

Breath test demand violated Charter rights, judge rules

The ruling: Vancouver police did not provide a driver with enough information for him to make an informed decision about taking a breath test.

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A man stopped in a Vancouver police roadblock checking for impaired drivers had his Charter rights violated when he was charged with refusing to provide a breath sample, a judge ruled Friday.

Vancouver provincial court judge Jack McGivern found Barry Major had no legal obligation to blow because police did not provide him with enough information to make an informed decision.

"It's going to affect a lot of cases," Vancouver lawyer Tony Serka, who represented Major, said of the ruling.

"He had a right to refuse because he wasn't given a proper demand," he noted. "It seems to me the [police] warning is not

sufficient so a driver can refuse it."

However, he added: "I would not counsel anyone not to take it. Most people do blow when asked to do so."

Serka believes it is the first ruling in Canada to find Sec. 10 (a) of the Charter was breached when the driver refused to blow into a roadside screening device.

Sec. 10 (a) reads: "Everyone has the right on arrest or detention ... to be informed promptly of the reasons therefor."

The judge's ruling could affect how police administer their demand for breath samples and give warnings about reasons to detain someone suspected of impaired driving, Serka said.

Major was stopped in a CounterAttack roadblock on July 9

last year. Asked if he had anything to drink, he said he had a beer and a highball.

An officer who could smell alcohol but saw no signs of impairment, asked Major to pull over and demanded a breath sample using a roadside screening device. When Major refused to blow, he was charged and had to take a cab home.

Serka argued his client was detained without being properly informed of the reasons and the demand for a breath sample did not fall within the scope of Sec. 254(2) of the Criminal Code — the charge of refusing to provide a breath sample.

Sec. 254(2) says: "Where a peace officer reasonably suspects that a person who is operating a motor vehicle ... has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample ... to enable a proper analysis of the breath to

be made by means of an approved screening device."

The judge, in dismissing the charge against the accused, ruled: "Because the demand given to the defendant failed to incorporate the reasonable suspicion the officer had as to the defendant having alcohol in his body and because it failed to require the defendant to provide a sample that would enable a proper analysis to be made of the breath, I must and do hold that it was not a demand within Sec. 254(2) of the Criminal Code.

"Therefore the defendant had no legal obligation to comply with that particular demand."

Lawyer Christopher McPherson, who acted for the Crown, said he is uncertain whether there will be an appeal or what affect the ruling will have on police roadblocks.

"Certainly, the Crown has to look at it and decide what to do," he said.