*Case Name:*

# R. v. George

**Between**
**Her Majesty the Queen, appellant, and**
**Nicholas George, respondent**

[2004] O.J. No. 3287

Docket No. C41000

Ontario Court of Appeal
Toronto, Ontario

**Rosenberg, Gillese and Armstrong JJ.A.**

Heard: May 12, 2004.
Judgment: August 10, 2004.

(62 paras.)

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Right to retain and instruct counsel without delay -- Criminal law -- Offences -- Offences against person and reputation -- Motor vehicle offences -- Impaired driving or driving over the legal limit -- Breathalyzer of blood sample demand, including refusal.*

Application by the Crown for leave to appeal the acquittal of the accused, George, for impaired driving. The officer did not have a roadside screening device with him when he pulled over the accused. He called for one to be brought from a nearby police station. During the wait, the officer did not inform the accused of his right to counsel. The accused had a cellular telephone and testified that he would have called a lawyer if he had the opportunity. The device arrived 16 minutes later and a sample was taken two minutes after its arrival. The machine registered a failure. At trial, the judge inferred that the police officer would have allowed the accused to make a telephone call to counsel, and found that there had been a violation of the accused's right to counsel. The judge excluded the breath samples and dismissed the charge. The summary conviction appeal by the Crown was dismissed.

HELD: Application allowed. The appeal was dismissed. The officer was not in a position to require

the accused to provide a breath sample before there was a realistic opportunity for the accused to consult counsel. The demand was not a demand to provide a sample forthwith but to provide a sample when the required apparatus arrived some time later. During the 18 minute delay, contact with counsel could have been accommodated using the cellular telephone or by means of the telephone at the nearby police station. The police officer could have asked the accused if he had a cellular telephone.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 8, 10, 10(b).

Criminal Code, ss. 238(2), 254(2).

**Appeal From:**

On appeal from the order of Justice Silja S. Seppi of the Superior Court of Justice, sitting as a Summary Conviction Appeal judge, dated October 31, 2003, dismissing the appeal against the acquittal entered by Justice John C. Moore of the Ontario Court of Justice dated September 6, 2002.

**Counsel:**

Benita Wassenaar, for the appellant.

Gregory Lafontaine, for the respondent.

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The judgment of the Court was delivered by

**1 GILLESE J.A.**:-- This is yet another appeal involving the tension between the right to counsel and the right to demand that a breath sample be supplied "forthwith" by means of an approved screening device.

**2** In the early morning hours of August 27, 2001, a police officer pulled over the respondent and made a roadside screening demand. As he did not have the necessary screening device with him, the officer called for one to be brought. He was told that the only available screening device was at a different police division and that it would take "fifteen to twenty minutes" to arrive.

**3** The device arrived sixteen minutes later. A sample was taken two minutes after its arrival. The machine registered a failure. The respondent was then arrested, charged with operating a vehicle "over 80" and given his rights to counsel.

**4** At trial, Moore J. of the Ontario Court of Justice found that there had been a violation of the respondent's right to counsel under s. 10(b) of the Canadian Charter of Rights and Freedoms, excluded the evidence of the breath samples and dismissed the charge.[1]

**5** The Crown appealed unsuccessfully to Seppi J. of the Superior Court of Justice.

**6** It now seeks leave to appeal the decision below and, if leave is granted, asks that the appeal be granted and the matter remitted for a new trial.

**7** For the reasons that follow, I would grant leave to appeal but dismiss the appeal.

BACKGROUND

**8** On August 27, 2001, Police Constable Andrew Ecklund saw a large cloud of smoke coming from the parking lot of a strip plaza. He believed that the smoke was coming from a car that he saw leave the parking lot at a high rate of speed. He followed the car and decided to stop the driver to ensure, among other things, that the driver was sober.

**9** The police officer pulled over the respondent's car. He noticed that the respondent's eyes were bloodshot and that he turned his head away when speaking to the officer. The officer asked the respondent about his alcohol consumption and was told that he, the respondent, had had two beers about an hour earlier.

**10** The officer made a demand pursuant to s. 254(2)[2] of the Criminal Code that the respondent provide a breath sample into an approved screening device and the respondent agreed to do so.

**11** The officer did not have an approved screening device with him at the time the demand was made. He requested one and was told that the only available unit was from a different division and that it would take fifteen to twenty minutes for the device to arrive.

**12** The officer told the respondent that it was going to take fifteen to twenty minutes for the screening device to arrive. He opened the back door of his scout car, left the door open and asked the respondent to sit in the back seat. The officer told the respondent that he was not under arrest and that he, the respondent, was free to get up and walk around. He also informed the respondent that if the respondent left the scene, he would be charged with failing to provide a breath sample.

**13** The officer knew that the closest police station was "around the corner" from where the respondent's car had been stopped.

**14** The officer did not inform the respondent of his right to counsel at any point during the wait. The officer was not aware that the respondent had a cellular telephone. The respondent did not tell the officer that he had a cellular telephone nor did he ask to call anyone. He testified on the voir dire that if the officer had given him the opportunity to call a lawyer, he would have done so.

**15** The respondent sat in the back of the scout car. The screening device arrived sixteen minutes after the demand for a breath sample had been made. Two minutes after the device arrived, the respondent provided a breath sample. The device registered a fail. By this time, the officer had detected the smell of alcohol on the respondent's breath. In addition, he noted that the respondent was unsteady on his feet and that his speech was slightly slurred. The officer then arrested the respondent for operating a vehicle "over 80" and read him his rights to counsel.

**16** Thereafter, as the respondent's car was going to be towed, the officer searched the respondent's car for valuables and discovered the respondent's cellular telephone.

**17** The officer took the respondent to the police station. After speaking to duty counsel, the respondent provided two blood samples, which registered 146 and 137 milligrams of alcohol in 100 millilitres of blood, respectively.

THE TRIAL DECISION

**18** After hearing testimony from the police officer and the respondent, the trial judge made the following observations:

* The respondent was co-operative from the beginning and he and P.C. Ecklund got along fine.
* When P.C. Ecklund was told that an approved screening device would be on location within fifteen to twenty minutes, nothing more specific than that was said. P.C. Ecklund testified that he understood that the delay could have been longer than twenty minutes and that it could have been shorter than fifteen minutes. There was no guarantee that there was anyone in the immediate area that could provide the machine.
* The respondent testified that had he known he could have used a cellular telephone, he would have.
* After the demand, the respondent was "free to roam around and do what he wished until the arrival of the machine" which he had been told would take about fifteen to twenty minutes.

**19** The trial judge "assumed" that if P.C. Ecklund had known the respondent had a cellular telephone and the respondent had asked to call a lawyer, P.C. Ecklund would have allowed him to do that. The assumption was based on the evidence that P.C. Ecklund gave and the way that he and the respondent "appeared to be getting along."

**20** The trial judge concluded that:

> Had the Officer indicated to the Defendant that he could call a lawyer if he wished, within reason, or made inquiries as to whether or not he had a cell phone or asked whether or not he wanted to go down to the Station, which was around

> the corner, to make a phone call to a lawyer, it probably would have happened, based on the evidence I have heard in this case.

**21** The trial judge then held that there had been a violation of the respondent's right to counsel under s. 10(b) of the Charter, excluded the evidence of the breath samples and dismissed the charge.

THE SUMMARY CONVICTION APPEAL

**22** The appeal judge held that the trial judge had reasonably inferred that the police officer would have allowed the respondent to make a cellular telephone call to counsel and that the proximity of both the cellular telephone and the telephone at the police station were relevant to a consideration of the circumstances of the case. She noted that the trial judge's determination that there was a realistic opportunity to consult counsel "was not made in a vacuum."

**23** The appeal judge concluded that "[t]he trial judge in the case at bar had reliable evidence on which to conclude that in all the circumstances there had been a realistic opportunity for the respondent to consult counsel before the screening, yet he was not afforded the benefit of s. 10(b)" and dismissed the appeal.

THE ISSUE

**24** The issue to be resolved on this appeal can be stated simply: did the appeal judge err in finding that, in the circumstances, there was a realistic opportunity for the respondent to have been advised of his rights to counsel before the test was administered?

**25** The Crown argues that the appeal judge did so err in that (1) she failed to consider the time it actually took for the screening device to reach the location; and (2) she held that the presence of a telephone augmented the respondent's s. 10(b) rights.

ANALYSIS

The Governing Legal Principles

**26** Ultimately, this appeal requires a determination of the legitimacy of a s. 254(2) demand where the roadside breath test cannot be administered immediately. In my view, that determination is made by recourse to this court's jurisprudence in R. v. Cote (1992), 70 C.C.C. (3d) 280 and R. v. Latour (1997), 116 C.C.C. (3d) 279.

**27** Before turning to Cote and Latour, it is useful to recall the parameters established by the decisions of the Supreme Court of Canada in this matter. To begin, it is accepted that where a roadside breath demand is made, the driver is detained and his or her s. 10 rights under the Charter are prima facie triggered. However, if the demand is validly made pursuant to s. 254(2) of the Criminal Code in that it is made "forthwith", the police officer need not advise the detainee of his or her s. 10(b) rights because, although s. 254(2) violates s. 10(b), it is a reasonable limit prescribed by

law and justified under section 1 of the Charter. See R. v. Thomsen (1988), 40 C.C.C. (3d) 411 (S.C.C.).

**28** It is also accepted that if a roadside demand is made and a sample is not provided "forthwith" because the approved screening device is not readily available, the demand is not valid and does not justify a failure to provide s. 10(b) rights. See R. v. Grant (1991), 67 C.C.C. (3d) 268 (S.C.C.).

**29** Based on Grant, it is understood that to be "forthwith", the demand must be that the detainee provide a sample after "a brief period of detention",[3] if not "immediately".[4]

**30** In R. v. Cote (1992), 70 C.C.C. (3d) 280 (Ont. C.A.), this court established a test by which it can be determined whether a given demand, when not made "forthwith", qualifies as having been made within s. 254(2).

**31** In Cote, an officer demanded that a detainee provide a sample under s. 238(2). The officer, who did not have a screening device in his vehicle, drove the detainee to a police detachment where such a device was located. The drive took nine minutes. Once at the detachment, the detainee was told to wait until the device was readied. Five minutes later, the officer again demanded that the detainee provide a breath sample. The detainee declined to do so. The officer charged him with failing to comply with his demand. At no point during the delay was the detainee informed of his right to counsel.

**32** Justice Arbour, on behalf of the court, held that in the circumstances of that case, the demand to provide a sample after a delay of fourteen minutes did not qualify as a demand made within the confines of s. 238(2). She explained at pp. 284-85 that:

> In this case, it took approximately nine minutes to drive the accused to the police detachment. Once he arrived at the detachment, he was required to wait in a place where telephones were readily available and where contact with counsel could easily have been accommodated. As Le Dain J. observed in Thomsen at p. 420:
>
> > That there is to be no opportunity for contact with counsel prior to compliance with a s. 234.1(1) demand is, in my opinion, an implication of the terms of s. 234.1(1) when viewed in the context of the breath testing provisions of the Criminal Code as a whole.

**33** If the accused must be taken to a detachment, where contact with counsel could more easily be accommodated than at the side of the road, a large component of the rationale in Thomsen disappears. *In other words, if the police officer is not in a position to require that a breath sample be provided by the accused before any realistic opportunity to consult counsel, then the officer's demand is not a demand made under s. 238(2).* The issue is thus not strictly one of computing the

number of minutes that fall within or without the scope of the word "forthwith". Here, the officer was ready to collect the breath sample in less than half the time it took in Grant. However, in view of the circumstances, particularly the wait at the police detachment, I conclude that the demand was not made within s. 238(2). As the demand did not comply with s. 238(2), the appellant was not required to comply with the demand and his refusal to do so did not constitute an offence [emphasis added].

The Law Applied

**34** On a straightforward application of the test as enunciated in Cote, in my view, the demand was not a demand made under s. 254(2). P.C. Ecklund was not in a position to require the respondent to provide a breath sample before there was a realistic opportunity for the respondent to consult counsel. There was a delay of eighteen minutes between the issuance of the demand and the taking of the sample. On the record, contact with counsel could have been accommodated either through the cellular telephone or, given that there were no safety concerns associated with the respondent, by means of the telephone at the nearby police station. In accordance with Cote, the ready availability of a telephone is a relevant factor for the court to consider in determining whether a detainee had a reasonable opportunity to consult counsel during the period of time between the issuance of the demand and the time at which the demand could actually be carried out. A conclusion that the demand was not made within s. 254(2) is also consonant with the Supreme Court's admonition in Grant that a demand that a detainee provide a sample "forthwith" must be a demand that the detainee provide a sample after "a brief period of detention", if not "immediately". The demand in the instant case was not to provide a breath sample "forthwith" but to provide a sample when the required apparatus arrived, which was some time later.

**35** The Crown contends, however, that the decision of this court in R. v. Latour (1997), 116 C.C.C. (3d) 279 runs contrary to such a determination. In Latour, an officer made a demand for a breath sample pursuant to s. 254(2) and then radioed for a screening device to be brought. The device arrived eight minutes later; the detainee produced a breath sample four minutes after the device arrived. The detainee was not informed of his right to counsel during the delay. No evidence was adduced as to whether the officer inquired, or was advised, how long it would take for the device to be delivered. The detainee failed the test and was arrested for operating a vehicle "over 80".

**36** The detainee was convicted at trial. On appeal, the summary conviction appeal court allowed the detainee's appeal and directed an acquittal. The Crown appealed; this court allowed the Crown's appeal and restored the conviction.

**37** Relying on the Supreme Court's decision in Thomsen, Charron J.A., on behalf of the court, explained at p. 286 that "[t]he meaning of the word forthwith' must ... be defined in terms consonant with the outside limit on the limitation to the right to counsel." She reiterated, at p. 287, that the test to be applied is that given in Cote:

> The determinative question then becomes in any given case, was the police officer in a position to require that a breath sample be provided by the accused before any realistic opportunity to consult counsel? If so, the demand, if otherwise appropriate, falls within the scope of s. 254(2). If not, the demand is not valid.

**38** Justice Charron held that s. 254(2) did not require an officer to have a reasonable belief in his or her mind at the time a demand is made that the sample would be taken before there was any realistic opportunity to consult counsel. She explained at p. 288 that:

> If, as the events actually unfold, the peace officer is in a position to require the person to provide the sample before there is any realistic opportunity to consult counsel, the statutory requirements are met. The detained person has no cause for complaint as the events will have unfolded in accordance with the legislative scheme and within its constitutional boundaries. I see no sound policy reason for requiring that the statutory requirements be met by design rather than by chance. Compliance is compliance whether fortuitous or otherwise.
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> ...
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> It is therefore my view that all circumstances, including the time elapsed between the demand and the taking of the sample, must be considered in determining whether the police officer was in a position to require that a breath sample be provided "forthwith", that is, before there was any realistic opportunity to consult counsel.

Justice Charron concluded that the trial judge's finding that the demand was made "forthwith" was "reasonable, supported by the evidence and correct at law."

**39** To the extent that the Crown's argument, based on Latour, is that both courts below fell into error because they failed to consider the actual time at which the device arrived, I agree. Latour makes it clear that the actual time of arrival of the testing device is a relevant factor that must be taken into consideration. In the trial judge's reasons, he stated that the actual time at which the device arrived was "not the relevant point" in determining whether the officer's demand was made "forthwith". Justice Charron stated in Latour that that the actual time that elapses between the issuance of the demand and the taking of the sample is a factor that the court must consider in determining whether the officer was in a position to require that a breath sample be provided "forthwith". As a consequence, the appeal judge erred when she stated that the trial judge's reasons "make it clear he did consider the evidence of all the circumstances in this particular case before concluding that the respondent's s. 10(b) rights were violated." The trial judge's reasons demonstrate that he did not consider a relevant circumstance: the actual length of the delay.

**40** However, for the reasons already given, that error does not invalidate the determinations

below that the respondent's right to counsel under s. 10(b) had been violated.

**41** It is important also, in my view, to point out that there is no inconsistency in the decisions reached in Cote and Latour. Latour applied the test established in Cote. Latour differs from Cote in that in Latour there was no evidence that telephones were readily available, whereas in Cote telephones were available at the police detachment to which the detainee was brought.

**42** In the instant case, the officer was aware that there would likely be a delay of fifteen to twenty minutes before the screening device arrived. In the face of that information, it was incumbent upon the officer to take reasonable steps to facilitate the respondent detainee's right to consult counsel. Such steps would involve asking the detainee whether he had a cellular telephone. In this case, the evidence is that the respondent would have used his cellular telephone and called his lawyer. I consider the proximity of the cellular telephone more fully below.

**43** The Crown submits that in R. v. Bernshaw (1995), 95 C.C.C. (3d) 193 (S.C.C.), the Supreme Court of Canada held that "forthwith" does not mean immediately and that there should be some leeway to administer the test after a certain period of delay.

**44** In Bernshaw, the Court recognized that the presence of alcohol in the mouth of a person being tested can falsely elevate the reading on a screening device: a delay of fifteen minutes is required to ensure that the person's recent consumption of an alcoholic beverage does not distort that reading. The Court then considered whether s. 254(2) - as a justifiable limitation on a detainee's right to counsel - permitted a delay of fifteen minutes in order to ensure the accuracy of the test results. Sopinka J., on behalf of the majority of the Court, concluded at pp. 224-25 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 ... Although we all agree that Parliament has every reason to vigorously pursue the objective of reducing the carnage on our highways, that objective is not advanced by subjecting innocent persons to invasions of privacy on the basis of faulty tests. I do not believe that this is what Parliament intended in enacting s. 254 of the Criminal Code.
>
> I note that a potential problem which may arise from delaying the screening test, and which was discussed by my colleague [Cory J.] in his reasons, as well as by Arbour J.A. [in R. v. Peirman; R. v. Dewald (1994), 92 C.C.C. (3d) 160 (Ont. C.A.)], is whether the suspect is entitled to access to counsel when detained for a longer period. In the Thomsen case, it was held that the roadside screening procedure was a reasonable limit on one's right to counsel under s. 10(b) of the Charter. In my view, a delay in the order of 15 minutes *in order to obtain a*

> *proper sample of breath* is not inconsistent with Thomsen. It would, indeed, be strange for us to hold that the rights of some persons under one provision of the Charter (s. 8) must be sacrificed in order to preserve the limit on their rights under another provision (s. 10(b)) [emphasis added].

**45** Justice Sopinka held that a delay of fifteen minutes occasioned for the purpose of obtaining a proper sample of breath is a justifiable limitation on the right to counsel. This holding is premised on the need to balance the s. 10(b) rights of a person detained by a demand for a sample of breath against that detainee's rights under s. 8. If the detainee's s. 10(b) rights are not limited to the extent that a breath sample test may be delayed for fifteen minutes where there is evidence that the detainee has recently ingested alcohol, an innocent detainee with mouth alcohol will be compelled to give an immediate sample. As a consequence, that innocent detainee may be further detained and subject to further tests on the basis of an unreliable reading from the screening device.

**46** A majority of the Court in Bernshaw concluded that a delay of fifteen minutes for the purpose of obtaining a proper breath sample was a justified limitation on the right to counsel because that right must be balanced against the right against unreasonable search and seizure.

**47** The Crown's reliance on Bernshaw in the present case appears to rely on the following interpretation of Bernshaw: a delayed demand for a breath sample is nevertheless a demand made "forthwith" as long as that delay is fifteen minutes or less. The Crown offers as authority for this interpretation the case of R. v. Stevenson, [2000] O.J. No. 1776 (S.C.J.).

**48** In Stevenson, the trial judge held that the detainee's right to counsel was violated when the police did not inform him of his right to counsel in circumstances where there was an opportunity for the detainee to exercise that right before the officer was in a position to obtain a breath sample.

**49** On summary conviction appeal, Durno J. reversed this decision. Justice Durno, citing the statement in Bernshaw that "a delay in the order of 15 minutes in order to obtain a proper sample of breath is not inconsistent with Thomsen", reasoned at para. 14 that:

> Here the delay from demand to sample was 11 minutes and from the request for the machine to arrival 8 minutes. Relying on Bernshaw, the fact the test is not administered for 11 minutes does not by itself require the officer to give the detainee his or her rights to counsel. The trial judge erred in concluding the rights must be given if there is an opportunity to contact counsel.

**50** With respect, I am of the view that this interpretation of Bernshaw is erroneous. Bernshaw does not stand for the proposition that any demand delayed for fifteen minutes or less is a demand made "forthwith", no matter what the reason for the delay. Bernshaw sanctioned a delay required in order to obtain a proper breath sample. In Stevenson, there was a delay because the officer did not have a screening device at the time he made the demand. The constitutional basis upon which Sopinka J. founded his acceptance of a delay required to obtain a proper breath sample - the need to

balance the right to counsel against the right against unreasonable search and seizure - offers no support for a delay caused by the absence of a screening device.

**51** Following Cote and Latour, where an officer is not in a position to require that a breath sample be provided by the detainee before there is any realistic opportunity to consult counsel, the officer's demand is not a demand made under s. 254(2). Where there is no requirement to balance the right to counsel against another Charter right, the test established in Cote and Latour to determine whether a demand has been made under s. 254(2) should apply.

**52** The Crown submits that the appeal judge erred in concluding that the proximity of a telephone weighed in favour of requiring the officer to advise the respondent of his s. 10(b) rights. The Crown cites three cases in support of this submission: R. v. Sadlon (1992), 9 C.R.R. (2d) 191 (Ont. C.A.), leave to appeal to S.C.C. refused, [1992] S.C.C.A. No. 191, [1992] 3 S.C.R. viii; R. v. Smith (1996), 105 C.C.C. (3d) 58 (Ont. C.A.); and Stevenson, supra. For the reasons already given, the availability of a telephone is a relevant consideration. That said, it is important to consider each of the cases referred to by the Crown to appreciate that they do not derogate from the legitimacy of considering the availability of a telephone. In Sadlon, a police officer made a demand for a breath sample under s. 254(2). The officer had an approved screening device with him at the time the demand was made. The officer did not know that the detainee had a cellular phone. The officer did know that there was a public telephone approximately "a minute's drive away" from the location where the demand was made.

**53** This court, in a brief endorsement, found that the officer's demand fell within s. 254(2) of the Code. The court explained at p. 191 that the case before it was "clearly distinguishable" from Grant and Cote because "in the present case - unlike as in those cases - the police officer was demanding an immediate breath sample by means of an approved screening device at the time when and at the roadside location where the [detainee] was stopped". The court went on to explain at p. 192 that its conclusion was unaffected by (1) the detainee's possession of a cellular telephone and (2) the proximity of a public telephone:

> A demand by a police officer, which complies with the statutory requirements, to provide forthwith a sample of breath by means of an approved screening device located in the immediate vicinity is a valid demand under s. 254(2). The exclusion of the right to retain and instruct counsel and to be informed of that right on the detention attendant upon such a demand has been held to be a reasonable limit demonstrably justified in a free and democratic society. The existence, or non-existence, of the constitutional right of a person detained in respect of such a demand, validly made, cannot appropriately vary on the basis of how far the person detained happens to be from a telephone at the time the demand is made.

**54** In my view, Sadlon does not support the Crown's submission. In Cote, Arbour J.A. explicitly

stated that the ready availability of a telephone was a relevant factor for the court to consider in determining whether a detainee had a realistic opportunity to consult counsel during the period of delay between the issuance of the demand and the production of the breath sample. The court's decision in Sadlon did not overturn Cote. Indeed, the court explicitly distinguished the circumstances of Sadlon from the circumstances present in Cote. Sadlon is distinguishable from Cote because in Sadlon the officer was prepared to take the breath sample immediately after the demand was made. Since there was no delay between the demand and the production of the sample, the officer in Sadlon was in a position to require that a breath sample be provided by the detainee before the detainee had any realistic opportunity to consult counsel. Since there was no period of delay during which the detainee could have consulted counsel, the proximity of a telephone did not impact on the court's determination that the demand was valid.

**55** The court's statement that "[t]he existence, or non-existence, of the constitutional right of a person detained in respect of such a demand, validly made, cannot appropriately vary on the basis of how far the person detained happens to be from a telephone at the time the demand is made" refers to "[a] demand by a police officer ... to provide forthwith a sample of breath by means of an approved screening device *located in the immediate vicinity*" [emphasis added]. Where an officer is in a position to require that a breath sample be provided by the detainee before the detainee has any realistic opportunity to consult counsel, the detainee does not have the right to delay the production of the breath sample in order to consult counsel by virtue of the ready availability of a telephone. However, where an officer is not in a position to require that a breath sample be provided immediately after a demand for such a sample, the court, in determining whether the detainee had a realistic opportunity to consult counsel during the period of delay, must consider the ready availability of a telephone as a relevant factor in making that determination.

**56** In Smith, the officer pulled over the detainee's vehicle. After speaking to the detainee, the officer demanded that the detainee perform a standing sobriety test. The officer then demanded a breath sample. The officer had an approved screening device with him at the time the demand was made. The breath sample was produced three minutes after the demand was made. The screening device registered a fail and the detainee was charged with operating a vehicle "over 80". At no point during these tests did the officer inform the detainee of his right to counsel. The officer knew that the detainee had a cellular phone.

**57** The detainee was acquitted at trial. On appeal, this court found that s. 48 of the Highway Traffic Act, R.S.O. 1990, c. H.8, which provided that an officer may require the driver of a motor vehicle to stop for the purpose of determining whether there is evidence to justify making a demand under s. 254 of the Code, imposed a justifiable limitation on a detainee's right to counsel. The court also considered whether the presence of a telephone had any impact on the detainee's right to counsel. Doherty J.A. explained at p. 78 that:

> The [detainee's] second ground of appeal is premised on the contention that there must be a case-specific assessment of the justification for the limitation on the

> [detainee's] right to counsel. The [detainee] argues that even if s. 48 of the H.T.A. imposes a justifiable limitation on his right to counsel, that justification disappears where, as here, the appellant, to Constable Stuckey's knowledge, had immediate access to a cellular phone.
>
> That argument was advanced and rejected in [Sadlon, supra]. The court held at p. 192: [citation set out above at para. 54].
>
> I agree. Individuals who can afford and choose to use cellular telephones do not have broader constitutional rights than the rest of us. The second ground of appeal fails.

**58** I do not find that Smith supports the Crown's submission either. Smith stands for the proposition that if an officer can administer the test, a detainee does not have the right to delay the test in order to consult counsel as a result of the ready availability of a cellular telephone. Smith does not stand for the proposition that the ready availability of a telephone is not a relevant factor for the court to consider in determining whether a detainee had a realistic opportunity to consult counsel.

**59** In Stevenson, there was a delay of eleven minutes between the demand for a roadside breath sample and the production of that sample; the screening device arrived eight minutes after the demand had been made. The stopped vehicle was "a matter of steps away" from a telephone booth and the detainee had a cellular telephone. Justice Durno held, in Stevenson, that the detainee's right to counsel under s. 10(b) was not violated by the delay. He cited Sadlon and Smith and concluded, at para. 21, that:

> The availability of a nearby phone in itself when the tests were taken within 11 minutes of the demand does not impose on the police the obligation to provide the detainee with his or her rights to counsel and an opportunity to exercise the rights before a roadside test is administered.

**60** This statement fails to address the relevant question, which is whether the detainee had a realistic opportunity to consult counsel during the period of delay between the issuance of a demand and the production of a breath sample. To that extent, I find that Stevenson is in error in suggesting the availability of a nearby phone did not impose an obligation on the police to give the detainee his or her rights to counsel.

**61** In conclusion, it is my view that neither the trial judge nor the appeal judge erred in holding that the respondent's right to counsel under s. 10(b) of the Charter had been violated in the circumstances of the case.

CONCLUSION

**62** Accordingly, I would grant leave to appeal and dismiss the appeal.

GILLESE J.A.
ROSENBERG J.A. -- I agree.
ARMSTRONG J.A. -- I agree.

cp/e/nc/qw/qlrme/qlkjg/qlmjb/qlgxc

drs/e/qlmqs/qlsez/qljal

1 It was not argued at trial or in the subsequent appeals that if there were a s. 10(b) violation that the breathalyser evidence was still admissible.

2 This provision of the criminal code - s. 254(2) - has been amended several times in recent years. As a result, a number of the cases cited in these reasons refer to previous versions of the provision. In R. v. Thomsen (1988), 40 C.C.C. (3d) 411 (S.C.C.), the Supreme Court considered such a previous version: the former s. 234.1. In R. v. Grant (1991), 67 C.C.C. (3d) 268 (S.C.C.) and R. v. Cote (1992), 70 C.C.C. (3d) 280 (Ont. C.A.) another version of the provision was considered: the former s. 238(2).

3 Justice Lamer stated at p. 276 that "[t]he s. 1 analysis in Thomsen focused on the important role played by immediate, roadside breath testing in facilitating the detection of impaired drivers and on the fact that the limitation of s. 10(b) rights was authorized in limited circumstances *and only during a short period of detention* (as the breath sample was to be given "forthwith")" [emphasis added].

4 Justice Lamer stated at p. 277 that "[t]he context of s. 238(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*" [emphasis added].