

Regina (respondent) v. Deborah Ann Jaycox (appellant)
(CA039126; 2012 BCCA 365)

Indexed As: R. v. Jaycox (D.A.)

British Columbia Court of Appeal
Levine, Frankel and Hinkson, JJ.A.
September 11, 2012.

Summary:

The British Columbia Provincial Court, in a decision cited as 2010 BCPC 140, acquitted the accused of charges of impaired driving and failing to comply with an Approved Screening Device (ASD) demand, contrary to ss. 253(1)(a) and 254(5) of the Criminal Code. The Crown appealed the acquittal on the charge of failing to comply with the ASD demand.

The British Columbia Supreme Court, in a decision reported at [2011] B.C.T.C. Uned. 662, set aside the acquittal and entered a guilty verdict. The accused sought leave to appeal.

The British Columbia Court of Appeal, per Chiasson, J.A., in a decision reported at (2012), 316 B.C.A.C. 209; 537 W.A.C. 209, granted leave to appeal.

The British Columbia Court of Appeal dismissed the appeal. The court held that the summary conviction appeal judge did not err in law in holding that the implicit suspension of the s. 10(b) Charter right to counsel recognized in *R. v. Thomsen* (S.C.C.) applied to the current wording of s. 254(2) of the Code (as amended by the trial judge).

Civil Rights - Topic 4608

Right to counsel - Right to be advised of - The accused was acquitted of a charge of failing to comply with an Approved Screening Device demand contrary to s. 254(5) of the Criminal Code - The Crown appealed - The summary conviction appeal judge set aside the acquittal and entered a guilty verdict - The accused appealed - At issue was whether the summary conviction appeal judge erred in law in holding that the implicit suspension of the s. 10(b) Charter right recognized in *R. v. Thomsen* (S.C.C. 1988) applied to the current wording of s. 254(2) of the Code (as amended by the trial judge) - The accused argued that while the court in *Thomsen* accepted that the operational nature and goals of roadside breath testing made necessary a limitation on the right to counsel that was reasonable and justified under a s. 1 of the Charter, the rationale for that limitation had been undermined and eroded since *Thomsen*, such that the limitation of the right to counsel was no longer justified under s. 1 of the Charter - The accused submitted that since the *Thomsen* decision, the advent of a 24-hour duty counsel system and the ubiquity of cellular telephones had altered the landscape addressing the concern regarding changes to blood alcohol that might occur during a lengthy delay to contact counsel - She further contended that the July 2, 2008, amendments to s. 254(2), and to related breath testing provisions in the Code, were so sweeping that the *Thomsen* rationale could no longer justify limiting a detained motorist's s. 10(b) rights - The British Columbia Court of Appeal dismissed the appeal - The summary conviction appeal judge

did not err in law in holding that the implicit suspension of the s. 10(b) Charter right to counsel recognized in *R. v. Thomsen* applied to the current wording of s. 254(2) of the Code (as amended by the trial judge).

Civil Rights - Topic 4610

Right to counsel - Impaired driving (incl. demand for breath of blood sample - Roadside screening test - [See **Civil Rights - Topic 4608**].

Civil Rights - Topic 8348

Canadian Charter of Rights and Freedoms - Application - Exceptions - Reasonable limits prescribed by law (Charter, s. 1) - [See **Civil Rights - Topic 4608**].

Criminal Law - Topic 1385

Motor vehicles - Impaired driving - Roadside screening test - General - [See **Civil Rights - Topic 4608**].

Cases Noticed:

- R. v. Thomsen, [1988] 1 S.C.R. 640; 84 N.R. 347; 27 O.A.C. 85, appld. [para. 18].
- R. v. Bernshaw (N.), [1995] 1 S.C.R. 254; 176 N.R. 81; 53 B.C.A.C. 1; 87 W.A.C. 1, refd to. [para. 34].
- R. v. Orbanski (C.); R. v. Elias (D.J.), [2005] 2 S.C.R. 3; 335 N.R. 342; 195 Man.R.(2d) 161; 351 W.A.C. 161; 2005 SCC 37, consd. [para. 35].
- R. v. Seo (1986), 13 O.A.C. 359; 25 C.C.C.(3d) 385 (C.A.), refd to. [para. 38].
- R. v. Woods (J.C.), [2005] 2 S.C.R. 205; 336 N.R. 1; 195 Man.R.(2d) 131; 351 W.A.C. 131; 2005 SCC 42, refd to. [para. 40].
- R. v. Grant (D.) (2009), 391 N.R. 1; 253 O.A.C. 124; 245 C.C.C.(3d) 1; 2009 SCC 32, refd to. [para. 45].
- R. v. Deruelle, [1992] 2 S.C.R. 663; 139 N.R. 56; 114 N.S.R.(2d) 1; 313 A.P.R. 1; 94 D.L.R.(3d) 638, consd. [para. 48].

Statutes Noticed:

- Canadian Charter of Rights and Freedoms, 1982, sect. 10(b) [para. 7].
- Criminal Code, R.S.C. 1985, c. C-46, sect. 254(2) [para. 9]; sect. 254(3) [para. 10].

Counsel:

- John W. Green, for the appellant;
- Rodney G. Garson and Lesley A. Ruzicka, for the respondent.

This appeal was heard on June 13, 2012, at Vancouver, B.C., before Levine, Frankel and Hinkson, J.J.A., of the British Columbia Court of Appeal. The following judgment of the Court of Appeal was delivered by Hinkson, J.A., on September 11, 2012.

Appeal dismissed.

Editor: Angela E. McKay

Civil Rights - Topic 4610

Right to counsel - Impaired driving (incl. demand for breath of blood sample - Roadside screening test - The accused was acquitted of a charge of failing to comply with an Approved Screening Device demand contrary to s. 254(5) of the Criminal Code - The Crown appealed - The summary conviction appeal judge set aside the acquittal and entered a guilty verdict - The accused appealed - At issue was whether the summary conviction appeal judge erred in law in holding that the implicit suspension of the s. 10(b) Charter right recognized in *R. v. Thomsen* (S.C.C. 1988) applied to the current wording of s. 254(2) of the Code (as amended by the trial judge) - The accused argued that while the court in *Thomsen* accepted that the operational nature and goals of roadside breath testing made necessary a limitation on the right to counsel that was reasonable and justified under a s. 1 of the Charter, the rationale for that limitation had been undermined and eroded since *Thomsen*, such that the limitation of the right to counsel was no longer justified under s. 1 of the Charter - The accused submitted that since the *Thomsen* decision, the advent of a 24-hour duty counsel system and the ubiquity of cellular telephones had altered the landscape addressing the concern regarding changes to blood alcohol that might occur during a lengthy delay to contact counsel - She further contended that the July 2, 2008, amendments to s. 254(2), and to related breath testing provisions in the Code, were so sweeping that the *Thomsen* rationale could no longer justify limiting a detained motorist's s. 10(b) rights - The British Columbia Court of Appeal dismissed the appeal - The summary conviction appeal judge did not err in law in holding that the implicit suspension of the s. 10(b) Charter right to counsel recognized in *R. v. Thomsen* applied to the current wording of s. 254(2) of the Code (as amended by the trial judge).

Civil Rights - Topic 8348

Canadian Charter of Rights and Freedoms - Application - Exceptions - Reasonable limits prescribed by law (Charter, s. 1) - The accused was acquitted of a charge of failing to comply with an Approved Screening Device demand contrary to s. 254(5) of the Criminal Code - The Crown appealed - The summary conviction appeal judge set aside the acquittal and entered a guilty verdict - The accused appealed - At issue was whether the summary conviction appeal judge erred in law in holding that the implicit suspension of the s. 10(b) Charter right recognized in *R. v. Thomsen* (S.C.C. 1988) applied to the current wording of s. 254(2) of the Code (as amended by the trial judge) - The accused argued that while the court in *Thomsen* accepted that the operational nature and goals of roadside breath testing made necessary a limitation on the right to counsel that was reasonable and justified under a s. 1 of the Charter, the rationale for that limitation had been undermined and eroded since *Thomsen*, such that the limitation of the right to counsel was no longer justified under s. 1 of the Charter - The accused submitted that since the *Thomsen* decision, the advent of a 24-hour duty counsel system and the ubiquity of cellular telephones had altered the landscape addressing the concern regarding changes to blood alcohol that might occur during a lengthy delay to contact counsel - She further contended that the July 2, 2008, amendments to s. 254(2), and to related breath testing provisions in the Code, were so sweeping that the *Thomsen* rationale could no longer justify limiting a detained motorist's s. 10(b) rights - The British

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Criminal Law - Topic 1385

Motor vehicles - Impaired driving - Roadside screening test - General - The accused was acquitted of a charge of failing to comply with an Approved Screening Device demand contrary to s. 254(5) of the Criminal Code - The Crown appealed - The summary conviction appeal judge set aside the acquittal and entered a guilty verdict - The accused appealed - At issue was whether the summary conviction appeal judge erred in law in holding that the implicit suspension of the s. 10(b) Charter right recognized in R. v. Thomsen (S.C.C. 1988) applied to the current wording of s. 254(2) of the Code (as amended by the trial judge) - The accused argued that while the court in Thomsen accepted that the operational nature and goals of roadside breath testing made necessary a limitation on the right to counsel that was reasonable and justified under a s. 1 of the Charter, the rationale for that limitation had been undermined and eroded since Thomsen, such that the limitation of the right to counsel was no longer justified under s. 1 of the Charter - The accused submitted that since the Thomsen decision, the advent of a 24-hour duty counsel system and the ubiquity of cellular telephones had altered the landscape addressing the concern regarding changes to blood alcohol that might occur during a lengthy delay to contact counsel - She further contended that the July 2, 2008, amendments to s. 254(2), and to related breath testing provisions in the Code, were so sweeping that the Thomsen rationale could no longer justify limiting a detained motorist's s. 10(b) rights - The British Columbia Court of Appeal dismissed the appeal - The summary conviction appeal judge did not err in law in holding that the implicit suspension of the s. 10(b) Charter right to counsel recognized in R. v. Thomsen applied to the current wording of s. 254(2) of the Code (as amended by the trial judge).