PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Beals, 2010 NSPC 66

Date: 20101129
Docket: 2075429
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Gary Archibald Beals

Judge:	The Honourable Judge Theodore Tax, J.P.C.
Heard:	September 13, 2010, in Dartmouth, Nova Scotia
Written decision:	November 29, 2010
Charge:	That he, on or about the 9th day of July 2009 at, or near Eastern Passage, Nova Scotia did without reasonable excuse fail or refuse to comply with a demand made to him by a Peace Officer to provide forthwith a sample of his breath necessary to enable an analysis to be made by means of an approved road-side screening device, contrary to Section 254(5) of the **Criminal Code**.
Counsel:	Perry Borden, for the Crown Warren Zimmer, for the Defence

By the Court:

[1] Mr. Gary Beals faces one charge that on or about July 9, 2009 at or near Eastern Passage, Nova Scotia, he did, without reasonable excuse, fail or refuse to comply with the demand made to him by a peace officer to provide forthwith a sample of his breath necessary to enable analysis to be made by means of an approved roadside screening device contrary to section 254(5) of the **Criminal Code**.

POSITION OF THE PARTIES:

[2] Defence Counsel submits that the Crown has not proved all of the essential elements of this offence beyond a reasonable doubt. The Defence position is that there was not a lawful demand for Mr. Beals to provide a sample of his breath, since there were no observations based on the manner of his driving or any physical observations that would provide reasonable grounds to suspect that the accused had consumed alcohol or drug within the preceding three hours and operated a motor vehicle. Counsel also submits that Constable Bromley did not comply with the requirements of section 254(2) of the **Code** because he detained Mr. Beals and made a demand to provide a breath sample forthwith when that officer did not have an approved

screening device in his possession at the time of the demand. Finally, it is the position of the Defence that Mr. Beals attempted to provide a breath sample and that there was no evidence that the approved screening device had been calibrated and working properly at that time.

[3] The Crown submits that they have established all of the essential elements of the charge under section 254(5) of the **Code**. It is the position of the Crown that the officers had reasonable grounds to make a lawful demand to provide a breath sample into an approved roadside screening device based upon Mr. Beals making a U-turn just before a police checkpoint, his statement that he had recently consumed a couple of drinks of beer and a moderate smell of alcohol from his breath. The Crown submits there was no delay in administering the breath test and that Mr. Beals was required to provide a breath sample forthwith. The Crown also submits that the approved screening device was working properly and that Mr. Beals had three opportunities to provide a sample, but based upon his own words and actions, the officer had reasonable grounds to believe that Mr. Beals refused to provide a sample of his breath. Finally, the Crown says that the Defence did not provide any reasonable excuse for Mr. Beals' failure to provide a sample of his breath.

TRIAL EVIDENCE:

[4] The Crown called two witnesses – Constable Bruno Labbé and Constable Todd Bromley. The Defence elected not to call any evidence.

[5] Constable Labbé stated that he was on duty as an officer of the Royal Canadian Mounted Police on July 9, 2009 in Eastern Passage, Nova Scotia. He and other officers had set up a traffic checkpoint that evening on Main Road at Albacore Road, near the CFB Shearwater. About 30 minutes after the checkpoint was set up on the Main Road (Eastern Passage Road), Constable Labbé noticed a car, which he believed to be a dark colored Pontiac Grand Prix, approach their checkpoint going in the direction of Dartmouth, Nova Scotia. Approximately 500 feet from the checkpoint, Constable Labbé saw the motor vehicle do a U-turn and go the other way. He advised Constable Bromley of that fact and Constable Bromley pursued the motor vehicle. A few moments later, Constable Labbé got in his car and followed Constable Bromley as he had the Approved Screening Device (ASD), an Alcotest 7410 in his car. Within approximately 1 minute, he arrived at Main Road and Hines Road where Constable Bromley had stopped the car which had made the U-turn. The car which had been stopped by Constable Bromley was driven by the accused person, Gary Beals.

Constable Labbé recognized Mr. Beals from some prior dealings with him and also identified him in court.

[6] As Constable Labbé walked up, he heard Constable Bromley read a demand to Mr. Beals to provide a sample of his breath for analysis and he also heard him advise Mr. Beals of the effect of refusing to provide a breath sample. On cross examination, Constable Labbé testified that he did not give any instructions to Mr. Beals on how to provide a breath sample. Constable Labbé heard Mr. Beals say that he had consumed two beers earlier in the evening, and he detected an odor of alcohol on Mr. Beals breath and noted that his speech was slurred. Constable Labbé handed the ASD to Constable Bromley and then Mr. Beals provided his first breath sample. Constable Labbé felt that Mr. Beals was not blowing as there was no tone from the ASD to indicate that a suitable sample of breath had been provided. On cross examination, Constable Labbé said that after the first attempt to provide a breath sample, Mr. Beals started arguing with the officers. He said that he had only had two beers earlier in the evening and that there was no need for the test. Both officers explained the consequences of a refusal and both officers tried to convince Mr. Beals to provide a sample.

[7] Mr. Beals made a second attempt to provide a breath sample, but the tone only sounded for one second which indicated that it was not a suitable sample. After the second attempt, Constable Labbé heard Constable Bromley advise Mr. Beals that the sample was “not suitable” because he did not blow long enough and that he would have to do it again. After the second attempt, Mr. Beals said “I am done, I am not going to provide any more samples.” Mr. Beals was then arrested by Constable Bromley for refusing to provide a sample of his breath.

[8] In response to a question as to whether the ASD was working properly, Constable Labbé said that he had received training on how to operate that device in December 2007. He also said that the ASD had been calibrated within the last two weeks and that the officers would only use the ASD if the calibration had been done. On cross examination, he was not sure when the last calibration was done as he did not review the log book which would have been filled in by the person who actually calibrated the ASD.

[9] Constable Todd Bromley, a member of the RCMP since November 2008 stated that he was a general duty officer, who was on duty during the evening of July 9, 2009. He stated that a motor vehicle checkpoint was set up by the RCMP at

approximately 10:45-11 PM that evening, near the intersection of Albacore Road and Main Road in Eastern Passage, Nova Scotia. Shortly after the checkpoint was set up, Constable Labbé told him that a car made a U-turn up the road and he noticed that there was no license plate on that motor vehicle. He got in his police car and activated the emergency equipment to pursue the car. He lost sight of the car for 3 to 4 seconds, but when he stopped the car near the corner of Main Road and Hines Road, about 1 km from the traffic checkpoint, he recognized the taillights and noticed that it had no license plates. He added that no other cars had come onto the road going in that direction in the interim.

[10] When Constable Bromley approached the driver, who was the only person in the car and spoke to him, the officer noted a mild odor of alcohol. The driver, who he later identified as Gary Beals stated that he had consumed a couple of beers. Constable Bromley also noted that Mr. Beals slurred his speech, had red bloodshot eyes, soiled clothes and open liquor in the car. Since Constable Bromley was sure that Mr. Beals had consumed some alcohol and he was operating a motor vehicle, he read a demand, from a card that he had, for Mr. Beals to provide a sample of his breath into an ASD. The demand to provide a sample of breath was made at 11:30 PM. Mr. Beals said that he understood that demand. Within one minute of Mr. Beals' car being

stopped, Constable Labbé arrived from the checkpoint with the ASD and handed it to Constable Bromley as Mr. Beals was walking back between the cars to comply with the demand.

[11] Mr. Beals agreed to comply with the demand and Constable Bromley gave Mr. Beals instructions on the proper way to blow into the ASD. Constable Bromley said that Mr. Beals pursed his lips and puffed his cheeks but did not blow any air through the device. He testified that there would be an audible sound if air was passing through the mouthpiece into the ASD, but there was no sound after Mr. Beals first attempt. Constable Bromley told Mr. Beals that he was “playing games” and that he did not provide a sample of his breath. Mr. Beals said he wanted to try again and he again puffed his cheeks and pursed his lips, but the ASD only made a small audible sound. It was Constable Bromley’s opinion that the mouthpiece was not obstructed because Mr. Beals was able to put some air through it and that the ASD was working properly because he had no problems with the device either before or after he dealt with Mr. Beals. On cross examination, Constable Bromley confirmed that he was utilizing the standard model 7410 Alcotest ASD, which is a handheld unit and that he had been trained and qualified to use that unit since June, 2009.

[12] Constable Bromley believed that Mr. Beals was restricting the amount of air that he was blowing and told him again of the consequences for not providing a suitable sample of his breath. The officer again provided an instruction on how to give a sample to which Mr. Beals replied: “I am not blowing in that thing.” Constable Bromley explained that the failure or refusal to provide a sample of breath was an offence and the consequence would be the same as if he had failed a breathalyzer. Mr. Beals stated: “I am not blowing in that fucking thing.” At that point, Constable Labbé also instructed Mr. Beals on how to blow and informed him of the consequences of not providing a sample of his breath. Constable Bromley noted that Mr. Beals became aggressive and combative, made a phone call and stated that he had to urinate. At 11:40 PM, Constable Bromley arrested Mr. Beals for a refusal to provide a breath sample contrary to section 254(5) of the **Code**.

[13] At 11:42 PM, Constable Bromley told Mr. Beals why he was arrested and he brought him back to his police car, searched him and put him in the cruiser. From a card, he read the **Charter** right to contact a lawyer, to which Mr. Beals responded that he had to urinate. The officer asked if Mr. Beals understood that **Charter** right, but he refused to respond. At 11:43 PM, he asked Mr. Beals if he wished to call a lawyer. Mr. Beals responded that he had to urinate. Constable Bromley then asked Mr. Beals

whether he wished to contact the Legal Aid duty counsel and Mr. Beals again responded that he had to urinate. Finally, Constable Bromley read the police caution at 11:43 PM and Mr. Beals refused to answer whether he understood it.

[14] On cross examination, Constable Bromley confirmed that he made the demand to provide a breath sample at 11:30 PM and that, in his opinion, Mr. Beals never provided a valid breath sample but only "pretended" to blow into the ASD by puffing his cheeks out the first time and did not blow anything at all the second time. After the second attempt at 11:40 PM, Mr. Beals was arrested for refusal to provide a breath sample.

ISSUES:

[15] The issues that require analysis in this case are as follows:

> (1) Did Constable Bromley have reasonable grounds to suspect that Mr. Beals had alcohol or drug in his body and that he had operated a motor vehicle within the preceding three hours in order to make a lawful demand for Mr. Beals to provide a sample of his breath in an approved screening device?

> (2) Did the Crown prove beyond a reasonable doubt that Mr. Beals failed or refused to provide forthwith an adequate sample of breath to enable a proper analysis by means of an approved screening device (the actus reus) and if so, did the Crown prove that Mr. Beals did so deliberately(the mens rea)?
>
> (3) Did the Crown fail to prove that the approved screening device had been calibrated and working properly on July 9, 2009?

ANALYSIS:

Was a lawful demand made for Mr. Beals to provide a sample of his breath?

[16] In addressing this first issue, I accept that the Crown has established beyond a reasonable doubt that Mr. Beals had been driving a motor vehicle just before his car was stopped by Constable Bromley and that the officer made a demand for Mr. Beals to provide a sample of his breath in an approved screening device. I accept the evidence that both Constable Bromley and Constable Labbé were both peace officers, who had been trained in the proper utilization of the ASD and were on duty in the late evening hours of July 9, 2009. The police officers had indicated that a police traffic checkpoint was set up near the intersection of Albacore Place and the Main Road in Eastern Passage, Nova Scotia around 11 PM on July 9, 2009. Both officers testified that the incident with Mr. Beals occurred about 30 minutes after the police checkpoint was set up. I note here that the Defence does not take any issue with the identification

of Mr. Beals as the accused person, but in any event, I accept that both Constables identified him as the accused person in court.

[17] In order to determine whether Constable Bromley had reasonable grounds to suspect that Mr. Beals had alcohol in his body within the preceding three hours while operating a motor vehicle, I accept the evidence of Constables Bromley and Labbé that they saw a vehicle approach their checkpoint, make a U-turn about 500 feet from their checkpoint on the Main Road and then speed away in the other direction. Both officers also noted that the vehicle making that U-turn did not have a license plate. Although neither Constable Bromley nor Constable Labbé observed any erratic driving such as the car weaving or having difficulty stopping, I find that based upon what they did observe, they both had reasonable grounds to suspect that the driver had taken an evasive action to avoid the police checkpoint. I also find that it was reasonable for the officers to suspect that the evasive action taken by that driver was either to avoid the police checkpoint because he/she had consumed alcohol or a drug and was operating a motor vehicle or that driver was trying to avoid detection for a **Motor Vehicle Act** offence, since the officers had observed that the car did not have a license plate attached. I conclude that the officers had reasonable grounds to suspect

that either an offence under the **Criminal Code** or the **Motor Vehicle Act** had been committed and to pursue the target vehicle in order to conduct an investigation.

[18] I accept the evidence of Constable Bromley that once his attention was drawn to the vehicle making the U-turn, he immediately got in his police car which was running at the time, activated his emergency equipment and pursued the target vehicle. While he acknowledged that he had lost sight of the target vehicle for only 3 or 4 seconds, I accept his evidence that no other cars came onto the road and that he stopped the car after a brief pursuit, about 1 km from the police checkpoint at Main Road and Hines Street. In addition, I accept Constable Bromley's evidence that the car he stopped had the same taillights as the car making the U-turn and that it had no license plates. Therefore, I conclude that the only reasonable inference from the evidence which I have accepted and the totality of the circumstances is that the vehicle making the U-turn and the one which Constable Bromley stopped, was the one which he later learned was being driven by Mr. Gary Beals.

[19] Once the car being driven by Mr. Beals pulled over to the side of the road, Constable Bromley parked his police car behind Mr. Beals and approached the driver's window. I accept the evidence of Constable Bromley that, during a short

conversation with Mr. Beals, he was told that Mr. Beals had recently consumed some alcohol. I accept that, during this brief conversation, Constable Bromley detected a mild odor of alcohol coming from Mr. Beals' breath which was consistent with what he had been told and confirmed his suspicion as to the reason why Mr. Beals had made the U-turn and gone the other way. I also accept the evidence of Constable Bromley, which was supported by Constable Labbé, that Mr. Beals' speech was slurred and that he had red glossy eyes. From this, I am satisfied beyond a reasonable doubt and conclude that Constable Bromley had reasonable grounds to suspect that Mr. Beals had alcohol in his body and that he was in operation of a motor vehicle. I therefore conclude that Constable Bromley made a lawful demand for Mr. Beals to forthwith provide a sample of his breath in an approved screening device.

Was Mr. Beals required to provide a suitable sample of his breath "forthwith"?

[20] As part of his argument, Defence Counsel submitted that the Crown did not establish beyond a reasonable doubt that the demand made to Mr. Beals complied with the statutory requirement contained in section 254(2) of the **Code** to provide a sample "forthwith." Counsel points to the fact that when Constable Bromley made the demand under section 254(2), he did not have the ASD in his possession, and that

therefore, Mr. Beals should not be obliged to comply with a demand made outside the ambit of that section. For the reasons set out below, I do not agree with the submissions of Defence Counsel on this point and having found that there was a lawful demand made, I also find that there was compliance with the provisions of section 254(2) of the **Code** and that Mr. Beals was, in fact, given the opportunity to provide a sample of his breath "forthwith."

[21] In terms of the facts relevant to this issue, I find that the evidence clearly established that Constable Bromley stopped Mr. Beals' car on the Main Road in Eastern Passage, Nova Scotia, and that about 11:30 PM, he made a demand for Mr. Beals to provide a sample of his breath into an ASD. While it is acknowledged by both police officers that Constable Bromley did not have an ASD in his car when he pursued the target vehicle, I find that the evidence of Constables Bromley and Labbé also established that Constable Labbé arrived with an ASD at the location where Mr. Beals car was stopped within approximately 1 minute.

[22] Furthermore, I find that Constable Bromley informed Mr. Beals on the proper way to blow into the ASD in order to provide a suitable sample of his breath and also warned him of the consequences for failing or refusing to do so. I also find that the

two officers established that Mr. Beals blew into the mouthpiece of the ASD on two occasions and that on both occasions, there was no indication by the ASD that a suitable sample had been provided. As stated previously, I accept the officers' opinion evidence that Mr. Beals was not making a sincere effort to comply with the demand to provide a suitable sample of his breath for analysis. Based on Constable Bromley's testimony which I accept, I find that the instructions by Constable Bromley, the two attempts by Mr. Beals and the officers warnings as to the possibility of being charged with refusing or failing to provide a breath sample all took place within 10 minutes of the demand by Constable Bromley for Mr. Beals to provide a sample of his breath.

[23] Against this factual background, the Crown Attorney and Defence Counsel have referred several cases to my attention which involved a factual or legal determination of the word "forthwith" as utilized in section 254(2)(b) of the **Code**. Indeed, there has been several Supreme Court of Canada cases which focused on the same factual and legal issues - **R. v. Thomsen**, [1988] 1 SCR 640**; R. v. Grant**, [1991] 2 SCR 139; **R. v. Bernshaw**, [1995] 1 SCR 254; and **R. v**. **Woods**,[2005] SCJ No. 42.

[24] The Supreme Court of Canada addressed constitutional concerns regarding the roadside detention of motorists in the **Thomsen** case. In that case, the Court held that the absence of an opportunity to retain counsel violated section 10 (b) of the **Charter,** but was justified under section 1 of the **Charter** as a reasonable limit prescribed by law because of the importance of the roadside testing in detecting and reducing the dangers of impaired driving. Le Dain J., writing for the Court at page 653, equated the word "forthwith" with "as quickly as possible."

[25] In **R. v. Grant**, *supra***,** the interpretation of the word "forthwith" was again before the Supreme Court of Canada. In **Grant**, the officer who had stopped the accused did not have a screening device in his car and asked another officer deliver one to him. The ASD arrived 30 minutes later and during that time, the accused was detained in the police car. Speaking for the Court, Chief Justice Lamer stated at page 150:

> "The context of s.238(2) [now section 254(2)] indicates no basis for departing from the ordinary, dictionary meaning of the word "forthwith" which suggests that the breath sample is to be provided immediately. Without delving into an analysis of the exact number of minutes which may pass before the demand for a breath sample falls outside of the term "forthwith," I would simply observe that where, as here, the demand is made by a police officer, who is without an ALERT unit and the unit does not, in fact, arrive for a half-hour, the provisions of section 238(2) will not be satisfied."**[emphasis is mine]**

[26] The Supreme Court of Canada was again asked to consider the definition of "forthwith" in the context of subsection 254(2) of the **Code** in **Bernshaw**. The majority of the Court referred to Chief Justice Lamer's remarks in **Grant** at p.150 and observed that those remarks did not rule out the possibility that there was, in fact, some leeway to administer the test after a certain period of delay. In fact, the majority in **Bernshaw** pointed out in para. 66 that Lamer C.J. "expressly declined to decide the exact length of time before which the demand could be said to fall outside the term "forthwith".' The majority concluded at para 74 that "although there is no doubt that the screening test should generally be administered as quickly as possible, it would entirely defeat the purpose of Parliament to require the police to administer the screening test immediately in circumstances where the results would be rendered totally unreliable and flawed."

[27] In **R. v. Woods**, *supra***,** the meaning of the word "forthwith" as utilized in subsection 254(2) of the **Code** was once again before the Supreme Court of Canada. Fish J. speaking for the unanimous Court said at para. 32 that the Court in **Thomsen,** *supra*, had essentially determined that the "forthwith" requirement of section 254(2) was a corollary of the fact that there was no opportunity for contact with counsel prior to compliance with the ASD demand. Fish J. concluded at paragraphs 43 and 44 of

Woods, *supra*, that "forthwith" as used in the context of section 254(2) may, in unusual circumstances, be given a more flexible interpretation which the ordinary meaning "strictly suggests." Thus, for example, a brief and unavoidable delay of 15 minutes can be justified when it is required in accordance with the exigencies of the use of the equipment (see **Bernshaw**).

[28] It is evident from my review of these Supreme Court of Canada cases that subsection 254(2) of the **Code** represents Parliament**'s** intention to balance the public interest between removing drunk drivers from the road, and at the same time, safeguarding individual rights. Since subsection 254 (2) of the **Code** was justified under section 1 of the **Charter** in **Thomsen,** *supra***,** in interpreting this provision, the trial judge should be mindful that both Parliament and the Supreme Court of Canada expect the ASD process to be completed as soon as possible, given the fact that there would not usually be a realistic and meaningful opportunity to consult with counsel before providing a breath sample in the ASD. While the **Grant** case indicated that the screening test should generally be completed within 30 minutes, the Supreme Court of Canada subsequently stated in the **Bernshaw** that there should be some flexibility in the interpretation of "forthwith" to accommodate the exigencies of the ASD test in order to ensure accurate results. 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.

[29] The facts which I have accepted demonstrate that Constable Bromley received the ASD from Constable Labbé within one minute after Constable Bromley formed the reasonable grounds to suspect that Mr. Beals had operated a motor vehicle with alcohol in his body and Constable Bromley's demand for Mr. Beals to provide a sample of his breath. In addition, I find that Constable Bromley then explained the ASD process to Mr. Beals and how to properly blow into the screening device in order to provide a breath sample for analysis and the consequences of a failure or refusal to comply. All of the instructions, information and Mr. Beals two attempts to comply with the demand took place within 10 minutes of his being stopped by Constable Bromley. Looking at all of the facts and circumstances of this case, I conclude that Constable Bromley's demand upon Mr. Beals to "forthwith" provide a sample of his breath for analysis in an ASD, complied with the statutory requirements of section 254(2)(b) of the **Code** and was therefore a lawful demand. I find that the ASD test was administered "forthwith" and it was certainly well within the parameters established

in **Grant**, but also well before there could be any meaningful opportunity to consult with a lawyer.

[30] The Defence also submitted that Constable Bromley did not comply with the requirements of subsection 254(2) of the **Code** simply because he did not have the ASD with him when he made the demand upon Mr. Beals to provide a sample of his breath. Based upon my review of cases such as **R. v. Torsney,** 2007 ONCA 67 at paras. 11 and 12; **R. v. Danychuk**, 2004 CanLII 12975 (Ont. C.A.) at para 19; and **R. v. Higgins**, [1994] M.J. No. 44 (Man.C.A.) at paras. 11-12, I cannot agree with that submission. Those Courts of Appeal have pointed that there is nothing in the language of subsection 254 (2) or the context in which that subsection is used which would mandate – either expressly or by implication – that before a demand may be made, the approved screening device must be in the hands of the police officer making that demand. I therefore conclude that Constable Bromley was not required by subsection 254(2) to have the ASD in his hands when he made the demand upon Mr. Beals to provide a sample of his breath to enable a proper analysis.

*Did the Crown establish all of the essential elements of a failure or a refusal contrary to s.254(5) of the **Code** beyond a reasonable doubt, including the demand to provide a breath sample "forthwith"?*

[31] In **R v. Lewko**, [2003] 2 W.W.R. 197, the Saskatchewan Court of Appeal stated at paras. 9 and 10-13 that the essential elements of an offence contrary to s. 254(5) of the **Criminal Code**, in addition to the date, time, jurisdiction and the identification of the accused, are the following:

> (1) a proper demand;
>
> (2) a failure or refusal by the accused to produce the required sample;
>
> (3) the intention of the accused to produce a failure or refusal; and
>
> (4) once raised by the evidence, most often from the accused, whether the Defence has put a reasonable excuse "in play."

[32] In this case, the Defence did not take any issue with the date and time of the offence or the jurisdiction in which this offence occurred. In addition, the Defence did not raise any issues relating to the identification of the driver as the accused person, Mr. Gary Beals. I have already concluded that Constable Bromley had reasonable grounds to suspect that Mr. Beals had alcohol or drug in his body and that he had just

been in operation of a motor vehicle, and as a result, I have found that the officer made a lawful demand for Mr. Beals to provide a sample of his breath into an ASD.

[33] After stopping the car being driven by Mr. Gary Beals, Constable Bromley made a demand for Mr. Beals to provide a sample of his breath into an ASD. According to the evidence which I accept, that demand was made upon Mr. Beals at 11:30 PM on July 9, 2009. I accept Constable Bromley's evidence that he read the demand from a printed card which he had with him and that Mr. Beals understood that he was compelled to provide a breath sample or face the possibility of being charged with refusing to provide a breath sample. I also accept that Constable Bromley was, at all material times, a peace officer who had been trained and qualified as an operator of an ASD in June 2009 and that each time before Mr. Beals blew into the mouthpiece of the ASD, the officer advised him how to properly blow into the instrument to obtain a sample of breath that would enable a proper analysis by the ASD. After each of his two attempts to provide a breath sample, I accept that Constable Bromley informed Mr. Beals that, in his opinion, the accused person was not really trying to provide a breath sample. In addition, I find that Constable Labbé also informed Mr. Beals of the possibility of being charged with refusing or failing to provide a breath sample in an attempt to convince him to try again.

[34] I accept the evidence of both police officers that between 11:30 PM and 11:40 PM, Mr. Beals was given two opportunities to provide a sample of his breath into an ASD. Based upon the fact that both police officers were trained and qualified as operators of an ASD, I accept their evidence that Mr. Beals did not blow into the mouthpiece of the ASD in the proper manner as there was no audible tone to indicate that a sample of breath had been provided to enable a proper analysis by the ASD. I find that after the two attempts made by Mr. Beals to blow into the ASD, no readings whatsoever were obtained for the proper analysis of his breath.

[35] In terms of the intention of the accused to produce a failure or refusal, I find that Constable Bromley as a peace officer who was qualified and trained to operate an ASD formed the opinion that Mr. Beals was not sincerely trying to provide a breath sample for analysis. In **R. v. Lazarska,** [2002] O.J. No. 2587 (Ont. S.C.), it was held that the court was entitled to rely on the opinion of the officer operating the ASD as to the adequacy of the sample supplied by the person being tested. While the evidence is admissible, like all opinion evidence, the court must determine the amount of weight to be afforded that opinion which in turn depends upon the reliability of the foundation for the opinion. Here, I have found that both officers instructed Mr. Beals

on the proper manner in which to blow into the ASD. I accept their evidence that, despite puffing out his cheeks, Mr. Beals failed or refused to blow into the instrument in the proper manner as there was no reading and there was either no audible sound or only a brief audible sound on the second attempt. After those two attempts, I accept the evidence of the officers that they warned Mr. Beals of the consequences of refusing or failing to provide a suitable breath sample.

[36] After being warned about the consequences of refusing or failing to provide a suitable sample of his breath, I accept the evidence of Constable Labbé that he tried to persuade Mr. Beals to, once again, blow into the approved instrument. However, Constable Bromley noted, and I accept his evidence, that after the second attempt to blow into the ASD, Mr. Beals stated that he "was not going to blow into that fucking thing." In his testimony, Constable Labbé also noted that statement made by Mr. Beals and I find that his evidence was consistent with and supported the evidence of Constable Bromley regarding the statement made by Mr. Beals. I find that the words expressed by Mr. Beals, as noted by both officers were a clear and unequivocal expression of his intention to refuse to provide any further samples of his breath after being informed that the first two attempts were not suitable samples to enable proper analysis of his breath.

[37] Although no *voir dire* was held as to the voluntariness of the statements by Mr. Beals, I find his statement refusing to blow into the ASD is the *actus reus* of the offence, and as such, cases like **R. v. Stapleton** (1982), 66 CCC (2nd) 76 (Ont.C.A) stand for the proposition that statements constituting the offence of refusal to provide a breath sample are admissible without proof of their voluntariness. Furthermore, I accept the evidence of Constables Bromley and Labbé that after Mr. Beals stated that he was not going to provide a breath sample, he became combative, argumentative and walked away from the officers to make a cell phone call. I find that this evidence is indicative of his state of mind and entirely consistent with the unequivocal statement that he refused to make any further attempts to blow into the ASD after his first two attempts had failed to provide a suitable sample of his breath for analysis.

[38] In all of the circumstances of this case, I am satisfied beyond a reasonable doubt that the Crown has proved the *actus reus* or the actual failure and the refusal by the accused to produce a suitable sample of his breath to enable proper analysis. I am also satisfied beyond a reasonable doubt that the Crown established the *mens rea* or intention of the accused to fail and to refuse to provide a sample of his breath to enable proper analysis by means of the ASD.

Does the Crown have to establish that the ASD was calibrated and working properly?

[39] On this point, Defence counsel submitted that the Crown had not established evidence that the ASD was working properly. Counsel submitted that Mr. Beals made two attempts to provide samples of his breath, but there was no evidence that the mouthpiece was not blocked or that the device was working properly and that therefore, there was reasonable doubt as to whether the screening device was working properly. The Crown Attorney submitted that the Crown does not have to prove that the ASD was working properly as long as there was some evidence before the court that the ASD was working properly.

[40] The evidence relating to this issue established that Constable Bromley had used a standard model 7410 Alcotest ASD which is a handheld unit and that he had been trained and qualified to use that screening device since June, 2009. It was Constable Bromley's opinion that, as an officer who was trained and qualified to use that particular ASD, he believed that the screening device was working properly because he believed that Mr. Beals was not sincerely trying to blow into the ASD on either of his two attempts. On the first attempt, Constable Bromley testified there was no sound

at all and on the second attempt, there was only a small audible sound, which indicated to him that air was going through the mouthpiece but not in sufficient quantity to enable proper analysis. In addition, Constable Bromley was of the opinion that the ASD was working properly because he had no problems with its operation either before or after dealing with Mr. Beals.

[41] Constable Labbé also indicated that he had been trained and qualified as an operator of an ASD since December 2007. During his testimony, he also stated that there was no audible tone from the ASD on Mr. Beals first attempt and that the tone was only present for about one second on the second attempt. Like Constable Bromley, Constable Labbé was also of the opinion that Mr. Beals did not provide a suitable sample of his breath for analysis. Constable Labbé had testified that the ASD in question had been calibrated within the last two weeks and that the officers would only use the ASD if that calibration had been done. However, he acknowledged on cross examination that he did not check the log book to confirm the date when that ASD was last calibrated.

[42] In his submissions, the Crown Attorney referred to the case of **R. v. Topaltsis,** [2006] O.J. No. 3181 (Ont. C.A.) which is, in my view, determinative of this issue. In

that case, the police officer administered the ASD test to the accused person on July 31, 2001. Before doing so, the officer noticed that the device had been last calibrated on July 5, 2001, which was outside the police department's practice of calibrating the ASD every two weeks. However, he also testified that he met a representative of the manufacturer at a tradeshow who advised him that the devices only require calibration once every six months. He also self-tested the ASD before administering the test to the accused person to ensure that it properly registered no alcohol.

[43] In **Topaltsis**, the Ontario Court of Appeal's oral endorsement judgment was that the trial judge had erred in the acquitting the accused person because the Crown had not established, on an objective basis, that the police officer had reasonable and probable grounds to believe that the ASD was in good working order. The Court of Appeal pointed out at paragraph 9 that the trial judge had applied the wrong test and that "rather than simply assessing whether, on an objective basis, the officer had reasonable grounds for believing that the approved screening device was in good working order, the trial judge embarked on the consideration of whether the evidence established that the device was in good working order."

[44] In the instant case, I am satisfied that the evidence of both police officers established that Constable Bromley had reasonable grounds for believing that the approved screening device was in good working order. Furthermore, I also note that in **Bernshaw,** *supra,* the majority stated at paragraph 80 that "where the particular screening device used has been approved under the statutory scheme, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary." After analyzing all of the facts and circumstances of this case, I cannot conclude that there was any credible evidence to the contrary. I therefore find, like the Ontario Court of Appeal in **R. v. Paradisi**, [1998] O.J. No.2336 at para.1, that where there was no evidence that the screening device was not operating appropriately at the time in question, the accused failed to meet the "high degree of unreliability" threshold which was established in **Bernshaw.**

[45] For all of the foregoing reasons, I find Mr. Gary Beals guilty as charged.