PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Mullins*, 2015 NSPC 80

Date: 2015-10-22
Docket: 2729085
Registry: Shubenacadie

Between:

Her Majesty the Queen

v.

Mitchell Daniel Kevin Mullins

Judge:	The Honourable Judge Timothy Gabriel, JPC
Heard:	June 4, 2015; June 22, 2015 and October 22, 2015, in Shubenacadie, Nova Scotia
Oral Decision	October 22, 2015
Charge:	Section 254(5) of the Criminal Code
Counsel:	Jillian Fage, for the Crown Robert Cragg, for the Defence

Gabriel, JPC (orally):

Background

[1] On April 3rd, 2014 at 11:04 p.m., R.C.M.P. Constable Shawn Carter, then a seven year veteran of the R.C.M.P., encountered a blue 2010 Hyundai Accent on the side of Findlay Road. This was a dirt road outside of the community of Kennetcook, Hants County, Nova Scotia.

[2] Although stopped, the vehicle's engine was running with its interior lights on. Given the time of night, and as Constable Carter put it, "being in the middle of nowhere", he stopped to check that everything was all right with the car and its' occupants.

[3] He noted that there were two males inside of the vehicle, one of whom was in the driver's seat. There was open liquor (consisting of an open can of beer) sitting on the centre console. A number of empty "Cold Shots" beer cans were strewn over the floor, and an empty Budweiser beer bottle was also seen on the driver's side floor in the front of the vehicle.

[4] Because of the open liquor in the vehicle, and the smell of alcohol emanating from inside of it, Constable Carter asked the male in the driver's seat to

accompany him. The driver did so without issue and was placed in the rear of the police car. He did not have a driver's license or photo ID of any sort with him, but he did have a "photo-less" piece of ID with his name on it. On that basis, and also based upon what he told the officer, it was ascertained that he was the accused, Mitchell Mullins. Mr. Mullins provided his correct address, phone number and date of birth.

[5] During this conversation in the police car, which occurred at 11:06 p.m., Carter made note of a smell of liquor on the accused's breath, and also that he was possessed of blood-shot, glossy eyes. Mr. Mullins was talking, in the words of the officer, pretty much non-stop.

[6] All the while, Constable Carter was engaged in conducting checks on Mr. Mullins through dispatch. The computer in his vehicle was not working dependably, which the officer attributed to the remoteness of the area, and the fact that there was not a signal tower in the vicinity. For that reason, he was unable to do the checks in his cruiser vehicle, and he had to run them through dispatch as a consequence.

[7] Carter explained that the information that he needed, the "checks" so to speak, related to things such as whether the accused had a valid driver's license,

whether a valid permit existed with respect to the vehicle, whether Mr. Mullins had a criminal record, and if so, of what it consisted, whether there were outstanding warrants in place, and such like.

[8] The process took eight minutes from 11:06 p.m. to 11:14 p.m. After that interval, the accused asked, "Well, what's going on here?" Carter responded by telling him that he smelled liquor on his breath, and was going to read him a demand to forthwith provide a sample of his breath. The accused responded to this information by saying that he would not do so, and that he wanted to speak to his lawyer.

[9] Carter then, at 11:14 p.m., read the demand for the ASD device directly from the police card. No issue has been taken as to the wording of the demand itself. Upon being presented with the demand, Carter testified that the accused answered, "I'm refusing. I'm not blowing into that," and added that he felt as though he shouldn't have to do so as he had only consumed one beer.

[10] The officer thereupon arrested him for refusal, advised Mr. Mullins of this fact, and provided him with his rights and caution, also directly from the police card. Again, the wording thereof has not been challenged.

[11] Immediately prior to being arrested, Mr. Mullins had asked if he could exit the police car. Carter advised him that prior to his refusal he could have done so had he wished. Although the door was locked, Carter said that he would have unlocked it, let him out, then administered the ASD demand at roadside if need be.

[12] Since he had by now refused the ASD demand, however, Carter told Mr. Mullins that he was under arrest for refusal and that he was no longer at liberty to leave the vehicle. Then he read him his rights and caution as noted above.

[13] Upon being asked if he wished to call a lawyer, the accused responded, "Yeah, for sure. One hundred percent, Robert Cragg." He was also advised of his right to obtain free legal advice by contacting the Provincial Legal Aid program if he wished.

[14] At this point another vehicle driven by a female known to the accused and his passenger pulled up. Simultaneously, Constable Carter went to speak with the accused's passenger. This latter laid claim to the liquor in the vehicle and was accordingly issued a Summary Offence Ticket. Carter returned to the police vehicle at 11:58 p.m. with the intention of trying to print Mr. Mullins' release documents in the car.

[15] Carter once again contacted dispatch. This time it was to obtain Mr. Cragg's contact information. Parenthetically, I note that he couldn't recall whether he made a request for the information right after the accused's arrest (and before he dealt with the passenger's Summary Offence Ticket) or upon his return to the police car at 11:58 p.m. In any event, Mr. Cragg's contact information was received from dispatch at 11:59 p.m., and the accused was permitted to speak to him from the back seat of the patrol car.

[16] While the accused was speaking to Mr. Cragg, Officer Carter went back to Mullins' vehicle and seized the beer cans and related items that were in the vehicle. Afterwards, upon discovering that the release documents could not be printed from his vehicle (due to a problem with either his vehicle's computer or printer) and therefore that the accused could not be released to the driver of the other vehicle waiting on scene, Carter departed the location with the accused at 12:35 a.m. and headed towards Enfield. It was then that the accused, who appeared upset, told Constable Carter that his lawyer had told him that he should have blown. He did not ask to blow again.

[17] Enfield detachment was 46 kilometers away. The accused and Constable Carter arrived at 1:11 a.m. While there, he was fingerprinted and photographed.

Carter asked Mr. Mullins if he again wanted to speak to his lawyer, now that they were in a more private room, and he declined.

[18] By 1:56 hours the paperwork was complete and Constable Carter was on route driving the accused home. While thus engaged, at 2:14 a.m., the accused offered that he was always told never to take the breathalyzer test. When Carter asked, "Who would tell you something like that?" He replied, "Lots of people." The accused was dropped off at home, at 2:24 a.m., which was 80 kilometers from the R.C.M.P.'s Enfield detachment, at 2:24 a.m.

Issue

[19] The matter proceeded as a blended *voir dire*. Mr. Mullins argues that the ASD demand was not made "forthwith" as required by section 254(5), due to the length of time that elapsed between Constable Carter's formulation of "reasonable suspicion" that he had alcohol in his body, and when the ASD demand was actually put to him. He argues that since the demand was not properly made, he cannot be convicted of refusal, since one cannot "refuse" an improper demand. Alternatively, he argues that since his s. 8, 9 and 10 **Charter** rights were denied to him, under these circumstances, that the evidence of his refusal ought to be excluded under s. 24(2) of the **Charter**.

Analysis

[20] Section 254(2)(b) reads:

> (2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, … the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:
>
> …
>
> *(b)* to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[21] Section 254(5) is the charging section. It is short and it reads:

> (5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section

[22] The Defence argues that Constable Carter had "reasonable grounds" to suspect that the accused "had alcohol in his body while operating his vehicle within the past three hours", almost from the instant that he came upon the scene. Here was the accused, sitting in the driver's seat, with an empty beer bottle on the floor at his feet, and other open liquor on the console, with empties in other parts of the vehicle, and with the smell of alcohol on his breath. This was at 11:08 p.m. Why then wait until 11:14 p.m., before giving the demand?

[23] The Supreme Court of Canada decision in *R. v. Woods* [2005] 2 S.C.R. 205, 2005 SCC 42 is an appropriate place to start. At paragraph 29 Justice Fish stated:

> [29] The "forthwith" requirement of s. 254(2) of the **Criminal Code** is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the **Charter**. In interpreting the "forthwith" requirement, this Court must bear in mind not only Parliament's choice of language, but also Parliament's intention to strike a balance in the **Code** between the public interest in eradicating driver impairment and the need to safeguard individual **Charter** rights.

[24] In paragraph 44, His Lordship continued:

> [44] The "forthwith" requirement in s. 254(2) appears to me, however, to connote a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed. …
>
> [Emphasis Added]

[25] The *Woods* decision and those in its aftermath have concluded that Section 254(2) and the approved screening device demand does infringe **Charter** rights embodied (to one degree or another) in Section 8, 9 and 10. However, it constitutes a reasonable limit prescribed by law "as can be demonstrably justified in a free and democratic society" as contemplated by Section 1 of the **Charter.**

[26] This is why Justice Fish indicated in *Woods* that the "forthwith" requirement is inextricably linked to s. 254(2) being able to pass "muster", so to speak, as a reasonable limit under Section 1 of the **Charter**. If the demand is promptly made, to be complied with "forthwith", there is no meaningful opportunity to obtain legal advice by the person of whom the demand has been made. However, the longer the time interval that elapses between when the officer forms the reasonable

suspicion referenced in s. 254(2)(b), and when the demand, is put to the accused, the more meaningful becomes the opportunity to obtain legal advice by the accused, and the more marked becomes the departure or the infringement of his right to counsel.

[27] That said, the analysis is more nuanced than simply counting up the amount of time that has passed before the demand is made. In *R. v. Bond*, 2006 N.S.J. No. 142, Provincial Court Judge Alan Tufts reviewed some of the authorities on the point, involving delays which ranged from 13 to 23 minutes. All of the delays (in those authorities) were found to have not been made "forthwith", in the manner contemplated by Section 254(2).

[28] Judge Tufts in *Bond* was himself dealing with a delay of 13 minutes, and he stated:

> [28] The issue here is simply whether the thirteen minute delay for the reasons explained in the circumstances constitute a "prompt" demand and an "immediate response" having regard to the constitutional considerations.
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> …
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> [30] In my opinion the requirement to provide a breath sample was in this case not made "forthwith". To be "forthwith" the demand must be after a "brief period of detention" if not "immediately", see **R. v. Grant,** [1991] 3 S.C.R. 139 as quoted with authority in **R. v. George**, *supra*, para. 28 and 29. The period of time is circumscribed by the constitutional limits contained in sections 8, 9 and 10 of the **Charter** as explained in **R. v. Woods,** *supra***.**

> The circumstances here do not justify the delay experienced.
>
> [Emphasis Added]

The circumstances in *Bond* arose when the screening device had to be brought to the scene, thus occassioning the delay in question.

[29] In *R. v. Billette*, 2001 S.J. No. 227, a decision of the Saskatchewan Court of Queen's Bench, the officer noted, upon approaching Mr.Billette's vehicle, a strong smell of liquor emanating from it. When the accused stepped from the car, the officer saw a beer bottle on the floor freshly spilled. The accused was slurring his words, was somewhat belligerent, and had liquor on his breath. He was arrested for impaired driving, was read his rights and placed in the back of a police car while the officer continued to conduct the search of his vehicle for further evidence of impaired driving. After an interval which the officer could not recollect at trial, he made a demand under Section 254(2). The accused refused.

[30] Under these circumstances, the essence of the matter was captured by Justice Ryan-Froslie at paragraph 19 of *Billette*:

> [19] It is obvious that "forthwith" means as quickly as possible in the circumstances. There should be no undue delay because in the normal operation of s. 254(2) an individual's s. 10(b) Charter rights are being infringed and because under the general scheme set out in s. 254, time is of the essence.

[31] Then, at paragraph 22, he continued:

> [22] The trial judge had no evidence as to the length of the delay in making the demand. It could have been 5 minutes, 10 minutes, 15 minutes, a half hour or more. It is clear from the case authority that a lapse of even 15 minutes may be too long. The trial judge erred in speculating about the time line and erred in failing to give weight to the fact that there was an unnecessary delay between the formation of the peace officer's reasonable suspicion and the demand.

[32] This is obviously not an exhaustive rendering of the authorities on the point. The implication which emerges from *Billette*, which ultimately derives from the Supreme Court of Canada authorities like *Woods*, *Grant* and others, is that the focus must be upon whether there was an unnecessary delay, rather than exclusively upon a strict count of the time that passed.

[33] In *R. v. Quansah*, 2012 286 C.C.C. (3d) 307, the Ontario Court of Appeal considered "unusual circumstances", and the extent to which they might, in some cases, warrant a more flexible interpretation of the words "forthwith" or "prompt" than their ordinary meanings might permit. The facts in *Quansah* are captured at paragraphs 3 to 8 of the decision and are as follows:

> [3] At approximately 3:03 a.m. Mr. Quansah was observed by a police officer, facing a green light but not moving. The officer approached Mr. Quansah's car and noticed that he was sitting in the driver's seat, with his eyes closed. While attempting to wake Mr. Quansah up, for 10-15 seconds, the officer observed that his eyes were red and bloodshot. Mr. Quansah then proceeded to drive forward through the intersection.
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> [4] The officer returned to his cruiser and pursued the vehicle, having broadcast over his radio that he was engaged in a pursuit. He was concerned about Mr. Quansah's erratic behaviour and his own personal safety. Mr. Quansah pulled over shortly thereafter, at 3:05 a.m.
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> [5] The officer ordered Mr. Quansah out of the vehicle and handcuffed him. He noted that Mr. Quansah was unsteady on his feet. Another police officer arrived

> on the scene at about 3:06 a.m. and noted an odour of alcohol on Mr. Quansah's breath and that his eyes were red, unfocused and glossy.
>
> [6] Between 3:06 a.m. and 3:17 a.m. the first officer conducted a limited search of Mr. Quansah for weapons. During this time period the officers had a short conversation with Mr. Quansah about his alcohol consumption. Mr. Quansah told the police that there was another person in his car, which the first officer found to be incorrect. The first officer walked Mr. Quansah to the second officer's vehicle, 20-30 feet away, in order to be in a safer position on the roadway.
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> [7] At 3:17 a.m. an approved screening device ("ASD") demand under s. 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, was then made. This was because the first officer had formed a reasonable suspicion that Mr. Quansah had consumed alcohol based on his visual and olfactory observations and Mr. Quansah's behaviour at the point of the initial encounter. The first officer, at around 3:20 a.m., then demonstrated the use of the ASD device.
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> [8] After two insufficient samples, Mr. Quansah's third sample at 3:22 a.m. resulted in a "fail" reading. He was arrested and the first officer informed Mr. Quansah of his right to counsel at 3:23 a.m., read him the standard caution at 3:24 a.m., and made an Intoxilyzer breath demand at 3:27 a.m.

[34] In appealing his conviction under Section 253(1)(b) (the "over .08" charge) Mr. Quansah argued that all evidence obtained after the purported ASD demand were made ought to be excluded. He argued, in connection with the ASD demand, that "forthwith" as noted in the legislation meant that the demand must be made "immediately without delay unless the delay is a reasonably necessary one".

[35] In paragraphs 45 to 49 of the decision, the Ontario Court of Appeal stated:

> [45] In sum, I conclude that the immediacy requirement in s. 254(2) necessitates the courts to consider five things. First, the analysis of the forthwith or immediacy requirement must always be done contextually. Courts must bear in mind Parliament's intention to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.
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> [46] Second, the demand must be made by the police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body.

> The immediacy requirement, therefore, commences at the stage of reasonable suspicion.
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> [47] Third, "forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).
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> [48] Fourth, the immediacy requirement must take into account all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD is not immediately available, or where a short delay is needed to ensure an accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delay that is no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.
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> [49] Fifth, one of the circumstances for consideration is whether the police could realistically have fulfilled their obligation to implement the detainee's s. 10(b) rights before requiring the sample. If so, the "forthwith" criterion is not met.
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> [Emphasis Added]

[36] In a similar vein, we have the comments of Provincial Court Judge Tax, in the earlier decision of *R. v. Beals*, 2010 N.S.J. 639, a case that is cited by both the Crown and Defence herein. At paragraph 28, after an analysis of the authorities, Judge Tax concluded:

> [28] … For these reasons, I conclude that determining whether the officers made a demand to provide a breath sample "forthwith" in accordance with subsection 254(2) of the Code requires the court to look, not only at the number of minutes that elapsed from the time the demand was made, but also to examine the totality of the surrounding circumstances.

[37] In the case at bar the location of the accused's car (when Constable Carter came upon it) was remote. So remote in fact that the computer related equipment

in his vehicle could not be depended upon to do ordinary checks for outstanding warrants, vehicle ownership, criminal record and the like. All of these had to be routed through dispatch. As Constable Carter stated at page 20 of the transcript:

> **A.** That's when I was grabbing the information from the vehicle and then running checks on the vehicle because it had a Nova Scotia temporary permit on it which was expired. So I was, like I said, I had to run—I had to go—it takes longer to run because now I had to run everything through the VIN number to find out who owned the vehicle if it was stolen. And like I said I still had to obtain the passenger's information and doing the Summary Offence Ticket so the passenger could leave the scene or do what they wanted. So that's all the stuff I was doing in the meantime.

[38] And although initially speaking about the interval between 23:18 and 23:58, Carter returned to explain checks that were being done between 23:06 and 23:14 in cross-examination, when the following questions were asked of the officer:

> **Q.** … Did any of that have anything to do whatsoever with the fact that you found liquor in the car and you smelled liquor on breath?
>
> **A.** Well, it would if all of a sudden he comes back that he's wanted for murder or that he's a high risk to have weapons on him. That all of a sudden now is going to change the avenue. So running the checks and doing that stuff to me is important.
>
> **Q.** Okay. But I'm just curious. Why wouldn't you have simply read the demand to him?: It's only four lines.
>
> **A.** Yeah.
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> **Q.** And perhaps then pause, check his status and the vehicle status and so on.
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> **A.** Well, when I'm roadside, those checks are important to me.
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> **Q.** More important than actually reading the ASD demand forthwith?
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> **A.** For the sake of a few minutes …
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> **Q.** Okay.
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> **A.** … absolutely, depending on what's going to come back on those checks.
>
> **Q.** Okay.

> **A.** It could be a difference. Because when I place him in the back seat, I don't give them a thorough search, so he could still have weapons on him, who knows.
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> **Q.** Uh-huh.
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> **A.** It's usually … it's just … it's a quick little pat-down. I ask, Do you have any weapons? They … he said, No. Placed him in the back seat. So I will take that time and do those checks.

[39] In any contextual analysis of this matter, it must be borne in mind that Constable Carter clearly had an objective basis for his "reasonable suspicion" that the accused had alcohol in his body: the open liquor in the car, and the smell of it on the accused's breath made this abundantly clear.

[40] So too, part of the officer's duty as contemplated by Section 254(2) requires that he conduct checks reasonably ancillary to those encompassed in the formulation of the ASD demand. The accused had no license or picture ID, so checks confirming the information with which Mr. Mullins had furnished the officer as to name and address were important for obvious reasons. So are those needed to determine whether the vehicle was registered or had been stolen. In this regard, the fact that the temporary permit on the vehicle had expired was of concern, and necessitated inquiries.

[41] Most importantly, Carter explained why checks as to criminal record, including the possibility of prior weapons offences or violent crime, were also necessary. The officer had to know with whom he was dealing and whether he

was likely to be met with violent resistance, or a weapon, when he attempted to administer the anticipated ASD test. This is particularly so given that the accused was not under arrest when placed in the rear seat of the police vehicle for the eight minute interval during which the officer was engaged in administering these checks. As such (and as he explained) a relatively cursory pat down search was all that had been performed up to this point.

[42] Finally, the remoteness of the setting meant that the reception over the equipment in Constable Carter's vehicle was not up to the task of performing these checks. As such, he was required to route the inquiries through dispatch, which consumed more time than it might have otherwise, under more optimal circumstances.

[43] Defence counsel has referred to my earlier decision in *R. v. Lombard*, 2013 NSPC 133 and in particular to paragraph 25 thereof where I said (albeit, in a different context to the one with which we deal here):

> [25] It therefore appears to be clear that a number of different refusal offences are encompassed within Section 254(5). Each and every allegation of refusal presupposes the existence of a proper demand, one that is appropriate to the specific refusal which is alleged. The onus is upon the Crown to establish that a "proper demand" was made, as well as a failure or refusal by the defendant to produce the sample required, and that the refusal was (of course) intentional.

[44] It is certainly the case that each and every allegation of refusal presupposes the existence of a proper demand; one that is appropriate to the specific refusal which is alleged. The onus is upon the Crown to establish that a proper demand was made as well as an intentional failure or refusal by the defendant to produce the sample required.

[45] I further agree that if the demand is not made promptly (which is part and parcel of "provide forthwith") as contained in s. 254(2) as that section has been interpreted by the authorities in the Supreme Court of Canada in *Woods, Grant* and others, it would not be a proper demand, and the accused would be entitled to an acquittal in such an event. That said, an eight minute delay between the formulation of reasonable suspicion by Constable Carter, and the demand being administered, under the particular circumstances as previously discussed, is prompt enough to comply the requirements of Section 254(2) in this case.

[46] This was not a situation, as in some of the authorities cited, where the delay was occasioned because the officer did not have the ASD with him at the scene and had to wait for it to be brought to him. Nor was it a situation where the officer, after forming his "reasonable suspicion" had gone off to investigate a matter unrelated to the accused or the offence, before making the demand. The delay in this instance was intimately bound up with the accused and was related to checks

needed to secure information absolutely vital to ascertaining the identity of the accused, the *bona fides* of the ownership of the vehicle that he was driving and the security of the officer who was alone, with no back-up, in a very remote setting, in anticipation of administering the ASD test.

Conclusion

[47] A delay of eight minutes (particularly where the inquiries had to be routed through dispatch) is not unreasonable, and did not adversely affect the promptness of the demand that was made. In these circumstances, I am satisfied beyond a reasonable doubt both that a proper ASD demand was made, and that the accused unequivocally (and intentionally) refused it. The accused's section 8, 9, and 10 **Charter** rights were, accordingly, infringed no more than in the manner, noted in *Woods* and contemplated by section 1, which is to say, no more than within such limits as "can be demonstrably justified in a free and democratic society".

[48] As such, I find Mr. Mullins guilty as charged under Section 254(5) of the **Criminal Code**.

Timothy Gabriel, JPC