidence on which those findings are based. The duties imposed on a Summary Conviction Appeal Court under the Criminal Code require the Court to approach findings of fact with some caution. A decision of the Appeal Division of the Supreme Court of Nova Scotia said in Regina v. Gillis 60 C.C.C. (2d) 169, at page 176:

> A verdict of acquittal should only be set aside where it is unreasonable or cannot be supported by the evidence. In applying that test, it is not the duty of the Appeal Court to retry the case, and findings of issues of credibility should only be interfered with in very rare circumstances.

Drawing on the findings of the Supreme Court of Canada in Yebes v. The Queen 36 C.C.C. (3d) 417 and in Stein et al v. The Ship "Kathy K" et al (1976) 2 S.C.R. 802, it is, nonetheless, the obligation of the Appeal Court to re-examine

and re-weigh the evidence, and to determine whether the verdict is one which a properly instructed jury, acting judicially, could reasonably have rendered. In reaching these conclusions, the Appeal Court is free to draw its own inferences from proven facts while taking into account the inferences drawn by the Trial Judge. The inferences drawn on the trial should be adopted on the appeal unless there are cogent reasons for not doing so. Whether there is any evidence at all to support the findings of fact is, of course, a question of law and is clearly reviewable. Questions of credibility are for the Trial Judge.

In her submission, Counsel for the Respondent asserts that the Judge, at the conclusion of the trial, made a finding of fact that the Accused had not been afforded a reasonable opportunity to exercise his right to counsel and that such a finding was based on the evidence. A careful review of the transcript does not support that proposition. The evidence relating to the issue is fully set out above. Aside from the advice given to the Accused by the police constable that he had the right to consult a lawyer without delay, there was no evidence before the Trial Court with respect to any opportunity afforded to the Accused to exercise his right. There was no inquiry made by the Accused as to how he might exercise his rights or when, and there is no evidence of the slightest indication from him that he had any interest in doing so.

Further, the words used by the Trial Judge in delivering his decision do not support the proposition advanced by Defence Counsel that there was a finding of fact by the Judge

that Elliott had not been afforded a "reasonable opportunity" . He said:

> When you give them the demand, you have to give them their rights and give them the opportunity to exercise their rights, regardless....

Adopting these words literally would mean that the notification and the exercise of the right are to be considered in one time frame - that is, "forthwith". If that was intended to be a statement of the law, then I must respectfully disagree. It is clear that while the notification or caution is to be given forthwith (not immediately), the exercise of the right is to be permitted at the first "reasonable opportunity".

The first "reasonable opportunity" would arise after the Accused indicates a desire to speak to Counsel, or perhaps if he behaves or reacts in such a manner as to make it uncertain what his desire is. Other factors may well apply in a given case, for example, the time constraints imposed by breathalyzers, the peaceful removal of the suspect from an area of conflict, the availability of a telephone.

To the extent that the words used by Judge Nichols in his decision might be interpreted as a finding that the Accused had been deprived of a right he desired to exercise, his conclusion is not supported by the evidence. There is no evidence which would reasonably support a finding that Constable Emeno told the Accused he could not contact Counsel until he was brought to "the office" in Digby. There is no evidence in fact that the Accused discussed contacting Counsel at all, and indeed

the Accused denies any such discussion. There was evidence that he was advised of his right "immediately", and it is clear that the Trial Judge accepted that as fact.

What does seem implicit in the decision of the Trial Judge is that he found, as a fact, that Constable Emeno had given the Accused his Charter 10(b) caution. The words used in his decision assume the demand had been given and rely on the case law cited as establishing that the officer not only had to give him his rights but also

> **give him the opportunity to exercise those rights, regardless of where you are** and notwithstanding you might be on the Island or somewhere else.

A review of some of the cases dealing with Charter section 10(b) is required to deal with the issues raised. The Canadian Charter of Rights, Annotated, 1988, C.L.B. reviews a number of cases bearing on this specific issue. At page 15.2-8, Regina v. Shields (1983), 6 C.R.R. 194, (Ont. Co. Ct.):

> **If such person wishes to retain and instruct counsel, he must be afforded the opportunity** to do so at that time and without delay.

At page 15.2-9, Regina v. Kelly (1985), 17 C.C.C. (3d) 419, (Ont. C.A.):

> The requirement that the accused be informed "promptly" of the reason for the arrest means that he be informed "immediately". However, the requirement that the accused be informed of the right to counsel **"without delay" is not the same as immediately.**

At page 15.2-10, in Regina v. Baig (1985), 20 C.C.C. (3d) 515, (Ont. C.A.):

> In this case, there was **a total absence of any evidence that the accused desired** or asked for an opportunity to retain and instruct counsel...His failure to acknowledge explicitly that he understood his rights or his failure to request an opportunity to exercise his right to retain and instruct counsel did not constitute special circumstances justifying a conclusion that his constitutional rights had been violated.

At page 15.2-14, in R. v. Mohl (1987), 56 C.R. (3d) 318, (Sask. C.A.), after advising the detainee of his section 10(b) rights, the arresting officer must:

> give the accused the opportunity to exercise that right, and **not to require the accused to provide evidence which may incriminate him prior to affording him the reasonable opportunity** to make a reasoned choice to **retain and instruct counsel.**

At page 15.2-14a, in Regina v. Elgie (1986) 48 M.V.R. 103, (B.C. C.A.):

> It is **only when the accused chooses to** invoke or **exercise his right** to retain counsel **that the officer must then provide** him with a **reasonable opportunity** and time to retain and instruct counsel.

And Regina v. Sheppard (1987), 48 M.V.R. 6, (Nfld. S.C.):

> it is incumbent upon the authorities to take positive steps to permit an accused to telephone a lawyer, **particularly when the detained person has already requested an opportunity** to do so.

At page 15.2-14h, in R. v. MacCormack (1988), 4 W.C.B. (2d) 379, (P.E.I. S.C.):

> **Simply to inform** an individual of the existence of a right **and to offer that individual no opportunity** to exercise that

> right **is to make a sham of the whole procedure.** An officer giving an accused his rights under this paragraph must explain in concise and understandable terms that he has the right to retain and instruct counsel, and that he will be given an opportunity to do so **as soon as he is taken to police headquarters,** and must satisfy himself that the accused understands this. The officer must make a telephone available to the accused upon his arrival at headquarters and permit the accused to use it.

At page 15.2-14j, in Regina v. Solonas (1982 B.C. Prov. Ct.):

> An accused's right to retain and instruct counsel as guaranteed by this paragraph is **not infringed where the accused makes no request for counsel.**

At page 15.2-14k, in Regina v. Fallowfield (1983), 24 M.V.R. 97 (B.C. Co.Ct.):

> While it was held that the right to consult counsel includes the right to do so in private, **there is no denial of the right** to counsel **when the accused does not complain** of the facilities provided.

At page 15.2-141, in Regina v. Fairweather (1982, Ont. LeSage, Co.Ct.J.):

> This paragraph **does not impose an obligation on the police to invite a person under arrest** to make a telephone **call to a lawyer,** or otherwise positively promote the calling of counsel. **The only obligation** on the police **is to facilitate the** making of a **call** in any way possible **when an accused requests** that he be permitted to make such a call.

At page 15.2-15, in Regina v. Sabourin (1984), 13 C.C.C. (3d) 68, (Man. C.A.):

> **..the onus is on him to** request counsel or **express a desire to contact one.** It need not be shown that the accused, having been informed of his right to retain and instruct counsel, specifically waived that right..

At page 15.2-16, in Regina v. Dombrowski (1985), 18 C.C.C. (3d) 164, (Sask. C.A.):

> ..the **accused was advised** that he had the right to retain and instruct counsel, and **that he would be permitted to do so at the police detachment. The clear inference was that he could use the telephone at the detachment but not before. No explanation was offered for not granting access to a telephone at the place of work.** This amounted to an unjustified limitation of the right to retain counsel. Accordingly, **oral statements made in response to questioning on the way to the (police) station** were obtained in violation of the Charter and, in all the circumstances of the case, **were excluded.**

At page 15.2-19, in R. v. Naugler (1986), 72 N.S.R. (2d) 271, (N.S.C.A.):

> ..this paragraph imposes **a duty not to call upon the detainee** to provide that evidence **without first providing** him with **a reasonable opportunity** to retain and instruct counsel.

At page 15.2-25, in R. v. Manninen (1987), 34 C.C.C. (3d) 385, (S.C. of Can.):

> This paragraph imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay. Secondly...the duty to cease questioning..until...
>
> The accused, following his arrest, was informed of his right to counsel and **indicated that he wanted to speak to counsel and would say nothing until he had done so.** Notwithstanding that fact and that a telephone was immediately available the police began to question the accused.
>
> (Statements excluded.)

This view of s. 10(b) was reiterated by the Supreme Court of Canada in a recent decision R. v. LeClair & Ross, No. 19176, January 19, 1989. In the decision of Beetz, for the majority, the Court spoke again of the two duties imposed on the arresting officer. Then went on to say:

> **Once a detainee has asserted his right to counsel,** the police cannot, in any way, compel the detainee to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right.

While there is clearly some difference of opinion amongst the various courts cited over the five-year period covered, it is apparent that there is no denial of the right to counsel "immediately" unless the accused has indicated with reasonable clarity his desire to contact counsel. That result is very much analogous to the finding in Fallowfield (above) with respect to "privacy". Fallowfield followed the decision of the Supreme Court of Canada in Jumaga v. The Queen (1976), 29 C.C.C. (2d) 269 on the question of the right to consult counsel in private. There, the Supreme Court held that unless the accused makes some complaint about the facilities provided, his right to privacy has not been infringed.

It is the evidence elicited from the accused between the time of the breach and the time when he does, in fact, exercise his right to consult counsel that is to be excluded in any event. No such evidence is before the Court in the case of Mr. Elliott. That was the case in Manninen and Dombrowski cited

above. In Dombrowski, the Saskatchewan Court of Appeal held that there was an infringement of the rights of the accused where he was taken from his place of work and was told, in effect, that he would not be permitted to consult counsel until he arrived at the police detachment. That case, it seems to me, is very like the situation in Hamilton cited by Counsel herein. It is readily distinguishable from the case against Elliott. In Hamilton, the evidence established, as in Dombrowski, that the accused was advised that he could call a lawyer when he got back to Bridgetown "if he so wished". The accused had been arrested at Kejimkujik National Park, a one-hour drive from the police detachment. As Judge Hall says:

> The evidence also revealed that there were telephone facilities at the park...there was a telephone conveniently available where the appellant could have been afforded the opportunity of consulting a lawyer before being required to respond to the demand..

At page 76:

> The fact is that the appellant did make some mention of talking to a lawyer. He was told by the police officer that he could "call a lawyer at Bridgetown", implying that **he would not be permitted to call a lawyer prior to his arrival at the R.C.M.P. detachment** there. This of course would have involved a delay of at least 1 hour and would have been after he was required to respond to the "demand".

Counsel for the Crown refers to the following quotation in Hamilton (page 76):

> In my opinion, in ordinary circumstances, a motorist should not be required to respond to

> a demand...until after he...has been afforded a reasonable opportunity to consult counsel **should he so desire.**

Counsel for the Crown, relying on R. v. Elgie 48 M.V.R. 103, contends that there is no obligation upon the arresting officer to go further than to advise the detainee of his right to counsel unless the arrested party signifies his desire to contact counsel. In response to the same argument as that raised for the defence in this case, Mr. Justice Craig of the British Columbia Court of Appeal approved comments made by Mr. Justice Callaghan of the Supreme Court as Summary Conviction Appeal Court, when he said (page 108):

> In my view, the Crown need not go that far. The officer detaining the individual, of course, has an obligation to communicate clearly to him that he has the right to retain and instruct counsel. In some circumstances he may have to go further in explaining the right if, because of the actions of the accused, or his statements, he appears not to understand his rights. Surely it is **only when the accused chooses to** invoke or **exercise his right** to retain and instruct counsel that the officer must then **provide him with a reasonable opportunity and time** to retain and instruct counsel...**the... obligation** to provide the applicant with a reasonable opportunity and time to retain and instruct counsel **comes only after a request for counsel has been made.**

Defence Counsel before me relies on R. v. Menzies, a decision of the Ontario Court of Appeal, reported at 49 M.V.R. 10, which was considered in Elgie, the conclusion of which the British Columbia Court of Appeal specifically disagreed with.

Counsel for the defence argues that Menzies is authority for the proposition that s. 10(b) imposes upon the accused

> a duty not only to inform the detainee of his right to counsel but also to **provide him with a reasonable opportunity and time to retain and instruct counsel.**

There can be no doubt of the accuracy of that quotation as a proposition of law but with great deference to the interpretation of the B.C. Court in Elgie, I do not understand that proposition to be the "ratio" in the Menzies case. The Ontario Court, in Menzies, as I read that case, determined nothing more than that the Trial Judge had failed to consider whether or not the detainee had been provided such a "reasonable opportunity" and determined that; the Trial Judge having failed to give that aspect of s. 10(b) any consideration; it was within the province of the Summary Conviction Appeal Court Judge to make his own finding of fact on that question. The decision of the Ontario Court is contained in the following quotation:

> The Summary Conviction Appeal Court Judge, having jurisdiction over questions of fact as well as questions of law, essentially, found as a fact that the respondent, in the circumstances, had not been afforded a reasonable opportunity to retain and instruct counsel.

MacKinnon A.C.J.O., then goes on to say:

> There was evidence to support this finding (by the Appeal Judge) and he was entitled to make it on that evidence.

Mr. Justice MacKinnon then declined to interfere with that finding of fact.

It will be seen that, in my view, there is no conflict between the decision of the British Columbia Court in Elgie and the Ontario Court in Menzies. Both decisions turn on a question of fact which is whether or not the detainee has been accorded a "reasonable opportunity and time to retain and instruct counsel".

The onus is on the Accused to establish on a balance of probabilities that his Charter right has been abridged. In the Hamilton case above, the accused had been arrested by the warden of the National Park who had summoned the police constable to the scene by telephone. This telephone was "conveniently available" to the detainee. A discussion took place between the detainee and the police constable with respect to contacting counsel and the accused was advised "you will have to wait". Accordingly, there was a factual basis upon which to determine that the accused had not been permitted to consult counsel "at the first reasonable opportunity", the accused having indicated his "desire" to do so.

In the case before me, the evidence of both the arresting officer and the Accused is that there was no discussion as to how and when the access to counsel would be provided and there was no expressed desire on the part of the Accused to consult counsel. He did, however, exercise his right to consult counsel after being returned to the R.C.M.P. detachment at Digby. There is no suggestion that any evidence was obtained from the Accused between the time of his detention

and the time when he actually consulted counsel. In the context of the cases I have cited, there is no evidence which could reasonably bear the interpretation that the Accused had his right infringed to have a "reasonable opportunity and time to retain and instruct counsel".

In response to the issues raised by the parties, I would conclude that, in the absence of a desire communicated by the detainee to exercise his right to counsel, there is no obligation on the arresting officer to afford him a reasonable opportunity to do so "at the point of detention". I find that the Learned Trial Judge did err in law in finding that the Accused was entitled to have a reasonable opportunity to instruct counsel, where he displayed no wish to do so.

The appeal is allowed and the Accused is convicted on the charge herein.

I am not aware of any special considerations to be taken into account in relation to sentencing. There is no notice on file that the Crown is proceeding by way of second conviction or is seeking an increased penalty. In these circumstances, the penalty will be a fine of Seven Hundred, Fifty ($750.00) Dollars to be paid within sixty (60) days from the date herein. The Respondent will have his license suspended under the provisions of the Criminal Code for a period of one year.

DATED at Digby, Nova Scotia, this 6th day of February, A.D. 1989.

CHARLES E. HALIBURTON
JUDGE FOR THE COUNTY COURT
OF DISTRICT NUMBER THREE

TO: Clerk of the County Court
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B0V 1A0

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CASES CITED:

R. v. Hamilton (1985), 39 M.V.R. 69

Regina v. Gillis 60 C.C.C. (2d) 169

Yebes v. The Queen 36 C.C.C. (3d) 417

Stein et al v. The Ship "Kathy K" et al (1976) 2 S.C.R. 802

Canadian Charter of Rights, Annotated, 1988

Regina v. Shields (1983), 6 C.R.R. 194, (Ont. Co.Ct.)

Regina v. Kelly (1985), 17 C.C.C. (3d) 419, (Ont. C.A.)

Regina v. Baig (1985), 20 C.C.C. (3d) 515, (Ont. C.A.)

R. v. Mohl (1987), 56 C.R. (3d) 318, (Sask. C.A.)

Regina v. Elgie (1986), 48 M.V.R. 103, (B.C. C.A.)

Regina v. Sheppard (1987), 48 M.V.R. 6, (Nfld. S.C.)

R. v. MacCormack (1988), 4 W.C.B. (2d) 379, (P.E.I. S.C.)

Regina v. Solonas (1982 B.C. Prov. Ct.)

Regina v. Fallowfield (1983), 24 M.V.R. 97, (B.C. Co.Ct.)

Regina v. Fairweather (1982, Ont. LeSage, Co.Ct.J.)

Regina v. Sabourin (1984), 13 C.C.C. (3d) 68, (Man. C.A.)

Regina v. Dombrowski (1985), 18 C.C.C. (3d) 164, (Sask. C.A.)

R. v. Naugler (1986), 72 N.S.R. (2d) 271, (N.S.C.A.)

R. v. Manninen (1987), 34 C.C.C. (3d) 385, (S.C. of Can.)

R. v. LeClair & Ross, No. 19176, January 19, 1989

Jumaga v. The Queen (1976), 29 C.C.C. (2d) 269

R. v. Menzies 49 M.V.R. 10

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF DIGBY

C.D. 2500

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT
OF DISTRICT NUMBER THREE

ON APPEAL FROM

THE PROVINCIAL COURT

BETWEEN:

HER MAJESTY THE QUEEN

-and-

LAWRENCE KEVIN ELLIOTT

HEARD BEFORE: His Honour Judge John R. Nichols, J.P.C.

PLACE HEARD: Digby, Nova Scotia

DATES HEARD: February 26th, March 3rd and March 17th, 1988

CHARGE: That he at or near Digby in the County of Digby, Nova Scotia, on or about the 13th day of June, 1987, did without reasonable excuse refuse to comply with a demand made to him by a peace officer, to provide then or as soon thereafter as was practicable, samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 238(5) of the Criminal Code.

COUNSEL: M. Alison Crowe for the Prosecution
Lorenne M. G. Clark for the Defence

C A S E O N A P P E A L